Chiteri v Republic (Criminal Appeal 139 of 2016)
[2022] KECA 475 (KLR) (11 March 2022) (Judgment)

Neutral citation: [2022] KECA 475 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 139 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MARCH 11, 2022

BETWEEN

JOSEPH CHITERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a judgment of the High Court at Kakamega (Sitati, J) dated 31st March, 2016 in HCCR NO. 19 OF 2008)

JUDGMENT

1. Moses Malala Olunga (the deceased or Olunga) died on 15th April, 2018. By an information dated 29th April, 2008 and filed on the same day at the High Court in Kakamega, Joseph Chiteri (the appellant), was jointly with another not before court charged with the murder of the deceased contrary to section 203 as read with section 204 of the Penal Code. He stood trial, was convicted and sentenced to death. He is aggrieved with both the conviction and sentence and appeals to this Court.

2. The appeal raises four grounds namely; that the learned judge erred both in law and fact in failing to appreciate that the prosecution had failed to establish their case to the required standard that is beyond reasonable doubt; that the prosecution's evidence was full of contradictions and inconsistencies; that the judge made conclusions, decisions and drew inferences which are not based on evidence or record, and that the sentence was harsh and manifestly excessive in the circumstances of the case and taking into account the mitigation tendered by the appellant.

3. The case built by eight prosecution witnesses is that the family of the deceased and that of the appellant share a boundary. There is a dispute between them over that boundary. On the fateful day, Francis Omulandi (PW1) a younger brother to the deceased set out to get grass for his cows. As he did so, Martha, the wife of the appellant began a quarrel. Mariam Mapesa (PW2) who had gone to the river to draw water heard the exchange.

4. At some point, a Zacharia Chiteri and the appellant came to the scene. Both were armed, Zacharia with a jembe and Joseph with a spear. Joseph speared the deceased. The deceased picked a stone but was hit with a jembe by Zacharia. The deceased fell to the ground. The appellant, Zacharia and Martha left the scene.

5. In his defence, the appellant gave an unsworn statement. He said that on that day he was working in his shamba. There was a dispute between Francis and the deceased. The two attacked him and cut him thrice. He passed out and was taken to hospital. He does not know what followed thereafter.

6. The trial court found the prosecution witnesses to be credible and believed them. In the same breath, the trial court did not believe the defence of the appellant.

7. This is a first appeal and the duty of the court is well known. The East African Court of Appeal in *Okeno Vs. Republic [1972] E.A 32* famously said;

> " 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] E.A. 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. Rulwala Vs. Republic [1957] E.A. 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 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] E. A. 424."

8. We start by considering the arguments made by the appellant's counsel that the prosecution evidence was full of contradictions and inconsistencies. Defence counsel posits that there was a fight between the deceased and the appellant but that the eye witnesses attempted to downplay that the deceased was armed and attacked the appellant.

9. The Investigating Officer Sgt. Maurice Amwayi (PW8) testified as follows:

> " Yes, the deceased was also in the fight. I am aware the accused was injured and that is why I issued him with a P3 form.
>
> The accused was injured by the deceased. Yes, some of the injuries on the accused included cut wounds.
>
> Yes, that means, deceased was also wielding weapons."

10. It is also true as submitted by counsel for the appellant that the pathologist Dr. Dickson Mchana (PW7) testified as follows regarding the injuries on the appellant.

> " Yes, I confirm the injury on the right forearm is a defensive injury."

11. Yet even if it was to be believed that the deceased also inflicted some injuries on the appellant, that may not give much traction to the defence case. The overwhelming evidence and which was believed by the trial court is that it was the appellant who first attacked the deceased by spearing him on the head. The three eyewitnesses (PW1, PW2 and PW1) were consistent on this evidence.

12. Not once during the trial did the appellant raise a plea of self-defence. In his defence, he talks of a dispute between Francis and the deceased. That the two attacked him. He does not allege that he fought

back in self defence. The plea of self defence should have been raised during trial and cannot be available at appeal. see Kazungu Katana Ngoa v Republic [2017] eKLR where this Court dismissed a defence of intoxication raised for the first time during appeal. Failure to raise a plea such as self defence at trial deprives the prosecution an opportunity to confront it. To our minds, the fact that the deceased fought back does not take away the culpability of the appellant and Zacharia who were the aggressors, and the appellant who inflicted the first blow.

13. We turn to the next issue. It is argued for the appellant that mens rea was not established. Counsel submits that malice aforethought was not proved. This Court is referred to the evidence of PW1 to the effect that the appellant was not present when he quarreled with the appellant's wife. Second, that PW3, the widow of the deceased, had in cross-examination stated that on that day there was no animosity between her husband and the Chiteri family.

14. Reacting to this proposition, the respondent submitted that the High Court rightly held that the appellant must have known that spearing someone on the head and also hitting the same person on the head with a jembe was likely to do grievous harm to or cause the death of that person. This Court's decision in *Jennifer Wanjiru Nganga –vs- Republic [2018] eKLR* was cited where it was stated;

> "It is enough to state as does David Ormerad, the learned author of Smith and Hogan's Criminal Law (13th Edn) Oxford University 2011 P497 that malice aforethought, an arbitrary symbol, is a concept of common law that consists in;
>
> 1. an intention to kill any person or,
>
> 2. an intention to cause grievous bodily harm to any person.
>
> It is instructive that these two elements are at the heart of the provision of Section 206 of the Penal Code aforesaid. Since, however, we have discounted intention, did the appellant have the knowledge that the act of selling the adulterated or methanol-laced chang'aa would probably cause the death of or grievous harm to the deceased or any other person as contemplated by Section 206(b)? It is clear that the knowledge first needs to be established before any indifference, or recklessness as to the consequence of the act or omission can become relevant. As to the knowledge itself, the position in law is that it means "true belief." See Ormerod (supra) at 128-29; USA vs. DYNAR [1997] 2SC R 462, a decision of the Canadian Supreme Court; and REGINA vs. SAIK [2007] 1 AC 18, a decision of the House of the Lords."

15. On this question of malice aforethought the learned trial judge held;

> "Section 206 of the *Penal Code* defines what constitutes malice aforethought, and proof of any one of the circumstances set out thereunder is sufficient for purposes of the Section. In the instant case, Francis testified that when the accused arrived at the scene, armed with the spear he (accused) announced "Someone will die today." Earlier on Martha had told Francis that the Malala family deserved to die because they were causing her trouble. It is clear to me that the accused, together with his wife Martha and their son Zacharia had made up their minds before they came to the scene that someone was to die that day. They made their threat come true when both the accused and his son Zacharia attacked the deceased by spearing him and hitting him with a jembe on the head. I am also satisfied the accused person must have known that spearing someone on he ahead and also hitting the same person on the head with a jembe was likely to do grievous harm to or cause the death of that person. The consequence of that vicious attack with spear and jembe resulted in the death of the

deceased. I am fully satisfied that he accused person's actions of spearing the deceased on the head was done with malice aforethought on the part of the accused."

16. It is settled learning that in respect to the crime of murder, an intention to kill any person or an intention to cause grievous bodily harm to any person can comprise malice aforethought. Indeed, section 206 of the Penal Code sets out the whole range of circumstances that can constitute malice aforethought. It reads;

> 206.Malice aforethought
>
> 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.

17. A finding at postmortem was that the cause of death was severe head injury due to an assault. The clear evidence is that the appellant assaulted the deceased with a spear and a further blow was dealt on his head by Zacharia with a jembe. It matters not which of the two blows eventually caused the deceased to die as even the single act of spearing someone on the head was likely to cause grievous harm or the death of the deceased. The trial court cannot be faulted for its decison.

18. A further ground of appeal is that the court erred in concluding that"the act of spearing the deceased was thus the direct consequence of the death of the deceased." As we have held, the conclusion that the deceased died from head injuries was drawn from the postmortem examination. The head injuries were caused by blows of a spear and a jembe. And as noted by the judge it did not matter whether it was the appellant or Zacharia who inflicted the fatal blow. The former House of Lords in *R v Rahman and others [2008] UKHL 45* (On Appeal from the Court of Appeal (Criminal Division) [2007] EWCA Crim 342) was faced with similar circumstances and Lord Bingham of Cornhill was of the opinion that:-

> "In the ordinary way a defendant is criminally liable for offences which he personally is shown to have committed. But, even leaving aside crimes such as riot, violent disorder or conspiracy where the involvement of multiple actors is an ingredient of the offence, it is notorious that many, perhaps most, crimes are not committed single-handed. Others may be involved, directly or indirectly, in the commission of a crime although they are not the primary offenders. Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.
>
> English law has developed a small number of rules to address this problem, usually grouped under the general heading of "joint enterprise". These rules, as Lord Steyn pointed out in

R v Powell (Anthony), R v English [1999] 1 AC 1, 12, are not applicable only to cases of murder but apply to most criminal offences. Their application does, however, give rise to special difficulties in cases of murder. This is because, as established in R v Cunningham [1982] AC 566, the mens rea of murder may consist of either an intention to kill or an intention to cause really serious injury. Thus if P (the primary offender) unlawfully assaults V (the victim) with the intention of causing really serious injury, but not death, and death is thereby caused, P is guilty of murder. Authoritative commentators suggest that most of those convicted of murder in this country have not intended to kill.

As the Privy Council (per Lord Hoffmann) said in *Brown and Isaac v The State [2003] UKPC 10*, para 8,"The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability".

It is (para 13) "the plain vanilla version of joint enterprise"."

Further Lord Rodger of Earlsferry under paragraph 33 went on to state:-

> " If A and B agree to kill their victim and proceed to attack him with that intention, they are both guilty of murder, irrespective of who struck the fatal blow. In Lord Hoffmann's words, they are engaged in a "plain vanilla" joint enterprise. It can, in my view, make no difference if A and B agree to kill their victim by beating him to death with baseball bats, but in the course of the attack A pulls out a gun and shoots him. B must still be guilty of murder: since he intended to bring about the death of the victim, B cannot escape guilt on the ground that he did not foresee that A would kill him by using a gun instead of a baseball bat. The unforeseen nature of the weapon is immaterial. If, instead of a baseball bat, in the course of the attack A unforeseeably used an explosive and killed people in addition to the intended victim, then B would still be guilty of the murder of their intended victim - but not, I would think, of the murder of anyone else who was killed by the explosive."

19. As we are satisfied that the conviction was safe, the only issue left is the question of sentence. In imposing the death sentence, the trial court noted that it had no discretion in the sentence. The decision in *Francis Karioko Muruatetu & another v Republic [2017] eKLR* has since clarified that the death sentence is not the only punishment that a person convicted of murder can suffer. The DPP here readily concedes as much. We have taken into account the mitigation of the appellant at trial. He was 52 years old at the time of sentence, was married to two wives and a father of 10 children, all of whom depended on him. Counsel appearing for him pleaded that the court give him a chance to start his life again. On our part we think that a sentence of 30 years is appropriate. The death sentence is hereby set aside and in its place the appellant shall serve imprisonment of 30 years with effect from the date of sentence by the trial court. Only to that extent does the appeal succeed.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

T. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR