



**Gitau v Republic (Criminal Appeal 3 of 2019)  
[2022] KECA 33 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 33 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 3 OF 2019  
MSA MAKHANDIA, A MBOGHOLI-MSAGHA & W KARANJA, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**SAMUEL TEDDY GITAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi,  
Milimani (Mutuku, J.) dated 28th October, 2015 in HCCC No. 72 of 2012)*

**JUDGMENT**

1. Samuel Teddy Gitau, “the appellant” appeals to this Court against his conviction and sentence to suffer death for the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the information were that on or about the 3<sup>rd</sup> or 4<sup>th</sup> of September 2012 at Umoja Road in Ongata Rongai Township within Kajiado County he murdered Mercy Wanjiku Muiruri (“the deceased”).
2. When arraigned in the High Court of Kenya at Nairobi, the appellant entered a plea of not guilty to the information and his trial soon thereafter ensued. In summary the prosecution evidence was that the appellant and the deceased were a couple. They had three children, B, a boy aged 8 years, N and J twin girls aged 1 ½ years respectively at the time of the offence. They lived in a tin roomed house in a neighbourhood of another 19 houses, which shared a common compound with a stone wall around them and one gate. The property was owned Charles Kiraba Chege PW4. Their marriage was however turbulent as testified to by Daniel Ngugi Muiruri PW1, a brother of the deceased Risper Kathambi, PW2, a neighbour, and B, PW3, the son. They all testified to the fact that the appellant would repeatedly assault the deceased whenever he was drunk.
3. On 3<sup>rd</sup> September 2012 around 4.00pm, PW2 who lived in house number 3 saw Mercy Wanjiku Muiruri, “the deceased” washing clothes outside her house number 1. Afterwards the deceased entered



- the house and an argument ensued between the deceased and the appellant. After the quarrel subsided she told the deceased to take care of her child as she was going out briefly on an errand. When she returned, she found the deceased's house locked from outside but could hear children crying therefrom. Later, PW3 came back from school and she accommodated him overnight.
4. PW3 stated that when he came back from school at 3.00pm he found their house locked. He went to the rear of the house and peeped through an opening where the iron sheet had been partly removed from its support. He saw the appellant hit the deceased on the head with a stool. When the appellant saw him, he went out of the house through the same opening and chased him away. It is then that he found himself with PW2 who accommodated him overnight and whom he told that the appellant was killing his mother but she took no action
  5. On the morning of 4<sup>th</sup> September 2012, as the door to the house of the deceased was still closed, police officers were contacted who came and forced open the door and found the body of the deceased dressed only in a T-shirt lying under the bed, but the appellant was absent. Among the police officers was Sergeant George Odhiambo PW6, a scenes of crime officer. He took photographs of the scene and noticed blood stains on the floor, a broken stool and signs of struggle in the house. He also noted a big opening at the rear of the iron sheet house. Similarly Chief Inspector of Police, Francis Njue (PW7) who was at the scene observed injury on the deceased's forehead and blood oozing from the ears. The body was removed to the City Mortuary where Dr. Peter Muriuki Ndegwa PW9, a pathologist conducted a post mortem. Her body was identified to him for that purpose by Peter Kibandi Maina PW5. It was his evidence that there were bruises on the anterior neck, both sides of the neck, chin and lower lip was lacerated with bleeding in the eye. He formed the opinion that the cause of death was asphyxiation due to ligation and manual strangulation. The appellant as a key suspect in the death of the deceased was subsequently traced by PW8 at Kangundo District Hospital where he had been admitted, arrested and following further investigations, he was charged with the offence.
  6. In his unsworn statement of defence, the appellant stated that on the material day he left his house at around 2.00 pm for his place of work at Joska near Kangundo. He had left his wife, the deceased outside washing clothes with their two small children and the child of a neighbour. Before leaving he gave the deceased some money which she dismissed as too little but he promised to send her more later. When he called the deceased the following day, she did not answer. Later he went with his colleague, Boniface Kioko to Migingo club where they had drinks. Upon taking the drinks, he became dizzy, lost consciousness and found himself in hospital when he regained consciousness. He was however arrested and taken to Ongata Rongai police station and was subsequently charged with the murder of the deceased. He vehemently denied committing the offence.
  7. The trial court having evaluated the evidence led by the prosecution, the defence as well as the law, was convinced that the appellant had committed the offence. It accordingly convicted the appellant and sentenced him to death.
  8. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds, that the learned judge erred in law and fact in failing to find that; the prosecution had failed to prove mens rea within the meaning of Section 206 of the Penal Code; that the provisions of Section 19 of *Oaths and Statutory Declarations Act* were not complied with; prosecution evidence was contradictory and inconsistent; the conviction was bad in law and manifestly unsafe; the appellant was prejudiced and not accorded a fair and impartial trial as enshrined by Article 50(2) and 25 (C) of the *constitution*; the provisions of Section 200(3) of the *Criminal Procedure Code* ("CPC") were not complied with and finally, that the High Court failed to analyze and evaluate the evidence as required by law.



9. The appeal was canvassed by way of written submissions with limited oral highlights. Whereas Mr. Kinuthia, learned counsel appeared for the appellant, Ms. Wang'ele learned prosecution counsel appeared for the state. Counsel for the appellant submitted that the evidence of PW3 was not corroborated at all as required by Section 19 of the *Oaths and Statutory Declarations Act* and that his evidence contradicted that of PW2 on the time he came from school. Further that the doctor's opinion as to the cause of death being strangulation differed from that of PW3 who testified that he saw the appellant hit the deceased with a stool which might have been the cause of death. Counsel further submitted that Section 200(3) of the CPC was not complied with. That Muchemi, J. heard the evidence of PW1 to PW8 when Mutuku, J. took over and heard the evidence of PW9 and the defence case. However the record does not show whether the appellant was informed of his rights under the said provision of the law by Mutuku, J. thereby rendering the trial unfair and fatally defective. To buttress this argument counsel referred us to the case of *Harrison Mirungi Njuguna vs. Republic, Criminal Appeal No. 90 of 2004, (UR)* where this Court held that non-compliance with Section 200 of the CPC was fatal to a trial once it was shown that the omission to comply materially prejudiced the accused.
10. It was submitted that the appellant's alibi defence was not properly considered and evaluated. The said defence was corroborated in material particulars by the arresting officer police, PW8 who found the appellant admitted at Kangundo hospital. That having put forth the said defence he did not assume the responsibility of proving it. It was up to the prosecution to discredit it, which burden was not discharged by the prosecution according to counsel for the appellant. Lastly we were urged to find that the prosecution had not proved its case as required and therefore allow the appeal, quash the conviction and set aside sentence imposed. In the alternative due to non-compliance with the statutory provisions of Section 200(3) of CPC, counsel urged that an order for retrial would be appropriate in the circumstances.
11. Opposing the appeal, Ms. Wange'le submitted that the prosecution had proved all the ingredients for the offence of murder to wit: that the deceased was dead; the death was through unlawful act of omission or commission by the appellant; in causing death the appellant had malice aforethought and that the appellant had been properly identified. That PW9 who carried out postmortem on the body of the deceased opined that the cause of death was due to asphyxiation due to ligation and manual strangulation. The evidence of the death of the deceased was buttressed by the evidence of PW5 who identified the body of the deceased to PW9. Indeed even the appellant in his testimony confirmed the fact of the death of the deceased. The deceased's death was thus proved beyond reasonable doubt. On who caused the death, it was submitted that even though the appellant contested that there was no direct evidence linking him to the death of the deceased, there was nonetheless overwhelming circumstantial evidence to that effect. Counsel in particular made reference to the evidence of PW1 and PW3. PW1 heard the deceased quarrel with the appellant moments before she met her death. On the other hand PW3 saw the appellant hit the deceased with a stool and chased him away. To counsel the appellant was placed at the scene of the crime from the evidence of these two witnesses. In support of her submissions on circumstantial evidence, counsel referred us to the case of *Abang Alias Onyango vs. Republic, Cr. Ap. No. 32 of 1990(UR)*, where it was held as follows:

“It is settled law that when a case entirely is on circumstantial evidence, such evidence must satisfy three tests; (i)the circumstances under which the inference of guilty is to be drawn must be cogently and firmly established, (ii) those circumstances should be of 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.”



12. Counsel maintained that the circumstantial evidence led by the prosecution pointed unerringly to the appellant as the perpetrator of the crime.

That the prosecution too had proved the *mens rea* as encapsulated in Section 206 of the Penal Code, including intention by the appellant to cause grievous harm to the deceased and that he knew that death or grievous harm could result from his actions but he proceeded to do so without lawful excuse. The evidence showed that the appellant had quarreled with the deceased and that the door had been locked from outside probably to restrain the deceased from running away and when he strangled and choked the deceased the appellant must have known that death may result. It was submitted that though the appellant argued that Section 200(3) of CPC was not complied with, the omission did not however occasion any prejudice to him in any way. Further that the appellant was represented by counsel throughout the proceedings who did not question the want of compliance. Lastly we were urged to find that the prosecution evidence outweighed the appellant's defence and proved its case beyond reasonable doubt. In the premises counsel urged that the appeal was unmeritorious which should be consigned to an order of dismissal.

13. This is a first appeal and we are called upon to re-evaluate the evidence tendered before the trial court and come up with our own conclusions. In *David Njuguna Wairimu vs. Republic [2010] eKLR* this Court in relying on the holding of the court in *Okeno vs. Republic [1972] EA.32* stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

Having carefully considered the record, in light of the rival submissions set out above and the law relied upon by the respective parties, the issues that arise for our determination are as follows:

- a) Whether the appellant's right to a fair trial was prejudiced by virtue of non-compliance with section 200(3) of the CPC
- b) Whether the appellants right to fair trial was prejudiced by virtue of non-compliance with section 200(3) of the CPC
- c) Whether the prosecution proved its case beyond reasonable doubt
- d) Whether sentence imposed ought to be reviewed.

Section 200(3) of the CPC provides as follows:

- “(1) .....
- (2) .....
- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person



may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

It is instructive to note that by virtue of Section 201(2) of CPC, the above provision applies mutatis mutandis to the trials in the High Court. It is worded thus,

“201(1).....

(2) The provisions of section 200 of this Act shall apply mutatis mutandis to the trials held in the High Court.

From the record two judges heard the case. Muchemi, J. took the evidence of prosecution witness numbers 1 to 8 whereas, Mutuku, J. took prosecution witness number 9, the appellant’s defence, crafted and delivered the judgment. The record however does not show that when Mutuku, J. took over the case from Muchemi, J. she explained to the appellant his rights as enshrined in the above provisions of the law. Even though the appellant was represented by counsel that right is for the protection of the accused and not his counsel. See Ndegwa Vs. R (1985) KLR 535 and Office of Director of Public Prosecutions Vs. Onyango Odongo & 2 Others [2015]eKLR. The record must show total compliance with the provision failing which the trial will be deemed to be a nullity. We reiterate what was stated in Ndegwa Vs. Republic (supra) that compliance with section is mandatory and “...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration....”

14. In this case there was total non-compliance with the provision and it cannot be said that the subsequent trial of the appellant was not prejudicial to him as urged by counsel for the state given that the evidence led by the prosecution was purely circumstantial. The prosecution concedes that it was an error on the part of the trial court to have not complied with the requirements of the law aforesaid. However this concession does not remedy the fatal omission.

The provisions of Section 200 as has been constantly stated by this Court in the past is couched in mandatory terms and therefore non-compliance is not an option. It requires the succeeding judge to explain to the accused his right under this section and give him an opportunity to elect whether to proceed with the trial from where it had reached or to commence de novo or resummon some of the witnesses who had testified. As already demonstrated, when Mutuku, J. took over the case from Muchemi, J. the appellant was entitled to be informed of the change and to decide how he wanted the matter to proceed. Though the appellant was represented by counsel, this did not take away this right from him, as counsel for the respondent seems to suggest.

15. Having held that the trial of the appellant was a nullity for want of compliance with the statutory provisions, we do not see the need to deal with the other issues framed for determination. What then? Should the appellant then be allowed to walk Scot free because of the omission by the trial court? We think not, more so when he was suspected to have committed a heinous crime. A retrial is an option. An appellate court may order for a retrial where it is of the opinion that on the consideration of the admissible or potentially admissible evidence a conviction might result, where the interest of justice requires it and should not be ordered when it is likely to cause an injustice to the person, when the original trial was illegal and defective, time that has lapsed and possibility of securing witnesses. See *Mwangi Vs. Republic* [1983] KLR, 522, *Lelimo Ekman Vs. Republic* [2005] eKLR and *Abdi Adan Mohamed Vs. Republic* [2007] eKLR.



16. The appellant is alleged or suspected to have committed a horrendous offence, murder of his wife. The interest of justice will be best served by an order of retrial in the circumstances, the evidence on record that we have perused if re-tendered is most likely to return a conviction. The witnesses, we think are readily available as most of them were relatives of the deceased. We have also considered the fact that the appellant was convicted and sentenced on 16<sup>th</sup> November 2015, which is not such a long period of time as to make a retrial of the appellant prejudicial.
17. Accordingly the appellant shall be subjected a retrial. For this purpose the appellant shall be presented before the High Court of Kenya within the next fourteen (14) days from the date of this judgment. The retrial shall be presided over by any other judge of competent jurisdiction other than Muchemi & Mutuku, JJ. who were involved in the previous proceedings. We further direct that the retrial be expedited.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

