**Agunga & another v Republic (Criminal Appeal 181 of 2016)**
**[2022] KECA 1134 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1134 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 181 OF 2016**

**PO KIAGE, M NGUGI & F TUIYOTT, JJA**

**OCTOBER 21, 2022**

**BETWEEN**

**GEOFFREY ODHIAMBO AGUNGA ..... 1ST APPELLANT**

**NAFTALI OUMA ODAWO ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Homabay (Majanja, J.) dated 6th May, 2016 in HC.CR.A NO. 32 OF 2014)***

## JUDGMENT

1. On 26th March 2012 a chilling killing took place that traumatized an innocent family in Kakelo Dudi Sub-location, Kakelo location in Rachuonyo South District within Homa Bay county. At around 1am, the family of John Ong'ondo Marianja (the deceased) were jolted out of their sleep only to witness the macabre killing of their father by people whom they knew as neighbours. According to the testimony of Emmanuel Ochieng Ong'ondo, PW1, the son of the deceased, the appellants, jointly with others broke into their home. He was woken up by screams from the deceased who was shouting in Dholuo "Boy, Boy, give me water....". As he ran from his bedroom to rescue his father, he was struck twice on his left shoulder with a machete by the 1st appellant. He was able to identify him as the one who struck him from light emanating from the torch the 1st appellant was carrying as it reflected on the walls. He tried to run away but the 2nd appellant poured petrol on him with the intent to burn him. It was at this juncture that he positively identified him, and also saw the deceased run from his bedroom into his little brothers' room. The deceased was visibly injured as there was a blood trail on the wall as he tried to support himself.

2. When PW1 entered his little brothers' room, he saw the deceased lying in a pool of blood writhing in pain while still begging for water. He also noticed that the deceased had deep cuts on his head. By

that time the attackers had left so he ran out of the house to seek for help while his step mother gave the deceased some water. PW1 went to George Osire and Tom Osire but by the time they got back to house, the deceased had breathed his last. The police eventually arrived and interrogated them PW1 directed them to the appellants' homes where they were promptly arrested.

3. Emmanuel Ochieng Otieno, PW3, and Humphrey Odira, PW4, sons of the deceased who were minors at the time, corroborated the testimony of PW1. The minors were sleeping in the room which the deceased ran into with the appellants in tow. That is when they both recognised the appellants as the assailants who, carrying torches, followed the deceased into the room and continued butchering him remorselessly in their presence. PW3 heard them speaking in Dholuo saying "today we have found you".

4. Stephen Ochieng Marianja, PW5, a brother and neighbour of the deceased's, heard screams from the deceased home on the fateful night. He testified that he saw the appellants at the door way of the deceased's house and the 1st appellant was shouting in Dholou "Kauino watieke" meaning "we have finished him." Geoffrey Ochieng Ong'ondo, PW6, a son to the deceased perhaps that there was a land dispute between the deceased and one Tabitha, which was the subject of a court case in Oyugis. It was said that the land belonged to the 2nd appellant's father.

5. The extent of the injuries inflicted on the deceased were attested by Dr. Peter Ogola, PW2. He testified that the deceased had 8 cut wounds on the head, ranging from 8cm to 12 cm in length which created a blood cavity on the skull. He had several other cut wounds; a bone deep cut on the upper right arm; one on the left lower arm; one on the right shoulder; one on the collar bone; and one on the lower back that had perforated his abdominal cavity causing spillage of the large intestines. It was his conclusion that the cause of death was severe head injury and severe haemorrhage resulting from skull fractures and multiple lacerations from the attack.

6. Inspector Damary Ombima, PW 8, testified that the motive of the killing was a land dispute between the deceased and some clan members. She further corroborated PW1's testimony that the appellants and other suspects were arrested on the night the crime was committed. After, further investigations, the appellants and another, who is now deceased, were arraigned before the High Court at Homabay and were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code.

7. In a ruling delivered on 26th October 2015, Majanja, J. held that after hearing the 8 prosecution witnesses, he found that the appellants had a case to answer and placed them on their defence.

8. The appellants, testified as DW1 and DW2. They gave sworn statements and both denied committing the crime or having any grudge with the deceased concerning any parcel of land. They both stated that they were shocked that police showed up at their door steps in the middle of night and arrested them. They only found out the reason for their arrest upon arrival at the police station.

9. Jackton Agweno Achieng, DW3, a former Assistant Chief testified in defence of the appellants. He testified that during his tenure as an assistant chief no land dispute ever existed between the appellants and the deceased. Nor had he heard of any by the time he was testifying. Both Juliana Auma Oindo, DW 4, a village elder, and Nicodemus Odawa Akello, DW5, corroborated the assertion that no dispute of any kind existed between the appellants and the deceased. DW5 who is the father of the 2nd appellant, also stated that he was together with his son until 9.00pm on the night before the murder.

10. In a judgment delivered on 6th May 2016, Majanja, J. held that the prosecution proved beyond reasonable doubt that the appellants broke into the deceased's house and killed him. He found the appellants' guilty of murder and sentenced them to death.

11. Aggrieved by that judgment, the appellants preferred the instant appeal, raising 5 grounds, which are that the judge erred in law and fact by;

    a. Failing to find that the prosecution did not to prove its case beyond reasonable doubt.

    b. Relying on the evidence of identification which was not safe.

    c. Basing the conviction on inconsistent evidence of a non-existent land dispute.

    d. Failing to consider the appellants defence and the evidence tendered thereof.

    e. Sentencing the appellants to death whilst its mandatory nature was declared unconstitutional.

12. At the hearing of the appeal, learned counsel, Ms Anyango Ida Rayner, was on record for the appellants while the State was represented by Beatrice Manyal, the learned Prosecution Counsel.

13. It was submitted that PW1, who was the star witness, did not witness the appellants attack the deceased. While he claimed to have recognised the appellants as his attackers, he further admitted that it was very dark and the light from the torches was not very bright. This, according to the appellants, rendered PW1's identification unsafe and thus the learned judge erred by relying on it.

14. It was further contended that PW3's testimony contradicted that of PW1 and was therefore unreliable. At the tender age of seven years, he must have confused the version of events or what he thought he saw. That he claimed that the 2nd appellant is the one that hacked PW1 while PW1 testified that the 1st appellant is the one who attacked him. PW3 also testified that he ran out of the room in fright which casts aspersions on his entire testimony.

15. During cross examination, PW4 confirmed the presence of many people in the room on the fateful night thus leading to the conclusion that in the midst of many people, it was possible that the minor may not have positively ascertain who attacked the deceased.

16. PW5 and PW6 similarly could not have properly identified the appellants on the night of the attack as they were far from the deceased's home. PW7, the arresting officer failed to find the murder weapons. Further, PW8 testified of an alleged land dispute between the deceased and some clan members. However, she did not tender any evidence in support of the allegation. Therefore, the learned judge ought to have cautioned himself against relying on these testimonies. The appellants relied on the cases of *Wamunga vs. Republic*(1989) KLR 424 and *Daniel Kipyegon Ng'eno vs. Republic*[2018] eKLR.

17. It was submitted for the appellants that they had raised an alibi to the effect that they were nowhere near the scene of the crime. They also had witnesses who testified to the non-existence of a land dispute as alluded by the prosecution. However, the learned judge erred by disregarding that testimony. It was argued that the prosecution failed to prove its case beyond reasonable doubt.

18. Finally, since the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court in *Francis Kerioko Muruatetu & others vs. Republic*[2017] eKLR, we were urged to give the appellants a term sentence should we uphold the guilty verdict since they have been incarcerated since 26th March 2012.

19. In reply, the respondent contended that the prosecution proved its case beyond reasonable doubt. The elements of the offence of murder, as held in *Anthony Ndegwa Ngari vs. Republic*[2014] eKLR, were proved; the death of the deceased was proved; that the appellants were the ones who committed the crime; and that they had malice aforethought. PW1 positively identified the appellants as part of the 10-man gang that broke into their home. His evidence was corroborated by PW3 and PW4 who were sleeping in the room where the deceased was ultimately butchered. They all put the appellants at the

scene of the crime and identified them as the attackers. Furthermore, their testimonies were credible and were not shaken in cross-examination. As regards the inconsistencies pointed out by the appellants, they were minor and did not affect the overwhelming evidence presented by the prosecution.

20. The non-recovery of the murder weapons did not diminish the guilt of the appellants. On the identification of the appellants, as the learned judge correctly held, the same was by recognition which is more reliable. It was not in dispute that appellants were neighbours of the deceased. Malice aforethought was proved based on the injuries sustained by the deceased. The respondent relied on the case of*Daniel Muthee vs. Republic Criminal* AppealNo. 218 of 2005 (UR). The allegation that the learned judge did not consider the appellants' defences was untrue as they were considered but found to be unmeritorious.

21. Regarding sentence, the respondent contended that the appellants committed a gruesome murder in a heinous manner and they do not seem remorseful. Therefore, they ought to suffer the full force of the law. We were urged to dismiss the appeal.

22. We have considered the record of appeal as well as submissions made by Counsel. We appreciate our role as a first appellate Court as was stated in *Reuben Ombura Muma & Another vs. Republic*[2018] eKLR;

> " This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

23. The appellants argue that the prosecution failed to prove its case beyond reasonable doubt. They claim that there were too many glaring inconsistencies on the testimonies of the prosecution witnesses to warrant a guilty verdict. The appellants were not safely identified as the house was dark with very little lighting. For the Court to satisfy itself that the prosecution proved its case beyond a reasonable doubt, we must establish whether the ingredients for murder were proved. In the case cited by the respondent of *Anthony Ndegwa Ngari vs. Republic*[2014] eKLR the ingredients were listed as follows;

> " For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought."

24. From the evidence tendered by the prosecution, it is clear that the appellants were among the 10-man gang that broke into the deceased home and murdered him in cold blood. PW1 placed them on the scene of the crime while PW3 and PW4 witnessed them butchering the deceased in their bedroom. PW1 also testified to witnessing the injuries inflicted on his father and how he later died while writhing in pain in the pool of blood that oozed from the injuries he sustained. The cause of death was ascertained by PW2 as severe head injury and severe haemorrhage resulting from skull fractures and multiple lacerations from the attack.

25. Although the attack was executed in the dead of night, PW1, PW3 and PW4 all testified that the light that shone on the walls from the torches carried by the appellants assisted them to positively identify them. It was also not in dispute that the appellants were neighbours of the deceased hence were easily recognized by PW1, PW3 and PW4. Further, the appellants acknowledged that they went to the same school with PW1. From the foregoing, we too arrive at the learned judge's conclusion that the

identification was based on recognition, which is more reliable. This Court has so held in many cases including *Hashon Bundi Gitonga vs. Republic*[2016] eKLR where it was stated;

> " It is trite law that 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. See: Anjononi & Others v Republic [1980] KLR 59."

26. Turning to malice aforethought, it is defined in Section 206 of the *Penal Code* as;

    (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.

27. We find that the learned judge properly applied the foregoing section and implied malice on the appellants based on the injuries they inflicted on the deceased. The 8 cuts on the head and the perforation of the abdomen that led to the spillage of his intestines leads to one conclusion that the appellants had intent to kill. Even though the prosecution did not clearly establish motive, the same is not necessary in order to prove murder. We made this clear in *John Mutuma Gatobu vs. Republic* [2015] eKLR;

> " There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

28. The appellants contend that the learned judge based his decision on irrelevant matters and failed to pay due attention to the glaring inconsistencies in the prosecution's case. We find that the learned judge considered relevant issues and came to a proper conclusion, which is the guilt of the appellants. The learned judge conducted voir dire on the minors and correctly established that they were possessed of sufficient intelligence and well-capable of testifying. Their testimony was cogent and credible and corroborated that of PW1. The inconsistencies as highlighted by the appellants, were inconsequential and did not go to the root of the prosecution's case. They did not cause any prejudice to the appellants nor weaken the prosecution's case. Their existence is but a reflection of differences inherent in human observation, recall and expression not a suggestion of falsehood. We reiterate what the court stated in *Joseph Maina Mwangi vs. Republic* CA No. 73 of 1992;

> " "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

29. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. See *ERick Otieno Meda vs. Republic* [2019] eKLR. However, in the present case the appellants defence consisted of mere denials and the alibi defence did not raise any possibility of truth. In the end, it did not shake the overwhelming evidence tendered by the prosecution that they were at the scene of crime perpetrating horrific murder. We therefore find that the learned judge appropriately rejected it.

30. Finally, even though the Supreme Court in *FRancis Karioko Muruatetu & others vs. Republic*(supra) declared the mandatory nature of the death sentence unconstitutional, it did not take away the discretion of the courts to mete it in deserving cases. And this is such a one. The appellants terrorized an entire family and subjected them to the direct witnessing of the blood curdling murder of their father. They did not have the slightest compassion or consideration for the little children, as they butchered their father in their presence, thereby traumatizing them, possibly for life. All these are aggravating factors that are not lessened by any mitigating circumstances. We are thus satisfied that the death sentence is proper and reject the appellants plea that we reduce it. It was fully deserved.

31. This appeal lacks merit and we dismiss it in its entirety.

Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 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**

**Signed**

**DEPUTY REGISTRAR**