



**Amola & another v Republic (Criminal Appeal 103 of 2016)
[2022] KECA 164 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 164 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 103 OF 2016
RN NAMBUYE, HM OKWENGU & MSA MAKHANDIA, JJA
FEBRUARY 18, 2022**

BETWEEN

ANTHONY OORO AMOLA 1ST APPELLANT

TOBIAS ODHIAMBO AMUGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Kenya at Homabay (D.S. Majanja, J.) dated 24th June, 2016 in HC.CR. C. NO. 70 OF 2013)

JUDGMENT

1. Anthony Ooro Amola and Tobias Odhiambo Amuga, the 1st and 2nd appellants respectively, were charged 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 1st November, 2013 at Kasimba village in Rachuonyo South District within Homabay, the two appellants jointly murdered Erick Odongo Agutu (the deceased).
2. The appellants were tried and convicted by the High Court sitting at Homabay (Majanja, J). Subsequently, they were each sentenced to suffer death by Omondi, J. (as she then was). The appellants being dissatisfied with their conviction and sentence, have each filed an appeal before this Court. Each of the appellants filed memorandum of grounds of appeal in person, challenging the judgment on several grounds.
3. In addition, learned counsel Mr. Richard Onsongo filed supplementary grounds of appeal for both appellants and also filed joint written submissions for both appellants. Subsequently, learned counsel Ms. Kagoya from the firm of Sala & Mudanyi advocates also filed written submissions on behalf of the 2nd appellant. Prosecuting Counsel Ligami Shitsama also filed written submissions on behalf of the Director of Public Prosecutions (DPP) for the respondent.



4. During the hearing of the appeal Mr. Onsongo appeared for Shitsama for the State. All counsel opted to rely on their written submissions and made no oral highlights.
5. The prosecution evidence upon which the appellants were convicted comprised of the evidence of five witnesses. Briefly, on 1st November, 2013, David Agutu Odede (Odede) who is father to the deceased decided to sell one of his cows. He sent the deceased and his nephew Brian (Brian) to take the cow to Oyugis livestock market where it was to be sold. Odede who is physically disabled decided he would later follow the two using a motorbike as he was the one to sell the cow. About 2 hours later, Odede received information from Silvanus Odhiambo Omodo (Silvanus) that the two boys he had sent to escort the cow to the market for sale were being beaten by some people. Acting on that information, he proceeded to a place known as Mbeja. At Kasimba junction in the area, he found the deceased and Brian tied to a tree and being beaten by two people whom Odede identified as Ooro and Paul both of whom were known to him. He identified Ooro and Paul who were as the 1st and 2nd accused persons at the trial respectively.
6. According to Odede the 1st appellant was armed with a masai rungu while the 2nd appellant had a big stick. Odede intervened and the two boys were released. When Brian and the deceased arrived back home, the deceased who had injuries on his head, ribs and back of the neck collapsed. Brian also had injuries, and the two were taken to Matata Nursing home in Oyugis. Unfortunately, the deceased died while undergoing treatment on the same day.
7. Brian's evidence was that on instructions from Odede they had taken the cow to Oyugis livestock market to sell, but at Kasimba junction they met the two appellants who accused them of stealing the cow, and started shouting that they were thieves. The two tied them to a tree with ropes and beat them up, the 1st appellant using a rungu while the 2nd appellant was using a stick. They were beaten for about 15 minutes after which Odede came and intervened. The deceased was later taken to hospital where he died.
8. On 6th November, 2013, Dr. Peter Ogola a medical officer, then working at Kasipul Sub-County hospital carried out a postmortem examination on the body of the deceased that was identified to him by Odede and Brian. Dr. Ogola concluded that the cause of death was head injury due to bleeding below the scalp, resulting from assault with a blunt object.
9. Omar Mohammed Noor who was described as Sergeant Inspector testified that on the 2nd November 2013, he visited a crime scene where he found the 1st appellant tied with ropes under the guard of the area chief, and members of the public. He arrested the 1st appellant who was subsequently charged. It is not clear when and who arrested the 2nd appellant, but apparently, he was also arrested and the two were charged together.
10. In his defence the 1st appellant gave sworn evidence in which he denied having assaulted the deceased and Brian. He explained that he had gone to the market when he heard people talking about a thief who was arrested at the junction. Later, he went to visit his mother who stays in the neighborhood, and while there the chief of the location appeared with 3 people and he was arrested. He maintained that Odede lied that he had seen him beating the deceased. He denied seeing Odede on the material day or talking to him.
11. The 2nd appellant in a sworn statement also denied assaulting the deceased whom he claimed not to know. He testified that on the material day he was in Nairobi doing carpentry work. He had been in Nairobi for 1 year. He was arrested about a year after the alleged murder on 30th April, 2014. He denied the allegation that he assaulted the deceased.



12. Silvanus testified as a defence witness. He testified that he was on his way from Oyugis when he found the son of Odede who had been arrested. He went to call Odede from his home and took him to the scene. Odede said that the cow which his son was alleged to have stolen belonged to him (that is, Odede's). When Odede was asked by the crowd whether he knew about the cow being sold, he said he had no knowledge. His son was then released to him, and at that time, both boys were walking normally. Silvanus only heard later that Odede's son had died. He denied seeing any of the appellants at Kasimba on the material day.
13. Josephine Awino Ondiege, wife to the 1st appellant was also a defence witness. She said that her husband left the house at 10 a.m. for the market and did not return until 5 p.m. in the evening. The next day he took the cows to pasture and then went to his mother's house and it was while there that he was arrested.
14. In his judgment the learned Judge found that the appellants defence of alibi was disproved by the prosecution, as both Odede and Brian knew the appellants, the two being from the same locality as the witnesses; that there was no evidence of any grudge that would justify the two witnesses randomly picking the appellants as the persons who assaulted the deceased; that the evidence of Brian clearly established that both the appellants acted together when they confronted Brian and the deceased, accusing them of stealing a cow, and inflicted violence on them; that while the 2nd appellant may not have administered the fatal blow, his participation in the assault showed that he had a common intention with the 1st appellant; and that malice aforethought was established as it was clear that the appellants intended to cause grievous harm to the deceased and knew that their actions would cause the deceased grievous harm, within the meaning of section 6(a) and (b) of the Penal Code. The learned Judge concluded that the two appellants committed the unlawful act that led to the death of the deceased with malice aforethought, and accordingly convicted each of the appellant of the murder charge.
15. The appellants have filed this appeal each raising 5 grounds in which they contend inter alia, that the prosecution did not establish the charge against them, as no malice aforethought was proved; that the prosecution case had contradictions that were not resolved; and that the sentence imposed was harsh and excessive.
16. In his submissions the 1st appellant raised several issues. These were the burden of proof; the court's failure to properly analyse the evidence; the court's failure to consider his alibi defence; and failure to note that there was no direct evidence as to who inflicted the fatal injury upon the deceased. Finally, the 1st appellant submitted that the trial court failed to exercise its discretion in sentencing him to death.
17. The 2nd appellant similarly identified 3 main areas of concern. First, that there was no evidence to support the charge of murder; secondly, that malice aforethought was not established as there was no evidence of any intention to cause death or grievous harm to the deceased; and thirdly, that the sentence imposed against him was excessive, illegal, unjust and against international law and customs.
18. For the respondent, it was submitted that malice aforethought as provided for under section 206(a) (b) and (c) of the Penal Code, could be inferred from the evidence of the post mortem examination report wherein the doctor indicated the cause of death as head injury due to bleeding below the scalp resulting from assault, and that even assuming that the appellants thought that Brian and the deceased were thieves, they could not appoint themselves as judge, jury and executioner. That the prosecution witnesses (Odede and Brian), clearly identified the appellants as the persons who assaulted the deceased and occasioned him injuries that led to his death and that there were no salient contradictions in the prosecution evidence as alleged by the appellants.



19. As regards the appellants' alibi defences, the respondent argued that the same was raised by the appellants as an afterthought during their defence evidence and that in accordance with *Karanja vs R.* [1983] KLR, the court weighed their alibi defences against the totality of the prosecution evidence and rightly rejected the same as untenable.
20. As regards the sentence, the respondents submitted that the appellants have not provided any sufficient reason that would justify the Court interfering with the sentence that was imposed upon them by the trial court.
21. We have considered this appeal, the evidence on record, and the contending arguments that have been raised by the parties.

This being a first appeal, this Court is enjoined to re-evaluate the evidence tendered before the trial court and make its own conclusions. The duty of this Court sitting on first appeal was expounded by this Court in *Dickson Mwangi Munene & Anor vs Republic* [2014] eKLR, as follows:

“This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is (sic) supported by the evidence on record. See *Okeno vs Republic* 1972 EA 32 and *Mwangi vs Republic* [2002] 2 KLR 28.”

22. The appellants were charged with the offence of murder. In order to establish this charge, the prosecution had to prove that the deceased died; that the deceased died as a result of an act or omission on the part of the appellants; and that the appellants in committing the act or omission, had malice aforethought. From the medical evidence that was adduced, it is apparent that the deceased died as a result of injuries inflicted upon him. The question is whether the two appellants inflicted those injuries, and if so, whether they did so with malice aforethought.
23. The main evidence implicating the appellants was that of Brian who was with the deceased at the material time, and who testified that the appellants accosted him and the deceased and inflicted violence upon them, alleging that they had stolen the cow which they were taking to the market to sell. This evidence was consistent with the evidence of Odede who claimed to have received information from Silvanus acting on which he proceeded to Kasimba junction where he found Brian and the deceased tied to a tree and the two appellants beating them.
24. On his part Silvanus who testified as a defence witnesses contradicted the evidenced of Brian and Odede. He explained that he found the deceased being detained for allegedly stealing a cow, and that he went and called Odede, who came to the scene. According to Silvanus, the deceased and Brian had not been beaten, nor were they injured and they were able to walk back home normally. Silvanus maintained that although the two (Brian and the deceased) were being surrounded by many people, no one beat them.
25. In their defence, the two appellants each simply denied having been at the scene where Brian and the deceased were detained, or having participated in beating them. Each of them claimed to have been elsewhere.



26. In dismissing the appellants' defence, the learned Judge stated inter alia as follows:

“I find that the prosecution evidence disproves the alibi for several reasons. The incident took place at daytime and it is clear that the PW1 and PW5 knew the accused person (sic) as they were from the same locality. The evidence did not disclose any grudge between the accused persons and the family of the deceased hence there was no reason for randomly picking the accused out as the people who assaulted the deceased. DW3 admitted that it was possible the boys were assaulted while he was away fetching PW1.

I did not detect any reason to reject the testimony of PW1 and PW2 nor is the credibility of PW'1s testimony undermined by the fact that he did not report the assault to the police. Since the injury was not apparent and the deceased died later that night, it was not unreasonable for the PW1 not to report the matter to the police. I also reject the suggestion something could have happened to the deceased between the time he left Kasimba to the time he died. The testimony of PW5 was clear on this point and it is that the deceased sustained a head injury, went home to sleep, was taken to the hospital and died that night.”

27. On our part, we have evaluated the evidence and find that the evidence of Odede and that of Silvanus was sharply in contrast. After Silvanus went to fetch Odede, the two arrived at the scene at the same time. Odede stated that he found Brian and the deceased tied to a tree being beaten by the two appellants. If that was so, Silvanus ought to have seen the same thing. There was speculation that Silvanus may not have seen the appellants beating the deceased as this could have happened when Silvanus had gone to call Odede. But Odede maintained that when they arrived at the scene with Silvanus, the deceased and Brian were being beaten, a fact that Silvanus strenuously denied, maintaining that he did not see the appellants at the scene. This material contradiction was not resolved.

28. Of note is also another material contradiction. Odede's evidence was that he had sent the deceased and Brian to take the cow to the market so that he could sell it, but according to Silvanus, Odede was shocked when he found the deceased and Brian with the cow because he was not aware that the two had taken the cow to go and sell. Why would Silvanus have lied about this?

29. In addition, Silvanus who was obviously an eye witness who alerted Odede about Brian and the deceased being apprehended and took Odede to the scene, ought to have been called as a prosecution witness. No reason was given as to why the prosecution did not call Silvanus as a witness. In *Bukenya & Others vs Uganda* [1972] EA 549 it was held inter alia, that:

- “(i) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.
- ii. The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- ii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”



30. Similarly, in *John Waweru Njoka vs Republic* [2001] eKLR this Court held that:

“Where the prosecution fails to call material witnesses, the Court may draw an adverse inference against the prosecution. That however only applies where the prosecution evidence tendered is weak and inadequate to support a conviction.”

31. It follows that in this case, an adverse inference must be drawn that the failure to call Silvanus as a prosecution witness was because his evidence did not advance the prosecution case as it materially differed with that of Odede. The material contradictions that we have pointed out brought to sharp focus the credibility of Odede’s evidence, and the trial Judge’s failure to adequately address the same. It is apparent that either Odede or Silvanus did not speak the truth. The evidence of Silvanus ought not to have been ignored because it was the evidence of an eye witness. Moreover, the evidence supported the appellants’ alibi defence that they were not at the scene, and thereby cast doubt on the prosecution evidence.

32. This leaves only the evidence of Brian regarding the identification of the appellants as the persons who assaulted the deceased. The Court record shows that Brian appears to have been a reluctant witness as he failed to respond to witness summonses issued to him, and the court had to finally issue warrants of arrest before he could come to testify. This raises a doubt about his credibility. Is it possible that he was being made to testify against his will? And if so, why would he be reluctant to testify if indeed they were assaulted by the appellants with such fatal consequence as the death of his cousin? In our view the evidence of Brian ought to have been treated with caution and since the evidence in regard to the identification of the appellants is contradicted by Silvanus’s evidence, that identification cannot be relied upon.

33. The upshot of the above is that whereas the deceased was assaulted and suffered fatal injuries, there is a doubt as to whether the two appellants were the ones who actually beat up and injured the deceased. Murder is a serious charge and the trial court could only convict the appellants if the prosecution discharged the burden of proof by establishing beyond reasonable doubt, that it was the appellants who assaulted the deceased. In light of the doubt created by the unresolved contradictions in the evidence that was before the trial court, the prosecution did not prove its case beyond reasonable doubt and the benefit of this doubt ought to have been given to the appellants. For these reasons the appellants’ conviction cannot be sustained.

34. We therefore allow the appeal, quash the conviction of both appellants, and set aside the death sentence that was imposed upon each appellant. The appellants shall each be forthwith released unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

