Thumbi v Republic (Criminal Appeal 99 of 2020)
[2023] KECA 1010 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1010 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 99 OF 2020

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

JAPHASON KARIUKI THUMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 5th May, 2016 in HC. CR. C. No. 25 of 2016)

JUDGMENT

1. The appellant, Japhason Kariuki Thumbi was charged with the offence of murder, contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that, on January 18, 2010 at Kiambiu estate in Buruburu within Nairobi area, the appellant jointly with others not before the court, murdered Raechel Wanjiru Maina.

2. In order to contextualize the appeal, it is necessary for us to set out the events that transpired on January 18, 2010 at Kiambiu Kosovo within Nairobi County that led to the charge and conviction of the appellant. Harrison Munyaka Wanjiru (PW1) was the son of the deceased. It was his testimony that his family, that is his mother (deceased), his brother, and his wife lived in the same plot that had 9 houses. They owned those houses where they occupied 6 and rented the other 3. The appellant and his wife also owned a house 10 metres apart from the deceased's house. He said that his mother and the appellant's mother were not on good terms and quarreled severally. On January 18, 2010, at about 7.30 pm, as his mother was returning home, he heard the appellant's wife shout, that "her enemies and their witchcraft could not harm her and that people could live without electricity but not without water."

3. PW1 further testified that the deceased retorted back and told the appellant's wife to direct her grievances directly to her. They began quarrelling and the appellant's wife took her phone and made a call to someone. Soon thereafter, the appellant arrived at the scene together with some young

men known as Kajiti, Kamau, Karaboi and two other men whom he only knew by appearance. The appellant and the men started beating the deceased, who was screaming, until she fell down.

4. It was his further testimony that the appellant followed the deceased to the ground, pinned her down, and instructed his wife, known as mama Thumbi to stab her. Mama Thumbi stabbed the deceased on her back-right side. His attempt to assist his mother was futile as the appellant and his associates were aggressive. After the beating and the stabbing, the appellant and his associates dispersed. PW1 and his brother, Kihara got a vehicle, and took the deceased to Kenyatta National hospital but she succumbed to the injuries at about 1.00 am. On January 19, 2010 they reported the case to Eastleigh Patrol base.

5. PW2, Jackline Kagero, wife to PW1 stated that on January 18, 2010 she was in her house when she heard noises outside. She went to find out what was happening and she saw the appellant who was with his wife, and four young men addressing the deceased. She said that the appellant who was threatening the deceased stated that she should go ahead and call the police. It was her further testimony that the appellant held the deceased and pinned her down on the ground as the wife stabbed her. The deceased was screaming while the appellant shouted to his wife 'stab her' directing his words to the deceased.

6. PW 4, Dr. Njau Mungai, the pathologist testified that he examined the body of the deceased on January 27, 2010 upon identification of the body by PW1 and PW3, Haron Maina Wanjiru, a son of the deceased. He found one right stab wound by the vertebra at the back, about 4 – 5 cm wide and very deep. The injury had extended through the diaphragm to the lungs and blood had collected in the right chest cavity. In his opinion, the cause of death was internal bleeding from the chest injury caused by the penetrating stab wound that appeared to have been caused by an assault.

7. PW5 PC Eliud Mishia stated that on January 12, 2010 at about 9.00 am he went to City Mortuary accompanied by PC Mwanza of Buruburu Police Station who showed him the body of the deceased. He produced in evidence the films and negatives of the body of the deceased, that were processed under his supervision.

8. PW6, Micheal Kihara Mwangi stated that on January 18, 2010 at about 7.00 pm he closed his shop and decided to visit PW1 at his barber shop. He found him there, stayed with him for about 5 minutes and decided to go home. He then met the deceased and mama Thumbi, the appellant's wife, quarreling and a fight ensued. He called PW1 and informed him of the fight. PW1 came, tried to intervene, but he was repulsed by the appellant and his associates who were attacking the deceased. At that point he ran away.

9. PW7, PC Joseph Wanjohi was the investigation officer who visited the scene of crime and recovered the murder weapon. PW8 Dr Zephaniah Kamau was the doctor who assessed the age, mental status and injuries of the appellant. He found him to be 42 years and mentally fit to stand trial.

10. PW9 Sergeant Dishon Angoya stated that on March 10, 2010, he received a call from the officer in charge of Eastleigh Patrol Base, Inspector Matoke who informed him that a suspect had been arrested by members of the public at the bus station. He rushed there and rearrested the appellant, took him to Kamukunji Police Station and he was later taken to Buru Buru Police Station.

11. When put to his defence, the appellant gave unsworn evidence. The appellant offered a defence of alibi. He denied committing the offence and testified that on January 21, 2010 he woke up at 4:30 am at his place in Banana and went to Gikomba to look for shoes, as he sold ladies' shoes (mitumba) for a living at Muthurwa market. He collected the shoes and while waiting for someone to take them to the stage for him, he met Daniel who was a neighbor at Kiambiu. Daniel then informed him that all was not well at home as his wife had locked up the water and the residents were suffering. Daniel also told him that his wife and the deceased had engaged in a fight and that the deceased had passed on, at Kenyatta National Hospital. He stated that he did not believe that the two could have disagreed to that

extent. Daniel asked him to go home and confirm the situation. He got distressed and decided to visit Kiambiu. On reaching, he confirmed the water point to be dry. A neighbor narrated to him about the fight that happened the day before. He did not find his wife. He reported this incident to his parents and on hearing the news, his father fainted. He also informed an aunt of his wife, who confirmed that she last saw her on 28th and December 29, 2009.

12. He added that he had always had differences with his wife as they had disagreed about her drinking alcohol and infidelity habits. He stated that they did not stay together as he had moved out and left her on the plot at Kiambiu slums and would therefore occasionally go to visit. On May 10, 2010, he went to Gikomba as usual to buy shoes for his business and later, while at the bus station met PW3 who inquired whether he knew where his wife was. Later on, a crowd intervened and an argument ensued on whether he should be taken to the police station or be forced to disclose his wife's whereabouts. PW3 hit him on the head with a piece of metal and two police officers in civilian clothing came and escorted him to Kamukunji police station.

13. The trial judge found the ingredients of the offence of murder to have been established and the charge proved beyond reasonable doubt. The appellant was convicted and sentenced to death.

14. Aggrieved by the conviction and sentence, the appellant lodged a notice of appeal on June 8, 2016 and later filed a memorandum of appeal containing 6 grounds and an amended supplementary memorandum with 3 additional grounds. We take the liberty to summarize the grounds of appeal as follows: that the trial judge erred in holding that the prosecution had proved their case beyond reasonable doubt on the question of recognition and mens rea; in disregarding the *alibi* defence and shifting the burden of proof to the appellant, contrary to the law; by accepting that the prosecution had discharged the burden of proof beyond reasonable doubt; in failing to comply with section 169 of the *Criminal Procedure Code*; and in sentencing the appellant to death which was harsh.

15. When the matter was called out for hearing, Miss Gathoni appeared for the appellant and relied on the written submissions and a list of authorities both dated March 2, 2023. She highlighted the submissions which she condensed into two points, namely: the infringement of the appellant's right to a fair hearing and that the sentence was harsh in light of the now oft - cited case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

16. She further submitted that there was no evidence showing that the appellant had the intention to murder the deceased and that there was no evidence that he is the one who stabbed the deceased; that the appellant did not hold the knife nor stab the deceased; that the trial judge erred by disregarding the appellant's plausible defence of *alibi*; that the judgment failed to comply with section 169 of the *Criminal Procedure Code* by failing to spell out the punishment of the appellant after conviction, which occasioned the appellant an injustice, as it denied him an opportunity to interpret the conviction and to become cognizant of the gravity of the punishment and to understand his role when called upon to give his mitigation. She also submitted that the appellant was not informed of his right to appeal and it does not matter that he later filed an appeal; and that the death sentence was declared unconstitutional and should be set aside.

17. On his part, Mr Muriithi, State Counsel, relied on his written submissions dated February 2, 2023 which can be summarized as follows: that the cause of death is not in dispute and that the trial judge's analysis and findings were correct and based on the evidence; that the prosecution witnesses had no reason to give a false account of what transpired during the fatal stabbing; that from the testimonies of PW1, PW2, PW3 and PW6, the appellant's wife was involved in a confrontation with the deceased; that the appellant was called by his wife and together with other men he went to the scene where they attacked the deceased; that the appellant pinned the deceased down and told his wife to stab her; that

the attack by the appellant and his accomplices was premeditated and they were well prepared for it and they deliberately and intentionally caused the death of the deceased; and that the prosecution had proved its case beyond reasonable doubt. Counsel concluded by urging that both the conviction and sentence should be upheld.

18. Having duly considered the record, the judgment of the trial court, the appellant's grounds of appeal and submissions of the appellant and counsel for the state, we start by reminding ourselves of the approach that this court takes when it is invited to interfere with the findings of the trial court. This is a first appeal and the duty of the court is to re - evaluate the evidence, assess it and reach its' own independent conclusions but also warning itself that it did not hear or see the witnesses. In the case of *Gabriel Kamau Njoroge v Republic* [1987] eKLR the court expressed itself as follows;

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

19. We have revisited the record on our own and considered it in the light of the rival arguments set out in the submissions by the appellant and the state. In our opinion, three issues arise for our consideration:

    i. Whether the ingredients of the offence were proved by the prosecution beyond reasonable doubt.

    ii. Whether the trial judge disregarded the appellant's defense of *alibi*.

    iii. Whether the death sentence should be set aside.

20. The appellant's position is that the prosecution failed to prove the elements of the offence of murder against the appellant. With regard to mens rea of the appellant, the trial judge had this to say:

> " The issue that remains for determination is whether the accused killed the deceased with malice aforethought. In the present case, it was clear that in causing the deceased to be stabbed with a knife on her chest, the accused intended to cause the death or grievous harm of the deceased. It may be argued that Mama Thumbi was provoked into the fight with the deceased. However, the evidence adduced clearly points to the fact that it was Mama Thumbi who provoked the fight and was assisted in the assault of the deceased by the accused and his accomplices. Taken in the context that there existed a grudge between Mama Thumbi and the deceased. This court cannot reach a finding that the circumstance in which the fight took place was so heated that the accused and his accomplices did not have sufficient time to cool. This court holds that the killing of the deceased was premeditated and deliberate. The death of the deceased was a natural consequence of the accused's and his accomplices' deliberate unlawful act."

21. In the offence of murder, malice aforethought is the mental element of the offence which takes the form of an unlawful intention to kill which is the express malice, or an intention to unlawfully cause grievous bodily harm which is the implied malice. It is not true, as asserted by the appellant, that he did not participate in the commission of death of the deceased. PW1, PW2, and PW6 all heard him shout to his wife to stab the deceased, which she dutifully did.

22. The appellant, together with his wife caused the death of the deceased. They both had a common intention to kill the deceased since the appellants' wife and the appellants' coordinated acts resulted in the death of the deceased. It is trite law that common intention arises where two or more people are shown to have had a plan to pursue a common unlawful objective.

23. The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre- meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act. (See *Dickson Mwangi Munene & another v Republic* [2014] eKLR.)

24. Taking all this evidence into consideration we come to the conclusion that there can be no doubt that it was the appellant, jointly with others, who caused the death of the deceased. By pinning the deceased and inviting his wife to stab her, there was a common intention in the commission of the offence.

25. With regard to the proof of identity of the appellant, the trial judge found that the prosecution had indeed established the participation of the appellant in the commission of the offence to the required standard of proof, beyond any reasonable doubt. The trial judge, on the element of identification held as follows:

> " With thrust of his defence to the effect that he was not at the scene when the deceased was fatally stabbed is incredible. The accused was well known to the prosecution witnesses at the scene prior to the incident. The said witnesses had no reason to frame the accused for a crime that he did not commit. This court therefore holds that the prosecution did prove, to the required standard of proof beyond any reasonable doubt, that it was the accused, in the company of others who caused the death of the deceased."

26. The PW1 gave a detailed account of how the incident took place and squarely put the appellant at the scene of the crime. Additionally, the appellant was well known to PW1 and hence had no reason to fumble on his identity. We find, as did the High Court, that the appellant was properly identified.

27. On whether the trial judge failed to consider the appellant's defense, we opine not. On this particular line of defense, the trial judge held:

> " On the material day of January 18, 2010, a quarrel ensued between the deceased and Mama Thumbi. From the evidence adduced by the prosecution witnesses, it was clear that it was Mama Thumbi who provoked the quarrel. The two fought. They were separated. Mama Thumbi was seen making several calls. After a while, the accused and his four accomplices identified as Kajiti, Kamau, Karoboi and Waginga arrived at the scene. They went to where the deceased was and started assaulting her. The prosecution witnesses heard the accused call his wife (Mama Thumbi) to stab the deceased. Mama Thumbi had a knife. She stabbed the deceased on the chest. It was this stabbing on the chest that caused the death of the deceased. The post mortem report produced by the doctor established that the stab on the chest resulted into the deceased sustaining excessive internal bleeding into the chest cavity that caused her death.PW1 and PW2, the sons of the deceased and other neighbours were not able to intervene to rescue the deceased because the accused was reputed to be a member of Mungiki gang that terrorized members of the public in the area. This court assessed the

evidence adduced by prosecution witnesses as consistent, credible and' gave a true account of what transpired on that material day. It was clear from the evidence adduced by the prosecution witnesses that the accused and his accomplices intended to cause injury on the deceased. lt was therefore no surprise that the deceased was killed as a result of the assault. The evidence adduced by the accused in his defence does not exonerate him from the crime. This court was not persuaded by the alibi defence that he adduced in court."

28. On his defence of *alibi*, it is trite law that where one raises such a defence, he has no obligation to explain it. In *Wangombe v R* (1980) KLR 119, it was held that if an accused person raises an *alibi* as an answer to a charge against him, he assumes no burden of proof, and the burden of proving his guilt remains on the prosecution. In the appellant's grounds, he posits that the trial judge shifted the burden of proof to him instead of it remaining with the prosecution.

29. The general statement of the law on the burden of proof of an *alibi* defence is rebuttable as not every *alibi* displaces what is otherwise a water tight prosecution case that has been proved to the required standard. For the appellant to have displaced the prosecution case, his defence of *alibi* must have created some doubt that the appellant was at the scene of the crime, yet no such doubt was created to shift the burden to the prosecution.

30. From the judgment, it is evident that the defence of *alibi* was canvassed and considered by the judge. The trial judge considered this defense in great detail and found that it did not absolve the appellant from culpability. In our view, just because the holding did not go his way, did not mean that his defence was disregarded. Our re-analysis of the evidence would lead us to the same conclusion. The witnesses having placed the appellant at the scene of crime on the fateful day, rendered his *alibi* defence implausible and far-fetched, and the High Court was right to have disregarded it. This ground thereby fails.

31. We are satisfied that the trial judge considered the evidence in its' totality, and in so doing, arrived at the correct conclusion as to the culpability of the appellant. The conviction was safe and we have no reason to interfere with the trial court's decision.

32. In the circumstances, we dismiss this appeal in so far as the conviction is concerned. On the question of sentence, the Supreme Court addressed this question in the now often quoted case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and stated as follows:

> "(45) To our minds, what section 204 the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.
>
> (46) We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the *Constitution* does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of the *Constitution* are not exhaustive.

(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under section 204 of the *Penal Code*, unfair thereby conflicting with articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the *Constitution*.

71. ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

a. age of the offender;

b. being a first offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re- adaptation of the offender;

h. any other factor that the court considers relevant."

33. It is now trite that the discretion of the court in sentencing, should not be taken away by the legislature. The offence of murder takes many shapes and forms and no case is on all fours with the other. The trial court is therefore under a duty to consider the circumstances and impose the appropriate sentence. In this appeal, we note that it is not in dispute that the deceased and the appellant's wife had long standing disputes, that led to the fatal injuries on that fateful evening. The appellant was not there when the fight commenced, but he made the unwise decision of getting involved and pinning the deceased on the ground as the wife stabbed the deceased. The wife and the other accomplices managed to run away while the appellant was properly convicted.

34. Considering the facts, the mitigation, and the circumstances of this case, we think that a custodial sentence instead of the death sentence is more appropriate. Accordingly, we set aside the death sentence and substitute therefore a sentence of forty-five (45) years imprisonment from the date the appellant was charged in court.

35. Accordingly, the appeal on conviction fails and is dismissed, but we set aside the death sentence and substitute it with a sentence of 45 years which shall run from May 25, 2010, the date that the appellant was arraigned in court, as the appellant remained in custody throughout the trial. Orders accordingly.

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

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR