



**Ouma v Republic (Criminal Appeal 128 of 2016)  
[2022] KECA 485 (KLR) (25 March 2022) (Judgment)**

Neutral citation: [2022] KECA 485 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 128 OF 2016  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MARCH 25, 2022**

**BETWEEN**

**NICHOLAS OKOTH OUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (D.S Majanja J) dated 27th June, 2016 in Criminal Case No. 60 of 2013)*

**JUDGMENT**

1. The appellant, Nicholas Okoth Ouma, was charged, tried and convicted of 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 the 19<sup>th</sup> of September 2013 at Homa Village, Samba Sub-Location, Suba District within Homa Bay County he murdered Peter Otieno Ogur. He was sentenced to death as provided under section 204 of the Penal Code.
2. Dissatisfied with both his conviction and sentence, he has preferred the present appeal in which he raises four grounds of appeal. He argues, first, that the trial court erred; in failing to find that the circumstantial evidence was not strong enough to support a conviction; by convicting him based on insufficient evidence; by failing to appreciate that the ‘admission’(sic) by the deceased was not corroborated hence was insufficient to support a conviction; and finally, that the trial court erred by imposing the mandatory death sentence, which was arbitrary and unconstitutional, on the appellant.
3. This is a first appeal from the decision of the High Court. Accordingly, we are required, under section 379 of the *Criminal Procedure Code* and as was pronounced in *Okeno v. R [1972] EA 32* to re-evaluate the evidence before the trial court and reach our own conclusion. In doing so, we bear in mind that, unlike the trial court, we have neither seen nor heard the witnesses, and for which we must make allowance.



4. The case against the appellant was presented through a total of 12 witnesses. Fredrick Onyango (PW1) had been requested by the appellant on the material day to ride his motor cycle registration No. KMCR 178W as the appellant was not feeling well. The appellant later called PW1 at about 8.00pm and requested him to pick him up at a bar in Magunga which he did, and they proceeded to the appellant's home. On the way, they met the deceased riding a motor cycle registration No. KMDV 654R. The deceased stopped them, removed the ignition key from the motor cycle that the appellant was riding and an argument ensued between the appellant and the deceased. The appellant then brandished a knife and when the deceased saw this, he ran off, and the appellant followed him.
5. The appellant did not find the deceased and so he returned and started slashing the tyres of the motor cycle that the deceased had been riding. The appellant told PW1 that he was waiting for the deceased, and PW1 left for Magunga. At about 9.00 p.m. the same night, he heard wailing from Magunga Health Centre. He rushed there and found that the deceased had been stabbed and had injuries on the forehead and left side of the chest.
6. Joshua Ogutu Nyonga (PW2) testified that he knew both the appellant and the deceased as they hailed from the same village. At around 8.00pm on the material night while he was in his house, he heard someone calling his name, 'Jaduong', which he was known by in the village. The person was screaming, "Jaduong, I am dying." He could not tell who was screaming but he followed the screams and found the deceased lying in a pool of blood. The deceased told him that "Carlos has killed me."
7. The deceased requested PW2 to assist him to remove his phone and ignition keys from his pocket and to remove his shoes from his feet. As he was assisting the deceased, other people arrived at the scene, among them another motor cycle rider, Kevin Okoth Okinyi (PW8) who assisted in taking the deceased to the Magunga Health Centre. PW2 handed over the keys and mobile phone he was given by the deceased to a village elder who handed them over to the police.
8. The testimony of PW3, Patrick Achola Nyaburi was that he had employed the appellant to ride his motor cycle. Prior to employing the appellant, he had employed the deceased to ride the same motor cycle, but the deceased had left his employment after he bought his own motor cycle. PW4, Julius Ochieng Odingo, had stopped by the appellant's homestead on the material day at around 8:00pm. He had found the appellant and PW1 by the roadside and had heard the appellant say that he must kill someone. He had seen the appellant, who had a knife in his hand, slash the tyres of one of the motor cycles at the roadside. Since he had a passenger, he left but before he went far, he heard people calling for help. He turned back and found people trying to place the deceased on a motor cycle, but he did not see any injuries on the deceased.
9. PW5, Denis Ouko Nyasoko, the appellant's uncle, was informed on the material day by his brother, one Marani, that the appellant had stabbed the deceased. He went to the Magunga Health Centre where he found that the deceased had died. On 7<sup>th</sup> September 2013, he saw the appellant heading towards Lambwe on a motor cycle. He had pulled him from the motor cycle, tied him with a rope and taken him to Karungo Police station from where he was later taken by officers from Magunga.
10. On the material night, PW8, Kevin Okoth Okinyi, had seen the appellant, whom he knew, standing by the roadside. He had flashed his lights on the appellant and seen that he had a knife. PW8 was riding his motor cycle with a passenger from Magunga to Kitereka. He did not talk to the appellant but rode on. As he was about to drop his passenger at his destination, he heard people screaming, and he went back and found people gathered and someone on the ground who was asking for his shoes to be removed. He carried the deceased on his motorcycle towards Magunga Health Centre. On the way, the deceased collapsed and fell off the motor cycle, and was then put on another motorcycle and taken to the Health Centre.



11. PW6 and PW7, Dominic Seko Ogur and Naftali Odira Okiro respectively, brothers of the deceased, identified his body prior to the post mortem.
12. PW9 Dr. David Onyango Nyawade, presented the post mortem report and findings following the demise of Dr. Ojwang who had conducted the post mortem on the deceased. His findings were that the deceased had two deep stab wounds at the scalp interiorly approximately 6x2x1 cm. There was another stab wound to the anterior chest wall between the left armpit approximately 3x1x6cm. The wound had severed the left subclavian vessels causing a lot of bleeding. He concluded that the cause of death was severe haemorrhage, deep stab wounds which were penetrative and violent trauma. Dr. Ojwang's conclusion was that the injuries could have been caused by a sharp object as evidenced by the penetrative nature of the injuries.
13. PW10, Elizabeth Waithira, examined all the items submitted for DNA analysis. She produced the results in a report dated 16<sup>th</sup> December 2015. The items submitted, namely a T shirt item B and soil sample, item C were heavily stained with blood of human origin which upon analysis was that of the deceased. The keys submitted as item E were moderately stained with blood which analysis indicated was that of the deceased. A red T-shirt, jean trousers and jacket identified as belonging to the appellant did not have blood on them, while an attempt to generate a DNA profile from the jacket belonging to the appellant were unsuccessful.
14. PW11, Chief Inspector Stephen Kibet received reports about the murder and visited the scene, secured the motor cycles, and then gone to look for the appellant, whom he had been informed was a boda boda rider. PW12, Sergeant Robert Mutai, the investigating officer, testified with regard to the report of the murder, the statements he had recorded from witnesses, collection of samples for analysis and the arrest of the appellant.
15. When placed on his defence, the appellant gave an unsworn statement in which he denied committing the offence charged. He stated that he left home early in the morning of 6<sup>th</sup> September 2013 to visit Sukari Industries in Ndhiwa. When he reached the tarmac of Sori to Ndhiwa, he met his brother who told him his best friend had died and that he needed to go to Sori to sort something out. As they were talking, people gathered and asked him to go with them to the Police Station at Sori. The police officers from Magunga later went for him, and he was later taken to Homa Bay and charged with the offence of murder.
16. The parties hereto filed written submissions in support of their respective cases. The firm of Nyauke & Co Advocates, which appeared for the appellant, filed submissions dated 5<sup>th</sup> November 2019 in which they raised four issues which echo the four grounds raised in this appeal. The respondent also filed its submissions in opposition to the appeal.
17. We have read and considered the submissions of the parties against the record of the trial court and the appellant's grounds of appeal. The appellant argues with respect to the first ground that the circumstantial evidence against him was not sufficient to found a conviction. Related to this argument is his contention that the trial court erred in convicting him when there was insufficient evidence to support the conviction. The respondent supports the conviction, arguing that the trial court correctly noted and directed itself on the principle applicable in convictions on the basis of circumstantial evidence.
18. We observe that in determining whether or not the circumstantial evidence adduced against the appellant was sufficient to found a conviction, the trial court reminded itself of the principles applicable as were laid out in the case of *Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135*. The trial court noted that in order to base a conviction on circumstantial evidence, the inculpatory



facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. Further, before drawing the inference of guilt against the accused from circumstantial evidence, the court should be sure that there are no other co-existing circumstances which would weaken or destroy the inference. In this regard, the court noted the evidence of PW1, 2, and 4.

19. We have considered the evidence adduced by these witnesses. PW1 had been riding on the same motor cycle as the appellant after picking him up from a bar in Magunga. He saw the appellant quarrel with the deceased, draw a knife and chase the deceased, then return and start slashing the tyres of the deceased's motor cycle with the knife. PW4, who had passed by the home of the appellant, also saw the appellant slashing the deceased's motor cycle tyres with a knife, and had heard him threatening to kill someone. The deceased called PW2 by his nickname 'Jaduong' and informed him that he was dying and that 'Carlos' had killed him. 'Carlos' was a name that the appellant was known by.
20. The evidence of PW8, who took the deceased on his motor cycle to take him to hospital, was that he saw the appellant on the roadside as he was taking a passenger home. The appellant was holding a knife. PW8 heard screams soon thereafter and went to the scene to find the deceased had been stabbed. The appellant was arrested by his uncle while attempting to flee.
21. Having evaluated the evidence before the trial court, we are satisfied that it was correct in finding that the circumstantial evidence pointed to the appellant as the person who had stabbed the deceased and thereby caused his death.
22. The appellant has submitted that the deceased's 'admission'- we believe this is a reference to the deceased's declaration that the appellant was killing him- was not sufficient, without corroboration, to found a conviction. As we have noted above however, there was sufficient circumstantial evidence, even without the deceased's declaration, to point to the appellant as the perpetrator of the offence.
23. The third issue raised by the appellant in his grounds of appeal- that there was insufficient evidence to support a conviction- is also answered by our findings with respect to the question of circumstantial evidence. Given the nature of the circumstantial evidence that was before the trial court, we are satisfied that the prosecution discharged its burden of proof in relation to the death of the deceased. Even though there was no eye witness to the stabbing and there was no DNA material found on the appellant's clothes submitted for analysis as is submitted on his behalf, the totality of the evidence from PW1, 2, 4 and 8 was sufficient to found a conviction.
24. Finally, the appellant raises the issue of the sentence imposed upon him- that the trial court was in error in imposing the death penalty which is arbitrary and unconstitutional. The respondent conceded in its submissions that guided by the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (the 'Muruatetu decision') the mandatory death sentence was unconstitutional.
25. In its decision in *Muruatetu*, the Supreme Court did indeed hold that the mandatory nature of the death sentence for the offence of murder was unconstitutional. However, the decision was rendered in 2017, and the trial court was therefore not in error in 2016 in imposing the penalty that was then provided in law. However, the appellant is entitled to the benefit of that decision.
26. The upshot of our findings above is that the appellant's appeal against conviction lacks merit and we accordingly dismiss it. Regarding sentence, we direct that this matter be remitted to the High Court for the taking of mitigation and re-sentencing in accordance with the decision of the Supreme Court in *Muruatetu*. The matter shall be mentioned before the High Court at Homa Bay within FOURTEEN (14) days of the date hereof for purposes of fixing a date for an expeditious re-sentencing hearing.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MARCH, 2022**



**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

