**Kiteme v Republic (Criminal Appeal 108 of 2022)**
**[2023] KECA 644 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 644 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CRIMINAL APPEAL 108 OF 2022**

**P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA**

**JUNE 9, 2023**

**BETWEEN**

**DAVID MATATA KITEME ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgement of the High Court of Kenya at Voi dated 25th May 2018 by Hon. Lady Justice J. Kamau and delivered on 30th May 2018 as well as the sentence passed by Hon. Lady Justice F. Amin on 5th December 2018 in Voi High Court Criminal Case No. 13 0F 2014)***

## JUDGMENT

1. The Appellant, David Matata Kiteme, was charged before the High Court at Voi in Criminal Case No 13 of 2014 (formerly Mombasa High Court Criminal Case No 181 of 2014) with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on the night of 21st/May 22, 2014, at Mtakuja village in Taveta Subcounty within Taita Taveta County, he murdered Bahati John. He pleaded not guilty to the charged.

2. The Prosecution's case was that on the material day in the evening, the Appellant, who was PW1's son, returned home drunk and found PW1 cooking. The Appellant then accused the deceased, PW1's disabled granddaughter, of being a thief and started assaulting the deceased with a stick. The Appellant then asked PW1 to go and buy fish and when PW1 declined, the Appellant hit her with a belt forcing PW1 ran into a farm screaming where she spent the night. The following morning, PW1 found the deceased lying down groaning and PW1 proceeded to report the matter to her daughter who told her to go and dress the deceased. When PW1 returned, she found that the deceased had injuries on her back and hands. A neighbour then arrived and called the police who went and took the body to the mortuary. By then the Appellant had disappeared.

3. That the deceased was injured was confirmed by PW2, a neighbour, who upon receipt of information about the incident, went to the scene and found the deceased seriously injured on the head which was smashed. She also had injuries to the eye with burnt injury on the back though was still alive. The deceased informed them that she had been beaten by the Appellant. By then the Appellant was not around. Later, PW2 assisted in facilitating the arrest of the Appellant after he was reported to be at Mrabani area.

   According to PW2, the deceased was covered with stones.

4. The body of the deceased was identified by PW3, an uncle, for the purposes of post mortem examination which was conducted by PW4. According to PW4, the body was of a 17 year old disabled girl with several extensive bruises and depression and blood stains on the head with internal bleeding. In his opinion the cause of death was intra cranial bleeding due to rupture of the blood vessels in the head. He formed the opinion that the object used could have been a stick or a stone. He further formed the view that the deceased could have been dragged on a surface or struggled to free herself. He however, ruled out a fall as the cause of the injuries.

5. The incident was investigated by PW6 who took statements from the witnesses and took the photographs at the scene which were processed by PW7 after which he made the decision to have the Appellant charged with murder.

6. On being placed on his defence, the Appellant, in his sworn evidence stated that on the material day he arrived home and was informed by PW1 that the deceased had eaten the food that had been prepared. Being unhappy, the Appellant decided to discipline the deceased using a cane. According to him the deceased was not physically challenged but was epileptic. He denied that he hit her on the head or hand and that he burnt her. When he was told by PW1 to stop beating the deceased, he went to the nearby shop, bought vegetables which he brought to PW1 who cooked the same and they ate before he went to sleep in his house. In the morning he woke up, greeted his mother, PW1, who was still asleep and left for his place of work where he was farming till the day he was arrested. It was his evidence that he was informed by his sister that the deceased had fallen. He denied killing the deceased who according to him died from falling as a result of epileptic fits.

7. In her judgement, the Learned Trial Judge found that there was no dispute as to the fact that the deceased died and the cause of death was similarly confirmed by the medical report. Based on the evidence adduced particularly that of PW1, the Appellant's mother, and that of the doctor, the Learned Judge found that the deceased suffered fatal injuries as a direct result of being assaulted by the Appellant who had the intention of killing him. Accordingly, the Appellant was convicted of the offence of murder. He was subsequently sentenced, albeit by a different judge, Amin, J, in a rather long decision which was mis-described as judgement" to life imprisonment.

8. When this appeal came up for hearing vide the Court's virtual platform on February 13, 2023, the Appellant who appeared virtually from Manyani Prison was represented by Learned Counsel Mr Were while Learned Counsel Ms Vallerie Ongeti, Principal Prosecution Counsel, appeared for the Respondent. Both counsel informed us that they had filed their respective written submissions which they highlighted.

9. According to the Appellant, the prosecution failed to prove its case against the Appellant herein beyond reasonable doubt; that the evidence adduced by the prosecution was based on suspicion and did not directly connect the Appellant to the death of the deceased; that the prosecution failed to prove malice aforethought, motive as ill intention against the Appellant; that the Learned Trial Judge failed

to appreciate the fact the Appellant was not arrested at the scene, but some five days later while on his farm; and that the Learned Trial Judge failed to keenly interrogate his sworn evidence in defence.

10. It was submitted that at the very least, the Learned Trial Judge should have considered and reduced the charges against the Appellant to that of manslaughter given the fact that the Appellant was only disciplining the deceased by caning her with a small stick and did not intend at any one time to kill her. We were therefore urged to allow the appeal, quash the conviction and set aside sentence passed by the Learned Trial Judge.

11. On the part of the Respondent, it was submitted that the death of the deceased was proved by PW1, PW2 and PW3; that the cause of death was proved by PW4, the doctor who produced the post-mortem; and that the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. In support of the last submission, the Respondent relied on *Republic v Boniface Isawa Makodi* [2016] eKLR in which the case of *Guzambizi Wesonga v Republic* (1948) 15 EACA 65 was referred to for the position that every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law.

12. It was submitted that given the nature of injuries and the beatings received from the Appellant who was using a rungu, it can safely be concluded that death was unlawful as it was not authorised by law.

13. As regards, malice aforethought, it was submitted that there is no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under Section 203 of the Penal Code. In this regard reliance was placed on *Daniel Muthee v Republic* Criminal Appeal No 218 of 2005 (UR) and it was submitted that the injuries inflicted on the deceased, who was paralysed and was incapable of defending herself, were severe in nature and cannot be said to be accidental but were a clear indicator that whoever attacked her knew or ought to have known that the injuries inflicted would cause harm. According to the Respondent, based on the evidence of PW1, the motive of the attack was the alleged theft by the deceased.

14. As to issue whether the Appellant was the attacker, it was submitted that PW1 saw the Appellant attack the deceased using a stick which evidence was corroborated by the evidence of the doctor, PW4, who testified that the object that was used to assault the deceased was blunt object and not a sharp one. It was submitted that the conduct of the Appellant of disappearing after the commission of the crime was that of a person who was guilty of committing an offence. While appreciating the legal position set out in *Bukenya & Others v Uganda* [1972] EA 549 on the need for the prosecution to make available all the witnesses necessary to establish the truth even if their evidence might be inconsistent, it was submitted, based on *Keter v Republic* [2007] 1 EA 135, that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as sufficient to establish the charge beyond any reasonable doubt. In this case it was submitted that the prosecution called the material witnesses whose evidence, as a whole, it assessed to be sufficient and that the Appellant was entitled to call his defence witnesses without direction from the prosecution.

15. It was therefore submitted that taking into consideration the totality of all the above, coupled with the conduct of the Appellant, there was sufficient evidence that pointed to no one else but the Appellant as the only person who must have murdered the deceased.

16. On the sentence, it was submitted that in meting out the sentence the trial court took into consideration the mitigation offered by the Appellant and the probation officers report. It was urged that the aggravating circumstances in this particular matter were brutal bearing in mind the circumstances of the deceased person and that the trial court correctly applied itself in sentencing the Appellant. We were therefore urged to confirm the life sentence.

**Analysis And Determination**

17. We have considered the issues raised in this appeal.

18. This being a first appeal, it is our duty to analyse and re- assess the evidence on record and reach our own conclusions. In *Okeno v Republic* [1972] EA 32 the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424."

19. In this case, there is no doubt, and it was admitted by the Appellant, that on the material day, the Appellant was at the scene where the deceased was assaulted and that he, in fact, assaulted the deceased. This assault was witnessed by the Appellant's own mother, PW1, who tried to intervene but the Appellant turned against her with a belt forcing her to ran into the shamba where she spent the night. The following day, the Appellant was not around and the deceased was found lying on the ground groaning in pain with serious injuries. As a result of the said injuries, the deceased passed away.

20. The Appellant's case is that though he inflicted minor punishment on the deceased, he stopped when PW1 intervened and after that they took the meal together before he went to sleep. The following morning, he left for his farm where he was later arrested. According to the Appellant, the deceased must have sustained her fatal injuries as a result of a fall since she was suffering from epilepsy. The Appellant's version of events of the day clearly contradicted that of his mother PW1. Apart from the evidence of PW1 that the Appellant had a stick, the medical evidence concerning the cause of death and the likely object used in the assault corroborated the evidence of PW1. Whereas the Appellant wished the court to believe that he had a small stick, his description of the said stick does not support this evidence. We do not see any reason why the Appellant's own mother would concoct a story against him. The evidence of PW1 portrays a picture of a person who arrived home drunk and was violent to the extent that his own mother was forced to flee the home and spend the night in the cold.

21. Based on the evidence of PW1 that it was the Appellant who was last seen with the deceased in a violent rage assaulting the deceased, before the deceased was found fatally injured the following morning by which time the Appellant was nowhere to be seen, the circumstances could only point to the Appellant as the one who caused the said injuries. This Court in *Isaack Kijiba v Republic* Nairobi Court of Appeal Criminal Appeal No 80 of 1980 expressed itself as follows:

> " The appellant was seen catching hold of the deceased, doing violence to him by knocking him down on the stone, and forcibly abducting him away from his school companions which led to the irresistible inference that the child who was not seen alive again was killed by the deceased. The totality of the circumstantial evidence could only lead to the conclusion, as it did, that these proved inculpatory facts were incompatible with the

appellant's innocence and incapable of explanation upon any other hypothesis than that of his guilt."

22. As rightly submitted by the Respondent, malice aforethought may be deduced from a number of circumstances and not necessary from an express intention to cause death. Section 206 of the *Penal Code* sets out the circumstances which constitute malice aforethought as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> a. An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
>
> c. An intention to commit a felony.
>
> d. An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

24. This Court stated in the case of *Nzuki v Republic* [1973] KLR 171 that the offence of murder must be committed with the following intentions: -

(i) The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue form his conduct is not by itself enough to convert a homicide into a crime of murder."

24. The element of intention in committing the offence was examined in the English case of *Hyam v DPP* [1974] 2 All ER 41 where Lord Diplock observed as follows:

> " No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act."

25. It is therefore clear that in order to return a verdict of guilt it is not mandatory that the prosecution proves that the accused intended to cause the death of the deceased. Even if the accused did not set out to cause death to the deceased but was aware that his action might well lead to the death of the deceased, he will still be liable if death does occur. Therefore, it does not matter whether he intended

to cause grievous harm to the deceased, if the Appellant was aware that his action might possibly cause such harm to the deceased.

26. In this case, the magnitude of the injuries inflicted on the deceased, a disabled girl who was unable to defend herself, can only lead to the conclusion that even if the Appellant did not intend to cause the death of the deceased, he intended to cause her grievous harm. That PW1, his mother, tried to restrain him but he turned his wrath on her is a further indication that the harm or injury caused to the deceased was not just accidental or in the heat of the moment but was deliberate as the mother's attempts to restrain the Appellant he did not dissuade him from his action but was met with violent reaction. In the premises, we have no reason to disagree with the Learned Judge that malice aforethought was established.

27. The Learned Trial Judge was faulted for not giving due regard to the defence. We have subjected the evidence to a re- evaluation and having done so, we find that the evidence against the Appellant was overwhelming and watertight and his evidence that he did not cause the death of the deceased was unable to dislodge the prosecution's evidence. If the Appellant left in the morning after bidding bye to his mother as he alleged, he could not have missed to notice the deceased lying outside PW1's house where PW1 found her when she returned in the morning. That he did not see the body can only mean that he did not spend the night at home and if he did so, then he must have left after seeing the deceased lying on the ground groaning. We therefore find no reason to fault the Learned Trial Judge.

28. As regards the sentence, it is now a fact that can be taken judicial notice of that for a long time death sentences have never been executed and in most if not all cases where death sentences have been passed by the Courts, the same have been commuted by the President to life sentences. Therefore, for all practical purposes, in terms of execution of the sentences, life sentence and death sentence seems to mean the same thing in this country. While death sentence is retained in statute books, in reality and for all practical purposes it no longer exists. However, it is not for us to delete it from the statute books. What is however clear that in terms of execution there is no distinction between death sentence and life sentence.

29. Life sentence has been criticised on the ground that its indeterminate nature does not offer incentive to the offenders to reform. In other words, in our context, life sentence may well amount to slow death sentence. In *Vinter and others v the United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10), a case which was referred to by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, it was appreciated that:

> "...if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment."

30. In the case before us, in what the Learned Judge who carried out the sentencing described as "Judgement" the Court seemed to have, unnecessarily so in our respectful view, dwelt on the evidence adduced at the trial. It would seem that the Learned Judge was confronted with two Probation Officers' Reports. In dismissing one, the Learned Judge, in what she termed as "taking judicial notice" seemed to have relied on statements which were allegedly issued by the said officer at a training forum. We are not aware of how the Learned Judge came across the said statements or the source of her information.

In the final analysis the Learned Judge formed the view that the Appellant needed "time to reflect and understand his offending behaviour before he can even start to reform and that there was a real danger and urgent need to protect the female members of his family from his offending (sic)".

31. In passing the sentence the Learned Judge was clearly oblivious of uncontroverted evidence from the prosecution witnesses that prior to the date of the incident, the Appellant and the deceased lived harmoniously and according to PW3, it seemed that it was the Appellant who was taking care of the deceased since the deceased's mother was dead and PW1, was in her 80's. There was evidence from PW1 who was present when the Appellant arrived home that the Appellant was drunk. While that might not have justified the Appellant's conduct, it was a factor that ought to have been taken into account in passing the sentence. Further, it was the prosecution's case that the Appellant was a first offender. There is no indication on record that these factors were taken into account in passing the sentence.

32. In those circumstances, we find that the sentence was rather harsh. Therefore, while we dismiss the appeal on conviction, we quash the life sentence passed on the Appellant and substitute therefore a sentence of imprisonment for 25 years. We note from the record that the Appellant was in custody throughout the trial from the time he was arrested which according to the evidence was on May 27, 2014. Pursuant to section 333(2) of the *Criminal Procedure Code*, the said sentence will run from the said date of arrest.

33. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 2023.**

**P. NYAMWEYA**

**.....**

**JUDGE OF APPEAL**

**J. LESIIT**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**