Kilonzo v Republic (Criminal Appeal 10 of 2020)
[2022] KECA 757 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 757 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 10 OF 2020

HM OKWENGU, F SICHALE & S OLE KANTAI, JJA

JUNE 24, 2022

BETWEEN

TERESIA MWENI KILONZO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit,J.) dated 5th December, 2017 in HC.CRA No. 32 of 2015)

JUDGMENT

1. The appellant, Teresia Mweni Kilonzo was charged with 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 4th March 2015 at Dandora Phase IV, within Nairobi County, she murdered Maxwell Nyambane Moranga. She denied the charge and in the ensuing trial, Lesiit, J (as she then was) found her guilty of the offence and sentenced her "... to death as by law prescribed".

2. Aggrieved by the outcome of the trial, the appellant proffered the appeal before us.

3. On 7th February, 2022, the appeal came up before us for hearing. Learned counsel Mr. Otieno appeared for the appellant whilst learned counsel Mr. Njeru appeared for the State.

4. Whilst relying on the appellant's written submissions dated 27th November, 2022, Mr. Otieno's complaint was on the sentence. He was of the view that the appellant ought to have been convicted of manslaughter as she was heavily intoxicated and could not have formed the necessary mens rea to commit murder; that the deceased was not expected at the scene; that the reason for the appellant's drunken state was a celebration of her having obtained a job offer in Dubai, which put her at the brink of financial freedom and finally, that the appellant who had been in custody since 2015, was a young woman of 33 years.

5. In opposing the appeal Mr. Njeru, whilst relying on the respondent's written submissions dated 2nd November, 2021 pointed out that the appellant had admitted that the deceased died in her hands; that there was malice aforethought as after the appellant stabbed the deceased, she uttered the word "Nimemdunga" meaning, I have stabbed him; that intoxication is not a defence and further that it was evident that the appellant was fully alert as she had been drinking in Kariobangi and later moved to Dandora where she continued drinking. Counsel was however not opposed to the reduction of the sentence.

6. The appeal before us is a first appeal. Our mandate as a 1st appellate Court is to re-appraise and re-evaluate the evidence and come to our own independent conclusion. For instance, in *Okeno vs. Republic* [1972] EA 32, this Court stated thus:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions....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 conclusions. Only then can it decide whether the magistrate's findings and conclusions 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 ..."

7. Upon our consideration of the record, the oral and written submissions, the authorities cited and the law, we find that the appellant's conviction was properly founded. In the Memorandum of Appeal dated 27thJanuary, 2022, the appellant faulted her conviction on the basis that the Court erred in finding that she had malice aforethought; in rejecting the defence of intoxication and finally, that it erred in finding that failure to recover the murder weapon was not fatal to the prosecution case.

8. From the foregoing and from the submissions made before us by the appellant, it is clear that the appellant is not disputing that she killed the deceased, her defence being that she had no malice aforethought and further that she was intoxicated. However, after the appellant had stabbed the deceased, she bragged that she had stabbed him. It was therefore not a case of being remorseful for an unintended action.

9. In the impugned judgment, Lesiit, J. stated:

> " Malice aforethought can be inferred from the facts if it is shown that an accused person had 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.
>
> In this case, the 1st accused picked a knife from a basin, which had the utensils. She then opened the door, stabbed the deceased and then closed the door and announced that she had stabbed him. Soon after that she walked away from the scene. I find that the accused choice of a knife, her choice to stab the deceased on the chest all show that her actions were deliberate and calculated to cause grievous harm or death. The 1st accused leaving the scene
>
> without any care as to the condition of the deceased is proof of indifference for what she had done. The fact she declared that she had stabbed the deceased was further proof that she was aware of what she had done and that it could cause serious injury or death to the deceased.

I find that the prosecution had proved malice aforethought as against the 1st accused. None was proved as against the 2nd accused."

10. We agree. The appellant's action prior and after the stabbing of the deceased point to the fact that she had the necessary intent, the malice aforethought.

11. As regards the failure to produce the murder weapon, the trial court relied on this Court's decision of *Karani vs. Republic* [2010] I KLR 73 wherein it was stated:

> " The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".

12. We too are in agreement with the summation of the trial court's finding that failure to produce the murder weapon was not fatal to the prosecution case.

13. As regards the defence of intoxication to the extent that the appellant was not capable of knowing what she was doing, we find that nothing turns on this. The trial court narrated how the appellant was:

> " ... able to come home on her own. The amount of alcohol consumed did not prevent her from walking and from reasoning. She was able to hear the deceased knock on the door and even recognized his voice. Her senses were very much alert. She was swift. She immediately took the knife from among other utensils and struck the deceased. She later explained to PW5 and Akinyi why she stabbed the deceased. She was very clear to PW5 that she knew what she had done, and went ahead to justify her action."

14. The learned judge concluded:

> " Having considered the evidence in regard to the alcohol intake by the 1st accused, and her state of mind at the time of this incident, I find that the 1st accused was not under the influence as not to know what she was doing. I find that her senses were alert, that her moves were swift. Her actions were deliberate and well calculated. I find her mind was not under the influence of alcohol as to make her incapable of knowing what she had done or of knowing what she had done was wrong. Further to that, the accused person got herself intoxicated voluntarily. I find that the defence of intoxication does not apply to the case against the 1st accused."

15. In our view, the trial court considered the appellant's actions and rightly found that she was alert and in control of her senses. The defence of intoxication was therefore properly discounted by the trial court.

16. Accordingly, the appellant's appeal against conviction is devoid of merit. We hereby dismiss it.

17. As for the sentence, Mr. Njeru for the respondent was not opposed to its reduction. We note that in sentencing the appellant, the court stated:

> " The law is clear on the sentence that can be meted out to an accused convict under Section 203 of the Penal Code. It attracts a death penalty as prescribed under Section 204 of the Penal Code.

Until Parliament changes the Law, the court must honour the mandatory sentence prescribed and the law as it is.

Having considered all these factors, I find that the court has no discretion in the sentence to impose for the offence for which the accused was convicted. Accordingly, the accused is sentenced to death as by law prescribed."

18. Fortunately for the appellant, the discretion of the trial court was restored in the decision of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR wherein the Supreme Court of Kenya found that the mandatory nature of the death sentence is unconstitutional. The trial court found its hands tied inspite of the fact that the appellant was a 1st offender, a young woman below the age of 30 years and a sole breadwinner of her elderly mother, and sentenced her to death as that was the law then. In our view, we think that had the trial court had the benefit of exercising its discretion, it would have sentenced her to a term of imprisonment and not necessarily a sentence of death.

19. Given the above mitigating factors, we shall reduce the appellant's sentence of death to a term of 20 years imprisonment from the date of conviction (4thDecember, 2017).

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR