M'Ituru v Republic (Criminal Appeal 100 of 2017)
[2023] KECA 1604 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1604 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 100 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

NOVEMBER 10, 2023

BETWEEN

DAVID NTONGAI M'ITURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Wendoh, J.) dated 28th July, 2015 in H.C.CR.C. No. 31 of 2007)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Meru (Wendoh, J.).

2. A background of this appeal is that the appellant was charged before the High Court with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence alleged that on 14th June 2007, at Muringene location in Meru North District within the then Eastern Province, the appellant murdered Jacob Meme Itirikia. When he was arraigned before the trial court, the appellant denied the charge. The matter proceeded to hearing with the prosecution calling a total of eight witnesses. The appellant on his part gave sworn evidence in his defence. He did not call any witnesses.

3. The brief facts of the case are that PW4, Margaret Ncolo, on that fateful night of 14th June 2007, at about 8.00 p.m., was seated outside her house when she heard someone calling out for help. The person was saying that he had been stabbed. PW4 stated that she recognized the voice as that of deceased. He was her neighbour. She saw the deceased from about twenty (20) metres. He was not moving. She walked over to where he was standing. She helped him walk to her house. He showed her the stab wound on the right side of his chest just below the ribs. He was bleeding. She called her son PW1, Meshack Mutuma Ntundu, for assistance. The deceased informed them that he had been stabbed by the appellant at Muriuki's (PW2) gate. PW1 stated that he informed the deceased's wife about the

incident. The deceased was rushed to Maua Methodist Hospital. They were later informed that the deceased had succumbed to his injuries and died on the following day.

4. PW3, Shadrack Mario, is a brother to the deceased. He told the court that on the material day at about 8.30 pm, he was informed by his mother and PW1 that his brother had been stabbed. They went to the scene of crime where they found the deceased. He was bleeding. The deceased informed them that he had been stabbed by the appellant using a spear. PW3 stated that on the following day, while in the company of one Michubu, he saw the appellant at Murungene bus stop. They apprehended him and took him to Maua Police Station. They were later informed that the deceased had died. PW3 informed the police of the same. He accompanied the police and the appellant to the scene of crime where the appellant was able to retrieve a spear. The appellant, at the time, was wearing a blood- stained jacket.

5. PW2, Rose Kaloki, stated that she had employed the appellant to guard her miraa farm. On 15th June 2007, at about 7.30 a.m., she was informed by PW4 that the appellant had stabbed the deceased. She confronted the appellant but he denied the allegations. She stated that the appellant told her that there were thieves at the shamba the previous night, and that the said thieves stabbed the deceased.

6. PW5, Elias Mugambi, was at PW2's home on the material night when he heard screams for help at about 8.00 p.m. He rushed outside where he met the appellant who was running while carrying two torches and a spear. He inquired from the appellant what the commotion was all about. The appellant however did not stop to talk to him. PW5 rushed to where the screams were emanating from. He found the deceased who had been stabbed about 100 metres from PW2's home. PW1 and PW4 were also at the scene. The deceased told him that it was the appellant who had stabbed him.

7. PW6, Christine Karamana Muriuki, was at her mother's house (PW2) on that fateful night. She stated that at about 8.00 p.m., the deceased came to the house to give her money for banana leaves which she had earlier sold to him. A few minutes after the deceased left, PW6 stated that she heard someone scream. She went out with a torch to investigate what had happened. She stated that she saw the appellant at the gate where he was guarding the miraa farm. He was holding a torch and a spear. She inquired what the screams were all about but the appellant kept quiet. PW6 stated that she found the deceased on the ground just in front of their homestead's gate. The deceased was screaming saying that he had been stabbed. He stated that it was the appellant who had stabbed him.

8. The post mortem was conducted by PW7, Dr. Benjamin I. Kanake, on 27th June 2007. He testified that the deceased had a stab wound on the right abdomen, penetrating to the perineal area, about 8 cm long. He concluded that the cause of death was severe hemorrhage due to penetrating stab wound to the right kidney.

