



**Sammy v Republic (Criminal Appeal 120 of 2019)
[2022] KECA 4 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 4 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 120 OF 2019
W KARANJA, MSA MAKHANDIA & A MBOGHOLI-MSAGHA, JJA
FEBRUARY 4, 2022**

BETWEEN

KENNEDY MUSEE SAMMY APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment and Decree of the High Court of Kenya
at Kiambu (Wakiaga, J.) delivered on 21st June 2017 in HCCC No. 99 of 2014)*

JUDGMENT

1. This is an appeal against the conviction and death sentence meted out against the appellant by the High Court (Wakiaga J.) for the offence of Murder.
2. The appellant, Kennedy Musee Sammy was charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code* in that on 13th October, 2014 at Waruku village Dagoretti District within Nairobi County, he murdered Rose Mukui (hereafter the deceased). He pleaded not guilty to the information and the matter proceeded to full hearing with the prosecution calling a total of six (6) witnesses in support of their case. On his part, the appellant tendered his evidence on oath and called no witnesses.
3. In a nutshell, the prosecution case was that the deceased was the appellant's girlfriend. The deceased used to stay with Mary Nzilani Kituku (PW1) her elder sister but would occasionally stay at the accused's house at Waruku Estate. On 13th October, 2014 at about 1.00 a.m. PW1 was called by neighbours who told her that the deceased was lying by the road side. She proceeded to the scene where she found the deceased in the middle of the road with three knife stab wounds on her body. She also had a "lesso" tied around her stomach.
4. It was her evidence that she and some neighbours followed blood soaked footprints from the scene which led them to the appellant's house and when they entered the house, which was not locked, they



found items strewn all over the house as if people had been fighting inside the house. Among the items on the floor were the deceased's purse which she always used to carry to work, jacket and a blood stained knife. The appellant was not in the house. According to the witnesses, the house was wet as if it had been recently washed and there were wet clothes and few drops of blood on the floor.

5. PW1's evidence was corroborated by that of George Kituku (PW2) who stated that they called the police who took photos of the scene and took the body of the deceased away to the mortuary.
6. Margaret Mueni Kituku (PW3) identified the body of the deceased on 16th October, 2014 for purposes of post mortem examination and confirmed that the body had three stab wounds on the left side of the stomach.
7. PC Peter Mwangi (PW4) testified that on 13th October, 2014 at 2.30 am while on patrol at Elmolo Road within Lavington area while in the company of PC Bakari and PC Ochieng they came across a salon car and decided to inquire where it had come from and one of the occupants introduced himself as Alex, a brother to the appellant and he informed the police officers that they were taking the appellant to hospital after being attacked at Makaburini together with his wife. PW3 asked him the name of the appellant's wife and he was told that she was called Rose. He asked them where they had left the lady and they said she had been killed and left at the scene. The officers became suspicious and decided to investigate. They proceeded to the scene where they found the deceased's body. On observing the scene, the officers suspected that the deceased had been killed elsewhere and her body dumped at the scene where they found it.
8. They followed the footprints which led them to a house less than one hundred metres from where the body was. At the said house there was disorder, a broken bed, basin with blood stained water and tissue paper, broken plates with blood stains, jumper used to wipe blood and kitchen knife with blood stains. They interrogated neighbours who said they heard a lady scream three times. PW3 then followed the appellant to Kenyatta National Hospital where he told him that they had been attacked by thugs who killed his wife and left the appellant with visible injuries on the stomach. Under cross examination he stated that Alex, the deceased's brother had informed him that they found the appellant at the scene where they had been attacked.
9. PW5 PC Kapuchor Kipsam a scene of crime officer visited the scene and took photographs which he produced before the court as exhibits.
10. Dr. Dorothy Njeru testified that she performed post mortem examination on the body of the deceased and confirmed that the body had several stab wounds on the stomach and a cut wound on the right hand. Internally, the heart had also been injured. The doctor formed an opinion that the cause of death was chest injuries due to penetrating sharp trauma.
11. After considering the evidence on record, the court found the appellant had a case to answer and placed him on his defence. In his defence, the appellant told the court that he was living with the deceased as husband and wife and that on 13th October, 2014 he escorted the deceased to the bus stage where she took a matatu to her place of work and returned to the house since he was off duty. At 11.50 p.m. the deceased called him and told him to pick her up from the stage. He left the house at 12.10 a.m. and at 12.15 a.m. met her and they proceeded to the house. Two hundred metres to the house they were attacked by three people and the deceased ran away followed by two people. It was his evidence that one of the people took out a knife and cut him on the wrist and the stomach. He raised an alarm and the person left him. He then ran to the house and lost consciousness and fell down. The next morning, he found himself at Kenyatta National Hospital in handcuffs.



12. It was his further evidence that there was no fight between him and the deceased in the house and that he was the one who was wearing the jumper with blood stains. He denied having killed the deceased.
13. Having considered the evidence presented to the court, the learned Judge noted that the fact and the cause of the death of the deceased was not in dispute as the witnesses had all seen the stab wounds on the body of the deceased and the doctor had also confirmed the cause of death to have been trauma caused by the said injuries which included the fatal injury to the deceased's heart.
14. The only riddle for the court to unravel was whether the said injuries were caused by an unlawful act of omission or commission the appellant. The Court noted that there was no eye witness who saw the appellant commit the offence, hence the prosecution case was solely grounded on circumstantial evidence.
15. The court noted that the deceased was found lying on the road dead and upon tracing the blood trail from the scene, it led to the appellant's house wherein according to the evidence of PW1 a purse which the deceased used to carry everyday was found. Items were thrown all over the house, there were broken plates and a blood stained knife together with a jumper the deceased used to wear. The court noted further, that according to PW4 he met the appellant being taken to the hospital and he was informed that the deceased had been left at the scene but upon visiting the scene there was less blood at the scene than that at the appellant's house.
16. The learned Judge wondered how if the deceased was killed at the scene as per the information given to PW4, then where did the blood stains in the house come from? The court contrasted this evidence with the evidence of the appellant in his defense that he ran to the house leaving the deceased and lost consciousness against the evidence of PW4 and dismissed the accused evidence as unbelievable in the prevailing circumstances.
17. The court noted that the following issues had not been resolved; how did the appellant's brother come to know that he had been attacked so as to come and take him to the hospital; who cleaned the appellant's house to get rid of the blood stains and why did they leave the deceased at the scene? The court found and held that the death of the deceased was caused by unlawful act on the part of the appellant to the exclusion of everybody else as per the circumstantial evidence adduced in court.
18. On whether the accused person had the necessary mens rea, the court looked at the post mortem report and the evidence of Dr. Dorothy Njeru, on the extent and nature of injuries inflicted upon the deceased and came to the conclusion that the appellant had the intention to kill and indeed succeeded in causing the death of the deceased. The court pointed out that whereas motive would make the prosecution case stronger, proof of the same was not mandatory in a charge of murder.
19. The court looked at all the circumstantial evidence tendered before it including the fact that there were more blood stains at the appellant's house than at the scene where the body of the deceased was found and where the appellant alleged that they were attacked by a group of three people; the fact that the deceased stomach at the point of injuries was tied with "a lessa" and the conduct of the appellant at the time when the motor vehicle he was in was stopped by the police officers when it was alleged that the deceased who had been attacked together with the appellant was left at the scene without a report thereon being made to the police, and found that there was strong circumstantial evidence that irresistibly pointed to the guilt of the appellant.
20. The court was satisfied and found that the prosecution had proved beyond any reasonable doubt, that the appellant with malice aforethought caused the death of Rose Mukui by an unlawful act and found him guilty and convicted him accordingly and thereafter sentenced him to death.



21. Being aggrieved by that decision the appellant has moved to this Court in the instant appeal seeking the quashing of the conviction and setting aside the sentence imposed. He faults the learned Judge for, inter alia, convicting him on suspicion without any tangible element of truth; failing to find that the evidence relied upon was contradictory and inconsistent hence unreliable; failing to find that crucial and vital witnesses were not summoned to testify and failing to consider the appellant's defence. The appellant also complained that the circumstantial evidence relied upon to convict was insufficient.
22. On the sentence, the appellant states that the learned Judge improperly exercised his discretion to sentence him to suffer death when the sentence of death was not the only appropriate proportionate sentence to achieve the objectives of deterrence or punishment.
23. Submissions dated 29th April, 2021 were filed on behalf of the appellant by learned counsel Mr. Malanga. In the said submissions, counsel identified three thematic areas which he expounded on. These are;
 - a. Whether the conviction of the appellant was safe having regard to the wholly circumstantial nature of the evidence relied upon?
 - b. Whether the conviction of the appellant was proper given that the evidence tendered only raised suspicion and no more?
 - c. Whether the trial court properly exercised its discretion in sentencing the appellant to suffer death?
24. On the first issue, he submits that despite acknowledging that the prosecution case was solely based on circumstantial evidence, the trial court failed to adhere to the principles governing circumstantial evidence and instead was satisfied with merely citing and quoting authorities touching on circumstantial evidence without properly applying the principles gleaned from those authorities; that there were so many reasonable inferences that could be drawn from those circumstances alluded to by the trial court other than the inference that the appellant is the one who inflicted injuries from which the deceased lost her life; that the appellant testified to their being attacked and although this testimony was disbelieved by the trial court the approach taken by the trial court was whimsical given the uncontroverted evidence that the appellant was indeed admitted in hospital at Kenyatta National Hospital due to the injuries from the attack that the trial court dismissed as "alleged attack".
25. On whether the appellant's conviction was proper given that the evidence tendered only raised suspicion and no more, he submits that it is unfortunate that the court based its conviction on evidence that was based on suspicion and was poorly investigated; that instead of finding that the case was based on suspicion and conjecture, the court resorted to dismissing the appellant's defense without justifiable reasons given that the evidence of the prosecution failed the test of circumstantial evidence.
25. On improper exercise of discretion in sentencing, he urges the Court to overturn the conviction and unconditionally set him free; that in the event that the Court is not minded to overturn the conviction he urges that the sentence imposed be interfered with and an order be made that the time already spent by the appellant in prison is enough to satisfy any punishment that was necessary to have been meted out on him; that there was no material on record to support the trial court's conclusion that only a death sentence would meet the deterrence and denunciation objectives of sentencing.
27. The appeal is opposed by the respondent through submissions filed by Ms. Wang'ele, learned Assistant Deputy Director of Public Prosecutions (ADDPP) dated 13th October, 2021. On the issue of proof of the fact and cause of death of the deceased the respondent submits that the fact and cause of death was



proved through the evidence adduced by the prosecution witnesses. She submits that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the appellant. She urges that the appellant admitted to have been with the deceased on the fateful day shortly before they were attacked by three people and in the process he was injured; that the court was left with no option but to make reasonable deductions from the available circumstantial evidence; that the deceased's body was recovered on the road estimated at 100 metres from the appellant's home where the appellant in his sworn testimony confirmed that they had spent the night together.

28. She submits further that there is sufficient evidence on record to show that indeed the appellant and the deceased were in the house identified as the appellant's house and that there were blood stained items in the house and above all a blood stained kitchen knife without a handle was also recovered; the deceased was said to have died of multiple stab wounds as stated in the postmortem report and the wounds were sharp at the edge; the appellant did not deny living in that house, that the information that was given to the PW4 by the appellant's brother was not believable by the court; that the trial court did not err in finding that the death of the deceased was caused by the unlawful action on the part of the appellant to the exclusion of anybody else as per the circumstantial evidence herein.
29. On the issue of malice aforethought, the respondent urged that the same could be implied or inferred from the circumstances; that the evidence of PW7 - Doctor Dorothy Njeri and the postmortem report showed that the deceased died of several stab wounds, a 5 cm stab wound on the right stomach, 8 cm and 12 cm wound on the mid, a 6 cm wound on the right chest and 5cm wound at the stomach; that by the time the appellant stabbed the appellant five times targeting the vital organs which is the stomach and the chest, he indeed had the intention to either kill or cause the deceased grievous bodily harm; that from the manner of the attack and the number of stabs, the killing was out of malice aforethought.
30. On sentencing, the respondent maintained that the trial court comprehensively considered the sentencing guidelines; that even if the sentence was meted prior to the advisory guidelines given by the Supreme Court of Kenya, it is evident that the trial court was alive to the said guidelines, and comprehensively considered and applied them before sentencing the appellant. she therefore urged the Court not to interfere with the sentence.
31. We have carefully considered the record of appeal in its entirety, the rival submissions of counsel, the authorities cited and relevant law. This being a first appeal, this Court is mindful of its duty and obligation to re-analyse, re-evaluate and re-consider afresh the evidence adduced before the trial court and to arrive at its independent conclusion. This duty was well articulated by this Court in *Erick Otieno Arum vs Republic [2006] eKLR* as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known *Okeno vs Republic* (1972) EA 32 will suffice.”
32. Having reconsidered the evidence, submissions and the law as summarized above, we discern the issues for determination to be whether:

1. Elements of the offence of murder were established.



2. The circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction.
 3. The sentence imposed was appropriate, and if not, whether we should interfere with the same.
33. On proof of elements of murder, as found by the trial court, the fact and cause of the deceased's death is not disputed. There is also no doubt that from the nature of injuries found on the deceased's body, whoever killed her had the requisite malice aforethought as there was a clear intention either to kill her, or to cause grievous bodily harm. Elements of malice aforethought as defined in section 206 of the Penal Code were satisfied.
34. On whether the conviction based purely on circumstantial evidence was safe in the circumstances of this case, there is a well-trodden path taken by this Court in numerous of its decisions starting from the locus classicus case of *Kipkering Arap Koske vs R. [1949] 16 EACA 135*, to the more recent decision of this Court in *Peter Mugambi vs Republic [2017] eKLR*, and in which the following guiding principles were crystallized, namely;
- i. The inculpatory facts must be incompatible with the innocence of the accused.
 - ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.
 - iii. There must be no other existing circumstances weakening or destroying the inference.
 - iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.
35. Even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. See *Teper vs R. [1952] AC 480, 489* as approved in *Simon Musoke vs Republic [1958] EA 715* where it is stipulated that before drawing the inference of the accused's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.
36. We have applied the same test and principles of law highlighted above to this appeal. As stated earlier, the appellant admitted that he was with the deceased moments before he claims they were attacked by unknown persons. He claims to have left her behind and ran back to his house where he says he collapsed and only came to at Kenyatta National Hospital. From our analysis of the evidence in its totality, we are not persuaded that the appellant told the truth in his defence. We say so because, first and foremost, if indeed he left the deceased being attacked, the first thing he could have done was to report to the police or even the neighbours. He could have screamed for help. Instead, he was found in a car being driven to hospital by his brother. Why did they not go back to the scene and try to assist the deceased if indeed they were telling the truth?
37. We also note the evidence of the witnesses who arrived at the scene. They found the deceased with a "lesso" around her waist. This is a piece of cloth women wrap around their waist when working around the house and not a dressing item that women wear to and from work. There is also the other evidence by the police officers that from the scene, it was clear that the deceased had been killed elsewhere and dragged to the scene where the body was recovered. The blood covered prints led the witnesses to the appellant's house. Inside the house, there was blood on the floor, things strewn all over and the amount



of blood on the floor and on some clothes clearly demonstrated that there had been a struggle inside the house. The sharp knife found inside the house also left more questions than answers.

38. The fact that the deceased's purse, which she used to carry to work every day, was found inside the house was evidence that she had already gotten home from work and was in the house and not outside when she was attacked. This ties up with the "lesso" tied round her waist, and also with the blood covered treads from the house to the scene. There was also the failed attempt to conceal evidence by trying to wash the blood from the floor. All these links lead to one conclusion, that the deceased was killed inside the house where she used to live with the appellant, and her body was then dragged to the scene from where it was discovered.
39. Lastly, although we are cognizant of the fact that the burden to prove the case beyond reasonable doubt reposes in the prosecution, there was no explanation by the appellant on the state of disarray inside his house. We have reconsidered the defence proffered by the appellant but, like the trial court, we are not convinced on its truthfulness.
40. We are satisfied that, the circumstances as outlined above unerringly point to the appellant as the perpetrator of the offence and admit no room for the co-existence of circumstances negating or weakening the inference that the appellant is the person who, with malice aforethought, committed the unlawful acts leading to the deceased's death; and that he thereafter set in motion a chain of events, not only to conceal the murder but also to exonerate himself. The learned Judge cannot be faulted for finding that the circumstances of the case irresistibly pointed to the guilt of the appellant. We find that the threshold required in law to sustain a conviction on the charge of murder based on circumstantial evidence has been met. The appeal against conviction therefore fails and is hereby dismissed.
41. As regards the sentence, section 204 of the Penal Code provides that "any person convicted for murder shall be sentenced to death". The Supreme Court of Kenya in *Francis Karioko Muruatetu & Another vs Republic, [2017] eKLR* (Muruatetu's case), held at para 69;
- "Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty." (Emphasis ours)
42. We note that after conviction, the learned Judge called for a pre-sentencing report and also for the Victim Impact Assessment report. He considered all these carefully along with the Sentencing Policy Guidelines which he took time to analyse in his 4 pages of sentencing notes. He also considered the mitigation proffered by the appellant and the Supreme Court decision in the Muruatetu case before pronouncing himself as follows:-
- "From the manner the deceased met her death and the nature of the injuries sustained, I am of the considered opinion and find that this is a matter that calls for deterrence and denunciation sentence so as to deter any person in a relationship from committing similar offence and to communicate the community's condemnation of the criminal conduct of the offender and the only sentence which will meet the said objectives is that provided for under Section 204 of the Penal Code.
43. In our view, the learned Judge considered all the relevant material that he was supposed to consider and did not consider any irrelevant or extraneous material before meting out the sentence he did. We have considered the said notes on sentencing and we see no room for us to interfere with the learned



Judge's discretion in sentencing. Accordingly, we dismiss the appeal against sentence also and uphold the death sentence. The appeal is dismissed in its entirety.

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

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

