Maangi v Republic (Criminal Appeal 45 of 2022)
[2023] KECA 1008 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1008 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 45 OF 2022

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

KITEME MAANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kitui (Mutende, J.) dated 6th June, 2017 in HC. CR.C. No. 70 of 2010)

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Kitui (Mutende, J.) where the appellant Kitema Maingi alias Nyamai was convicted for the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. It had been alleged in the Information that he had on 3rd November, 2010 at about 3 p.m. at Kalua Village in Kitui County murdered Katambo Maangi. It being a first appeal our duty is to re-evaluate the evidence and reach our own conclusions on facts but always remembering that we don't have the advantage that the trial Judge had of seeing and hearing the witnesses as they testified – See *Okeno & another v Republic* [1972] EA 32 where that duty of a first appellate court was identified 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. R*., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*., [1957] E.A. 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 findings and conclusions; 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] E. A. 424."

2. The prosecution called 8 witnesses; the appellant gave a sworn statement and called 2 witnesses and in the end he was convicted and sentenced to death in the Judgment delivered on 6th June, 2017 and the sentence of the same date.

3. The star prosecution witness was Titus Muthambi Jane (Muthambi – PW3), then a student at a local school then aged 18 years. He testified that on 3rd November, 2010 he was at his grandmother's (Ruth Mwende Simba (Mwende – PW4) farm at 8 a.m. when the appellant, who is his grandfather passed near the farm and:

> "…. He was screaming saying he was going to kill Katambo now deceased. He was approximately 50 metres away when I saw him. He was having a panga tucked on his side of the belt and he had a club. I followed him. Katambo was sitting under a tree on his farm. This is a neighboruing farm. Katambo was my grandfather as well …
>
> Nyamae went to Katambo's farm. On reaching him Katambo stood and took a piece of wood to defend himself. They argued. Nyamae chased Katambo. They crossed the fence and entered Nganga's land. Katambo slid and fell down. Nyamae hit him with a club on the head, then on the legs – knees …"

4. The witness further testified that the appellant used the panga he was carrying to cut the deceased on the head and left him at the scene and that he (the witness) summoned his grandmother (Mwende) who came to the scene and sent him to call the deceased's mother Kakuo Maangi (Kakuo – PW1) who also came to the scene. He identified the panga that the appellant had used to attack the deceased and stated in cross-examination that the deceased was mentally unstable and used to beat up people who trespassed on his land.

5. Kakuo was at home on 3rd November, 2010 when the deceased (her step son) called on her requesting for flour. She did not have any. Moments after the deceased left her she heard screams from her co-wife Mutethio and when she rushed there she found the appellant who told her to find where she would bury the deceased. The appellant left and went to look for the deceased and she observed that he carried a panga. There was a land dispute where the appellant claimed that the deceased had been given a portion of land that belonged to his (appellant's) mother. She went back to her house but Muthambi soon arrived and informed her that the deceased had been attacked by the appellant. When she ran to the scene she found the deceased alive but badly injured. She arranged to take him to hospital but he died on the way forcing her to ask a motorbike operator to take her and the deceased back home. The Assistant Chief of the area (Jonathan Musyoka Kanyi – PW5) who had been informed of the incident came to the scene and in turn informed police who visited the home the next morning and took the body of the deceased to the mortuary at Kitui hospital. She later identified the body to Dr Patrick Mutuku who performed a post-mortem on it. She stated in cross-examination:

> "… I did not see Kiteme killing him but he had notified me that he was going to do it. I saw him with a panga. It was a big panga. It was a new panga. I saw it because he was near me …"

6. Cosmas Masabia Kithome (PW2) received a telephone call on 3rd November, 2010 from the appellant who is his cousin and he learnt later that the deceased had been killed. He attended post mortem and observed that the deceased had a cut wound on the left eye and the rear part of the head. He was one of those who identified the body of the deceased for purposes of the post mortem.

7. Mwende testified that on the material day she saw people running towards the deceased's farm. When she followed them she found the deceased badly injured, he was almost dying. It is she who sent Muthambi to call the deceased's mother (Kakuo) to the scene.

8. Benson Mutua Matangi (Mutua – PW5) was the motor bike (boda boda) operator who was summoned to take the deceased to the hospital. He found the deceased injured and bleeding. He and Kakuo were en route to the hospital when the deceased died and they took the body back home.

9. When the Assistant Chief visited the home he viewed the body and observed injuries to the head and legs. The police came the next day and he accompanied them to the murder scene. He testified that the appellant had reported to him that the deceased had been harassing him but denied that the deceased was of unsound mind.

10. Dr Patrick Mutuku of Kitui District Hospital performed post-mortem on the body of the deceased. He testified that the body of the deceased had a cut wound on top of the skull; there was a cut wound on the left eyebrow; the right upper arm was deformed; there was a fracture to the radius and ulna of the arm; and there was a cut wound on the index and finger of the right hand and cuts on both legs. There was a depressed fracture on the skull and a bone piece of 6 cm was displaced. The orbital bone had a fracture that went through to the skull bone and there was a massive haematoma on the brain. The doctor formed the opinion that the cause of death was brain death due to massive subdural haematoma which was caused by a depressed skull fracture due to trauma (assault). He produced post-mortem report into evidence. In his view, such injuries could be caused if a person was attacked by a mob.

11. The last prosecution witness was PC Daniel Otieno who was at the material time attached to Mutitu Police Station. He accompanied the Officer Commanding Station (OCS) of that police station to the deceased's home after receiving a report of murder where they found the deceased lying in a grass thatched house. He observed various injuries on the body which they took to the mortuary. He recovered a panga (it had been washed) and arrested the appellant 2 days later. He produced various items into evidence – an exhibit memo form on the panga; a report from the Government Chemist and a sketch plan of the scene drawn by the OCS who had since died.

12. After the close of the case by the prosecution, the appellant was placed on his defence and in a sworn statement he told the court that his relationship with his cousin (the deceased) was cordial; that the deceased had fallen ill in 2010 – he had become insane and would assault people who passed near his (deceased's) farm. He would assault the appellant's children and the appellant had made various reports to police regarding those assaults. On 12th November, 2010 the deceased visited him and claimed that the appellant had reported him to the police. The deceased had a panga and a bottle which he claimed contained tear gas and he said that he would kill 5 people (including the appellant) who had made reports about him to police. Many people gathered including the Assistant Chief which prompted the deceased to run away very fast. He was given a letter by the Assistant Chief to take to the police but when he got to the police station he found only 1 police officer who could not assist him. On his way back home he heard screams from his home and when he rushed there he found about 40 people; his mother, who had locked herself in her house informed him that the deceased was looking for him to attack him. He later heard that the deceased had been attacked by a mob. He denied that he had threatened to attack the deceased.

13. The appellant called Kioko Musee (Musee – DW2) as a witness. He testified that he was at home on 3rd November, 2010 when he left at 3 p.m. to go to the shopping centre. He heard noise while passing near the appellant's home and when he entered the compound he found the appellant, his mother and neighbours and was told that the deceased had attacked people. He cautioned the appellant not to follow the deceased to where he had gone and observed that the appellant's bicycle had been damaged.

When he reached the shopping centre he was informed that the deceased had been beaten to death by a mob.

14. Also called by the appellant was Muthui Mwangangi (Mwangangi – DW3), a teacher at a local primary school. The deceased was a step-brother to his wife and lived in the neighbourhood. When he left school after lunch while riding a bicycle,e he heard noise coming from the deceased's farm. He entered the appellant's home where he found the appellant and others and was shown a bicycle that the deceased had damaged. When passing the shopping centre he learnt that the deceased had been beaten to death by a mob.

15. That was the case made by both sides and as we have seen the appellant was convicted and sentenced.

16. There are 4 grounds of appeal set out in supplementary memorandum of Appeal drawn by counsel for the appellant, Doreen A. Okwiri. The High Court is faulted in law and fact for failing to consider the appellant's defence; that the High Court erred in law by finding that the prosecution had proved the case beyond reasonable doubt; that the High Court erred in law and fact by convicting the appellant on circumstantial evidence and, finally, that the High Court erred in law and fact by sentencing the appellant to a

> " ... maximum death sentence even after mitigation ...".

17. When the appeal came up for hearing before us on a virtual platform on 2nd May, 2023 the appellant was present from Kamiti Prison and was represented by learned counsel Miss Ivy Atieno who held brief for Miss Okwiri while learned State Counsel Mr. O.J. Omondi appeared for Office of Director of Public Prosecution. Both sides had filed written submissions which we have considered. It is submitted for the appellant that the trial Court failed to consider his plausible defence which was corroborated by his 2 witnesses; that the appellant had reported various cases of assault on his children but that the police had not taken any action and that the Court did not consider that the deceased suffered from mental illness. Further, the appellant testified that he was away at the shopping centre only to return home and find a mob chasing after the deceased; he did not join the mob and this gave him an *alibi* defence.

18. On whether the prosecution proved its case to the required standard it is submitted for the appellant that no one saw the deceased being killed; that defence witnesses had stated that they had seen a mob chasing after the deceased. The appellant faults the evidence of Muthambi and wondered why she did not alert neighbours after witnessing the assault and also faults the prosecution for not creating the necessary link on the weapon used to attack the deceased. It is submitted that there was no scientific or forensic analysis evidence produced by the prosecution to prove the case. The appellant further submits that the prosecution did not prove that he had malice aforethought as provided by Section 206 of the Penal Code and the English case of *R v Moloney* [1958] AC 905 is cited for the proposition that there cannot be murder if there is no malice aforethought.

19. On whether the court was right to convict the appellant based on circumstantial evidence the appellant cites the case *Republic v Kipkering Arap Koskei & anor* 16 EACA 135 where it was held that to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of an accused and incapable of an explanation upon any other reasonable hypothesis than that of his guilt. The trial Judge is faulted for relying on evidence of Muthambi which, according to the appellant, is contradicted by that of Mwende.

20. Finally, on sentence, various cases including the Supreme Court decision in *Francis Karioko Muruatetu & anor v Republic* [2017] eKLR are cited for the submission that the appellant should not have been sentenced to death.

21. In opposing the appeal, the ODPP submits that the prosecution proved the case to the required standard by producing witnesses who proved the case that the appellant murdered the deceased. It is submitted that the alibi defence was displaced by the prosecution case and that the prosecution had proved that the appellant killed the deceased and he had malice aforethought when he did so.

22. We have considered the whole record, submissions, and the law and this is how we determine the appeal.

23. Starting with whether the case by the prosecution was proved to the required standard there was the direct testimony of Muthambi on the events as they unfolded on the fateful day. He knew both the appellant and the deceased both of whom he called "grandfather". He testified that while at the farm the appellant passed by and was screaming that he was going to kill the deceased.

24. He saw him well as he was about 50 metres away. The appellant had a panga tucked on his side and he also carried a club. He followed the appellant who proceeded to where the deceased was sitting under a tree and the witness saw the appellant chase the deceased who fell down and the appellant cut the fallen man with the panga and hit him with the club.

25. Then there was the evidence of Kakuo who testified that when she heard screams at her co-wife's home she rushed there and found the appellant who told her to find a suitable place where she would bury her son (the deceased) because he would kill him. She observed that he carried a panga, a panga which was recovered 2 days after the attack by the Assistant Chief and the police from the appellant's house.

26. The trial Judge considered the direct evidence of a witness who saw the appellant pursuing the deceased and attack him with a club and a panga. She considered that it was the evidence of a single witness and applied the principle set in *Maitanyi v Republic* [1986] KLR 198 to the effect:

> " Although it is trite that a fact may be proved by testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification .... the court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made."

27. The Judge observed that the witness was a relative of both the deceased and the appellant and was about 50 metres away when the deceased was being assaulted by the appellant. The witness described the events as they had unfolded and the Judge believed that he told the truth.

28. We have re-evaluated the evidence and reached the same conclusion as that of the trial Judge. The appellant and the deceased were relatives of the witness Muthambi; they all lived in the same neighbourhood. Muthambi was at the farm during the day and he clearly saw the appellant attack the deceased who suffered such severe injuries that he died moments later while being taken to hospital.

29. The *alibi* defence was clearly displaced by the strong prosecution case where the appellant was seen by Muthambi while attacking the deceased. He was not at the shopping centre at all as he claimed. He was at the scene to carry out the threat he had issued to Mwende who he had told to find a suitable place to bury the deceased. The whole defence case was considered and was properly dismissed. The conviction was based on direct evidence, not circumstantial evidence.

30. Then there is the issue of whether there was malice aforethought to prove the offence of murder. This is how the Judge analysed that part of the evidence at paragraphs 20 and 21 of the Judgment:

> " 20. When the accused went to their home in search of the deceased he was armed with a panga. When he told PW1 to find where to bury the deceased and he

had formed an intention to kill him. He had the motive to kill the deceased or at least injure him and this was not hidden. It was obvious.

21. The accused went in search of the deceased and when he found him he confronted him. The deceased picked a stick to defend himself but abandoned his quest. He ran away as the Accused pursued him. Subsequently he assaulted him. The examination of the body of the deceased revealed the injuries he sustained. He suffered a cut wound on top of the scalp; a cut wound on the left eye brow; the right upper arm was deformed as the radius and ulna bones of the forearm were fractured; a cut wound between the index and middle finger of the right hand; small cuts on both legs and bruises on the forehead. The head had a depressed skull fracture and the fracture of the orbital bone. There was subdural haematoma. These injuries were serious. The accused had the intention to kill or at least cause grievous harm. In the premises he acted with malice aforethought."

31. We have set out the injuries inflicted on the deceased as per the testimony of the doctor. There was a head injury involving a depressed skull fracture and the fracture of the arbital bone and there was subdural haematoma, amongst other injuries.

32. The appellant set out while armed with a panga and a club and attacked the deceased so viciously that the deceased died moments later. Arming himself the way he did and inflicting the injuries he did on the deceased is evidence that he had formed the intention to kill. This Court in *Morris Aluoch v Republic* [1997] eKLR referred to the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 where it was stated:

> " It was correctly pointed out in Tubere case as follows:
>
> > " With regard to the use of stick(s) in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts."

33. The High Court in the persuasive case of *Republic v Priscillah Wanjiru Salome* [2017] eKLR stated on the same:

> " This provision under section 206 has also been considered way back in 1945 in the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the predecessor of the Court of Appeal stated interalia that "in determining whether malice aforethought has been established the court has to consider the weapon used, the manner in which it is used, part of the body targeted and injured, the severity of the injuries inflicted, the conduct of the accused prior, during and after the killing."

34. Like the trial Judge we find that there was malice aforethought. This is evidenced by the way the appellant armed himself and the injuries he inflicted on the deceased. He targeted such parts of the body of the deceased that he knew or ought to have known that they would cause fatal injuries on the deceased. It is clear that the killing of the deceased was a premeditated action as PW3 testified that

he heard the appellant shouting that he would kill the deceased. We note that in her testimony PW1, narrated how she ran to the shamba when she heard screams. She met the appellant who informed her to look for a place to bury the deceased. Clearly, these kind of utterances by the appellant show that the killing of the deceased by the appellant was not spontaneous. Accordingly, all grounds of appeal on conviction have no merit and are dismissed.

35. On sentence of death imposed the appellant submits that the same was harsh and excessive in the circumstances. We note that sentence was imposed on 6th June, 2017 which was just before the Supreme Court of Kenya pronounced itself in *Francis Karioko Muruatetu* (*supra*) petition. That Court was asked to pronounce itself on whether it was constitutional for Parliament to impose minimum sentence and thus take away the discretion of the courts in sentencing. That case involved murder. The Supreme Court returned that it was unconstitutional for Parliament to do so as Courts should be left to consider the facts of each case before it and impose an appropriate sentence. The circumstances that applied in the case leading to this appeal are bad in that the appellant armed himself and attacked his step brother inflicting such injuries that killed him moments after the offence. The State Counsel informed the trial Judge that the appellant was a first offender. In mitigation counsel for the appellant pleaded that the appellant had a family of a wife and 3 children who were dependent on him as he was the sole breadwinner. He also took care of his aged mother as his father had passed away.

36. Considering all the relevant factors we think that this is an appropriate case where we should interfere with the sentence. We set aside the death sentence imposed and substitute thereof an imprisonment term of twenty five (25) years from 12th November, 2010 when the appellant was first produced before the High Court at Kitui.

37. The final orders of the Court are that the appeal on conviction fails and is dismissed. The appellant will serve 25 years imprisonment from 12th November, 2010.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR