Mbatha v Republic (Criminal Appeal 90 of 2020)
[2023] KECA 915 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KECA 915 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 90 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JULY 24, 2023

BETWEEN

SAMMY MUTUA MBATHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Makueni delivered on 19th July 2019 (C. Kariuki, J.) in HCCR No. 118 of 2017)

JUDGMENT

1. This is a first appeal from the judgment of the High Court, where the appellant 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 October 5, 2010 at Maavuni village, Kilungu Sub-Location, Kitundu Location, Mbooni West District, in the former Eastern Province, the appellant murdered Nduu Mbatha Kioko, (the deceased).

2. The appellant pleaded not guilty, and the prosecution called 7 witnesses. The appellant was placed on his defence and gave an unsworn statement. Upon considering the evidence, the High Court convicted the appellant for the offence of murder and sentenced him to serve 35 years' imprisonment.

3. Aggrieved by the decision, the appellant has lodged this appeal, where the grounds in a supplementary memorandum of appeal were that; the trial judge was in error when he failed to find that key ingredients of the offence of murder were not established to the requisite threshold; that the explicit contradictions on record not only impugned on the credibility of the witnesses, but also went to the root of the whole case facing the appellant; that essential witnesses did not testify; and that the appellant's mode of arrest was questionable based on circumstances of the case.

4. Both the appellant and the respondent filed written submissions which were highlighted on a virtual platform during the hearing. Learned counsel Mr C Kimathi appeared for the appellant and in a

brief highlight of the submissions, stated that the trial judge convicted the appellant on the erroneous evidence of PW1 and PW2, the nephew and niece of the appellant, and the grand children of the deceased. It was submitted that PW1 and PW2 were minors and therefore, a voir dire examination ought to have been conducted to ascertain the credibility of their evidence.

5. It was further asserted that the prosecution witnesses who are all related were not credible, since there was bad blood that existed between them and the appellant; that furthermore, the doctor who carried out the post mortem was not called to confirm the cause of the deceased's death. It was further submitted that there was no proper identification of the appellant, as the incident took place at night and that the prosecution did not call one essential witness who was independent. The appellant maintained that the prosecution did not prove its case to the required standards, and that his rights under article 50 2 (k) of the *Constitution* were violated as he was taken to court a month after arrest.

6. Learned prosecution counsel, Mr Orinda highlighted the submissions on behalf of the State. Counsel opposed the appeal and submitted that the evidence of PW2 was direct, as she saw the appellant cut the deceased with a panga to death; the evidence of PWI corroborated that of PW2 since he also saw the appellant aggressively demand money from the deceased and even though PW1 was chased away, he came back with neighbours and found the deceased dead, having been cut on the neck. It was further submitted that the identification of the appellant was adequate and safe, particularly as this was a case of recognition of a known person by relatives. The source of light was described as adequate, and at no time did the burden of proof shift from the prosecution. Counsel continued that, the defense amounted to a bare denial and that the alibi raised by the appellant was an afterthought. It was asserted that the appellant had the option to call witnesses of his choice, but failed to do so; that the defence did not dislodge the strength of the prosecution case and that without doubt, the offence of murder was proved as prescribed.

7. Counsel went on to submit that the delay in arraigning the appellant in court was due to restructuring of the court and that the same were not raised during trial.

8. We have considered the grounds of appeal and the submissions. This is a first appeal, and the duty of this court as a first appellate court has been variously spelt out. In the case of *Kiilu & Another vs Republic*(2005) 1 KLR 174, this court stated are:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination 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. It is not the function of the first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower court's findings and conclusion. Only then it can decide whether the magistrate should be supported and in doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

In view of the said mandate, we consider the issues to be ascertained

i) Whether PW1 and PW2 who as minors were credible witnesses;

ii) Whether the prosecution proved its case to the required standards;

ii) Whether there were inconsistencies and contradictions in the prosecution's evidence;

iii) Whether the appellant was properly identified to warrant a conviction of murder; and

iv) Whether the appellant's rights under articles 50 (2)(e), (f), (g), (h) and (k) were violated by the delay in arraigning him in court.

9. So as to address the issues raised, it is imperative that we lay down the facts that were before the trial court.

10. Jacob Musembi Mbindyo, PW1 a grandson of the deceased testified that on October 5, 2010 at about 7.30 pm while burning charcoal with aid of firelight and the moonlight, he saw the appellant who was carrying a bow and arrow going to the deceased's house which was about 20 metres away from where he was. The appellant knocked on the door and demanded money from the deceased. When PW1 enquired from the appellant as to which money, the appellant placed an arrow on the bow and chased him. PW1 stated that he ran to a neighbour's place (Mulwa Matheka), and explained to him what had happened. Together they went to their grandmother's house but when they got to the house, the appellant was not there, and the deceased was lying on the ground with a cut at the back of her neck. They started screaming and neighbours came to the scene. A panga and arrows were found where the body was lying and a head cap of the appellant was in nearby bushes together with the bow which he identified. The police were called to the scene, and they collected the deceased's body.

11. On cross examination, he stated that he did not scream when he was being chased by the appellant; that he could see the appellant, who was the deceased's son entering the deceased house.

12. NM, PW2, was a 15 years old student in standard 7 and a granddaughter of the deceased. She stated that on the material day, the appellant came home and asked her where her mother, Syombua was. She said she did not know. The appellant went to her grandmother, (the deceased's) house which was within the compound and he asked her to open the door. The deceased did not open the door, but he pushed it, and then N heard screams coming from the kitchen. The deceased's house was 30 metres from their house. She had seen the appellant with the aid of fire and a lamp in the kitchen. After she heard the screams, she rushed to the deceased's house and found the appellant bending over her, cutting her with a panga in the sitting room. There was a hurricane lamp which was on. When the appellant saw her, he chased her, and she ran away screaming to their house, where she locked herself in still screaming. Her screams alerted neighbours who came to the house and saw the dead body of the deceased with a cut on the neck.

13. On cross examination, she stated that she was 15 years old at the time, and she heard the appellant order the deceased to open the door. She confirmed that she had seen appellant cut the deceased and inflict the injury that was at the back of her neck.

14. Jane Syombua Mbindyo, PW3, heard her 2 children PW1 and PW2, crying on the fateful evening. They narrated to her how the appellant killed her mother in-law. She went to her mother in-law's house and found that the deceased's neck had been cut. A bow, arrows and a panga and head cap she used to see the appellant wearing were at the scene.

15. On cross examination, she said that she used a torch to see inside of deceased's house because the lamp had been put off.

16. Peter Mbindyo Mbatha, PW4, the deceased's son identified her body for post-mortem. He stated that the appellant was his brother. He agreed that he had land dispute with the appellant who wanted his mother's share of land. PW1 and PW2 are his children and PW3 is his wife. He stated that the appellant demanded Kshs 85,000 from deceased for potatoes the deceased had sold. At the time, the dispute was over money from the potatoes.

17. APC Elias Njiru Kibaara, PW5, a police officer located at Mbooni West Sub-County Headquarters stated that on the day in question while on patrol accompanied by PC Fredrick Karoki in Kilungu area, he heard loud voices. They rushed to the scene and found a dead body lying in a pool of blood inside a house. Her neck had been cut. They also saw a panga, a bow, 6 arrows near the body.

18. Felister Mawia Mutua, PW6, is a neighbour of the deceased. She heard screams from PW1 and PW2, and on proceeding to the deceased's house, she found her lying on the floor. The children told her that Sammy (the appellant) had killed her. She had an injury at the back of her head.

19. Corporal Simon Luhathe, PW7, then attached at Mbooni Police Station stated that he received a call from the OCS informing him of a murder and instructed him to accompany him (the OCS) to the scene. There they found the deceased's body lying in a pool of blood with deep cut at the back of the head. They also saw arrows, a bow and a panga. A hat which they were informed belonged to the appellant was also at the scene. They were told that the deceased was killed by her son Sammy Mbatha, the appellant. The appellant was later arrested in Kangundo and charged.

20. The appellant testified that on the material day, he was selling timber for building and that on September 13, 2010, police found him and took him to Kangundo, Nguluni where he found his employee who was in charge of his work; that the employee said that he knew him; that the owner of the premises he rented also confirmed he was a tenant. He was locked up on September 15, 2010 at Mbooni Police Station and on October 28, 2010 he was taken to the High Court at Machakos.

21. On cross examination, he said he had lived well with the deceased who was his stepmother; that he was last at home on September 2, 2010, and had given her money before leaving for Nairobi.

22. Returning to the grounds raised, the appellant's first contention was that PW1 and PW2 were minors and that for this reason, the trial judge ought to have conducted a voir dire examination before they testified; since a voir dire examination was not conducted, their evidence was inadmissible and consequently, the conviction could not be sustained.

23. While the court records do not reveal the age of PW1, in his testimony he stated that he was a machine operator in a coffee factory. The fact that he was working in a coffee factory would mean that he was not a minor.

24. In cross examination, PW 2 confirmed that she was 15 years old at the time of the murder. The court record reveals that she was not subjected to a voir dire examination to determine if she was sufficiently intelligent to understand the importance of telling the truth on oath.

25. Subjecting a witness of tender age to voir dire examination is founded under section 125 (1) of the *Evidence Act*, which provides that;

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".

26. In considering whether she was a child of tender years and liable to be subjected to a voir dire examination, this court in the case of *Johnson Muiruri vs Republic* (1983) KLR 445 held that;

> " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the

court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

27. In the oft cited case of *Kibangeny Arap Korir vs Republic*, [1959] EA 92 the predecessor of this court, the Court of Appeal for Eastern Africa, while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

28. In a recent decision of *Patrick Kathurima vs Republic*, [2015] eKLR, this court emphasised that;

> " We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of Cap 15.
>
> We are aware that section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15.
>
> We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

29. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court in *Maripett Loonkomok vs Republic* [2016] eKLR in reiterating that children under the age of 14 years ought to be taken through a voir dire examination held that;

> " The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R, Criminal Appeal No 137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No 16 of 2014 where it categorically stated that the definition in the Children Act is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify".

30. The court further stated that:

> " It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

31. As such, in so far as PW2 was a girl aged 15 years, and was not below 14 years of age, a voir dire examination was not mandatory. This ground therefore fails.

32. We next turn to consider whether the offence of murder was established. To do so, the burden remains on the prosecution to establish three factors. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought.

33. All the prosecution witnesses testified that the deceased died as a result of a cut on the back of the neck. She was found lying dead on the floor of her house in a pool of blood.

34. The appellant challenged the prosecution's case on whether death of the deceased was proved since it failed to call the pathologist to produce the post-mortem report, which was fatal to its case.

35. A review of the proceedings discloses that a post-mortem examination was conducted on the body of the deceased that was witnessed by PW3, but the post-mortem report was not produced in court. This was because the pathologist who conducted the post-mortem examination was consistently never available to testify, despite numerous adjournments. This begs the question as to whether this omission was fatal to the prosecution's case.

36. In the case of *Bernard Reuta Masake vs Republic* [2019] eKLR this court observed;

> "We note that it is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Comparatively, in the Tanzania case of Republic v Cheya & another (1973) EA 500, it was stated: "The absence of medical evidence as to death and the cause of it is not fatal because a post mortem report primarily is evidence of two things; the fact of death and the cause of it. However, the fact of death and the cause of it could be established otherwise than by medical evidence."

See also *Chengo Nickson Kalama vs Republic* [2015] eKLR, *Ndungu vs Republic* [1985] eKLR and *Republic vs Frankline Mugendi Miriti & another* [2019] eKLR).

37. Clearly therefore, the failure by the pathologist to produce the post- mortem report was not necessarily fatal. In the instant case, the evidence adduced showed that the deceased sustained a deep cut to the back of the neck and that she was found lying in pool of blood. The severe injuries resulted in excessive bleeding which then led to her death. All the prosecution witnesses confirmed that she had died, and after her body was removed to the mortuary, a post-mortem was conducted where PW3 identified her body. No doubt, with or without the post mortem report, the prosecution evidence demonstrated that the deceased had died.

38. As to the cause of her death, it is trite that where the cause of death is obvious in certain incidents, such as where the deceased was stabbed through the heart or their head was crushed by a heavy object, a conclusion as to the cause of death can be conclusively drawn. The evidence that was before the court was that PW2 saw the appellant cutting the deceased with a panga which resulted in the severe injuries sustained at the back of her neck. Once again without the post mortem report, it was possible to conclude that the deep cut in the back of the neck with the panga was the cause of her death.

39. As to whether the appellant caused the deceased's death, central to the prosecution's case was the direct evidence of PW2 who testified that she saw the appellant, her uncle bending over the deceased and cutting her with a panga. She stated that the room had a hurricane lamp that was on, and she could clearly see him attacking the deceased. He was a person she identified through recognition as her uncle.

40. It is also well settled in law that the evidence of recognition is more reliable than that of identification. In the case of *Anjononi vs Republic* [1980] KLR 59, the court had this to say:

> "Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another"

41. In view of this evidence, there is no doubt that the appellant was identified, and together with the first hand eye witness account of PW2, we are satisfied that the prosecution proved that the appellant murdered the deceased.

42. Turning to whether malice aforethought was proved, section 206 of the *Penal Code* defines malice aforethought as;

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -
>
> a. An intention to cause the death of or to do grievous harm to any person, whether that 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 that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

43. In order to establish malice aforethought, the predecessor of this court the East African Court of Appeal in in the case of *Rex vs Tubere s/o Ochen* [1945] 1Z EACA 63, explained;that;

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

44. And in the case of *Hyam vs DPP* [1974] AC the court further stated

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

45. The appellant used a panga to cut the deceased at the back of her neck. He must have known that the act of cutting the deceased's neck with a panga would cause death or grievous harm to the deceased. The vicious attack described by PW 2 resulted in the injuries sustained leading to the deceased's death. As such, malice aforethought of the appellant was proved beyond a reasonable doubt as set out in section 206 (b) of the *Penal Code*.

46. In seeking to dispel the prosecution's case against him, in his defence, the appellant stated that on the material day, he was selling timber for building and that on September 13, 2010 police found him and took him to Kangundo, Nguluni where he found his employee in charge of work. In respect of the attempt to provide an alibi defence the trial court stated thus;

> " The accused's defence completely avoids the event of 5/10/2010 and is based on alleged alibi. PW1 and 2 are his nephew and niece who had no grudge to invent a story against him. They talked to him, they knew him, they cried after the murder and were crying telling everybody the accused had killed the deceased."

48. We agree with the trial court that this was an attempt to put up an alibi defence which did not hold any water. The alibi did not in any way explain his whereabouts on the material day. This, coupled with the fact that PW1 and PW2 saw him go into his stepmother's house positively placed him at the scene, and the learned judge cannot therefore be faulted for disregarding the defence.

49. Next, the appellant also challenged his conviction on the basis that the prosecution failed to call crucial witnesses. In particular, that a neighbour, and the appellant's employee were not called.

50. In addressing a similar argument regarding the alleged failure by the prosecution to call crucial witnesses in a criminal trial, this court in Julius Kalewa Mutunga vs Republic [2006] eKLR expressed itself thus;

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

51. Much as it is the responsibility of the prosecution to call witnesses who are sufficient to prove its case, as clarified by section 143 of the *Evidence Act*, "...No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." The prosecution is not obliged to call a superfluity of witnesses. See *Keter vs Republic* [2007] EA 135.

52. The proceedings are clear that the prosecution called a sufficient number of witnesses to prove that the appellant committed the offence for which he was charged. It was not obliged to call the defences' witnesses. It would follow that this ground is farfetched, and also fails.

53. With respect to the allegation that the evidence of PW1 and PW2 was inconsistent and contradictory, the appellant stated that they did not see him killing the deceased, and they did not categorically state the role he played on the fateful night.

54. On reassessment of the evidence of PW1 and PW2, we find that their evidence was neither contradictory nor inconsistent. Each of the witnesses outlined the appellant's movements that evening while armed with a bow, arrows and a panga, how he forced his way into the deceased's house and demanded money from her, and how he chased them away when they tried to assist the deceased. It was PW2 who saw the appellant cutting the deceased on the neck, which was at all times her testimony in court. The High Court found their evidence to be cogent and believable, and like the High Court, we too find that their evidence was consistent and credible. This ground is lacking in merit.

55. Finally, the appellant complained that his rights under article 50 (2) (e) of the *Constitution* were violated, as he was taken to court 23 days after being arrested. Though this issue was not included in the grounds of appeal, the appellant has raised it in the oral submissions before us, and as such, we consider it necessary to address it. The record shows that indeed, the appellant was arraigned in court 23 days after he was arrested. The record does not however disclose that the issue was raised in the trial court, so as to give the prosecution an opportunity to explain the delay.

56. But having said that, this court has stated time without number that the mere fact that the appellant was not taken to court within the constitutional timelines does not vitiate the validity of the trial, unless it is demonstrated that the accused was prejudiced by the delay. In the case of *Julius Kamau Mbugua vs R* [2010] eKLR it was stated that where an appellant is not produced in court within twenty–four hours, it would not lead to an automatic acquittal, but the appellant maybe at liberty to seek damages for the violation.

57. The appellant has not specified that he has suffered prejudice, and in any event, he can seek damages for violation as he deems appropriate. There is no merit on this ground, and we therefore dismiss it.

58. In sum, the prosecution proved all the ingredients of the offence of murder to the required standard, as a result of which, the appeal against conviction fails.

59. As concerns the severity of the sentence, after hearing the appellant's mitigation that he was 76 years old, he has 7 children, and is a first time offender who is remorseful, and seeks leniency, the High Court sentenced him to 35 years' imprisonment to run from the date of arrest, instead of the death sentence prescribed by section 203 as read with section 204 of the *Penal Code*.

60. It is evident that the sentence imposed by the High Court was pursuant to the Supreme Court case of *Francis Muruatetu & another vs Reublic* [2017] eKLR where the court found the mandatory death sentence to be unconstitutional.

61. Needless to say, the appellant has urged us to take into account his age, in that when he was sentenced, he was 76 years, and as at the date of the hearing of this appeal, he was 84 years. In view of his advanced age, and notwithstanding the immense pain that he has caused to his family, we are inclined to reduce the sentence imposed to 20 years from the date of arrest.

62. In view of the aforegoing, the appeal against conviction fails, while the appeal against sentence succeeds. The appellant's sentence be and is hereby reduced to 20 years from the date of arrest.

63. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR