Kiiti v Republic (Criminal Appeal 85 of 2021)
[2023] KECA 1192 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1192 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 85 OF 2021

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

OCTOBER 6, 2023

BETWEEN

DAVID KIILU KIITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Kitui (Mutende, J.) delivered on 26th August 2020 in HCCR NO. 1 OF 2015)

JUDGMENT

1. This is a first appeal from the judgment of the High Court where the Information specified that the appellant, David Kiilu Kiiti was charged with the offence of murder contrary to section 203, as read with section 204 of the *Penal Code*. The particulars of the charge were that on the August 26, 2015, at Kyeni Village, Katutu location, Kitui West Sub- County, Kitui County, the appellant jointly with others not before court murdered CMP (the deceased).

2. The appellant pleaded not guilty and the case went to trial. The prosecution called 10 witnesses and the appellant gave a sworn defence. Upon considering the evidence, the trial judge found the appellant guilty and convicted him of the offence. He was sentenced to serve 30 years' imprisonment.

3. The case that was before the trial court, was that on August 26, 2015, Obadiah Nzomo, PW1 an elder at Katongoli Village received a call from Joyce Mwikali Mokangi, PW3 (Joyce) asking him to go to her home. When he arrived, he found the deceased who was burnt, lying on the ground. She was talking and identified herself to him as Mwikali Peter Mwanya from Kyeni Village. She stated that she had been burnt by the appellant and another person whom she had not seen before. He called the Assistant Chief and the police who came and took the deceased to hospital. He later learnt from the deceased's mother that the deceased had passed on.

4. Japheth Vundi Mwami, (PW 2) the Area Assistant Chief-Nzalai Sub- location testified that on the material day, at 6.00 p.m. he was called by one James Kiilu, the village elder of Nzalai village and informed that a girl by the name of Mwikali Peter Mwasya from Kyeni village was found burnt, but was alive. He informed the Assistant Chief, Kasakun Malambe Kalunde, of the neighbouring Kanyonyo sub-location. They went together to the home and found a person covered with a sheet. He removed the sheet and saw that the deceased could open her eyes and talk. The burns on her body were from the chest downwards. She had injuries on her head. The girl told him her name, and the village she hailed from; that her village elder was Muwethi Mwelelu and that she was returning from her uncle's place when she encountered two people on a motor bike, one of whom was David Kiilu, the appellant.

5. They ordered her to give them her cell phone, and she was made to sit on the motor-cycle and taken to an unknown destination, where fuel was sprinkled on her and she was set ablaze. When she regained consciousness, she found herself at the scene where PW1 found her; that when he sought to know how she knew it was David, she stated that she had a defilement case in court with him. The witness stated that the police from Kabati Police Station took her to hospital, but she died at Kenyatta National Hospital the following day. The appellant was arrested and subsequently charged.

6. The witness then went on to state that he knew the appellant as they were from the same area, and that, the appellant had defiled the deceased when she was in Standard 7. In cross examination, he confirmed that the deceased told him that she was burnt by the appellant and his brother in law.

7. Joyce PW3 a resident of Musimbe village, Kanyonyo sub location, Lower Yatta, was asleep at 6.00 a.m. on August 26, 2015 when she heard someone calling out to her. The person said she was dying, and when she opened the door, she saw a naked person who was burnt pleading for assistance. The girl introduced herself and narrated how she was accosted by David Kiilu, and driven away on a motor-bike. That the deceased told her how she was hit with an iron bar and hammer on the head, ordered to remove her clothing and lie down on the ground. Thereafter, maize stalks were piled on her and she was set ablaze. The witness reported the matter to the headmen of the area Njoroge Nzomo Kingele and the Assistant Chief Sammy Mueti and, police officers from Kabati took her away. She later learnt that the deceased died while undergoing treatment.

8. Monica Ndinda Peter, PW4, the mother of the deceased stated that after dinner, her daughter retired to the house where she used to sleep. The following day in the morning she received news of what had befallen her. She stated that the deceased told her that the appellant had rang her to meet him outside; that after she met the appellant with another person, they tied her mouth with a cloth and took her away. According to the witness, the appellant who was their neighbour had an ongoing defilement case with the deceased as he had impregnated her, and she had since given birth.

9. Patrick Ndambu Kimanzi, PW6 stated that on August 24, 2016, at about 1.00 a.m. he met the appellant who was a head teacher in a school where he was the treasurer as they planned to buy window panes for the school. The next day, they ran some errands and were together until they parted ways at 8.00 p.m. John Mutita Nzula, PW7, confirmed going to the scene where he found the deceased already injured and assisted in taking her to hospital.

10. Stanley Kirop, PW8 and P.C. Ondego, PW9 also found the deceased alive at the scene. She told them that on August 25, 2015 at about 9.30 p.m. while she was walking from her home to her neighbour's house, she was confronted by two men, one of whom she identified as the appellant. The two men forced her to sit on a motorbike and rode off with her towards B2 Forest where they stopped, told her to make her last wishes, poured paraffin on her and set her ablaze. She lost consciousness and when she regained it in the morning, she walked to a nearby house and sought assistance. She was taken to the hospital where she succumbed to her injuries on August 27, 2015 while undergoing treatment.

On September 3, 2015 a post-mortem was conducted and the appellant was subsequently arrested and later charged.

11. Dr. Okemwa Mindi, PW10, the pathologist carried out the autopsy on the deceased's body that was identified by her uncle and sister. He established that the deceased was 16 years of age, and had multiple burn wounds on the chest, head and limbs estimated at 40% and three stab wounds on the head which caused multiple brain contusion. He indicated that the cause of death was serious burns and emphasized that the stab wounds on the head did not reach the brain.

12. When placed on his defence, the appellant stated that on the date of the alleged incident, he was at home with his family and slept at 11.00 p.m. The following day, he took a painter to Kyenso school to complete some work commenced the previous day. Thereafter, he went to the market where his brother told him about a person who had been burnt. He admitted knowing the deceased, but denied having defiled her, or that a defilement case existed against him. He was arrested on August 27, 2015.

13. Musangi David, DW2, the appellant's son, stated that, his father was at home throughout the August 25, 2015 and into the night of August 26, 2015; that he was at home with Mwende David and his grandmother and had slept in a separate house, but he did not know whether he left his house or not.

14. As stated above, the trial court found the appellant guilty and sentenced him to 30 years' imprisonment. Aggrieved by the decision, the appellant filed this appeal on grounds that the learned judge convicted him on the basis of unreliable and contradictory evidence; that the learned judge misdirected herself in relying on the dying declaration of the deceased without considering the circumstances surrounding the admission of such a declaration, and the weight to be attached to it; that even though the learned judge acknowledged that it was unsafe to convict the appellant on the declaration, she nevertheless went ahead and relied on it to convict the appellant; that the learned judge disregarded the detailed account of the appellant's movements on the material day proffered in his defence, and failed to consider his evidence that he was not with the deceased on the night in question, which evidence was corroborated by his witness; that though the prosecution alleged that the appellant called the deceased on the material day, it did not produce any call data records to prove this allegation; that the trial court failed to appreciate that the offence of murder was not proved and as a consequence, reached an erroneous conclusion.

14. Both the appellant and the respondent filed written submissions and when the appeal came up for hearing before us on a virtual platform, learned counsel Prof. Nandwa appeared for the appellant. Counsel submitted, that the case was not proved beyond doubt, and that the learned judge wrongly relied on the deceased's dying declaration which was incomplete, uncorroborated and contradictory.

15. Counsel further submitted that the deceased's mother did not provide any details of the dying declaration in her evidence, and that the judge did not warn herself before admitting and relying on the dying declaration to convict the appellant.

16. On the alibi defence, counsel submitted that the appellant's defence was not dislodged as he narrated where he was on the night in question, which did not leave any room for association with the crime.

17. Counsel also submitted that the charge sheet was defective as the deceased was said to have been killed in Kyeni, but the evidence shows that she was assaulted at a forest on August 25, 2015.

18. In response, learned counsel for the State,Mr. Okeyo submitted that the ingredients of murder were proved to the required standards. Counsel stated that the dying declaration was complete as it was oral and corroborated by 8 witnesses without any contradictions. On the alibi evidence adduced by the appellant, counsel submitted that it was insufficient and there was no benefit that he could derive from it. On sentencing, counsel submitted that the same was fair and ought to be upheld.

19. This is a first appeal, and this Court is mindful of its duty as a 1st appellate court, which duty as set out under section 379(1) of the *Criminal Procedure Code* and rule 31(1)(a) of the *Court of Appeal Rules*, 2022 is to re-evaluate and analyze the facts and evidence that resulted from the decision of the High Court and thereafter to arrive at its own independent decision.

20. This duty was well articulated by this Court in the case of *Erick Otieno Arum v Republic* [2006] eKLR that;

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court, also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."

See also *Dickson Mwangi Munene & Another v Republic* [2014] eKLR.

21. Having regard to the appeal and the parties' submissions, the issues that arise for consideration are;

i) whether the charge sheet was defective,

ii) whether the offence of murder was proved against the appellant;

iii) whether the deceased dying declaration was corroborated to warrant a safe conviction; and

iv) whether the sentence was lawful.

22. It is the appellant's contention that since the charge sheet read that the deceased was murdered in Kyeni Village, Katutu Location, Kitui West Sub County while the evidence adduced by the prosecution was that the deceased was murdered at Katongili Village, Kanyonyo Sub County, that such discrepancy rendered the charge sheet defective.

23. In the case of *Isaac Omambia v Republic*, [1995] eKLR, this Court considered the essentials of a charge sheet thus;

> "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

24. We are not persuaded that the charge sheet was defective or that the area specified in the charge sheet differed from the place where the deceased was found. The charge sheet clearly indicated the specific offence, and provided particulars concerning the murder of the deceased, which occurred within the vicinity of her home. Further, the appellant was fully aware of the facts and nature of the offence. He was clearly able to participate fully in the trial as he understood the charges he was facing, and was also able to put up a defence. In the absence of any prejudice to him having been demonstrated, any defect in the charge sheet was curable under section 382 of the *Criminal Procedure Code*. This ground is lacking in merit and accordingly fails.

25. Concerning whether the offence of murder was proved. For murder to be established, the prosecution must demonstrate the existence of three elements. First, the death of the deceased must be established and the cause thereof; 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.

26. In the instant case, the fact of the deceased's death is not in dispute. According to the post-mortem report of Dr. Okemwa Mindi, the pathologist who carried out the autopsy on the deceased's body that was identified by her uncle and sister, the examination established that the deceased was 16 years of age and that she had sustained multiple burn wounds on the chest, head limb estimated at 40%, She also had three stab wounds on the head which caused multiple brain contusion. The cause of death was from serious burns.

27. So, was the appellant responsible for the deceased's death? In this case, the evidence implicating the appellant is a dying declaration of the deceased made before she died. The trial court referred to the deceased's statements as a dying declaration, and relied on it as such. This is what the court said;

> " The basis of the prosecution's case, therefore remains the statement made by the deceased where she mentioned the Accused by name as the perpetrator of the unlawful act. By then she hopelessly expected death, just as she cried out for help to PW3. I do appreciate that it may be unsafe to base a conviction solely on the statement, but due to the peculiar nature of evidence adduced, I am satisfied that it was not a case of mistaken identity."

28. Section 33(a) of the *Evidence Act* permits admission, as evidence, the statements made by a person who is dead where;

> "...the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

29. The case of *Mwangi v Republic* [2023] KECA 246 (KLR) defined a dying declaration as;

> "...a statement made by a person concerning what he believes to be the cause or circumstances of his death, when knowing that death is imminent. The statement so made earns its credibility and evidentiary value from the general belief that most people, upon realizing that they are about to die "will not lie".

30. And on the admissibility of a dying declaration, it was emphasised in the case of *Choge v Republic* [1985] KLR that;

> "...The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.

31. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

See also *Pius Jasanga s/o Akumu v R* [1954] 21 EACA.

32. The factors pertaining to admissibility of a dying declaration were also set out in the case of *Philip Nzaka Watu v Republic* [2016] eKLR where this Court stated thus;

> " Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death,or asto any of the circumstances of the transaction leading to his death.Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ....."

33. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe." (emphasis ours)

34. Additionally, the case of *Henry Mulamba Bwire & another v Republic* [2019] eKLR cited the Supreme Court of India in the case of *P.V. Radhakrishna v State* (AIR 1989 SC of Kamataka) on the principles for admission of a dying declaration thus;

> " The principle on which a dying declaration is admitted in evidence is indicated in latin malent, "nemo morturus procsomitur mentri, a man will not meet his maker with a lie in his mouth."
>
> The court then went on to detail the tests to be applied for admissibility of evidence of a dying declaration as whether;
>
> (1) there is any possibility of any concoction or distortion in the narrative.
>
> 2. The event forming the narrative was so unusual, startling or dramatic that it gave rise to a likelihood of the victim misapprehending the correct position and therefore made in error; and lastly.
>
> 3. The statement must be closely connected with the event causing the death of the deceased".

35. Again, in the case of *Peter Kimathi Kanga v Republic* [2015] eKLR this Court underscored the necessity for courts to exercise caution before relying on a dying declaration. The Court had this to say;

> " Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement."

36. In this case, we begin by noting that the trial court did caution itself before relying on the deceased's statements. And in observing that the deceased "...hopelessly expected death..." there is no doubt that the court was cognisant that the statements under interrogation were a dying declaration, and our analysis of the evidence would lead us to a similar conclusion.

37. The testimonies of PW1, PW2, PW3, PW8 and PW9, who all spoke to the deceased on the morning after she was assaulted, are unequivocal that she told them that she had been set ablaze by the appellant. The fact that the deceased died a day later in hospital, whilst undergoing treatment for severe burn injuries qualified the statements a dying declaration.

38. As to whether the dying declaration was contradictory, PW 1 a village elder, PW2 an area Assistant Chief, PW8 and PW9 who were police officers were all told by the deceased that it was the appellant who had set her ablaze. Nothing in the evidence showed that she was coerced or forced to inform them of what had happened to her. Rather, she candidly volunteered information on all that had transpired and to all who cared to listen. PW2 further stated that the appellant was well known to him as he was alleged to have defiled the deceased when she was in class 7. This was also confirmed by the deceased. Furthermore, it is instructive that PW3, PW8 and PW9 did not know either the appellant or the deceased. They were independent witnesses who merely repeated what the deceased had told them. Their separate accounts of the incident, did not in any way differ from the evidence of the other witnesses. Contrary to the appellant's assertions, there is nothing in the evidence that would lead us to conclude that the evidence was incomplete, uncorroborated or contradictory.

39. That said, after applying the principles on admission of a dying declaration, what comes out of our re-analysis of the evidence is that the deceased's dying declaration was consistently repeated to several witnesses, who in turn repeated it to the trial court. It graphically described how the deceased came to be severely burned, which injuries resulted in her death the following day. More importantly, it properly identified the appellant as the person who set her alight. As such, we are satisfied that, the dying declaration was proper and therefore admissible, and effectively established that the appellant caused the deceased's death. Accordingly, the trial court was similarly right in so finding.

40. Turning to malice aforethought,section 206 of the *Penal Code* lays down the circumstances that would lead to a finding of malice aforethought. The provision clearly specifies that;

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."

And in the case of *Hyam v DPP* [1974] A.C. the Court held that;

> 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."

41. In her dying declaration, the deceased stated that the appellant piled maize stalks on her as she lay on the ground, poured paraffin and set her ablaze, whereafter she lost consciousness. PW3 confirmed that when the deceased came to her door seeking assistance, she was naked and burnt. She stated that the deceased told her that the appellant and his accomplice piled maize stalks on her, poured paraffin and set her ablaze. Dr Okemwa Minda, the pathologist confirmed that the deceased had multiple burn wounds on the chest, head limb estimated at 40%. She also had three stab wound on the head which caused multiple brain contusion, and that the cause of death was serious burns. From the nature of the injuries the deceased sustained, it cannot be doubted that the appellant intended to cause the death of or grievous harm to the deceased. The burns on the chest and fore limbs coupled with the stab wounds on the head clearly indicate that there was malice aforethought on the appellant's part. In effect, just like the trial court, we too are satisfied that malice aforethought was proved to the required standard.

42. On the defence of alibi raised, the trial judge having been of the view that DW2's evidence did not in any way account for the appellant's whereabouts after 8.00 p.m. of the night in question, accordingly discounted it.

43. In the case of *Victor Mwendwa Mulinge v R* [2014] eKLR while addressing alibi defence, this Court explained;

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja v R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

44. A consideration of the evidence clearly shows that the defence was an afterthought and was raised too late in the day. We agree with the learned judge that the alibi defence was wanting, and was incapable of assisting the appellant in any way.

45. In sum, the prosecution proved its case to the required standards and for this reason, we dismiss the appeal against conviction.

46. On the complaint against the sentence, as submitted by the respondent, the offence of murder attracts a sentence of death. In this case, the trial judge took into account the guidelines pronounced by of the Supreme Court in the case of *Francis Karioko Muruatetu v Republic* [2017] eKLR, and sentenced the appellant to serve 30 years imprisonment. For our part, we consider the sentence to be very lenient notwithstanding the heinous and macabre manner in which the appellant caused the death of a young woman who had a promising life ahead of her. So that, nothing having been placed before us upon which to exercise our discretion to reconsider the sentence, we have no reason upon which to interfere it.

47. In sum, the appeal against conviction and sentence lacks merit and is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 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

Signed

DEPUTY REGISTRAR