Kamande v Republic (Criminal Appeal 165 of 2019)
[2022] KECA 930 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KECA 930 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 165 OF 2019

AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

AUGUST 19, 2022

BETWEEN

ALBERNUS MICHAEL KAMANDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Muchemi, J.) delivered on 1st July 2014inCriminal Appeal No. 102 of 2010)

JUDGMENT

1. The appellant, Albernus Michael Kamande, was charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars of the charge were that on 15th December, 2010 at Olekasasi – B village in Kajiado North District, he murdered Samson Musembi Musyoka, the deceased. The appellant pleaded not guilty to the charge.

   The trial judge convicted and sentenced him death as by law prescribed after finding that the offence was proved to the required standard. The appellant was aggrieved by that decision and has appealed to this Court on the grounds set out in the amended memorandum which, in summary, are that: the High Court failed to consider that the case against the appellant was not proved beyond reasonable doubt; in relying on the evidence of the prosecution witnesses which was not credible and was contradictory; in failing to consider the appellant's defence; in failing to find that no malice aforethought was established; in failing to find that he was provoked and that he was intoxicated contrary to section 13(2) of the Penal Code; in meting out a punitive, harsh and excessive sentence; in failing to appreciate that the appellant acted in self-defence and therefore should not have been convicted of murder; and, finally, the learned judge was faulted for failing to comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code when she took over the proceedings.

2. When the appeal came up for hearing before us, learned counsel for the appellant, Ms. P. Irungu, had filed written submissions, which were highlighted during the hearing. Counsel submitted that the offense was not proved to the required standard due to shoddy investigations conducted by the prosecution; that the evidence of Florence Achieng' Okun'go, PW1, Lavender Awour Mumma PW8, and Pete,r PW10 did not prove guilt or proof of malice aforethought on the appellant's part; that the prosecution's evidence was incoherent and contradictory, and that the learned judge ought not to have relied on it; that the murder was not planned since the appellant did not come with a knife, and that secondly, it was the deceased who joined the appellant on a drinking spree; and that the appellant had no prior knowledge of the deceased's presence in PW1's house at the material time.

3. It was also submitted that malice aforethought was not proved; that the burden of proving that the appellant formed the intention to murder remained with the prosecution; that since the appellant was intoxicated, he was un aware that he was committing murder, and that, therefore, he did not have the capacity to form the necessary mens rea; that, furthermore, if the appellant committed the offence, it was because he was provoked by the deceased and acted in a moment of heated passion whilst being harassed, beaten and threatened by the deceased during a confrontation. Counsel relied on section 13 (4) of the *Penal Code*, which allows for intoxication to be taken into consideration when determining whether the person charged formed any intention and, in the absence of such intention, he cannot be found guilty of the offence. The cases of Boniface Muteti Kioko and Willy Nzioka Nyumu vs. Republic [1982-88] 1 KAR 157 and Nyakite s/o Oyugi vs Republic [1959] EA 322 were relied on in support of this proposition.

4. It was submitted that, if the prosecution or defence evidence is supportive of the appellant having been intoxicated, provoked or acted in self- defence, then it is the duty of a trial judge to direct himself or herself in accordance with the evidence; that failure to do so would result in a conviction for murder being set aside and substituted for manslaughter; that, furthermore, evidence of drunkenness need not necessarily come from an accused person himself, and that such evidence can come from prosecution witnesses, and that it cannot be disregarded because it emanated from the prosecution witnesses.

5. Next, counsel submitted on the defences of provocation and self- defence. Relating to the defence of provocation, counsel relied on section 207 and 208 of the Penal Code and submitted that the evidence showed that the deceased was provoked; that the two had disagreed, whereupon a confrontation ensued; that the deceased grabbed the appellant at the waist and said, 'niko kazi'; that the deceased then searched the appellant's pockets and took his mobile phone; that the appellant demanded his phone and the deceased ordered him to be quiet; that he beat him and dragged him outside; that, as a consequence, the appellant was subjected to provocation; and that the learned judge disregarded the appellant's evidence and wrongly concluded that provocation was not demonstrated. Counsel relied on the case of *Stephen Kipkeror vs. Republic* [2002] eKLR for the proposition that, if in the heat of the moment or passion, a person strikes another when insulted to a degree which would deprive an ordinary person of the power of self-control, an act of killing resulting from such striking could amount to manslaughter rather than murder.

6. The next complaint was the failure by the trial judge to comply with the mandatory provisions of section 200(3) of the *Criminal Procedure Code* when Muchemi, J. took over from Kimaru, J. on 14th May 2012 and omitted to read or explain the provision to the appellant.

7. Turning to the sentence, counsel submitted that the appellant was sentenced to death in accordance with section 203 of the Penal Code; that the sentence did not comply with the Supreme Court decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, and further, the sentence was

unduly harsh and punitive in view of the appellant having been intoxicated and on account of the other mitigating circumstances surrounding the deceased's death.

8. Opposing the appeal, Ms. Matiru, learned counsel for the State, submitted that she had filed written submissions. Highlighting the submissions, Counsel submitted that the offence of murder was proved to the required standard; that the death of the deceased was proved by the evidence of PW 1 and PW8, who witnessed the appellant grab a kitchen knife from PW 1 with which he stabbed the deceased on the right side of his chest; that, coupled with the evidence of Dr. Peter Muriuki Ndegwa, PW9, who performed the post-mortem and formed the opinion that the cause of death was haemorrhage due to chest cavity injury, and the recovery of the murder weapon with the deceased's blood, it was demonstrated that the appellant murdered the deceased.

9. It was further submitted that the deceased died from the appellant's unlawful act, which constituted the actus reus; that PW8 properly corroborated the evidence of her mother PW1, and confirmed that indeed the appellant committed the murder; that malice aforethought was proved when the appellant rushed out of the room, grabbed a knife and returned to stab the deceased in the chest; and that, at all times, his intention was to cause grievous and premeditated harm to the deceased. On the sentence, it was submitted that the conviction was safe, but that should the Court deem fit to commute the sentence, the prosecution did not have any objection.

10. This is a first appeal, and the duty of this Court was outlined in the case of *Kamau vs. Mungai* [2006] 1KLR 150 where it was held that, in a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions, bearing in mind that we have not seen or heard the witnesses; and in the case of *Njoroge vs. Republic* [1987] eKLR 19 where it was emphasised that the Court is under an obligation to lay out the evidence as a whole and reach its own independent conclusions.

11. Having regard to the above criterion, the issues for our consideration are:

    i. whether the trial judge complied with section 200 of the Criminal Procedure Code when she took over the proceedings;

    ii. whether the offence was proved beyond reasonable doubt;

    iii. whether the prosecution's evidence was inconsistent and contradictory;

    iv. whether the appellant's defence of intoxication and provocation were taken into account; and

    v. whether the sentence was harsh and severe.

11. Beginning with the issue as whether the trial court failed to comply with the requirements of section 200 of the Criminal Procedure Code when Muchemi, J. took over from Kimaru, J. on 14th May 2012,we have considered the record, which clearly shows that on 18th July, 2012 the counsel on record for the appellant, Mr. Tunya, made an oral application in the following terms:

> " ...the defence wishes to proceed from where Judge Kimaru reached, we shall not be recalling any witness."
>
> Mr. Kimanthi
>
> We agree with the defence's proposal. We have five more witnesses to call.
>
> Court
>
> Case to proceed from where Kimaru, J reached."

12. It is therefore evident that, following the takeover of proceedings by Muchemi, J. the appellant's counsel confirmed that the defence, which comprised the appellant, wished to proceed from where Kimaru, J. reached. ccordingly, the trial court complied with section 200 of the Criminal Procedure Code, and we find that this ground is without merit.

13. Turning to the next issue as to whether the offense was proved beyond reasonable doubt, section 203 of the Penal Code sets out the pre-requisites of the offence of murder as: i) the death of the deceased and the cause of the death; ii) that the appellant committed the unlawful act which caused the death of the deceased; and iii) that the appellant had malice aforethought as required by section 206 of the Penal Code when the offence was committed.

14. In the instant case, the fact of the deceased's death is not in dispute. The post-mortem report of Dr. Peter Ndegwa PW 4 specified that the deceased died from injuries to the chest, and that the cause of the death was haemorrhage due to a chest cavity injury.

15. As concerns proof of malice aforethought, in the case of *Republic vs. Tubere S/O Ochen* [1945] 12 EACA 63, it was explained that:

> " An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before during and after the attack".

16. To determine whether malice aforethought was in fact established will require that we re-evaluate the evidence. Florence PW 1 testified that she resides in Olekasasi – B village in Kajiado County; that she is a businesswoman who sells fish and chang'aa; that on 15th December 2010, while she was in her house carrying on with her business, the appellant came in and requested for some chang'aa. After she sold it to him, the deceased also came in and after a while the appellant ordered a bottle which he shared with the deceased. She stated that while selling her fish, the appellant rushed to where she was, picked a knife and ran back into the house; that she sent her daughter Lavender, PW8, to check and see what was happening as she needed the knife to continue preparing the fish; and that Lavender PW8 found the appellant stabbing the deceased and rushed back to her screaming. When she went into the house, she saw the appellant about to stab the deceased again. She stated that she pleaded that the appellant give her the knife which he eventually returned to her; that the deceased was alive, but not talking. When she asked the appellant why he had stabbed the deceased, he answered that he wanted the deceased to give him back his phone.

17. PW1 testified that they found a taxi to take the deceased to the hospital, but that on arrival, he succumbed to his injuries and died; that, thereafter, they went to the police station to report the incident. Lazarus Njuguna PW6 received the report of the incident.

18. Lavender PW8, a student aged 14 years old, testified that the appellant and the deceased were in the house drinking chang'aa; that she saw the appellant leave the house and come towards the place where her mother was preparing fish; that he took the knife she was using and returned to the house; and that her mother told her to go and retrieve the knife from him so that she could continue with her work. As she stood at the door, she saw the appellant had placed the knife on the seat behind him; and was demanding that the deceased return his phone. At that point, the deceased raised his hands in surrender because the appellant was approaching him with the knife; and that, before the deceased could utter a word, the appellant stabbed him with the knife in the chest. She then called out to her mother and informed her of what had happened. On cross-examination, she stated that she did not see the phone that the appellant referred to.

19. PW 9, Peter Kinyua Igweta was the Investigating Officer. He reiterated the evidence of PW1 and PW9.

20. PW4 was Dr. Zephania Kamau a police surgeon in Nairobi Area, who examined the appellant. He stated that the appellant did not have any physical injuries, and that he was of sound mind. Dr. Ndegwa PW 9, the pathologist, examined the deceased body that had a stab wound on the chest that penetrated the right side of the chest towards the middle the body; and that the right lung was lacerated and in the right chamber of the heart cavity, there was about 3 litres of blood. The doctor formed the opinion that the cause of death was haemorrhage due to chest cavity injury.

21. Paul Waweru Kangethe, PW5 was the government chemist who examined the knife to determine the blood group and confirm that it matched with the blood sample submitted for his analysis; that the findings were that the kitchen knife stained with human blood group B and the blood sample indicated that the deceased was group B. In his opinion the blood stains on the knife matched the blood group sample and indicated that it belonged to the deceased.

22. In his defence, the appellant stated that he was a casual labourer working in a quarry; that he entered PW 1's house and ordered for some chang'aa; and that, a short while later, the deceased came in, greeted him and asked him to buy him a drink; that the appellant obliged and ordered a glass of chang'aa for the deceased; that, suddenly, the deceased held the appellant's belt and said: "Niko Kazi" meaning I am on duty. He then searched his pocket and took his mobile phone; and that when he demanded that his phone be returned, the deceased ordered him to keep quiet, beat him up and dragged him out of the house. PW 1 was cutting vegetables outside the house using a knife. The appellant says he stood up and asked her to give him the knife, she refused to do so; that he saw the deceased prepare to remove a gun from his waist; and that that is when he picked up the knife and stabbed the deceased; that as he fell, the appellant pushed him into the house and made him sit on a chair; and that, thereafter, he returned the knife to the table. He then noticed that the deceased was not talking, and that his head had dropped. He stated that he stabbed the deceased because he was harassing and beating him and had intended to shoot him. He believed that the deceased would have shot him if he did not defend himself.

23. The evidence is clear that the deceased met his death after he was stabbed with a knife in his chest. The evidence of PW1 and PW 8 was that the appellant grabbed a knife from PW1 who was cleaning fish with it. When PW8 went to retrieve the knife, she saw the appellant stab the deceased. The appellant removed the knife from the deceased's chest while PW 8 was watching. It cannot be gain said that, when the appellant rushed to the table where PW1 was cleaning fish to grab the knife and used it to stab the deceased, he must have known that the act of stabbing the deceased in the chest with the knife would have resulted in the deceased's death. As a consequence, we are satisfied that malice aforethought was established in accordance with section 206(b) of the Penal Code; that the appellant conviction was watertight and the offence of murder proved beyond any reasonable doubt.

24. The appellant admitted to having stabbed the deceased. He claimed that he stabbed him in self-defence because the deceased had threatened to shoot him. In his submissions, he also claimed that the deceased provoked him. In his grounds of appeal to this Court, he complained that the learned judge did not also take into account that he was intoxicated, and that was not aware of what he was doing at the time that he stabbed the deceased.

25. This brings us to the next issue as to whether the trial court took into account the appellant's defence. Indeed, the judgment shows that the learned judge considered the appellant's defence. And in considering the question of provocation, the judge concluded thus:

> " The deceased in this case did not do anything to provoke the accused in order to justify the use of a knife on him, the holding of the accused trousers and search in his pocket if it

happened at all was not sufficient to provoke the accused and to justify his cruel act on the deceased, accused was of sound mental status and had not been intoxicated, it is important to note that the accused did not raise the defence of intoxication."

26. We agree. Our analysis of the testimonies of both PW1 and PW8 does not disclose that the deceased had done anything to provoke the appellant. To the contrary, it was the appellant who kept demanding that the deceased return his phone. Further, there is nothing in the evidence that demonstrated the presence of a phone that was taken from him by the deceased. As was the trial judge, we too are satisfied that the defence of provocation was not established. This ground is unmerited and, accordingly, fails.

27. On the defence of intoxication, the trial judge observed that this defence was not raised during the trial. Though the appellant claims that the prosecution witnesses attested to his having been intoxicated, we have carefully considered the evidence, and besides the testimony that PW1 sold him chang'aa which he shared with the deceased, neither PW1 nor PW8 stated that he was intoxicated. Therefore, not only was the defence of intoxication not canvassed, there is nothing in the evidence that pointed to his having been intoxicated at the time he stabbed the deceased. This ground also fails.

28. Finally, on the contention that he stabbed the deceased in self-defence, the trial judge had this to say:

> " In the case before me the burden is on the accused to offer a reasonable explanation to justify his behaviour. The explanation that the accused has given herein that he was defending himself is not convincing. The accused rushed outside the house, picked the knife and kept it on the chair behind him. He continued to demand his phone in the presence of PW 8 who stood at the door. He then picked the knife and stabbed the deceased who was standing up in surrender. There is no evidence that the deceased had taken the phone of the accused or that he was armed with a gun or any other weapon to justify the act of the accused in self-defence..."

29. Having re-analysed the record, we find nothing to support the appellant's assertions that he acted in self-defence when he stabbed the deceased. We also find nothing to support the allegation that the deceased had a gun on his person, or that he was about to shoot the appellant. Of pertinence, however, is that, before the deceased was viciously stabbed by the appellant, he had raised his hands as a sign of surrender. Having done so, he could not have been a threat to the appellant or acted in a manner that would have caused the appellant to have stabbed him in self-defence. In the circumstances, the only conclusion that we can reach is that the appellant's action in stabbing the deceased was cold blooded and premeditated, and we so find. Similarly, this ground also fails.

30. On the issue that the evidence of PW1 and PW8 were inconsistent and contradictory, this is what the learned judge had to say:

> " The court found PW1 and PW8 to be credible witnesses, their corroborated testimonies were in harmony with the defence of the accused on how and why he stabbed the deceased, and what weapon he used... PW1 and PW8 created an impression to the court that they were straightforward witnesses and persons of integrity thereby passing a test of credibility".

31. The evidence is clear that PW1 and PW8 were crucial witnesses to the events as they unfolded. Our re-examination of their evidence does not lead to a finding that it was contradictory or inconsistent. In our considered view, their evidence was cogent and credible, and did not in any way dislodge the prosecution's case. This ground is lacking in merit.

32. All told, as was the High Court, we too are satisfied that the totality of the evidence proved that the appellant committed the offence to the required standard which rendered the conviction safe.

33. The final ground of appeal was that the trial judge sentenced the appellant to death as by law prescribed, which the appellant contends was harsh and severe; and that had the trial court applied the threshold requirements set out in Francis Karioko Muruatetu (supra), the court would have imposed a more lenient sentence. For her part, Ms. Matiru had no objection to substitution of the death sentence for a custodial sentence. As such, we are minded to allow the appeal on sentence, interfere with the death sentence and impose a custodial sentence.

34. In sum, we uphold the conviction, and substitute the sentence of death for a custodial sentence. On this premises, we order that the case be remitted back to the High Court for custodial resentencing.

35. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A.K. MURGOR

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K.I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR