Agunga & 2 others v Republic (Criminal Appeal 119 of 2016)
[2022] KECA 14 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 14 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 119 OF 2016

PO KIAGE, J MOHAMMED & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

FREDRICK JUMA AGUNGA ..... 1ST APPELLANT

RAPHAEL OWUOR OUKO ALIAS APOLLO ..... 2ND APPELLANT

MICHAEL AKAL OSONGO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellants, Frederick Juma Agunga, Raphael Owuor Ouko Alias Apollo and Michael Akal Osongo, were charged together with Dannish Odhiambo Otiango and Kephas Ochieng Aluoch in High Court of Kenya at Homa Bay in High Court Criminal Case No. 25 of 2014 with murder contrary to section 203 as read together with section 204 of the Penal code. The particulars of the charge were that on 17th May 2014 at Ngere Village, West Kanyada in Homa Bay District within Homa Bay County, they murdered Johana Omondi Oguda. The appellants denied the charge and their trial commenced before Majanja, J on 21st April 2014.

2. At the trial, the prosecution called eight witnesses while the appellants testified on oath and called witnesses. At the conclusion of the trial, the learned Judge delivered judgment on 19th June 2016 convicting the appellants of the offence of murder and imposed the mandatory death sentence. On the other hand, the learned Judge acquitted their two co-Accused.

3. Aggrieved by the conviction and sentence imposed on them, the appellants appealed to this Court. The three were represented by learned counsel Mr. Okoyo Omondi Shem, who filed a Memorandum of Appeal dated 28th May 2020 setting out three grounds of appeal claiming that:

> " 1. The learned Judge erred in law in finding that the case against the appellants was proved beyond reasonable doubt.
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> 2. That the appellant are fully seeking refuge in the provisions of Articles 165(3) (a) and (b), 159(2) (a) and (b) and 22(4) of the *Constitution*, bearing in mind the Supreme Court Decision in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR.
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> 3. That further grounds will be adduced at the hearing."

4. The appellants prayed that "... the appeal be allowed and the trial court's judgment quashed and the sentence be set aside and substituted for an order that the Court deems fit."

5. At the hearing of their appeal, the appellants were represented by Mr. Okoyo while Mr. Antony Onanda represented the State. Mr. Okoyo adopted his written submissions dated 28th May 2020, which he highlighted at the hearing and, in response, Mr. Onanda adopted and highlighted his written submissions dated 7th October 2021.

6. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.

7. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya v R 1957 EA p.336*. In that case, the Court cited with approval the case of *Figgis v R 19 KLR p.32*, which had adopted the principle in *The Glannibanta* (2) (1876) 1 PD p.283 where the Court had this to say at p.287:

> " ... the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were ... material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of 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 nor heard the witnesses, and should make due allowance in this respect."

8. In the same vein, the East Africa Court of Appeal in the often-cited case of *Okeno v R [1972] EA p.32 at p.36*, the Court observed that –

> " 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 v R* [1957] EA p.336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R* [1957] EA p.570). It is not the function of the first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 v Sunday Post* [1958] EA p.424."

9. In effect, we must make our own findings and draw our own conclusions. Only then can we determine whether the findings by the learned Judge should be sustained. In doing so, we take into account the fact that the trial court had the advantage of hearing and seeing the witnesses, a benefit we do not have.

10. Applying the principle enunciated in the foregoing persuasive authorities, we have carefully examined and evaluated the evidence presented by the prosecution in support of the charge against the appellants together with the defence proffered by the appellants at the hearing in the High Court, and make the following findings of fact, which are, in our considered judgment, established beyond reasonable doubt in answer to the substantive grounds on which this appeal stands or falls.

11. In her testimony, PW1, Elizabeth Opiyo Adhola, told the trial court that she was the next-door neighbour of the deceased, Johana Omondi Oguda Alias Kwela. On the night of 17th May 2017 at 8.00Pm or thereabouts, she heard repeated screams coming from the direction of the deceased's house. She took a torch and went out to investigate what was going on. When she approached the deceased's house, she saw, under her torch light, the 1st and 3rd appellants (Frederick Juma Agunga and Michael Akal Osongo) together with other men, all of whom she clearly recognised. They were her village mates. She shone her torch light on them and saw the 1st appellant repeatedly hitting the deceased with a club on the head. The 3rd appellant was also armed with a club. She pleaded with the 3rd appellant not to kill the deceased. As the 3rd appellant walked away in the company of Dannish Otiango, the 1st appellant continued beating the deceased.

12. It is then that PW1 raised an alarm attracting PW2 (Clement Odhiambo Kwemba), who was one of her neighbours. PW1 gave her torch to PW2 and left the scene. Shortly thereafter, PW2 caught up with PW1 and told her that the 1st appellant had snatched the torch from him. By the time PW5, Kenneth Omondi Achieng (the area Chief) arrived, the appellants had left the scene.

13. PW4, Lilian Akinyi Omondi (the deceased's wife) told the trial court that her husband had returned home at about 7.30Pm. Shortly thereafter, he went out armed with a torch and a spear. It is then that the 1st, 2nd and 3rd appellants, who were in the company of Dannish and David Otieno Akal, all of whom she recognised, appeared in pursuit of the deceased. They were armed with clubs and pangas, which they used to beat the deceased. They ignored Dannish's plea not to beat him. According to her, the 2nd appellant hit the deceased with a blub and cut him near the mouth with a Panga. The 3rd appellant hit the deceased on the neck. When the deceased took flight to seek refuge at PW1's home, the appellants pursued him and continued beating him. She ran away and returned the following day only to learn that her husband had died and his body taken to Homa Bay District Mortuary.

14. According to PW5, he visited the scene and found PW1, PW2 and the deceased bleeding profusely and breathing with difficulty. He was lying on his back with injuries on the head. PW5 then called the police who visited the scene only to find the deceased dead. They took the body to Homa Bay Referral Hospital where PW7, Dr. Nicodemus Odundo, works.

15. At the trial, PW7 produced the postmortem report signed by a Dr. Ojwang on 22nd May 2014, which confirmed that the deceased had died of cut wounds on the head and lips, fractured skull and hemorrhage. The cause of death was certified as head injury, severe skull fractures and violent trauma.

16. Having examined and evaluated the evidence on record, we have no doubt in our minds that the Learned Judge was correct in finding, as we do, that the deceased met his death in the hands of violent assailants who included the appellants. In their defence, the appellants gave sworn evidence and denied

killing the deceased. Having considered the evidence adduced at the trial by the prosecution and the defence, the learned Judge convicted the appellants of murder contrary to section 203 as read together with section 204 of the Penal Code. Consequently, he imposed the mandatory sentence of death on the appellants, who have lodged this appeal on the grounds set out above. Having carefully considered the Memorandum of Appeal dated 28th May 2020, the record of appeal, the written and oral submissions of learned counsel for the appellants and learned state counsel, we are of the considered view that this appeal stands or falls on three main issues:

(a) whether the prosecution had proved the charge against the appellants beyond reasonable doubt;

(b) whether the appellants were charged, convicted and sentenced in violation of the provisions of Articles 165(3) (a) and (b), 159(2) (a) and (b) and 22(4) of the Constitution; and

(c) whether the sentence imposed on the appellants by the trial court was excessive.

17. In their second ground of appeal, the appellants allege various breaches or violation of their constitutional rights and freedoms as set out above. It is noteworthy, though that, at the hearing of the appeal, learned counsel for the appellants made oral submissions electing to abandon this ground, which we need not belabour. Suffice it to observe that the alleged violations were neither raised during the trial in the High Court nor elaborated at the hearing of the appeal before us. Accordingly, we find no basis for those allegations which, in any event, have been abandoned. And that settles the second issue before us.

18. We now return to the first ground of appeal. The appellants challenge their conviction on the ground that it was against the weight of evidence, contending that the prosecution had failed to prove the charge against them beyond reasonable doubt. In particular, they fault the learned Judge's finding that they were positively recognised by key witnesses, who were their fellow villagers, and who were well known to them.

19. We are cognisant of the fact that the learned Judge was cautious in ensuring that the appellants had been clearly recognised as having committed the offence as charged. In paragraph 21 of his judgment, the Learned Judge states:

> " The key issue is whether the accused persons committed the unlawful act that led to the deceased's death. The incident took place at night. Hence, our courts have taken the position that evidence of visual identification in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo and another v R* [1953] 20 EACA p.166; *Wamunga v R* [1989] KLR p.42 and *Maitanyi v R* [1986] KLR p.198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *R v Turnbull* [1967] 3 All ER p.549). This requirement is, however, relaxed with dealing with the case of recognition because, '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.' (see *Anjononi and others v R* [1980] KLR p.59). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution."

20. Having also examined and evaluated the prosecution evidence comprised of the direct testimony of PW1, PW2 and PW4 to implicate the accused, we find nothing to fault the learned Judge's finding that their testimonies clearly establish that the prosecution witnesses and the appellants were neighbours in Ngere village. We find as a fact that they knew each other and interacted regularly. Accordingly, the learned Judge was correct in finding that the case was one of recognition rather than identification of strangers, which lessened the chances of mistaken identity. We have no doubt in our minds that the appellants were recognised by PW1 and PW2, who carried a well charged torch, which they used to illuminate the scene and the faces of those present. They stood in close proximity to the appellants, about 2 metres from them. They were their neighbours and knew them well. The beating took an appreciably long period of time punctuated by pleas to stop. Despite such pleas, the appellants continued beating the deceased, inflicting on him severe injuries that resulted in his death shortly thereafter. In the circumstances, we can only draw the conclusion that it would not have been difficult for PW1, PW2 and PW4 to recognise the appellants, who they knew well as next-door neighbours.

21. In his submissions dated 28th May 2020, learned counsel for the appellants invited us to consider this Court's decisions in *Wamunga v R [1989] KLR p.426*, *Nzaro v R [1991] KLR p.212* and *Kiarie v R [1984] KLR* p.789, all ofwhich serve to underscore the court's need to exercise caution before returning a conviction on the evidence of identification or recognition. The learned Judge did so and correctly concluded that the appellants were properly recognised as the persons who beat the deceased causing his death. Having carefully examined and evaluated the evidence on record, we are satisfied that the prosecution had proved its case beyond reasonable doubt and, accordingly, sustain the trial court's judgment on conviction of the appellants for the offence of murder contrary to section 203 of the *Penal Code*. That settles the first issue before us.

22. The third and final ground of appeal advanced by the appellants is that the learned Judge erred in law in imposing a sentence which, according to them, was too severe. They urged us to consider reviewing and imposing a lesser sentence in place of the mandatory death sentence imposed by the trial court in the event that we were not inclined to overturn the conviction. Section 204 of the Penal Code reads:

> " 204. Punishment of murder
>
> Any person convicted of murder shall be sentenced to death."

23. In his oral submissions, learned counsel for the appellants told us that the appellants had families that depended on them. According to him, the appellants had been in prison since the year 2016, they were remorseful and had learned their lessons. He urged us to consider a custodial sentence in place of the mandatory death sentence.

24. We call to mind the principle that a mandatory sentence goes against the grain of judicial discretion. This principle was underscored by the Supreme Court in *Francis Karioko Muruatetu & another v Republic, [2017] eKLR* where the Court had this to say about the mandatory nature of the death sentence under section 204 of the Penal Code:

> " Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."

25. In *Evans Wanjala Wanyonyi v Republic [2019] eKLR*, this Court reduced to ten years, a sentence that had been enhanced by the High Court to the mandatory minimum sentence of 20 years. Applying the principle enunciated in the *Muruatetu's case* (*supra*) on the nature of a mandatory minimum sentence, the Court stated:

> "On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law .... This Court noted that the Supreme Court in F*rancis Karioko Muruatetu & another v Republic* (*supra*) held the mandatory death sentence prescribed for the offenceof murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution."

26. Guided by the afore-cited Supreme Court decision, this Court in *Christopher Ochieng v R* (*supra*) stated:

> "In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis ... Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic* (*supra*), we would set aside the sentence for life imprisonment imposed and substitute therefor for a sentence of 30 years' imprisonment from the date of sentence by the trial court."

27. With regard to the sentence of death meted on the appellants, we find that this is an appropriate case in which this Court ought to intervene. This Court has the discretion either to impose the appropriate sentence, or remit the case back to the High Court for re-sentencing. However, in view of the fact that we have substantially disposed of the main limb of the appeal, and the appellants having already served over 5 years imprisonment, we find it expedient to bring this matter to conclusion by exercising our discretion to impose the appropriate sentence.

28. In determining the appropriate sentence, it is incumbent upon us to consider not only the mitigating factors addressed by learned counsel for the appellants in his oral submissions, but also the gravity of the offence, the brutality displayed by the appellants in full view of their neighbours, the traumatic effect of the heartless and fatal assault on the deceased's widow and children, their diminished source of livelihood, and the deceased's children's emotional distress inflicted on them. When all is said and done, the appellants' conduct among men and women of good sense must be deterred. To our mind, a crime of this nature calls for retribution to such reasonable degree as would allow time for healing of those adversely affected by the crime in issue, and for the appellants' reform in due time. And that is the least we can do in determining the appropriate sentence to be meted on the appellants.

29. Having considered the evidence on record, the written submissions of learned counsel for the appellants and learned State counsel, the appellants' plea in mitigation, and the Supreme Court's decision in Fr*ancis Karioko Muruatetu & Another v Republic (supra*), we hereby set aside the sentence of death imposed on the appellants by the trial court and substitute therefor a term of imprisonment for 30 years' with effect from the date of first sentence by the trial court. Accordingly:

    (a) the appellants' appeal against conviction is hereby dismissed; and

(b) the appeal against the sentence succeeds only to the extent that the sentence of death meted on the appellants by the High Court is hereby substituted for a term of imprisonment for thirty (30) years with effect from the date of the first sentence imposed by the trial court, being the 19th day of July 2016, and those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR