Muli v Republic (Criminal Appeal 44 of 2022)
[2023] KECA 1217 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1217 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 44 OF 2022

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

OCTOBER 6, 2023

BETWEEN

MARTIN SILA MULI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kitui (L. N. Mutende, J.) dated 25th April 2017 in HC.CR. No. 11 of 2016)

JUDGMENT

1. Martin Sila Muli, "the appellant", was charged before the High Court at Kitui with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the 6th day of April, 2012 at Kaangwa village, Kibwea sub–location in Kibwea location in Mutomo district within Kitui County murdered Maria Sila, (deceased).

2. He pleaded not guilty to the charge and the case proceeded to trial, where the prosecution called 11 witnesses. By way of background and to put the appeal in context we shall give in summary form the evidence that was adduced in the trial Court. If this was a Hollywood script, one would have started with a disclaimer that viewers' discretion is required as the violence is chilling and heartbreaking.

3. According to PW1, RMS a daughter of the deceased, she was asleep in her grandmother's house, which was in the same homestead as her parents' house, when she heard her younger sister, crying. She got up and found her grandmother pleading with the appellant to stop beating her mother.

4. According to PW1 the appellant, who worked in Nairobi, was not at home by the time she went to sleep. It was her evidence that when she woke up, after hearing the noise, she could clearly see what was going because the moon was shining brightly. The appellant slapped her mother who was weeping loudly severally. PW1 then ran and woke up her uncle, Muthui Muli. By that time, all the children had woken up and were crying loudly. A neighbor by the name Mwikali also went to the scene and the

appellant threatened him and ordered him to go back to his home. Another neighbor by the name, Mayuku came and the appellant also chased him away. The deceased managed to free herself and ran to the farm but the appellant chased and caught up with her. He then picked a stick and ruthlessly beat her. PW1 followed them to the farm. Her grandmother and her uncle, Mutuku also ran to the farm and unsuccessfully tried to stop the appellant from beating the deceased. The stick eventually broke and the appellant sent his son, MS for a belt. MS brought the belt and he continued beating the deceased, who was then on the ground. The belt broke into pieces and the appellant took a stick but once again the deceased got a chance to get up and ran to the homestead.

5. It was further her evidence that the deceased reached the house, and asked PW1 for drinking water, which she gave her in a container. As the deceased was drinking, the water, the appellant, who had followed her, threw the container away, picked up a stool, and hit the deceased on the head with it, throwing her to the ground. The appellant then undressed the deceased and washed her face. Thereafter, the appellant and an uncle carried the deceased into the house. The appellant placed a bed sheet on the floor, placed the deceased on it, and covered her body with another bedsheet. The appellant then slept in the same room as the deceased. PW1 and her siblings also went to sleep. In the morning, PW1 and her siblings woke up, but the appellant was not in the house. Later police officers went to the house, took photos of the body of her mother who had since died and took the body.

6. PW2, Patrick Mutuku a doctor at Kitui District Hospital, testified that he was the one who filled in the post – mortem form dated April 13, 2012 after carrying out the post-mortem on the body of the deceased. He opined that the cause of death was a severe head injury caused by an assault.

7. PW3 Mawia Muli, the appellant's father stated that on 5th April 2012 at about 9.00 pm, the appellant returned home from Nairobi where he worked. The appellant woke him up at about

10. 00 pm but he requested him to go to sleep. After a short while, he was woken up by his grandchild and on stepping out of the house, he saw the appellant beating his wife. The moonlight shone bright and he could vividly see what was happening. He unsuccessfully tried stopping the appellant from beating the deceased with a stick and later with a belt. He then went to call his other relatives to assist and when he returned the deceased was bleeding from the head, lying on a mattress covered with a bed sheet. He reported the matter at the Administration police camp and later police officers from Mutomo police station went to the scene, photographed, and removed the body. By that time, the appellant had disappeared from the scene.

8. PW4, Martin Munuve Muli, a brother to the appellant stated that on April 5, 2012 at about 10.00 pm, the appellant went to his house and greeted him. Later, at around 1.00 am – 2.00 am the deceased's children woke him up. He went to the appellant's house and found him beating the deceased. He held the appellant and stayed with him for about three hours and peace prevailed. He went to sleep but later, his brother Muthui woke him up, found the deceased groaning on the ground. She had a head injury, that was bleeding. He held the appellant, who had picked up a stone that he was about to throw on to the deceased. He then noticed that the appellant's wife was dead and at that point, the appellant disappeared from the scene.

9. PW5, Moses Kilonzo, a brother to the appellant together with his father, PW2 were the ones who identified the body of the deceased at Kitui District Hospital Mortuary during the postmortem.

10. PW6, Muthui Muli, stated that on April 5, 2012, he was woken up at about 11.00 pm by the appellant's children who informed him that their parents were fighting. He then woke up his brother, went to the appellant's house, and separated the appellant and his wife. He then went back to his house but after about 30 minutes, he heard noises and woke up his brother again. They went to the deceased's house and found her on the ground. The deceased passed away while they were making arrangements to take

her to the hospital. They carried the body of the deceased into the house and made a report at Kisayani Administration Police post.

11. PW7 Corporal Francis Mutunga was the arresting officer. He stated that the appellant surrendered himself at Kithani AP Post at around 1.30 am. He arrested him and took him to Mutomo police station for further action. PW8 Lawrence Kinyua Muthuri was the government analyst who did the profiling of the blood sample of the deceased, the stool, clothes, the bed sheet, and the DNA analysis. The result of the DNA analysis was that the DNA profile generated from the stool, bedsheet, and blouse matched the DNA profile from the blood sample of the deceased. PW9 Corporal Livingstone Katui prepared the photographic prints which were to be used as exhibits. PW10 PC Benjamin Maundu was the officer that escorted the exhibits to the Government chemist for comparison. PW11 PC Salaton Sironga, was the investigation officer who visited the scene, collected the evidence, interrogated the children of the deceased, and took the fingerprints of the appellant after he was arrested.

12. The appellant's defence was that on 5th and April 6, 2012 he was in Nairobi. He went home and reached at 12.30 am and found a man in his house. A fight ensued between them and in the process, the man hit the deceased. He heard his wife screaming. He ran after the man but he got away. On asking the deceased, who the man was, she said she was injured on the head and that she had fallen on a stool in the course of the commotion. He stated that he had no intention of killing his wife and he regretted having lost his wife.

13. The trial Court upon considering the evidence, convicted and sentenced the appellant to death. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that: the trial Judge erred in law and in fact, in convicting the appellant yet the prosecution failed to prove its case beyond reasonable doubt; that the element of malice aforethought was not proved; and that the death sentence was harsh as the court did not consider the extenuating circumstances.

14. The appellant has filed two sets of submissions; one that is un- dated but was forwarded for filing on January 27, 2023 and the other dated March 21, 2023. On its part, the respondent has filed submissions dated March 21, 2023.

15. The appellant submissions can be summarized as follows: that he had a cordial relationship with his wife; that on the material night, he was drunk and that in view of the intoxication he had no knowledge or intention to kill the deceased hence there was no premeditation; that though the defense of intoxication was not raised during the trial, the Court ought to have made a specific inquiry into it before convicting the appellant; and that the prosecution failed to show directly or indirectly that the appellant indeed had malice aforethought or the intent to kill the deceased.

16. On sentencing, the appellant submits: that the trial Judge erred in law by sentencing the appellant to death as a mandatory sentence even after mitigation and implores this Court to intervene, as he has already served 7 years; that there were "extenuating circumstances" and for this reason the death penalty is harsh; that there is no duty on the appellant to show that extenuating circumstances exist and a Judge had the overriding responsibility even in the absence of any submissions by the defence to consider the same. On these grounds, the appellant prays for leniency and for a sentence whose term is equivalent to the number of years already served in prison citing the case of *Titus Ngamau Musila alias Katitu v R*, Cr. Case No 78 of 2014.

17. When the appeal came up for hearing through the online digital platform, Ms. Atieno appeared for the appellant and the State was represented by Mr. Omondi, Senior Deputy Director of Public Prosecutions. Ms. Atieno highlighted her written submissions and stated that the trial Court ought to have made an inference to the defence of intoxication and that the prosecution failed to prove the element of malice aforethought.

18. The State through Mr. Omondi submitted that the prosecution had proved the case against the appellant beyond any reasonable doubt. On the question of malice aforethought, he stated that the evidence of PW1 and PW3 demonstrated a clear intention to murder or inflict serious bodily injuries, as the appellant, despite pleas from his children, mother, brothers, and neighbors beat the deceased with a stick until it broke, then with a belt until it broke and then followed the deceased to the house when she managed to escape from the farm. The appellant found the deceased drinking water and he kicked the cup and then hit the deceased with a stool inflicting the fatal blow. He submitted that these actions clearly demonstrate that the appellant was alive to what he was doing.

19. This is a first appeal. As such, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination on whether or not to uphold the conviction and sentence of the trial court. See *Okeno v Republic* [1972] EA 32.

20. We have revisited the record of appeal and carefully considered it in light of the rival arguments set out in the submissions by the appellant and the state and note that this appeal turns on the following issues:

    a. Whether the offence was proved to the required standard;

    b. Whether the trial Court ignored or failed to consider the defence of intoxication; and

    c. Whether the learned Judge meted out a punitive, harsh, and excessive sentence.

21. On the first issue of whether the offence was proved to the required standard, it is trite that for one to be convicted of the offence of murder the prosecution must prove: that the death of the victim was caused by an act or omission of the appellant and that the appellant did that act or omitted to act with malice aforethought. From the record, it is clear that the appellant savagely beat the deceased for hours with a stick and a belt. The deceased managed to run away twice, first to the farm and later to the house where the fatal blow was inflicted with a stool. The cause of death was a severe head injury as confirmed by PW2, who conducted the postmortem. The evidence by the appellant that he found the deceased with another man and a fight broke out and it is that man who threw the stool, flies in the face of the clear evidence that was adduced. The evidence shows that the beating of the deceased went on for hours, first in the house, then she ran to the farm where she was followed by the appellant and finally, she ran back to the house, where she was pursued and hit with a stool. The trial court considered in great detail the events of that fateful night and we are satisfied that there can be doubt that the appellant caused the death of his wife. He savagely beat her for hours and thwarted all the attempts by his parents, and children to stop the beating.

22. How about malice aforethought? Did the appellant have malice aforethought to murder the wife? Was the appellant aware that the ruthless beating with a stick until it broke; requesting the son to get a belt and beating the wife with it until it broke, and finally hitting her with a stool in the head could cause grievous harm that could cause death? The answer to this issue lies in section 206 of the *Penal Code*, which provides as follows:

> " 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 cause or not, or by a wish that it may not be caused;

c. An intent to commit a felony; (d) "

23. The element of malice aforethought, is the mental element of the offence which takes the form of an intention, unlawfully to kill which is the express malice, or an intention, unlawfully to cause grievous bodily harm which is the implied malice. From the record, it cannot be true, as asserted by the appellant, that he came home and found a man in his house, whereby a fight ensued between them, and in the process, the man hit his wife. It is also not plausible that in his defence on asking the deceased, who the man was, she told the appellant that she was injured on the head and that she fell on a stool in the course of the commotion. There is ample evidence on record that this narrative by the appellant is certainly not true. The beating was done in the presence of his parents, brothers, and children and the plea for mercy for the deceased from all of them, fell on deaf ears. The manner in which he attacked the deceased and kept at it despite her being subdued and even trying to come at her with a stone when she was lying helpless on the ground, connoted malice aforethought, as he was intent on either killing her or causing her grievous body harm which eventually led to her death.

24. In the case of *John Mutuma Gatobu v Republic* [2015] eKLR, this Court stated as follows:

> " There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.
>
> We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited."

25. The second ground for consideration is the defence of intoxication. The appellant in his submissions states that he was drunk and thus could not possibly have knowledge or intention to kill and that there could not have been premeditation. From the record, it is evident that the appellant got home, and shortly after a fight ensued. His mother and brother tried holding him back but he overpowered them and proceeded to beat the deceased, with a stick and later a belt, followed her to the farm as she ran for safety. While looking for a stick to beat her and while the deceased had managed to walk back home and was drinking water while seated outside their house, he came and threw away the container with water, picked a stool, and specifically aimed for her head. Even with the deceased on the ground bleeding from the hit of the stool, he still picked a stone and wanted to hit the deceased were it not for his brother who restrained him. These were actions of a person who intended to kill the deceased or to cause grievous harm to her, which eventually happened. See *Ekaita v R* (1994) KLR 225. It cannot lie in the mouth of the appellant, that he did not have the intention to cause harm, for the reason that he was intoxicated. We find and hold that the appellant had the requisite malice aforethought.

26. We note that the appellant's grievance is that the learned Judge failed to consider his defense of intoxication. On this particular line of defense, the learned Judge held:

> " It was alleged that when the accused went to speak to his mother he was reeking of alcohol and PW6, his brother suggested that the deceased used to socialize with a certain man known as Kamami. The accused did not suggest that he acted as a result of intoxication. Similarly,

he did not suggest that he acted as a result of provocation. In any case, in the case of *Kupele Ole Kitaiga v Republic* (2009) Eklr Criminal Appeal No 26 of 2007 the Court stated:

> "A clear message must also go out to those of the appellants ilk who deliberately induce drunkenness as a cover up for criminal acts.
>
> Failure to plead the defence of intoxication is evidence of the Accused having been in control of his thoughts."

27. It is trite law that the defence of intoxication can be availed only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The question that begs is, did the state of intoxication, negate malice aforethought since the appellant was too drunk to form the specific intention required?

28. In Juliana Obare Angeso vs. Republic CR. A 271 of 2008, this Court quoted David Mugo Maina vs. Republic CR. A 212 of 2005 where the court observed:

> " ... a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of him having consumed liquor and whether that state has deprived him of the ability is form the specific intend to kill.
>
> The court is under a duty to consider such a defence where it is raised."

29. The answer as to whether the appellant can benefit from the defence of intoxication lies in section 13 of the *Penal Code* which provides as follows:

    1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

    2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and- intoxication insane, temporarily otherwise, at the time of such act omission.

    3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

    4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

    5. For the purpose of this section, "intoxication' includes a state produced by narcotics or drugs."

30. A reading of this section clearly shows that the application of the defence of intoxication is constricted in its' application and not a carte blanche available for use by any person who alleges that he had taken alcohol at the time the offence was committed.

31. The appellant in his defence only stated that he was drunk. There was no evidence of where and when and with whom he took the alcohol; there was no evidence of how much alcohol he had taken and the time it took him to travel home after taking the alcohol; there was no evidence that the alcohol was given to him negligently and malicious by another person; there was no evidence that he was temporarily

insane or otherwise at the time of the act. For the appellant to rely on the defence of intoxication, such details would aid the Court in assessing viability of the defence.

32. On the contrary, the evidence shows that the appellant was in full control of himself as he took time to visit his parents and his brothers before he committed the act, his mental faculties were functioning well and he could even remember to tell his son to get the belt when the stick he was using broke, he had the strength to chase the deceased to the farm and even when she managed to escape, he had the energy to run after the wife for a second time when she ran to the house and even kicked the cup of water that had been given to her and when he realized that the wife was dead, he disappeared from the scene. This kind of behavior points to a person who was in control of himself and full of energy. The appellant, whatever the reason of his anger was out to punish and cause grievous harm to the deceased. If indeed he was intoxicated to the extent that it affected his judgment, that is a situation that would be discerned from his behavior or mannerisms that fateful night and it would not have escaped the attention of all the witnesses who testified. From the facts on record, it cannot be said that the appellant had become incapable of having particular knowledge in forming the particular intention to kill the deceased.

33. In this case, we find and hold that the learned Judge was clearly alive to the defence of intoxication and dealt with it. The learned Judge considered his defense and found that it did not absolve him from culpability and just because the holding did not go his way, did not mean that his defence was ignored. Consuming alcohol, narcotics or drugs should not in any circumstances be used as a gown to cover criminality and the defence of intoxication should only be available within the narrow confines of section 13 of the *Penal Code*. This ground thereby fails.

34. The third issue is that the death sentence that was imposed is harsh and excessive and the Court should substitute it with a sentence equivalent to the time spent in prison. The appellant in his submissions relies on section 333 of the *Penal Code* on the consideration of the time spent in custody during trial. In addressing this issue, we note that section 333(2) of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

35. We find and hold that this section of the law does not apply to the appellant's case, as his, is a sentence to the death penalty. The appellant seems to be praying for leniency but his reliance on section 333(2) is misplaced and inapplicable in his case. The appellant was sentenced to death. It is instructive to note that the oft cited case of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR did not abolish the death sentence but declared its' mandatory nature under section 204 unconstitutional as it had taken away the discretionary power of the Court. It is trite that that discretion is to be exercised judiciously and that each case has to be determined in its own merit. Where circumstances justify a non-custodial sentence can be given and there is no standard sentence and a person can be given a short or lengthy sentence. This also means that where circumstances justify keeping away an accused person from society, the Court is at liberty to pass any sentence as provided in the law.

36. In the appeal before us, the appellant attacked and eventually killed the deceased in a very atrocious and horrifying manner. Despite the deceased being unarmed and subdued, the appellant, proceeded to beat her with a stick, a belt, hit her head with a stool, and still wanted to throw a stone at her, even after she lay on the ground, minutes before she died. In our view, the sentence that was meted out was

lawful in the circumstances and we will only interfere with it to the extent that we commute the death sentence to life imprisonment.

37. In conclusion, having considered the entire record and examined the evidence as a whole minutely and exhaustively, we have come to the conclusion that the appellant was aware that there was a real risk that his assault on the deceased could result in grievous harm or lead to her death. We find just like the trial Court, that the appellant viciously assaulted the deceased, with the intention of causing at the very least, grievous bodily harm, which she eventually succumbed to. We are satisfied that in the eyes of the law, the prosecution proved the offence beyond reasonable doubt and the defence of intoxication was duly considered. The plea for leniency or mercy by the appellant is not justified in the circumstances of this case.

38. Consequently, the appeal on conviction fails and is dismissed.

    The appeal on sentence is allowed to the extent that the sentence of death is set aside and substituted with sentence for life.

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