9. The case was investigated by PW8, Cpl. Muriithi, who at the time was based at Maua Police Station. He stated that the appellant was brought to the station by members of the public on 15th June 2007 at 10.25 a.m. He was alleged to have stabbed the deceased on his right lower abdomen. The deceased was rushed to hospital where he later succumbed to his injuries. PW8 stated that they recovered a blood stained spear head from PW2's house when they were led there by the appellant. He also recovered deceased's clothes from the hospital and sent the clothes together with the spear head to the Government Chemist for analysis. He testified that the blood group of the blood stains on the spear head matched the blood on the deceased's clothes, being blood group O. PW8 stated that he was not able to establish the motive of the appellant to stab the deceased.

10. The appellant was put on his defence. He gave a sworn statement. He testified that on 13th June 2007, at 3.00 p.m., he went to Isiolo to deliver miraa and arrived back home by 7.30 pm. He slept and woke up the next morning at about 6.00 a.m. On his way to work, he passed by his miraa farm, and was informed by one Teresia that the deceased had been stabbed on the farm the previous night. She however did

not tell him who had stabbed the deceased. PW2 also informed him of the incident. He asked PW2 to accompany him to the deceased's house where they found his wife. He stated that the wife informed them that the deceased had been taken hospital. He was arrested by three people as he was preparing to go to the hospital with PW2 to visit the deceased. The appellant denied the allegation that he had stabbed the deceased. He stated that the deceased was his in-law. He had a good relationship with him.

11. After a full trial, the appellant was convicted as charged, and sentenced to suffer death. Aggrieved by his conviction and sentence, the appellant filed the instant appeal. He advanced a total of 13 grounds of appeal in his memorandum of appeal and supplementary grounds of appeal. In summary, the appellant faulted the trial court for convicting him on the basis of circumstantial evidence that failed to meet the required legal threshold. He stated that the evidence of identification relied on by the learned trial Judge was not sufficient to sustain a conviction. He took issue with the fact that the learned Judge failed to take into consideration the evidence of the expert witness.

12. The appellant was aggrieved that the learned Judge had improperly shifted the burden of proof to him. He stated that the learned Judge failed to appreciate the fact that there were no eye witnesses to stabbing, and no OB report was adduced by the prosecution to show the same. He faulted the trial court for relying on inconsistent and uncorroborated evidence by the prosecution witnesses to convict him. He was aggrieved that no forensic tests were done to link him to the murder weapon or the alleged offence. Lastly, he faulted the learned Judge for rejecting his cogent and credible defence.

13. The appeal was heard by way of written submissions which was duly filed by both parties. Counsel for the appellant, Ms. Nerima, submitted that the circumstantial evidence relied on by the trial court to convict the appellant did not irresistibly point to the appellant as the person who stabbed the deceased. She explained that other than what the deceased told the witnesses, no other evidence was adduced to connect the appellant to the stabbing. She asserted that exhibits recovered from the scene, especially the murder weapon, were not brought to court for identification by the witnesses. She submitted that the report by the Government analyst was inconclusive and failed to link the appellant to the offence. She stated that since the incident occurred at night, the dying declaration by the deceased was not free from error of mistaken identity as the conditions favouring positive identification were absent. Learned counsel submitted that the evidence relied on by the trial court to corroborate the dying declaration of the deceased was contradictory and inconsistent. She faulted the trial court for taking into consideration extraneous matters and arriving at the wrong conclusion. She invited this court to set aside the decision of the trial court and acquit the appellant.

14. The appeal was opposed by the State. Learned State Counsel submitted that the ingredients establishing the offence of murder were proved by the prosecution in the trial. She stated that the deceased, prior to his demise, informed PW2, PW4, PW5 and PW6 that it was the appellant who had stabbed him. She explained that PW2 testified in the court that she had earlier that day seen the appellant with a spear. She submitted that the appellant's conduct after the attack on the deceased pointed to that of a guilty person. She stated that the appellant was guarding PW2's gate, which was about 70 metres from scene of crime. This is where the deceased lay while screaming for help. The appellant never offered him any assistance. She further submitted that a blood-stained spear was recovered from the appellant house. It was the appellant who led PW8 to its recovery. Learned State Counsel dismissed the appellant's alibi defence stating that several prosecution witnesses placed him at the scene of crime. She submitted that the appellant was properly convicted by the trial court. With regard to sentence, Learned State Counsel was not opposed to this court reconsidering the same in light of the Supreme Court's decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR.

15. We have carefully considered the record of appeal, the submissions by both parties, and the applicable law. The duty of the first appellate court was stated by this court in *Gabriel Kamau Njoroge vs Republic* [1987] eKLR as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)".

16. The issues falling for determination by this Court are: whether the circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction based on circumstantial evidence; whether the appellant's defence was considered and whether this Court should interfere with the death sentence handed down to the appellant by the trial court.

17. On the first issue, it is not disputed that there was no eye witness to the stabbing of the deceased. The incident was said to have taken place between 7.00 pm and 8.00 pm. The prosecution's case was based on circumstantial evidence and the dying declaration by the deceased. The appellant is of the view that the circumstantial evidence relied on by the trial court to convict him did not meet the legal threshold required to secure a conviction in a criminal case.

18. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court observed as follows on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor*, *Weaver and Donovan* [1928] Cr. App. R 21: -
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> > " It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

19. Several decisions of this Court have set the conditions to be met for a trial court to convict on reliance of circumstantial evidence. In the case of *Abanga alias Onyango v. Republic* Cr. Appeal No. 32 of 1990 this Court held thus:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and none else."

20. Similarly, in *Sawe vs. Republic* [2003] eKLR, the Court of Appeal stated thus:

> "In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

21. In the instant appeal, two witnesses placed the appellant at the scene of crime. The appellant was employed by PW2 to guard her miraa farm. PW6, a daughter to PW2, lived within PW2's compound. On the fateful night, PW6 told the court that the deceased came to her house to pay money owed from the purchase of banana leaves. A few minutes after he left her house, PW6 heard someone screaming. She took a torch and went outside the house to investigate what the commotion was all about. She stated that she saw the appellant near the gate to her homestead. He was holding a spear and a torch. She inquired from him what was going on but the appellant kept quiet. PW6 stated that she found the deceased lying on the ground just outside the gate. The deceased told her that he had been stabbed by the appellant. Another witness who placed the appellant at the scene was PW5 who was also at PW2's home that night. He stated that when he heard the screams he ran out and saw the appellant carrying a torch and a spear.

22. The second piece of circumstantial evidence was that PW1 to PW6 testified that the deceased made a dying declaration in which he named the appellant as the person who had stabbed him. Under Section 33 (a) of the *Evidence Act*, a statement made by a deceased person relating to his cause of death is admissible in evidence. It provides as follows:

> "When 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."

23. This Court in the case of *Philip Nzaka Watu vs Republic* [2016] eKLR held as follows on admission and reliance on a dying declaration:

> "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 as to 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. ....."

> 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 to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

24. The appellant submitted that the conditions fovouring positive identification were absent as the incident occurred at night. He doubted whether the deceased positively identified him as his assailant. PW6, who was the first to see the deceased after he was stabbed stated that when she found the deceased on the ground, he was conscious and aware of his surroundings. PW4 stated that the deceased was standing when she went to his assistance. The deceased was therefore conscious of what he was saying. When asked who stabbed him, the deceased replied that it was the appellant. The deceased repeated this to PW1, PW2, PW3, PW4 and PW5. Both the deceased and the appellant were well known to the six witnesses. The witnesses had no doubt who the deceased was referring to because the appellant was a resident of the area. The deceased consistently repeated that it was the appellant who had stabbed him with a spear.

25. The prosecution was able to establish that the deceased was stabbed with a spear. The appellant was placed at the scene of crime holding a torch and a spear. PW6 stated that she saw the appellant put back his spear in PW2's house. When the appellant was arrested, he led the investigating officer to PW2's house where they recovered the spear. The investigating officer testified that the spear head was bloodstained. The spear head was however not produced in court. The appellant latched on this fact to dispute the evidence adduced against by the prosecution. This Court in the case of *Chris Kasamba Karani vs. Republic* [2010] eKLR delivered itself as follows:

> " The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".

26. From the record, it appears as though the exhibits and especially the spear head, were misplaced by the investigating officer. The deceased told the witnesses that he had been stabbed using a spear. PW5 and PW6 confirmed that the appellant was holding a spear when they saw him near the scene of crime. PW6 and PW8 confirmed that the appellant led the police to the recovery of the spear at PW2's house. Further, the exhibit memo dated 6th July 2007 and the report by the Government analyst dated 24th August, 2007 confirmed that the recovered spear head was bloodstained.

27. The other circumstantial piece of evidence that linked the appellant to the offence was his conduct after the incident occurred. When PW5 and PW6 met the appellant near the gate of PW2's homestead, they inquired from him where the screams were emanating from. The two witnesses testified that the appellant did not answer them. He remained silent. He did not go outside the gate to assist the deceased who was screaming that he had been stabbed. The appellant, in his testimony stated that the deceased was his in-law and that he loved him, and that their children would often visit each other. It therefore begs the question why the appellant would not offer to assist the deceased who was stabbed and bleeding on the ground, considering that the deceased was his relative. The appellant did not seem shaken or bothered by the screams from the deceased, and did not join PW5 and PW6 who were running towards where the screams were emanating from. The said prosecution witnesses also assisted the deceased so that he could be rushed to hospital for treatment.

28. PW7 who conducted the post mortem told the court that the deceased's cause of death was severe hemorrhage due to penetrating stab wound to the right kidney.

29. From the foregoing, the circumstantial evidence adduced by the prosecution when considered together pointed to the appellant, and no one else, as the assailant. The circumstantial evidence sufficiently corroborated the deceased's dying declaration. The appellant in his defence stated that he was not guarding PW2's gate on the material night. The appellant gave an alibi defence. He stated that after arriving home from Isiolo from where he had made a miraa delivery, he went home and slept. The appellant in his submission faulted the learned Judge for disregarding his alibi defence. We agree with the learned Judge's finding that the appellant's defence was displaced by the evidence of PW2, PW5 and PW6. PW2 was categorical that she had employed the appellant to man her miraa farm. PW6 confirmed that the appellant was on duty that night and placed him at the scene of crime. PW6 further testified that even after the deceased had been stabbed, the appellant continued manning the gate. She saw the appellant return the spear to PW2's house. PW5 who was also at PW2's house stated that he saw the appellant at the said gate. Therefore, the appellant's assertion that he was sleeping in his house at the time the deceased was stabbed is incredible.

30. From the nature of injuries sustained by the deceased, it can correctly be inferred that the assault on the deceased was meant to cause his death or at the very least cause him grievous harm.

31. Failure by the police to obtain a sample of the deceased's blood to be matched against the blood sample obtained from the murder weapon was a weak link in the prosecution's case against the appellant. However, it is our considered view that although such evidence would have strengthened the evidence against the appellant, the absence of the evidence did not in any way weaken the circumstantial evidence against the appellant. His conviction by the trial court was safe. We find no merit with the appellant's appeal against the conviction. We dismiss the same.

32. With regard to the sentence, the appellant was sentenced to suffer death upon conviction. The learned Judge noted that the death sentence, at that time, was mandatory once an accused is convicted of the offence of murder. However, the Supreme Court's decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR outlawed the mandatory death penalty for murder after declaring it unconstitutional. Section 204 of the *Penal Code* was struck down to the extent that it prescribed a mandatory death sentence upon conviction for murder. In the premises therefore, the appellant is deserving of a re- consideration of his sentence. The State was not opposed to such re-consideration.

33. We have taken into consideration the appellant's submissions as well as his mitigation before the trial court. The appellant is a first offender. In his mitigation before the trial court, he stated that he was remorseful. He told the court that he was the sole bread winner for his wife and three young children. This court has also taken into account the aggravating circumstances of this case in that the appellant stabbed the deceased with a spear on his right lower abdomen, which led to severe bleeding that caused the deceased to lose his life. The appellant has spent approximately six years and nine months in custody since his conviction and sentence by the trial court. Having considered the circumstances of this case, the appellant's mitigation notwithstanding, this Court is of the opinion that the period that the appellant has spent in prison is not sufficient in light of the gravity of the offence that he had committed.

34. The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence. This Court hereby sets aside the sentence of death, and substitute thereto with a sentence of twenty (20) years imprisonment to take effect from 15th July, 2007, the date when the appellant was arrested. This is because the appellant was not granted bail during the trial.

DATED AND DELIVERED AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR