



REPUBLIC OF KENYA



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**Wanjiku v Republic (Criminal Appeal 71 of 2016)
[2022] KECA 165 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 165 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 71 OF 2016
J MOHAMMED, K M'NOTI & S OLE KANTAI, JJA
FEBRUARY 18, 2022**

BETWEEN

BERNARD MURIMI WANJIKU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Kerugoya (Limo, J.) dated 27th July, 2016 in H.C.C.C. No. 5 of 2013)*

JUDGMENT

1. Two families in today's Kirinyaga County were feuding over a parcel of land identified in the case before the Judge as Rice Paddy No. 4611 measuring 1½ acres or thereabouts (the suit property). They had litigated over ownership of that suit property in the civil courts and the family of the deceased (Evans Kiarie Maina son of Douglas Maina Kangangi (PW2 Kangangi) had won the case over the family of Gathombe Rurige and his son Dedan Muthie. According to the prosecution on the morning of 29th June, 2013 a group of men who included the deceased invaded the suit property and were in the process of uprooting freshly planted rice when the appellant, Benard Murimi Wanjiku accompanied by others all armed with weapons including pangas and stones came to the suit property and attacked those who were uprooting the rice. James Maina Mwangi (PW1) was one of the men uprooting the rice that morning and he told the trial Judge that he was in the company of others when he saw invaders come to the suit property and that he knew two of the invaders. The invaders pelted them with stones and when they (those invaded) were running away (Evans Kiarie Maina) (the deceased) was hit on the leg and he fell down. The invaders descended on him and cut him up with pangas and PW1 was robbed of money and a mobile phone and he was told to disappear from the scene. According to PW1 as he run away he saw the deceased being carried away after a thorough beating and he later found the deceased in hospital where he died after 4 days. He recorded a statement at Wanguru Police Station.



2. Those are the events that led to the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code being preferred against the appellant. The information stated that on 29th June, 2013 at Karaba area in Kirinyaga County the appellant, Benard Murimi Wanjiku, jointly with others not before court murdered the deceased.
3. Douglas Maina Kangangi (PW2 – Kangangi) was father of the deceased and he testified that on 27th June, 2013 he was in court together with David Muthie and his father Gathombe Rurige litigating over the suit property; that he had no title to the land but had a card and a licence to the suit property and that Gathombe Rurige had given the suit property to his son Dedan Muthie despite existence of a court order in his (Kangangi's) favour. On 29th June, 2013 he left home early in the morning and visited the home of the Assistant Chief to report to him that his son (the deceased) would go to the suit property to work on it and he suspected that there would be trouble because of the litigation that was ongoing in the civil court. The Assistant Chief advised him to serve the court order on the police. When he reached the Police Station a lady called Wanjiku (Leah Wanjiku Warui – DW2 appellant's mother) arrived and shouted words to the effect "today somebody will die". According to Kangangi the suit property had been given to Wanjiku and Dedan to cultivate by their father Gathombe. In the course of the discussions at the Police Station news came that there was trouble at the suit property where the deceased had been injured. Police visited the suit property where they found the deceased injured; he was taken to hospital where he later died.
4. Peter Ngige Ngugi (PW3 – Ngugi) was on his way to his farm (shamba) on the material day when he heard people screaming. He went to the scene and found the deceased stuck in mud and he saw other people running away. He with others assisted the deceased by removing him from the mud. He noted that the deceased had wounds on the leg and shoulder and they took him to the nearby Kwibota Health Centre and he then went his way.
5. There was then the evidence of Martin Irungu Muchira (PW4 – Irungu), a boda boda rider who testified that on the material day he was called on mobile phone by the deceased and they went to the suit property where they started working but after 30 minutes they were attacked by ten to twenty people who pelted them with stones and the people were also armed with pangas. He fled the scene on his motor bike. He recognized the appellant (who he knew before) as one of the attackers and in his own words:

"In the crowd I could identify Bernard. I know him well since he does tomatoes business. I saw that Bernard was leading the mob.... I saw Bernard cut Kiarie with panga, others were beating him with sticks..."

Irungu later learnt that the deceased who had been taken to hospital had died.
6. Dedan Muthii Kathumbi (PW5 – Muthii) owned the plot next to the suit property. He was on his way when he received information that there were people on his land. When he went there he found about six people uprooting rice in the suit property. He called Wanjiku (DW2) who according to him owned the suit property and informed her of what was going on. He visited Ciagani AP Post with Wanjiku where they made a report and visited the suit property where they found uprooted rice and were informed that an injured person had been taken to hospital.
7. Lydia Wambui Maina (PW6), sister to the deceased, upon receiving news that her brother had been injured visited him at Embu General Hospital where he died after a few days. She and her brother James Wanyoike Maina (PW7) identified the body of the deceased for purposes of post mortem which was performed by Dr. Godfrey Njiru who was at the material time based at Embu Level 5 Hospital. Dr. Njiru performed post mortem on the body of the deceased on 4th July, 2013 and noted a fracture



of left lower limb, fracture of ulna bone, and a cut wound on left shoulder joint. Upon opening the body the doctor noted signs of chronic illness; there was loss of blood and there was a fracture on the base of the skull. The doctor reached the conclusion that the deceased died due to head injury and he produced his report in evidence.

8. The last witness called by the prosecution was Corporal Christopher Okoko of CID Kirinyaga South who was the investigations officer. Upon being assigned the case he found that the facts as stated by witnesses had taken place. The appellant was charged with murder as we have already stated.
9. Upon being placed on his defence the appellant testified that in the morning of the material day he was sent by his mother to go to the suit property to scare away birds from the rice fields. When he reached the farm he found 9-10 men uprooting seedlings from the farm and when he asked them why they were doing that they attacked him with pangas and sticks. He screamed and this attracted people from the neighbourhood who rescued him and took him away. His mother (DW2) arrived and they went to Karaba Police Post where they made a report and also sought treatment at Kategi Health Centre. About 4 days later he went to Karaba Police Station where he was referred to Wanguru Police Station where he was issued with a P3 Form but he was later arrested and later charged. He denied committing the offence and stated that there was a dispute in court over the suit property. According to him the suit property had been sold to his mother by a third party and he denied that there was a court order giving the suit property to the father of the deceased.
10. The appellant called his mother Leah Wanjiku Warui (Wanjiku) as a witness. She testified that in the morning of the material day she sent the appellant to the suit property to protect a rice crop from birds. At 9 a.m. she received a telephone call informing her that there were people on her land who were uprooting rice. When she reached Siagani Police Post she met Kangangi who admitted that he had hired people to uproot the rice. She then received news to the effect that her son (the appellant) had been injured and she proceeded to the suit property where she took him to Kategi Dispensary. She reported the matter at Wanguru Police Station but she was arrested and detained. She was later released and ordered to produce the appellant to the said Police Station which she did; he was arrested and later charged. She had a card showing that she owned the suit property and she denied that there was a case in court at all.
11. That was the case made out by both sides and upon consideration, Limo, J., in a Judgment delivered on 27th July, 2016 convicted the appellant and sentenced him to death.
12. We have travelled that long route of re-appraising the evidence as we are required to do as a first appellate Court. In the oft-cited case of *Okeno v Republic* [1972] EA 32 it was held by the predecessor of this Court on the duty of a first appellate court:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”



The appellant in what his lawyers Gori, Ombongi & Company Advocates call “Petition of Appeal” raises five grounds of appeal to the effect that the Judge erred in finding that the appellant had been positively identified; that the Judge erred in rejecting the appellant’s defence; that the charge of murder had not been proved beyond reasonable doubt; that the Judge erred in finding that common intention had been established and, finally, that the Judge erred in sentencing the appellant to a mandatory death sentence.

13. When the appeal came up for hearing before us on a virtual platform on 1st December, 2021 the appellant was represented by learned counsel Mr. Makura who held brief for Mr. Gori while learned counsel Miss Rugut appeared for the Director of Public Prosecutions. Both counsel had filed written submissions which they relied on entirely without the need for a highlight.
14. We have considered the whole record, the said submissions and the law.
15. In the said submissions the appellant claims that he was not positively identified and that he acted in self-defence. He cites the case of *Mokua v Republic [1976-80] eKLR 137* where it was held that self-defence is an absolute defence unless in the circumstances of the case the accused uses excessive force. The appellant further submits that the prosecution did not establish common intention as he was, in any event, defending himself. He finally cites the case of *Geofrey Ngotho Mutiso v Republic [2010] eKLR* for the proposition that mandatory death sentence is antithetical to constitutional provisions on protection against inhuman or degrading treatment and fair trial and the case of *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* where the Supreme Court of Kenya declared that the mandatory nature of death sentence as provided in Section 204 of the *Penal Code* was unconstitutional.
16. On its part the respondent submits that conviction was safe as elements of the offence of murder had been proved to the required standard. The case of *Robert Galma Wario v Republic [2015] eKLR* is cited for the holding:

“For the conviction of Murder to be sustained, it is imperative to prove that the death of the deceased was caused by the Appellant; and that he had the required malice aforethought, without malice aforethought, the Appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

On the issue of common intention, the respondent cites the case of *Njoroge v Republic [1983] KLR 197* where it was held that where several persons combine for an unlawful purpose and one of them kills a man, it is murder on the part of all who are present whether they actually aided or abated or not, provided that the death was caused by an act of someone of the party in the course of the endeavours to effect the common object of the assembly.

17. In the case before the Judge, Maina was one of those uprooting rice from the suit property and he testified that they were invaded by a group of men and that he knew two of them:

“In the group, I saw two people I knew previously. I did not know their names but I knew them by physical appearance. I used to go to that shamba often and I used to see one of them in the shamba and the other one I used to see him in the village....”

Irungu, a boda boda rider, was likewise in the suit property when he saw the appellant cut the deceased with a panga while those with the appellant were beating him with sticks.

18. The importance of identification in criminal trials is of paramount importance as mistaken identity can lead to gross injustice where innocent men may be made to suffer penal consequences which they do



not deserve. This is why this Court stated of identification in the case of *Wamunga v Republic* [1989] KLR 426:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

In the earlier case of *Reuben Taabu Anjononi & 2 Others v Republic* [1980] eKLR the court observed:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

19. The trial Judge was satisfied that the appellant had been positively identified as one who, with others, attacked the deceased inflicting injuries from which he later died. Upon re-appraisal of the evidence we reach the same conclusion as that of the trial Judge. The deceased was attacked at the suit property by a group of men. Maina and Irungu who were present at the suit property stated that it was at about 10 a.m. when the attack took place and they saw the appellant, who they knew before, lead the mob that attacked the deceased and cut him with a panga while beating him with sticks. As was stated in *Anjononi* (supra), this was a case of recognition, not identification, of the appellant; it was more satisfactory, more assuring, more reliable than identification by a stranger. The two witnesses knew the appellant before the incident that morning and the attack took place in broad day-light. The attack was committed by the appellant in the company of others and Maina and Irungu recognized the appellant, a person they knew before.
20. On the other grounds of appeal (save the ground on sentence) the appellant was charged with the offence of murder and it is required in law that the act be accompanied with malice aforethought. Malice aforethought is defined in Section 206 of the Penal Code to be:

“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.”



20. The trial Judge relied on this Court’s holding in the case of *Dickson Mwangi Munene & Anor v Republic [2014] eKLR* where it was held:

“Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although a common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of crime showing a pre-meditated plan to act in concert....”

We hold that all the ingredients required to establish malice aforethought were proved to the required standard. The appellant had armed himself with a panga and he used it to cut the deceased several times. He must have known that the action of cutting the deceased with a panga would cause grievous harm or death. Dr. Njiru testified that the deceased died from a fracture injury to the skull amongst other injuries. We may conclude this part of the Judgment by relying on a persuasive case of *Republic v Lawrence Mukaria & Anor [2014] eKLR* where it was held:

“When the Appellant set upon the deceased and cut her with a Panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b).”

The appellant knew that cutting the deceased with a panga on the head and other parts of the body could cause death or grievous harm. The deceased died from the injuries inflicted on him by the appellant.

21. The appellant submits, finally, that the trial Judge should not have imposed the death sentence. We note that Judgment was delivered on 27th July, 2016 when Section 204 of the Penal Code required in mandatory terms that a person convicted of the offence under Section 203 of the Code be sentenced to death.
22. The Supreme Court of Kenya in Francis Karioko Muruatetu (supra) was asked the question whether it was constitutional for Parliament to command trial courts to impose mandatory death sentence. It returned that it was unconstitutional for Parliament to do that as courts should have the discretion to impose a sentence depending on the circumstances of the case.
23. In the case before the trial Judge there was a dispute over ownership of a parcel of land which was claimed by two families including that of the appellant. A rice crop had been planted on the disputed land and in the morning in question the deceased with others uprooted that crop. That is what led to the attack which had fatal consequences. It is true that the appellant used brutal force while laying his family’s claim to the land. The mitigation given by the appellant was to the effect that the he was a young man with a family; he was remorseful and he prayed for leniency.
24. These circumstances do not call for imposition of the death sentence. The appeal on conviction is hereby dismissed. We set aside that part of the Judgment imposing the death sentence and substitute thereof a sentence of 20 years’ imprisonment from the date of conviction.

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

K. M’INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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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

