Lumira v Republic (Criminal Appeal 6 of 2020)
[2022] KECA 609 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 609 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 6 OF 2020

HM OKWENGU, F SICHALE & S OLE KANTAI, JJA

JUNE 24, 2022

BETWEEN

GEOFFREY AMIANI LUMIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (S.N. Mutuku, J.) dated 21st June, 2016 in HC. CR.C. No. 39 of 2014)

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Nairobi (Mutuku, J.) where the appellant Geofrey Amiani Lumira was convicted for the offence of murder. He was sentenced to suffer death in a ruling delivered on 21st June, 2016. It is our duty as a first appellate court to re-evaluate the evidence and make our own conclusions as was held in the oft-cited case of *Okeno v Republic* [1972] EA 32 where the predecessor of this Court pronounced on that mandate:

> " 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) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. [1957] EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] EA 424."

In the information the appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code particulars being that on 28th April 2014 at Muthurwa market in Nairobi he murdered Benard Otoro. The prosecution case was through the evidence of 9 prosecution witnesses and that evidence can be summarized as follows. The deceased was a security officer at Muthurwa market. On 28th April, 2014 he (the deceased) disagreed over an unstated matter with a man who went by a nickname Crate. The deceased, according to Julius Aswani Omwerema (PW2 – Aswani), attacked the man who was called Crate. Crate ran away but returned soon thereafter accompanied by several men including the appellant. The appellant, Crate and their accomplices accused the deceased of abusing his office where he would constantly assault people. They set upon him and Aswani saw the appellant pick up a piece of firewood which he used to hit the deceased 3 times on the head. The deceased fell down whereupon the appellant and the other attackers fled the scene leaving the deceased bleeding on the ground. The deceased was taken to Kenyatta National Hospital where he died 3 days after the attack. This witness identified the appellant at an identification parade as the person who had assaulted the deceased. He in any event knew him before the incident.

2. That narration of facts was confirmed by William Ndegwa Walwe (PW1 – Walwe) who, upon receiving information that the deceased had been attacked proceeded to the said hospital and found the deceased admitted with a serious head injury. The deceased could not talk or recognize him. The witness reported the matter at Kamukunji Police Station and attended post mortem conducted by Dr. Emily Adhiambo Rogena (PW8- the doctor).

3. Patrick Ekesa Ouma (PW3 – Ouma), brother of the deceased, visited the deceased at the said hospital where he found him in serious condition leading to death.

4. Bernard Washington Osiro Otito (PW4 – Otito) was present at the scene and he witnessed the deceased attack the man called Crate. He saw Crate leave and come back with other men including the appellant and he saw the appellant pick a piece of wood with which he hit the deceased 3 times on the head. The place was well lit with electric light. When the deceased fell down bleeding on the head the appellant and his accomplices fled the scene which was visited by police including Corporal Duncan Musule (PW7) of Muthurwa Police Post. The Police Officer who was on patrol upon receiving information visited the scene and found the deceased lying on the ground. He called his duty officer who visited the scene and the deceased was taken to hospital. This officer (PW7) met the appellant on 11th May, 2014. The appellant was well known to him and had been described to him. He arrested him and the appellant was later charged with the offence.

5. IP Isaack Kiama (PW5) of CID Office, Kamukunji Police Station, conducted an identification parade on 20th May, 2014 where Aswani and Otito identified the appellant as the person who had assaulted the deceased.

6. PC Joseph Njiru (PW6) arranged for post mortem of the body of the deceased which was carried out at the said hospital by the doctor after it was identified by relatives of the deceased who were prosecution witnesses.

7. The doctor, on post mortem, found on the scalp a large laceration on right side 4 cm running obliquely toward the centre of the head "…. with association with abrasion". Internally there was bruising underneath the scalp and on the skull there was a c-shaped flap measuring 27 cm stitched with nylon sutures. There was a flap of bone measuring 5 x 4 cm on the right side of head. There was a fracture on right side of skull extending to the back and towards base of the skull. There was extradural haematoma of the brain. There was fluid in the lungs. The doctor concluded that cause of death was due to head injury; fracture of skull due to blunt force trauma to the head. The doctor produced her report into evidence.

8. The last prosecution witness was Dr. Joseph Maundu (PW9) of Nairobi Surgery. He assessed the mental fitness of the appellant and found him fit to stand trial.

9. Upon evaluation the trial court found that there was a case for the appellant to answer and in a sworn statement the appellant, who was a loader at Muthurwa market stated that on the fateful day he was at work at the said market and in the evening, while on his way home to Kibera he found a crowd of people gathered on the road. He was curious and upon reaching the scene he found a security officer on the ground injured. He learnt that the security officer (the deceased) had been fighting. He (the appellant) left the scene and went home. He continued working on subsequent days until 16th May, 2014 when he was arrested by a police officer who had arrested him on previous occasions when he worked as a tout. This officer demanded a bribe but because he had no money he was taken to Kamukunji Police Station where he was detained and later charged. He denied that he had attacked the deceased using a piece of wood.

10. As we have seen the trial court considered the whole case and convicted the appellant.

11. In Supplementary Memorandum of Appeal filed for the appellant by his lawyers M/S E. Kinyanjui & Company Advocates seven grounds of appeal are raised to the effect that the trial court erred in law by finding that the appellant had been positively identified as the perpetrator of the offence; that crucial witnesses were not called; that there were material contradictions in the prosecution case; that the trial court did not consider the appellant's defence; that the trial court erred by finding that the prosecution case was proved to the required standard and, finally, that the sentence meted out was harsh and excessive in the circumstances of the case.

12. When the appeal came up for hearing before us on a virtual platform on 7th February, 2022 the appellant was represented by learned counsel Mr. Michuki while learned counsel Mr. Njeru appeared for the office of Director of Public Prosecutions. The appellant was present appearing from Kamiti Maximum Prison. Counsel for both sides had filed written submissions. In an oral highlight Mr. Michuki submitted that the appellant had not been properly identified as the person who committed the offence. According to learned counsel the identification parade was not properly conducted and the identifying witnesses did not properly identify the appellant. Counsel submitted that failure to call the man called Crate was fatal to the prosecution case as that man would have exonerated the appellant.

13. Mr. Njeru did not agree. He submitted that the case had been proved to the required standard where the appellant had been identified through recognition by Aswani (PW2) and Otito (PW4) who knew the appellant before the incident. According to counsel the attack was perpetrated at the market which was lit with bright electric lights. Witnesses gave a description of the appellant to the police and identification at the identification parade fortified the prosecution case on the issue of identification. Counsel submitted further that there was no dispute on cause of death and on failure to call the man called Crate counsel submitted that Crate was a suspect awaiting arrest. Counsel saw no inconsistencies in the case and asked that the appeal be dismissed.

14. In a rejoinder Mr. Michuki submitted that identification was not conclusive; that recognition did not apply in the circumstances.

15. We have considered the whole record, submissions made and the law and this is how we determine this appeal. The trial Judge found that the case was proved through direct evidence by two witnesses who were present when the deceased was attacked. Those witnesses (Aswani – PW2 and Otito - PW4)

placed the appellant at the scene and they testified how the appellant picked a piece of wood with which he hit the appellant repeatedly on the head leading to injuries from which he later died. Aswani stated:

> " Accused picked a piece of firewood and hit Otaro on top of the head and behind the head. Otaro fell down. He hit him two to 3 times. The firewood had been split and placed near the store.
>
> The accused is the only one who hit Otaro …."

Otito, who was present, witnessed the whole incident and reported to police stating that he knew the appellant as the person who had assaulted the deceased. These witnesses picked out the appellant at the identification parade. The appellant complains that there was no proper identification in the case. The trial Judge found that the appellant had been properly identified as the person who had assaulted the deceased. We agree with that finding and conclusions. The appellant was a person well known at Muthurwa market. He was known to Aswani and Otito who both worked at that market. They both saw him in the company of others and it was the appellant who picked a piece of wood which he used to hit the appellant deceased on the head. The scene was well lit with electric light and the witnesses gave a description of the appellant to the police. Identification was proved to the required standard in a case where the 2 witnesses recognized the appellant, a person they knew before, assaulting the deceased. Identification was through recognition and as was held by this Court in the case of *Reuben Taabu Anjononi & 2 Others v Republic* [1980] eKLR:

> " This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)."

Failure to call the man called Crate has been sufficiently explained as he was a suspect who had not been arrested. The grounds of appeal relating to the question of identification have no merit and are dismissed.

16. The charge facing the appellant was a case of murder and it was necessary for the prosecution to establish malice aforethought which is defined at Section 206 of the *Penal Code* to be:

> " 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."

The evidence before the trial Judge was that the appellant picked a piece of wood with which he repeatedly hit the deceased on the head. The doctor testified that the cause of death was head injury with subdural, extradural and subarachnoid haemorrhage with right temporal bone and base of skull fractures due to blunt force trauma to the head. The trial Judge concluded, and we agree,:

> " ....one does not hit another three times on the head with a piece of wood or any other weapon without intending to at least cause grievous harm to that person...."

The appellant picked a piece of wood with which he inflicted injuries to the deceased's head from which he died a few days later. That action showed that he had the intention of causing grievous harm to the deceased and malice aforethought was proved to the required standard.

17. The few inconsistencies such as how many people were present during the attack or whether the deceased could speak or communicate after the attack are irrelevant to the case and they do not go to the root of the case at all. It was proved to the required standard that it was the appellant who attacked the deceased; he inflicted on him injuries from which he died a few days later as per the doctor's evidence.

18. The appellant has raised, in the final ground of appeal, the issue of sentence which he says is harsh and excessive in the circumstances of the case.

19. The appellant was convicted on 12th May, 2016 and the sentence of death was pronounced on 21st June, 2016.

20. The *Penal Code* provides at Section 204 that a person convicted of murder under Section 203 of that Code shall be sentenced to death.

21. The Supreme Court of Kenya was asked in the case of *Francis Karioko Muruatetu & others v Republic* [2017] eKLR (this was after the said sentence meted against the appellant) to answer the question whether it was constitutional for Parliament to provide for mandatory sentence under the said Section 204. That court returned that it is unconstitutional for Parliament to do that as Courts should be free to consider particular circumstances of the case before Court and award an appropriate sentence. That Judgment has freed the courts to consider particular circumstances and award an appropriate sentence.

22. The peculiar circumstances in the case before the trial court were that the deceased was employed as a security officer to guard merchandise at Muthurwa market. According to witnesses including Aswani and Otito the deceased had the bad habit of assaulting people without good reason. On the particular evening the deceased had an argument with the man Crate whom he attacked. Crate left the scene and came back accompanied by men including the appellant. The appellant attacked the deceased as we have seen.

23. Upon being convicted, and in mitigation, the appellant through counsel pleaded for leniency; that the appellant, a first offender, was remorseful and was the sole breadwinner of his family and took care of his mother.

24. Considering all that we have said we do not think the sentence of death was an appropriate sentence in the case. We set aside that sentence and substitute thereof a sentence of 20 years' imprisonment.

25. The final orders we make are that the appeal on conviction fails and is dismissed. The appeal on sentence is allowed, the sentence of death is set aside and the appellant will serve an imprisonment term of 20 years' imprisonment with effect from the date of conviction.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR