Yahya v Republic (Criminal Appeal 36 of 2021)
[2022] KECA 389 (KLR) (4 March 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 36 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 4, 2022

BETWEEN

THABIT JAMALDIN YAHYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court, at Mombasa (Muya, J.) delivered 20th February 2016 in HCCRI. NO. 35 of 2012)

JUDGMENT

1. This is an appeal by Thabit Jamaldin Yahya (Appellant) against the conviction and sentence for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence he faced were:

> " On the 15th day of May, 2012 at Bella Vista Hotel Mombasa County, jointly with others not before the court, murdered Mary Cheptirim."

2. After the trial, the Appellant was found guilty and convicted of the offence. He was sentenced to suffer death as by law provided.

   Being aggrieved by the conviction and sentence he filed this appeal. In his memorandum of appeal he raises nine grounds of appeal in which he challenges the learned judge's findings on basis of relying on discredited dock identification; relying on disjointed and discredited DNA evidence; relying on extraneous information to associate the Appellant with terrorism activities and for declaring the attack a terrorist attack devoid of any evidence; relying on testimonial hearsay evidence; convicting the Appellant using evidence that did not meet the required standard of proof; for ignoring prosecution evidence tending to exonerate the Appellant; for rejecting the Appellant's defence and for failing to

consider the Appellant's mitigation, failing to exercise his discretion and in holding that there was only one mandatory sentence available thus meting out a severe and excessive sentence of death.

3. The appeal was heard virtually with learned counsel, Mr. Chacha Mwita for the appellant and Senior Principle Prosecution Counsel Mr. Duncan Ondimu learned counsel for the State highlighting submissions on behalf of the parties.

4. This is a first appeal. We have duly considered the record of appeal, the judgment of the High Court, the memoranda of appeal by the appellant and submissions by the respective learned counsel, and the authorities that they cited. This is in line with the principles enunciated in the *Okeno v. R* [1972] EA 32:

> " 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] 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. Ruwala v. R., [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."

5. Before delving into the appeal, let us give a summary of the evidence adduced before the high court, which was as follows; The prosecution called a total of 30 witnesses in support of its case, and adduced as evidence a statement of a witness who could not be found in time to testify. We agree with Mr. Mwita for the Appellant that PW1 and PW16 were not witnesses in the case but were called to answer a query regarding medical needs of the Appellant. However, in order not to cause confusion we shall refer to the witnesses as per the court record.

6. The brief facts of the prosecution case were that on the material day, the deceased Mary Cheptirim was on duty at the main entrance to the Bella Vista Club and Restaurant (hereinafter Club) as a guard who, alongside Boniface and Gregory, PW2 and PW3 respectively were checking patrons as they entered the club. PW2 was the one frisking patrons at around 9:00 pm. He testified that two men, one of whom he described as slim, tall and black wearing jeans trousers and a black jacket, came to the entrance of the club. They declined to be frisked and they walked away.

7. PW2 said that ten minutes later he saw the two return and hurl something to the ground. He then heard three successive blasts which threw him to the ground. His colleague, PW3 said that all he saw was something rolling on the ground towards the club entrance which was followed by two blasts. PW3 said that he was taken to hospital with the Appellant who was also injured at the blast. PW2 stated that he saw the Appellant next at the hospital after the incident.

8. The other witnesses at the scene of the incident were PW4, PW5, PW8 and PW9 who did not witness the hurling of the objects which preceded the blasts, nor the parties involved.

9. Among those taken to hospital for injuries arising out of the blasts were PW2, PW3, PW4, the deceased and the Appellant. The deceased was the only one who succumbed to the injuries.

10. The prosecution relied on eye witness accounts of the incident, especially from the evidence of PW2 and PW3. They also relied on DNA analyses results from various items, among them contents of a bag P. exhibit 1, placed in Pegassus Bus by the Appellant, in the presence of PW20. The bag was recovered from the Pegassus Bus in Nairobi by PW6, PW12 and PW29 among others. Inside the bag, among

other items, was a tooth brush marked exhibit 9. The prosecution relied on the evidence of PW7, an FBI Laboratory Supervisor who also carried out DNA testing on various items, which were exhibits in the case and found the Appellant's DNA only in the toothbrush P. Exh 9. The prosecution also relied on results of analyses of DNA testing from various exhibits collected by PW10, and found by Government Chemist PW21 to match that of the Appellant's DNA. These were specifically blood stains in jeans jacket (P. Exh. 24)), left and right safari boots (P. Exh. 25) collected by PW10 under the Appellant's bed at the hospital; blood stains from two grenade safety pins ring A and mix B (P. Exh. 16), all collected at the scene of the blast by PW10. The Government Chemist's (PW21) report attesting to the findings, together with the DNA profiles were P. Exh. 34 (a), (b), (c) and (d).

11. The prosecution also relied on the evidence of PW15 who testified to having handled a bag with a lap bag, which the Appellant kept giving and retrieving from him in May 2012. It was PW15's evidence that one day after the Appellant collected the lap top and bag from him, the Appellant's brother through whom he met the Appellant, called him from Nairobi and asked him to go for the Appellant's bag at Pegassus Bus booking office in the morning. It is at the office that he learnt that the lap top and bag were seized and the owner of both arrested by police. The prosecution also relied on the evidence of PW20, whose evidence was to the effect that on the 15th May, 2012, the Appellant booked seat number 15 in Pegassus Bus that was to travel to Nairobi from Mombasa at 10:30pm of the same day. He said that the Appellant placed a bag inside the bus and left him with a second one inside which was a laptop. The Appellant did not show up for the journey, neither did he collect his laptop and bag. PW20 surrendered the bag and contents to police the following day. He identified them as P. Exh. 33 (a) and (b).

12. The Appellant gave a sworn defence and called no witness. He denied any involvement in the grenade detonations, claiming that he was an innocent passer-by when the grenades went off. He narrated his movements on the material day saying he was hawking his wares around Mombasa town when at around 9pm he decided to go home. He said he was near the Mombasa Tusks in Town when he heard a blast. He said he woke up few days later in hospital.

13. Having considered the facts of the case, the submissions of counsel in the case, and the cases cited by both counsel, we find that the issues for determination are: whether the body on which PW17 carried out post mortem examination was properly identified as that of the deceased, and whether the cause of death was as a result of injuries suffered from the grenade blasts on the material day; whether the DNA evidence was credible; whether there was evidence creating a nexus between the Appellant and the bag P. Exh 1; and, whether the learned trial judge misdirected himself on the sentence meted out to the Appellant.

14. Mr. Mwita submitted that death was not proved. He relied on the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR in support of his submission that there are three elements which constitute the offence of murder, which he urged were not all proved as required. Counsel urged that PW17, the pathologist did not refer to any other injuries that could be attributed to a grenade to enable his opinion on the cause of death to be conclusive. Counsel took issue with identification of the body of the deceased by PW 11 and 13,urging that they were not the ones named in the post mortem as the identifying witnesses. Counsel also took a swipe at PW17 for choice of term used to describe the piece of metal he retrieved from the deceased body. Counsel urged that PW17 use of the word shrapnel was a technical term associated with bombs, which was not within his line of profession, and that he should have laid a basis for using that term. He also urged that the learned trial judge filled in the gaps in the prosecution case by concluding that the piece of metal PW17 retrieved from the deceased was a shrapnel without any factual basis, and further that it was never subjected to examination by a bomb expert.

15. Mr. Ondimu, learned counsel for the State opposed the appeal. He relied on his written submissions. Counsel urged that the death of the deceased was confirmed by PW2 and PW3, her colleagues at work, and by PW11 and PW13, relatives of the deceased who identified her body for post mortem. Counsel urged that the important issue to consider is whether the deceased death was unlawful, and submitted that PW14 the police officer who escorted the deceased family for the post mortem witnessed as the pathologist PW17 retrieved the piece of metal from the deceased body, and that both testified that the piece of metal had perforated the body of the deceased. He urged that the circumstances of death were shown to be a blast and therefore the cause of the death of the deceased was unlawful. Counsel cited the Ugandan case of *Uganda Vs Lydia Drarulia Atim* HCT-OO-CR-SC-0404 for the proposition that every homicide is presumed to be unlawful unless circumstances make it excusable. He urged that the circumstances of death were shown to be a blast and therefore the cause of the death of the deceased was unlawful. On the use of the word shrapnel, counsel urged the court to see the learned judge's conclusion which was that whether the word used was shrapnel or piece of metal was akin to splitting hairs. Counsel urged us to ignore the Appellant's argument on the same.

16. In a quick rejoinder, Mr. Mwita urged that the defence was not challenging the post mortem, but the identification of the deceased Secondly, that the word shrapnel is not a medical term and that therefore the court should have led the witness to verify the use of that term. He urged finally that the post mortem was carried out on 18th May, 2012. long before the piece of meatal was given to a bomb expert to confirm what it was, the latter which was done in 2013.

17. We have considered the judgment of the learned trial judge and find that the issue raised before that court related to the one raised before us which is whether there was proof that Mary Cheptirim is dead or alive; and further whether injuries which led to the deceased death were connected to a grenade attack. In his judgment the learned trial judge found:

> "It is not in dispute that PW11 and PW13 a sister and brother of the deceased respectively did accompany PW14 to identify the body of the deceased for post mortem examination which was carried out by Dr. Mbuko Ngali. The doctor formed the opinion that death was as a result of bleeding due to the perforation injury caused by shrapnel. This shrapnel was produced as exhibit No. 30. It is the defence contention that the piece of metal should have been subjected to an examination by a bomb expert so as to find out whether it was a component of a grenade. It is not in dispute that grenades were used in the blast that occurred at Bella Vista club where the Deceased was working as a security guard together with PW2, PW3, PW4, PW5 who suffered injuries. To prove death prosecution did not have to produce a death certificate but a post mortem report which would help the court understand what the cause of death. It is not contended that Dr. Mbuko Ngali (PW17) is not a qualified pathologist. He formed the opinion that death was a result of excessive bleeding due to perforation injury caused by 'shrapnel'."

18. The Appellant's complaint is that the names of the persons who were recorded as having identified the body of the deceased were different from those who testified in court. The post mortem was P. Exh. 31. An examination of the report reveals at page 1 that the persons who identified the body to the pathologist were Silas Cheptirim and Peter Kiprono Cheptirim, relatives of the deceased. PW11 and PW13 were Josephine Cheptirim and Cyrus Amundanyi who stated that they were related to the deceased by virtue of being a sister and a brother respectively.

19. We note from the proceedings that in cross examination the Appellant did not challenge PW11 and PW13 for identifying the deceased, yet they were not recorded as having done so in the post mortem form. Furthermore, according to his evidence PW14 was the one who filled page 1 of the post

mortem form, and carried it to the pathologist. Simultaneously, he escorted PW11 and PW13 for the identification of the body. He is the one who should have been asked to give an explanation why he escorted different persons to identify the body from those he named in the report. We note that no such question was put to him in cross examination by the defence. The issue was also not raised before the trial court. Furthermore, upon analysing and evaluating the evidence in regard to this issue, we have no doubt that there was sufficient evidence to prove that the person identified to the pathologist before the post mortem was the same one who died soon after the blast, and the same one who is the deceased in this case.

20. The Appellant challenges the basis of the use of the word shrapnel by the doctor, in connection to the post mortem findings. We take this to be a challenge as to the basis of the pathologist's findings and consequently, the value to be placed on his findings. We find that the learned trial judge summarized his conclusion on the issue raised by the defence challenging the evidence of PW17 thus:

> " The doctor formed the opinion that death was a result of bleeding due to the perforation injury caused by a shrapnel. This shrapnel was produced as an exhibit no 30"
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> The learned trial judge continued to state:
>
> "It is not contested that Dr. Ngali Mbuko (PW17) is not a qualified pathologist. He formed the opinion that death was a result of excessive bleeding due to perforation injury caused by shrapnel.
>
> I do not find any good reason to fault the Doctor for using the term shrapnel instead of calling it a metal object. To do so would be an exercise in splitting hairs."

21. The English case of *Rep v Turner* {1975} QB 834 at page 840 it was held:

> " Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless."

22. The principle in that case suggests that the facts upon which doctor's opinion is based must be disclosed and proved in evidence. The importance of doing so being to aid the court make a determination as to the value of the expert opinion based on whether the expert's findings had a basis, whether he was misinformed, or whether he considered extraneous matter. Doctors and pathologists are experts.

23. On the issue of value, Sarkar's *Law of Evidence 15th Edition Vol. I*, has this to say in the opening remarks under the title Medical Opinion and its Value:

> " The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death."(emphasis ours)

24. The principle in the above excerpt shows the importance of the medical opinion as to, inter alia the nature of the injuries and the manner or by what instruments they were made. This makes it plain that in accessing the manner or instrument by which death was caused, PW17 was entitled to give his

opinion based on his examination and findings. And closer home, the Court of Appeal laid down the law on expert evidence in the case of *Parvin Singh Dhalay v Republic* {1997} KLR 514 thus:

> " We think we should at this stage say something about the opinions of experts when they appear to assist the courts. It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo v George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: - "Because this is the evidence of an expert, I believe it."
>
> " That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it."

25. However, when all is said and done, as was held by the Court of Appeal in *Juliet Karisa v Joseph Barawa & Another* Civil Appeal No. 108 of 1988, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds. What comes out clearing from the above cases and texts is that the opinion of experts, including medical opinion should be closely considered alongside the rest of the evidence in the case, and should not be rejected unless there is a cogent basis for so doing.

26. We have considered the evidence of PW17 alongside other evidence in this case. We find the information given to PW17 before he performed the post mortem at page 1 of the said report, which was written by PW14 was as follows:

> " Brief details of alleged offence: THE DECEASED WAS SHOT DEAD BY TERRORISTS WHO ATTACKED HER AT HER PLACE OF WORK AS SHE STOPPED THEM ENTRY AT THE GATE OF BELLA VISTA CLUB WHERE GRENADES WERE DETONATED."

27. From this brief it is clear that PW17 had information of the circumstances surrounding the death of the deceased, and what was suspected may have caused her death. The pathologist was given a scenario of firing of gun shots and detonation of grenades. It is also important to note that the post mortem examination by PW17 was carried out as part of police investigations, not only into the deceased death, but also as to what transpired and caused blasts at Bella Vista Hotel on the material day. With the

information he got, we are persuaded that the use of the word shrapnel was not his creation, neither was it farfetched, in all the circumstances of the case.

28. We have also examined the nature of the injuries PW17 found in the deceased body. He said that on examination, he saw a perforation in the left breast, which went through the chest and wall, through the heart and lung and lodged in the gullet. In the report, the pathologist wrote that "the perforation causes through the fourth intercostal space, through the pericardium through the right and left ventricle and exist the pericardium at the lower posterior aspect... where a metallic shrapnel measuring about 0.5x0.6x0.3mm is identified."

29. In the gullet he was able to recover a metal piece, which he described as shrapnel. When cross examined by Mr. Mwita for the Appellant, PW17 stated that 'the metal which I found inside the esophagus was a shrapnel. The piece of metal could not have propelled itself.' We find that there was basis for the use of the word shrapnel, first the written brief PW17 received before the post mortem, and second the circumstances in which PW17 recovered it in the body of the deceased, based on an analyses of the trajectory of the metal from the breast to the esophagus. The result of the findings by PW17 was that death was not caused by gunshots as suspected earlier, but by shrapnel from a grenade.

30. We also considered the other evidence adduced in the case and find that it confirms that there were blasts at the scene just before the deceased received the fatal injuries. This was the evidence of PW2, PW3, PW4, PW5, PW8 and PW9 all who testified of hearing at least two blasts at the scene of attack. In addition, PW9 testified that his vehicle which he had packed outside had all the screens shattered and tyres flattened. PW10, the crime scene officer testified of seeing several damaged vehicles outside Bella Vista Hotel, and collected two grenade safety pins (P. Exh. 16) and four grenade levers (P. Exh.15), a pistol (P. Exh.22), ammunition and magazine (P. Exh 24 and 25). Given this evidence we find the finding of PW17 was consistent with the evidence of witnesses at the place and time of blasts, and the findings of crime scene officers.

31. We analyzed and evaluated afresh the above evidence as well as that of the bomb expert, PW26. He testified that he received the items for examination and the exhibit memo form on 18th May, 2012. This was after the post mortem by PW17. And Mr. Mwita's submission that the metal recovered from the deceased had not been examined is true. After all, it could not have been examined by PW26 before PW17 retrieved it from the body. The metal itself (P. Exh. 30) does not seem to have been taken to PW26. However, we noted the explanation given by this witness as an expert. He stated that explosives inside the grenade are meant to propel the pellets of grenade, levers and safety pins. He explained that the grenades are designed to cause injury through pellets, that those near the blast receive blast injuries, those far would get injuries from the pellets, both of which can be fatal.

32. Upon analyzing and evaluating afresh the evidence on this issue, we agree with the learned trial judge's finding that the deceased was injured as a result of fragments from the grenades detonated at the entrance of the club, which was where she was working. We find that the metal found in her body must have been propelled by a detonated grenade, and the evidence adduced by the witnesses and the circumstances at the scene of the blasts, together with the findings of PW17, PW26 and PW10 all establish beyond any reasonable doubt that the deceased died of injuries arising from perforation by a piece of metal propelled by a detonated grenade. As to whether it was a shrapnel or piece of metal is beside the point. The important fact is that the circumstances are clear that it was propelled through a force, which in this case we find was a grenade.

33. On identification, Mr. Mwita urged that the evidence of PW2, the only eye witness who claimed to have identified the Appellant, was not corroborated by the other eye witnesses PW3, PW4, PW5, PW8

and PW9. He urged that the CCTV at the scene which the investigating officer said was blank, should have been produced in court as critical evidence. We see no value in producing a useless exhibit

33. Mr. Ondimu on his part submitted that there was no need for identification parade as PW2 identified the Appellant at the scene, which evidence was the beginning of the chain of evidence against him, and that the forensic evidence supported that finding.

35. There has been no doubt on the Law on identification and the weight to be given to the testimony of a single identifying witness to a criminal charge. In the well-known cases of *Abdallah Bin Wendo v R* 20 EACA 166 and *R v Turnbull* {1976} 3 ALL ER 551, the obligation on the part of the trial Court to assess and analyse the evidence of identification with meticulous care is well laid down.

36. The learned trail Judge while addressing this issue considered the evidence of PW2, how he saw a slim tall man in blue jeans refuse to be frisked by him at the entrance of the club, and shortly later saw him hurl an object towards the club's entrance, and concluded that he had identified the Appellant.

37. The starting point is that even the Appellant in his evidence admits being at the scene of the grenade detonation, and having received serious injuries that necessitated hospitalization. PW2 saw the Appellant, first as the one who declined to be searched and left without entering the club, and second only for him to re-surface ten minutes later with an object he threw towards the club entrance which detonated with loud blasting sounds. PW2 said that he saw the Appellant again at the hospital, where both of them were being treated for injuries suffered at the blast scene. PW2 saw the Appellant three times at close range in all the three times. At the club, PW2 was in-charge of frisking patrons both when Appellant declined, and the second time when he threw the object which exploded. The place was well lit, and identification was not made in difficult conditions.

38. PW2 was able to describe him and the clothing he was wearing. The clothing was retrieved by PW10 under the Appellant's bed in hospital, and fitted the description given by PW2. Additionally, the Appellant's physical features were described and we see nowhere where that description was challenged. We agree with the learned Judge's finding that the Appellant was properly identified by PW2 as one of two people he saw throwing objects at the club entrance that later detonated causing serious damage. We are satisfied that the identification of PW2 as one of the perpetrators of the crime was safe. We see no reason to interfere with this finding of fact by the trial judge.

39. Regarding DNA evidence, learned counsel urged that the persons who removed buccal swabs from the Appellant and those who swabbed the toothbrush did not testify, that only medical personnel could remove the same in line with Section 122(c) of the *Evidence Act*, but no such evidence was adduced. The toothbrush, P. Exh. 9 was sent to PW7 who testified that they are the ones who swabbed the toothbrush on the bristle during examination. Her evidence is clear it was not a swab of the toothbrush that was sent to them.

40. As for the buccal swab, PW30, the investigating officer in this case testified that he wrote a request to Coast General Hospital dated 17th May 2012, for the taking of buccal swabs from the Appellant pursuant to Section 122 of the *Evidence Act*. He testified that he accompanied the form to Coast General Hospital where in his presence the Appellant voluntarily signed the request as consent for the buccal swabs to be taken. The request was also signed by Irene, D. K. Ngethe the Chief Technologist both of Coast General Hospital, whose phone contacts are also given, and by PW30. He produced it as P. Exh. 42. At the bottom of the request were remarks by PW30 that the buccal swabs were voluntarily taken. Contrary to Appellant's counsel's submission, the buccal swabs were actually taken, and the legal procedure of taking them fully complied with.

41. Mr. Mwita urged that there was inconsistency in the chain of custody of the exhibits in Kenya, unlike the handling in USA by FBI, making them unreliable. This is a blanket allegation. We have nevertheless examined the evidence on the chain of custody in Kenya. Starting with the exhibits recovered from the scene of the grenade attack, PW10 recovered P. Exhs. 15, 16 being 4 grenade levers and 2 safety pins respectively, and fragments of pellets P. Exh 29; P. Exhs. 22, 23 and 24 being pistol, magazine and ammunition; P. Exhs. 25, 26 and 27 being the Appellant's jacket, safari boots and socks; and took swabs from the Appellant's hand; swabs from the safety pins, safety levers, pistol, magazine and ammunition respectively; and collected blood stains from pools of blood near the junction to Moi Avenue, near the TSS mosque and near a manhole. He handed over to PW30, the investigating officer all the exhibits.

42. PW30 testified that he directed PW24 who took the exhibits and an Exhibit Memo Form to PW21 at Government Chemist Mombasa, on the 17th May, 2012, to carry out DNA profiling and prepare his report and results of DNA. From his report, P. Exh. 34 PW21 received swabs of blood stains from 4 safety levers and 2 safety pins, the Appellant's clothes, hand swabs, buccal swabs and blood collected from pools of blood near the scene. (. P. Exhs. 15, 16, 22, 23, 24, 25, 26 and 27).

43. PW30 on the 16th May 2012 sent PW23 to deliver the safety pins and levers, the pistol, magazine and rounds of ammunition to CID Headquarters Nairobi, where he handed them over to PW18 on the 17th May, 2012. On the same day, PW18 handed some of these exhibits to PW19, who handed over the same to an FBI Agent, Mr. Schmidt who flew them to the US and delivered them to FBI Laboratory where PW7 and others analyzed them.

44. PW18 explained that he also at the same time handed over to PW19 exhibits recovered from the Pegassus bus in Nairobi by PW6, PW12 and PW29. These included the toothbrush, P. Exh. 9.

45. PW19 stated that the weaponry was sent to US through diplomatic bag on undisclosed date. That would explain the examination of part of the weaponry by PW26 after the same were received in his office from PW23 on 18th May, 2012. Specifically, those received were the 2 grenade safety pins, 4 grenade levers and grenade pellets or fragments, P. Exhs. 16, 15 and 29 respectively. Eventually on their return from US, PW25, the Ballistic expert was asked to examine the firearm, magazine and ammunition on 15th January, 2013.

46. From this long analysis we are satisfied that the chain of custody of all the prosecution exhibits was well documented and accounted for. There was no breach in the chain and their handling is clear.

47. Mr. Mwita has challenged the admissibility of the evidence of PW7 (the FBI Scientist) urging she gave testimonial hearsay evidence for reason she only analyzed processes undertaken and concluded by others who were not called as witnesses. He cited the case of Robert Young Vs United States of America District of Columbia Court of Appeals, and urged that PW7 was the witness in that case where her evidenc was rejected for being hearsay in circumstances similar to this case, which, he urged the witness admitted. The cited case was not supplied. He also relied on the case of *Cosmas Matee Kimanzi Vs. R* [2014] eKLR for the proposition that the Appellant's right to confront the biologist who analyzed and quantified the samples sent to the FBI labs were violated. He urged court to make an adverse inference against the prosecution for failing to call vital witnesses, citing *Ng'ang'a Vs. R.* [1981] KLR for that proposition.

48. Section 63 of the *Evidence Act* provides:

> " Section 63 of the *Evidence Act* which was relied upon by the learned counsel for the Accused persons provides as follows:
>
> "(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means

—

a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

> Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable."

49. We examined the evidence of PW7. She stated that she was the FBI Laboratory Supervisor, DNA Accumulative and Examiner with FBI for 12 years, with training in Bachelor of Science in Biology and Chemistry. She stated that her work involved reviewing cases, evidence and DNA testing after testing has been done, analyzing data and making comparisons. It has not been alleged that PW7 was not qualified for her role. It is alleged that she did not perform the examination herself and that therefore her evidence is testimonial hearsay.

50. From her evidence as given before the trail court PW7 performed her duty as per her job description. She was an Accumulative Scientist and Supervised staff working under her, and reviewed their tests and analyses, taking comparisons. The role of PW7 entailed confirming the results of her juniors by actively reviewing them. We find that she was actively involved in the testing and analyses to the extent we are satisfied that her evidence was direct, and not hearsay, and falls within the meaning of Section 63(2) (d) of the *Evidence Act*.

51. In any event, we are satisfied that the fact she reviewed, analyzed data and made comparisons of work done by staff working under her as their supervisor does not in any way belittle the importance of her contribution to the final result, neither does it discredit the results. We find the indictment against PW7 was not justified and that her evidence was properly admitted in evidence.

52. Mr. Mwita urged that there was no evidence to show who placed the bag exhibit 1 in which the toothbrush exhibit 9 was found, in the Pegassus bus. He urged further that no one said they took the brush for DNA analyses, thus that evidence was unreliable. Learned counsel also took a swipe at the learned for concluding that the Appellant's DNA was found in the firearm, magazine and bullets recovered at the scene of the grenade attack, yet PW21 gave no such findings. Further that the Scenes of Crime officers should have put the various scenes in this case in context, that PW22, the investigating officer failed to document the scenes and thus the prosecution case was not clear.

53. Mr. Ondimu urged the court to find that the evidence of extraction of the laptop and the tooth brush, as well as that of the swabs was given. He drew courts attention to the evidence of PW10 who testified that he took swabs from the Appellant at the hospital. He also drew our attention to the evidence of PW20 and urged that the Appellant was not only placed at the scene of the blast but was linked to same through DNA evidence. He urged that the trial court considered the question of the Appellant being an innocent passer-by before convicting him.

54. We have analyzed and evaluated afresh the evidence adduced on these issues and the learned Judges conclusions and are satisfied that there was direct evidence of PW20 that the Appellant placed a bag in the Pegassus bus, and then gave him a second one to keep for him. That was the unclaimed bag recovered in Nairobi and produced as P. Exh. 1. We have no doubt it was his bag given the DNA findings on the toothbrush, P. Exh. 9, which was inside that bag, and which confirmed he had used the brush. In addition, several items of personal nature were found in it as documented in the inventory, including wedding invitation and bus tickets in his names for journeys he had made severally between Nairobi and Mombasa.

55. Regarding the sentence, learned counsel for the Appellant, Mr. Mwita, urged that the court ruled that there was only one mandatory sentence, thus allowing himself to be held hostage by legislation and therefore failing to be guided by discretion and by the Muruatetu case. Counsel urged that being a first offender, the Appellant was entitled to a less harsh sentence.

56. On the sentence, learned counsel for the State Mr. Ondimu urged that the record bore witness to fact the Appellant was given an opportunity to give his mitigation, in respect of which his counsel on record stated that he was a first offender. Counsel urged that the circumstances of the case, the nature of the crime and the degree of injuries inflicted on the victims would warrant a confirmation of the sentence meted out even if the case arose after the Muruatetu case.

57. The punishment for the offence of murder contrary to Section 203 of the Penal Code is provided under Section 204 of same Act. That section provides for a mandatory death sentence. We are cognizant of the famous Supreme Court decision of *Francis Karioko Muruatetu & another v Rep* [2017 eKLR as consolidated, where the Court held and ordered as follows:

> " [41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.
>
> [42] Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:
>
> The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.
>
> Section 329 of the Criminal Procedure Code provides:
>
> The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
>
> [43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the

circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

Orders

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a. The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution*.

b. This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment."

58. We are guided. We note that the trial court received mitigation from the Appellant before sentence, in which his counsel urged that the appellant was suffering in custody; that he had not received proper medical care; and that he was a first offender. The sentence is challenged on the basis the learned trial Judge found the death penalty mandatory and imposed it. The Judge found:

> " The accused has been found guilty of the offence of murder which carries a mandatory death sentence. The court bears in mind that the grenade were hurled at club Bella Vista. The intention was to create mayhem, disorder, great harm, to both limb and property. This was a disturbing act that does not land (sic)
>
> itself to cries of mercy.
>
> The Accused is sentenced to suffer death as law provided."

59. We have also considered the circumstances of the case and the role played by the Appellant. We are satisfied that the learned judge exercised his discretion within the confines of the law. We find no reason to disturb that sentence.

60. The result of this appeal is that it fails in its entirety and is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR