Anyanje v Republic (Criminal Appeal 45 of 2017)
[2023] KECA 880 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 880 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 45 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

JULY 7, 2023

BETWEEN

HERBERT ANYANJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Busia (F. Tuiyott J.) dated 7th July 2015 in Busia High Court Criminal Case No. 11 of 2013)

JUDGMENT

1. The appellant, Herbert Anyanje, was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information against him stated that on April 24, 2019 at Wakhungu sub-location within Busia County, he murdered Paul Omboko. He was tried before the High Court in Busia, convicted and sentenced to death.

2. Aggrieved by both his conviction and sentence, the appellant preferred the present appeal in which he raises five grounds of appeal in his memorandum of appeal dated October 2, 2019. He impugns the decision of the High Court on the grounds that the trial judge erred in law and fact in:

    i. failing to appreciate that the prosecution had failed to establish its case to the required standard;

    ii. failing to acknowledge and appreciate the glaring contradictions in the prosecution case;

    iii. wholly relying on the evidence by the prosecution witnesses and totally failing to consider the merits of the defence;

    iv. admitting a statement that was not a dying declaration without cautioning himself of the danger of admitting such evidence;

v. completely failing to consider the Appellant's mitigation on record and thereby passing a sentence which was manifestly harsh and excessive in the circumstances.

3. As this is a first appeal, we are under an obligation to re- evaluate the evidence before the trial court and reach our own conclusion- see *Okeno v R* [1972] EA 32.

4. The evidence that emerged from the testimony of the six prosecution witnesses was that the appellant was a grandson of the deceased. According to his cousin, Kilo Sakwa Geresa (PW1, Kilo) the appellant had returned home from Nairobi where he lived, on April 21, 2013, and had been welcomed home by his grandfather, the deceased. On April 24, 2013 at about 7.00 p.m., the deceased arrived home where he lived with his grandchildren, Kilo and Dino. They served him dinner, which he ate in the sitting room.

5. At about 9.00 p.m., the appellant came home from Funyula and found the deceased, Kilo and Dino in the sitting room. Kilo heard the appellant telephone his mother, a daughter of the deceased, and tell her that he would kill the deceased if he did not give the appellant land. The appellant then stood up, held the deceased by the shirt and banged his head against the wall several times. When Kilo attempted to intervene, the appellant shoved him out of the way. Kilo then opened the front door, which gave the deceased an opportunity to run out.

6. The appellant, armed with a stick, pursued the deceased through the back door. Kilo followed them outside where he saw the appellant assault the deceased, hitting him on the back of the head with the stick, as a result of which the deceased fell down. The appellant then picked up a jembe (hoe) with which he hit the deceased three times on the head. Kilo then ran to the neighbours where he informed Boniface Sukulu Wanyama (PW2, Boniface) that 'Herbert is killing Babu'.

7. On receiving the information, Boniface and his brother, Michael Bwire Wanyama (PW3, Michael), accompanied by Kilo, went to the deceased's house. They found the door to the house wide open. The sitting room was lit by a tin lamp. They checked each of the rooms of the house but did not find either the deceased or the appellant. On returning to the sitting room, they noticed blood on the floor, near the door.

8. Kilo, Boniface and Michael then searched the deceased's compound, which was heavily overgrown. They did not find the deceased. As they were leaving the deceased's compound to return to their homes, they met the deceased. They shone a torch on him and noticed that he was covered in blood. He had four cut wounds on his head. According to Kilo, the deceased told them that "Herbert has killed me". Boniface and Michael also confirmed in their testimony that the deceased had said to them that "Herbert has killed me. I cannot survive. Take me to hospital."

9. Boniface and Michael then took the deceased to Nangina Mission Hospital where he was admitted until 26th April 2013. Upon his discharge, Boniface and Michael escorted the deceased to Funyula Police Station where he made a complaint about the attack on him by the appellant. Boniface then took the deceased to a private clinic run by Caleb, the deceased's cousin. He later learnt that Christine, a daughter of the deceased, had taken him to Busia District Hospital where he was admitted. The deceased succumbed to his injuries on 3rd May 2013.

10. Charles Gaunya (PW4) the Assistant Chief of Budalangi sub- location, had been informed on 25th April 2013 that the appellant had assaulted the deceased. He arrested the appellant on 3rd May 2013 when he saw him at Amedo Centre in Siaya County and took him to Funyula Police station.

11. The post mortem report on the body of the deceased was produced by Dr Rabare Nina (PW5). The report had been prepared by Dr Nicholas Mitei who performed the post mortem examination.

The report indicated that the deceased had two deep lacerations on the scalp at the occipital region measuring approximately 5cm and another at the left parietal region measuring 5cm. The body also had diffuse bruises and abrasions at the occipital and frontal scalp. The cause of death, according to Dr Mitei, was cardio respiratory failure secondary to head trauma.

12. In cross-examination, Dr Rabare noted that the diffuse nature of the injuries sustained by the deceased- on the occipital, frontal and parietal areas- made it difficult to explain the injuries on opposite sides of the head from a fall. It was therefore, in her view, unlikely that the injuries could have resulted from a fall.

13. Cpl Robert Kisilu (PW6), received the deceased's complaint on 26th April 2013. At the time of lodging his complaint, the deceased had a bandage on his head. His complaint was that he had been assaulted by his grandson, Herbert Anyanje, the appellant. PW6 produced a copy of the Occurrence Book (OB) report on the assault which had been recorded by PC Margaret Njeri.

14. When placed on his defence, the appellant gave a sworn statement. He confirmed that he had met the deceased on the night of 24th April 2013. He had returned home at 8.00 p.m. from Funyula market where he had taken alcohol with his friends. He stated that when he got home, he found the deceased in the company of his grandsons, Kilo and Dino. Kilo and Dino were in the bedroom. The appellant testified that the deceased was extremely drunk, and when the appellant spoke to the deceased, he got angry and attempted to slap the appellant. The appellant therefore stood up from the chair he was sitting on and pushed the deceased who fell on his back and hit his head against a chair.

15. The appellant further testified that the following day, he woke up and when he noticed his grandfather was not around, he prepared breakfast for his cousin Dino, then left for Funyula market. He met the deceased, who was on his way to a posho mill, at the market. When he noticed that the deceased had a bandage on his head, he advised him to go home and rest, advice that the deceased did not heed. He later met the deceased with Kilo at 2.30 p.m. He returned home at 9:00 p.m. but did not find the deceased. He found Kilo and Dino who told him that the deceased had gone to visit their grandmother at the hospital. He never saw the deceased again.

16. In its decision, the trial court found that the prosecution had adduced evidence that established the offence of murder to the required standard. The recollection of the events of the material night by Kilo was supported by the medical evidence. It was also supported by the events happening after the incident: the deceased sought medical attention at Nangila Mission Hospital where he was admitted for two days; after his discharge, he was accompanied by Michael to Funyula Police Station where he filed a complaint; his complaint, captured as entry no. 16 in the OB, indicated that the deceased had been cut with a jembe by his grandson, Herbert Anyanje, and sustained injuries on the head, neck and both eyes. The court noted that the deceased died 8 days after the incident.

17. The trial judge further found that the evidence of Kilo that the appellant used a jembe to inflict blows to the head of the deceased was corroborated by the post mortem report. The trial court therefore found the appellant guilty of murdering the deceased.

18. The appellant was represented by learned counsel, Mr. Wangonda, at the hearing of the appeal. His submissions were first, that the ingredients of murder were not established as the murder weapon was not produced in evidence to corroborate the medical evidence adduced by PW5 with respect to the injuries sustained by the deceased. Further, that malice aforethought was not proved as both the deceased and the appellant were drunk when they engaged in a quarrel and a fight ensued. It is the appellant's submission that none of the prosecution witnesses disputed the assertion that the appellant was drunk at the time of the incident.

19. The appellant further submits that he had no intention of killing the deceased as they only engaged in a fist fight. He reiterates that no murder weapon was recovered from the appellant or at the alleged scene of the crime to suggest that he had the intention to kill the deceased.

20. The appellant submits further that the trial court did not consider his defence that during the confrontation, the appellant pushed the deceased who fell and hit his head on the seat. Had the trial court considered the defence, it would have come to the conclusion that *mens rea* was not established.

21. With respect to the sentence of death meted out on him, the appellant submits that the trial court failed to consider the appellant's mitigation, thereby passing a sentence which was manifestly harsh and excessive in the circumstances.

22. The respondent, represented by learned Prosecution Counsel, Mr Okang'o, opposes the appeal. The respondent submits that malice aforethought was established given the circumstances and the extent of the injuries sustained by the deceased as confirmed by the post mortem report.

23. It is the respondent's submission further that the identity of the appellant as the person who inflicted injuries on the deceased is not disputed.

24. With regard to the sentence, the respondent submits that since the death sentence was declared unconstitutional by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, this court should uphold the conviction but refer the matter to the High Court for resentencing.

25. Having considered the proceedings and judgment of the trial court, the memorandum of appeal and the submissions of the parties, we believe that two issues arise for determination. The first is whether the prosecution proved its case to the required standard, and secondly, should we answer the first in the affirmative, whether the sentence meted out is manifestly harsh and excessive in the circumstances.

26. The prosecution evidence shows that the appellant, a grandson of the deceased, arrived home at about 9.00 p.m. on the night of 24th April 2013. While there is no dispute that the injuries that the deceased sustained, which ultimately proved fatal, were sustained that night in an encounter with the appellant, there are two versions of what transpired and led to the injuries. The defence version is that the deceased and the appellant were both drunk; that they fought, and that the deceased fell and hit his head on a chair.

27. The prosecution version emerged succinctly from the evidence of Kilo (PW1), Boniface (PW2) and Michael (PW3). Kilo was at home with his grandfather, the deceased, and his younger brother, Dino. They had just given the deceased dinner when the appellant came in. There was a lit tin lamp in the sitting room. Kilo heard the appellant telephone his mother and tell her that he would kill his grandfather as he had refused to give him land.

28. Kilo saw the appellant attack the deceased, banging his head against the wall three times, and hitting him with a fimbo or stick. Kilo attempted to intervene but was shoved aside by the appellant, so he opened the front door, which allowed the deceased to get out of the house, and he saw the appellant follow the deceased outside through the back door. Kilo saw the deceased fall down after the appellant struck him with the stick; he saw the appellant pick up a hoe and hit the deceased several times with it, so he ran to call for help.

29. Boniface and Michael went to the deceased's house in response to the summons from Kilo. While they did not find either the deceased or the appellant in the house or compound, they saw blood stains on the floor of the sitting room. They then met the deceased when they were on their way back to Boniface's

house, and he told them that he had been attacked by the appellant. The deceased made a complaint to Funyula Police Station after his discharge from hospital, naming his grandson, the appellant, as the person who had attacked him. The trial court was therefore correct in its finding that it was the appellant who had attacked the deceased, leading to the injuries that ultimately resulted in his death.

30. The appellant contends that he did not intend to cause the death of the deceased, that the injuries the deceased sustained were as a result of a fight between them as they were both drunk. That, therefore, the necessary mens rea, an essential element for a guilty finding to the offence of murder, was not established.

31. The appellant submits that if he were to be found guilty of any offence, it ought to be manslaughter as he and the deceased fought while they were drunk. We note from the evidence that the alleged drunkenness of the deceased was not put to the eye witness, Kilo, who was present when the incident occurred. There was therefore no basis for the trial court to find that the deceased sustained injuries as a result of a fight between him and the appellant while they were both drunk.

32. On the contrary, the evidence shows that the deceased attempted to flee from the attack by the appellant. The uncontroverted evidence before the trial court is that the appellant attacked the deceased in the presence of Kilo. He banged the deceased's head against the wall three times; struck him with a stick; followed him outside and struck him at least three times with a hoe.

33. Kilo's evidence is corroborated in this regard by the medical evidence: the deceased had injuries in the occipital, frontal and parietal regions of the head. These injuries are not consistent with the appellant's contention that the deceased fell while they were fighting and struck his head on a chair. Indeed, as the trial court noted, counsel for the appellant asked a critical question in his cross-examination of Dr Rabare (PW5). In her response, Dr Rabare observed that it was unlikely that the deceased could have sustained the kind of injuries he had, on opposite sides of the head, from a fall as alleged by the appellant.

34. The appellant has further argued that malice aforethought was not established. Section 206 of the *Penal Code* provides that malice aforethought shall be deemed to be established by evidence proving:

> i. 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.
>
> ii. 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; ...

35. We have set out above the evidence before the trial court relating to the actions of the appellant against the deceased, and the post mortem findings with respect to the cause of death of the deceased. The trial court considered these provisions in finding that the appellant caused the death of the deceased with malice aforethought. It noted that prior to attacking the deceased, the appellant had called his mother, the deceased's daughter, and expressed his intention to kill the deceased for refusing to give him land. He had then commenced his assault on the deceased, banging his head several times against a wall, pursuing the deceased and hitting him with a stick, and finally, when the deceased was down, hitting him viciously on the head with a hoe.

36. We are unable to fault the conclusion by the trial court that the death of the deceased was caused by the actions of the appellant, and that the appellant caused the death of the deceased with malice aforethought.

37. The appellant has also contended that since the murder weapon was not produced in evidence, the prosecution did not establish its case to the required standard. This is an argument easily disposed of.

38. In *Godfrey Wafula Simiyu v Republic* (2021) eKLR this Court held as follows:

> "There is no requirement in law for a murder weapon to be produced in criminal cases. As a matter of fact, many a times the weapon is never recovered. Whereas it might have been important to produce the murder weapon, it is our considered opinion that failure to produce the same was not fatal to the prosecution case."

39. The Court went on to cite *Ramadhan Kombe v Republic* Mombasa CA No 168 of 2002, in which this Court held as follows:

> "In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission."

40. We too, find no difficulty in finding that the argument by the appellant with respect to production of the murder weapon is without merit.

41. The appellant has also challenged the sentence of death meted out upon him. He relies on the decision of the Supreme Court in Muruatetu declaring the mandatory nature of the death penalty for the offence of murder unconstitutional.

42. In meting out the death penalty against the appellant, the trial court observed that, despite the mitigation offered, the court was bound by the provisions of the law that made the sentence of death mandatory for the offence of murder.

43. The respondent concedes that the position in law has changed with the Muruatetu decision. Mr. Okang'o submitted before us, however, that the present case is one in which the death penalty is merited.

44. In its decision in Muruatetu, the Supreme Court held that courts have discretion in determining whether or not to impose the sentence of death upon a conviction for murder. In exercising this discretion, the court should take into account the circumstances of the case as well as any mitigation offered by the accused.

45. In this case, the appellant was given an opportunity to mitigate. In offering mitigation on behalf of the appellant, learned counsel, Mr. Wanyama, stated that the appellant was remorseful; that he was a young man, aged 32 years, with a wife and two children who wholly depended on him. Counsel further observed that in the pre-sentencing report, it was indicated that both the appellant and the deceased were predisposed to taking alcohol. He prayed for leniency for the appellant, who was a first offender.

46. We have noted the mitigation offered by the appellant before the trial court, and we are satisfied that it is sufficient to enable us consider the appropriate sentence to mete out in light of the Muruatetu decision instead of remitting the matter to the High Court with the attendant delays that this may occasion.

47. In considering the appropriate sentence, we note that the appellant was 32 years old at the time of the offence. He killed his grandfather on the basis that he had refused to give him land. His grandfather was 67 years old, and had taken care of the appellant. The deceased was also taking care of the appellant's two cousins, minors, the oldest of whom was 16. At the time of the murder, the deceased's wife was in hospital, where she had been for an extended period.

48. All this notwithstanding, the appellant attacked his grandfather, who was twice his age, viciously. He was not content to assault him by banging his head against a wall: he compounded the assault by arming himself and hitting the deceased with a fimbo. Not satisfied with that, the appellant attacked the deceased with a hoe. Several times. Because he refused to give him land! The level of entitlement and lack of concern for others demonstrated by the appellant in this case is astounding.

49. As learned counsel, Mr Okang'o, conceded, this may not be the worst of the worst cases that come before our courts. It is, however, up there, with the worst. We are satisfied that the appellant deserves a long custodial sentence. We therefore dismiss the appeal against conviction and set aside the sentence of death imposed on the appellant. We substitute therefor a sentence of thirty (30) years imprisonment from the date of sentence by the trial court.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.