Murunga v Republic (Criminal Appeal 182 of 2016)
[2022] KECA 626 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 626 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 182 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 8, 2022

BETWEEN

DAN SLAUS MURUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (Hon. R.N. Sitati J.) dated 25th February, 2016) in Criminal Case No. 27 of 2012)

JUDGMENT

1. The appellant, Dan Slaus Murunga, was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information against him stated that on the 22nd day of July 2012 at Shirere sub-location, Bukhungu location, Kakamega Township in Kakamega Central District within Western Province, he murdered Charles Kubai. He was sentenced to death upon conviction, the trial court noting that the only penalty provided in law for the offence of murder was the death sentence.

2. Aggrieved by his conviction and sentence, the appellant has filed the present appeal in which he raises, in his memorandum of appeal dated 8th March, 2021, two grounds of appeal. He faults the trial court, first, for failing to adequately evaluate the evidence tendered and disregarding the defence evidence. Secondly, for him to suffer death yet the death sentence was declared unconstitutional.

3. Learned Counsel, Mr. Mirembe, appeared for the appellant. He relied on the submissions dated 25th March 2021 which he briefly highlighted. He submitted that the evidence relied on by the trial court was not well evaluated and as a result, the court reached an erroneous decision thereby occasioning a miscarriage of justice.

4. It was submitted on behalf of the appellant in this regard that the trial court relied on the evidence of PW1 who stated that on the material day he had gone to visit the deceased after attending church; that he had seen the appellant engage in an altercation with the deceased and assault him; that the appellant had then left and returned, armed with a panga, with which he cut the deceased. It was further submitted that PW2 and PW3 did not witness the murder while PW5 stated that he saw the appellant assault the deceased and cut him with a panga after they had been involved in an altercation involving the issue of cows.

5. According to the appellant, the trial court had ignored the appellant's defence in which he had told the court that he was not at the scene at the time of the altercation. He was requested by some people to assist the deceased to the hospital after he had been beaten by his son. He was suddenly attacked by a group of people and injured while fleeing for his life and thereafter arrested by the police.

6. Regarding sentence, Mr. Mirembe submitted that the appellant was sentenced to suffer death yet the mandatory death sentence had been declared unlawful and unconstitutional by the Supreme Court in *Francis Karioko Muruatetu vs Republic* [2017] eKLR (Muruatetu). Learned Counsel urged us to quash the conviction and sentence or to remit it to the High Court for re-sentencing.

7. The State, represented by learned Prosecution Counsel, Ms. Manyal, opposed the appeal. Ms. Manyal submitted that all the ingredients of the offence of murder were established by the prosecution. The death of the deceased on 22nd July 2012 had been established by the evidence of four prosecution witnesses; the cause of death had been shown to be due to severe bleeding secondary to cut wounds following an assault; the appellant had been placed at the scene of crime; and malice aforethought had been established in that the appellant assaulted the deceased using a panga; and the nature of the injuries sustained by the deceased and the fact that the appellant first hit the deceased with a fist and then went back and brought a panga which he used to assault the deceased clearly showed the appellant's intent.

8. Regarding the identity of the assailant, it was submitted for the State that the incident took place in broad daylight. The appellant was accosted by members of the public when he tried to flee.

9. The present appeal raises two main issues for determination. The first is whether the evidence before the trial court was sufficient to found a conviction, particularly with regard to the identification of the appellant as the person who assaulted the deceased, thereby leading to his death. Should we answer this issue in the affirmative, then we shall consider the second issue- whether the trial court was correct in imposing the death penalty on the appellant on the basis that the only penalty provided for the offence of murder is the death sentence.

10. In considering these issues, we bear in mind that this is a first appeal. Our duty, as enunciated in the case of *Okeno v R* [1972] EA 32, is to re-evaluate the evidence and reach our own conclusion. In doing so, we are required to bear in mind that we have neither seen nor heard the witnesses, which the trial court had the advantage of doing.

11. The evidence presented before the trial court was as follows.

12. Evans Obiero Shivega (PW1) was at the home of the deceased at about 3.00 p.m. when the appellant went to the deceased's home and assaulted him with his fists. The appellant then went away but returned soon thereafter armed with a panga hidden in his clothes. The appellant removed the panga and, without uttering a word, cut the deceased on the hand and then ran away. As he was running away, he was arrested by some touts who also informed Kakamega Police Station of the arrest. The Police from Kakamega Police Station went to the scene and re-arrested the accused as they also took the deceased to Kakamega Provincial General Hospital for treatment. PW1 accompanied the Police when

they took the deceased to the hospital. The next morning, PW1 went back to the hospital to check on the condition of the deceased only to find that the deceased had died.

13. The assault on the deceased was also witnessed by PW5, Mohammed Mzee Juma. PW5 stated that on 22nd July 2012, he was outside the mosque at Sigalagala area when he heard people quarrelling. He heard the voice of the appellant, whom he knew well, asking for cows from the deceased. The appellant and the deceased were in the homestead where they both lived. PW5 saw the appellant remove a panga and cut the deceased on the hand before fleeing. The attempt to flee, however, was thwarted by members of the public who chased and arrested the appellant and handed him over to the police. PW5 testified that he knew that the cows, the cause of the quarrel, belonged to the deceased.

14. The post mortem examination of the deceased was carried out by Dr. Dickson Mchana (PW4) on 25th July 2012. PW4, who also produced the post mortem report, testified that the cause of death was severe blood loss secondary to cut wound following an assault.

15. Morris Luteshi, PW3 a brother of the deceased, was only informed of the deceased's death. He confirmed, however, that the deceased and the appellant used to live together in Kakamega.

16. The investigating officer, Number 86381 Cpl Phoebe Oluoch of Kakamega Police Station PW6, went to the scene with other officers where they found both the deceased and the appellant who were both nursing injuries. The deceased had a deep cut wound on the left arm while the appellant had multiple injuries on the face, feet as well as some scratches on the lower leg. The deceased and the appellant were both rushed to Kakamega Provincial General Hospital for treatment. The appellant was treated and discharged while the deceased was admitted. He succumbed to the injuries later that night. PW6 recovered the alleged murder weapon, a slasher, which was produced in evidence.

17. When placed on his defence, the appellant gave sworn evidence in which he denied committing the offence. He stated that he was hit on the head with fists when he was trying to assist the deceased who had allegedly been attacked by his son. He knew the deceased well as they used to work together. He did not know who had killed the deceased, and he denied knowing PW1 and PW5.

18. We have considered the evidence summarized above. It shows that the appellant was identified as the assailant by both PW1 and PW5. Both witnesses saw him attack the deceased with a panga. PW1 saw him attack the deceased first with his fists, then go away and return with a panga which he used to cut the deceased on the arm, an injury that proved fatal. The incident occurred at about 3.00 p.m., so there was no difficulty with identification of the appellant as the assailant. We find no reason to fault the trial court for believing the testimony of PW1. PW1 gave a detailed and credible account of the assault on the deceased. He knew the deceased, and he saw the appellant attack the deceased.

19. Like PW1, PW5 knew the deceased and the appellant. He knew that they lived together. He heard the appellant quarrel with the deceased over cows. He saw the deceased removed a panga and cut the deceased, then ran away. He was accosted by members of the public while trying to escape. There is no doubt that the appellant was properly identified as the person who assaulted the deceased with a panga, thereby leading to his death.

20. The question is whether the appellant caused the deceased's death with malice aforethought. The post mortem report indicates that the deceased died as a result of severe blood loss secondary to cut wound following an assault. Section 206 of the *Penal Code* sets out what amounts to malice aforethought for the purposes of establishing the offence of murder as being:

    i. n intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.

ii. 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly

iii. An intent to commit a felony.

21. From the evidence before us, the appellant initially assaulted the deceased with his fists, ostensibly in a quarrel over some cows. Had he left the matter there, we would not be here today, and the deceased would probably be alive. The evidence, however, shows that the appellant was not satisfied with the use of fists. He went, came back with a panga or slasher, as described by PW6, concealed in his clothes, and cut the deceased with it. In our view, the assault with the panga demonstrated an intent to cause the death of or grievous harm to the deceased, and thus malice aforethought was established by the prosecution, and the conviction of the appellant cannot be faulted.

22. The appellant has challenged the sentence of death imposed on him by the trial court. The challenge is based on the Supreme Court decision in the Muruatetu case. In this decision, the Supreme Court held that the mandatory nature of the death penalty for the offence of murder is unconstitutional. In the case before us, the trial court, while noting the mitigation offered on behalf of the appellant, stated that it had no discretion in sentencing the accused. It therefore imposed the death penalty which was then deemed as the mandatory sentenced for the offence. Following the decision in *Muruatetu*, courts now have a discretion in sentencing, subject to the guidelines set by the Supreme Court therein.

23. Under these guidelines, the court is required to consider, among other things, the circumstances of the case and any mitigation offered by the accused. In her submissions, learned Prosecution Counsel, Ms. Manyal, noted that the appellant had inflicted one cut on the deceased's arm, which resulted in his death. Before the trial court, Ms. Muleshe, in offering mitigation for the appellant, stated that he was a young man in the prime of life and a father of 2 children who were now living without his guidance and provision. Further, that he had learnt a great lesson during the time he had been in court, was remorseful and was praying for leniency.

24. We have the option of re-sentencing the appellant in light of the decision in Muruatetu, or remitting the matter to the High Court for re-sentencing. We believe, however, that there is sufficient material on record, in light of the appellant's mitigation before the trial court, to enable us to conclude this matter without the further delay that would be occasioned by remitting it to the High Court for re-sentencing.

25. While the appellant was a first offender and indicated that he was remorseful for his actions that led to the death of the deceased, he did assault the deceased with a panga, in an assault that, from the evidence, appears entirely unprovoked and premeditated. It is our view, therefore, that he merits a custodial sentence.

26. Accordingly, as noted earlier, we find the appeal against conviction to be without merit and we hereby dismiss it. We however, find the appeal against sentence merited. We accordingly set aside the sentence of death imposed on the appellant by the trial court and substitute therefor a sentence of 25 years imprisonment to run from the date of sentence by the trial court.

27. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 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