Mutwiri v Republic (Criminal Appeal 60 of 2017)
[2022] KECA 1088 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1088 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 60 OF 2017

W KARANJA, PO KIAGE & J MOHAMMED, JJA

OCTOBER 7, 2022

BETWEEN

DENIS MUTWIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Wendoh, J.) dated 13th April 2016 in H.C. Criminal Case No. 77 of 2012)

JUDGMENT

1. Dennis Mutwiri, (the appellant) 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 6th November, 2012 at Karemamuthwa Village, Kambereu Sub-Location, Giaki Location in Imenti North District within Meru County he murdered Nathan Kathurima Mugambi (the deceased). The appellant was tried before the High Court sitting in Meru, convicted of the offence and sentenced to death.

2. The evidence adduced by the prosecution in the High Court was that on November 5, 2012, Francis Mutegi Karekethi (PW1) was walking home from his place of work at around 11 p.m. in the company of the appellant who was his neighbour and the deceased who was the appellant's cousin. PW1 testified that the appellant told the deceased that it was he (the deceased) who had taken the appellant's wife back to her parent's home whereupon the deceased and the appellant started arguing. PW1 testified that he advised the deceased and the appellant to go to their respective homes and he continued walking; that he then heard the deceased tell the appellant "Mutwiri, you have stabbed me" and saw a stab wound on the deceased's neck; there was moonlight and the deceased and the appellant were standing two metres away and he was able to see them well.

3. It was PW1's further testimony that he went towards the deceased while the appellant walked ahead of PW1, and subsequently turned on PW1 threatening to stab him the same way he had stabbed the

deceased. The appellant chased PW1, taunting him and inquired whether he, (PW1) wanted to feel what the deceased had felt when he was stabbed.

4. PW1 further testified that he ran away and went to seek refuge in a nearby home where he found a young man who escorted him back to the road. PW1 then called the area Chief, Japheth Kibui Jonathan, (PW2) who was the appellant's father, to get a vehicle to take the deceased to the hospital. When PW2 arrived, he and PW1 proceeded to Giaki Police Station to report the incident. Before the incident there had been no disputes between him, the deceased and the appellant.

5. PW2 testified that at about 1 a.m on the material day, PW1 called him and informed him that the deceased and the appellant had fought and the appellant had injured the deceased. PW1 requested PW2 to take the deceased to the hospital. PW2 woke up the deceased's brother and before they left home, the appellant requested him to take the deceased to the hospital as he and the deceased had fought. PW2 testified that while at the scene he noticed that the deceased had already died and reported the matter to Giaki Police Station. At around 5 a.m on 6th November, 2012, PW2 went back to the scene and waited for police officers from Meru who took photographs and took the body of the deceased to the mortuary. He testified that the appellant ran away and was subsequently arrested. He went on to state that there had been no dispute between the appellant and the deceased and that they used to drink alcohol together.

6. CIP Samwel Ndung'u (PW7) the Investigation Officer, testified that he received a call from the Chief at around 1.40 a.m. on the material day informing him that the appellant had killed the deceased. It was his testimony that he called his in-charge at 6.30 a.m on the material day, and that he went with Scene of Crime officers who took pictures at the scene. PW7 testified that he observed the body of the deceased and saw injuries on the left side of the neck and chest that seemed to have been inflicted by a sharp object. It was his testimony that they searched the scene but did not find any evidence of a struggle or weapon and that on November 17, 2012, he got information that the appellant had been traced and arrested. It was his further testimony that he recorded the appellant's statement on November 18, 2012 in the presence of PW2; and that the investigations did not disclose the reason for the murder as the appellant and deceased were friends and had been drinking together.

7. PC John Munyi (PW8), a Scenes of Crime officer based at Meru produced photographs of the scene and of the body of the deceased, as well as the report prepared by his former colleague, PC Cleophas Musinga who was not available to testify.

8. Japhet Kaiberia Mathiu (PW6), the Chief of Kanuni Location recalled getting a report on November 14, 2012 that there was a murder suspect in his area and commenced investigations as to his whereabouts. PW6 testified that on November 17, 2012, they arrested the appellant who they found in a house with other occupants.

9. Joyce Mugambi (PW3) the mother of the deceased, and Edwin Munene Mutua (PW4), a cousin of the deceased both saw stab wounds to the neck, chest and thighs of the deceased when they went to Meru Level 5 Hospital to identify the deceased's body and attend the post mortem examination.

10. Dr. James Kihumba (PW5) based at Meru Teaching and Referral Hospital produced a post mortem report prepared by Dr. Njuguna who performed the post-mortem examination on the deceased and with whom he had worked with for 3 years. The post-mortem report indicated that the deceased had a stab wound to the left side of the neck 6cm deep and 3cm wide; a stab wound on the near chest region; and multiple stab wounds on the right thigh. The post-mortem report also indicated that there was a punctured cardiac artery and stomach with intra-abdominal haematoma and concluded that the cause of death was severe haemorrhage due to stab wounds on the abdomen and punctured carotid artery.

11. In his defence, the appellant gave a sworn statement and testified that on the material day, he was on his way home at upper Giaki Market at 8.00 p.m. when he passed by a bar and was called by the deceased who was inside; and that he joined the deceased, who was with PW1, and they drank alcohol until 9.30 p.m. It was his further testimony that he left for his home together with the deceased, PW1 and three youths. Along the way they passed by a shop and bought drinks to partake on their way home and after walking for about 1½ km, the deceased informed the appellant that he owed him Kshs. 500 which he had used to escort the appellant's wife to her parent's home. The appellant replied that he would not pay the debt and the deceased held him from the back and insisted that the appellant must pay him back since he had money. The appellant testified that the deceased taunted him by telling him not to be in a hurry to go home as his wife had left and only his mother could give him food. It was his further testimony that he struggled to free himself while holding a torch and keys that also had a nail cutter. He and the deceased fell and he heard the deceased cry that he had been stabbed. The appellant testified that during the struggle he stabbed the deceased with the knife on the nail cutter and he removed his vest and tied it on the neck of the deceased. He thereafter moved the deceased off the road and called his father, PW2 and informed him (PW2) where the deceased was lying so that PW2 could take the deceased to the hospital.

12. The appellant further testified that he did not sleep in his house and the next day he went to see one Margaret at Mutharankari who gave him money. He also asked for a phone and called PW2 to enquire how the deceased was and he was informed that the deceased had died and that the Police were looking for him. It was his further testimony that he went to Kimongoro to inform a friend of his father what had happened and he was arrested there. It was his further testimony that he had no intention of killing the deceased but they fought as they were drunk and he was stressed as his wife had returned to her parent's home.

13. In cross-examination, the appellant testified that he was offended by the remarks made by the deceased and that he had drunk a glass of chang'aa at the bar. The knife that stabbed the deceased was on a nail cutter which was large (about 4 inches). The nail cutter was old and the knife was loose; and he got money the next day to visit the deceased in hospital. The appellant denied having gone into hiding and stated that he had told the police where he was.

14. The trial court (Wendoh, J.) found that the appellant was not drunk on the material day but was conscious and alert and therefore could not benefit from the defence of intoxication. The trial court was also not convinced that the appellant should benefit from the defence of provocation. The court was satisfied that the appellant possessed malice aforethought and proceeded to convict him. At sentencing, the trial court took the appellant's mitigation into account but held that the law only provided one sentence for the offence of murder, which was death.

15. Aggrieved by that decision, the appellant filed the instant appeal challenging the conviction and sentence. The appeal was disposed of by way of written submissions with brief highlighting. Learned counsel Ms. Ntaragwi represented the appellant while learned counsel Mr. Ondimu represented the State.

16. Regarding the conviction, the grounds of appeal are that the trial court erred: by failing to note that the most vital witnesses were not summoned by the prosecution; by failing to note that the prosecution did not avail the arresting officer; that other witnesses were hearsay witnesses who knew nothing about the scene; and that the trial court sentenced the appellant without any exhibit to support the evidence.

17. Regarding the sentence, the grounds of appeal are that the mandatory death sentence meted on the appellant was excessive, arbitrary, inhumane and deprived the appellant the right to a fair trial contrary to Article 50 (2) of the *Constitution*; that the appellant has suffered inhumane degrading punishment

and deprived the right to life in breach of Article 26 (1) (3) of the *Constitution*; that the law was not fully served when convicting and sentencing the appellant and denying him access to justice in breach of Article 48 of the *Constitution*; and that the trial suffered some procedural irregularities.

18. Learned counsel for the appellant, Ms. Ntaragwi, filed a supplementary memorandum of appeal setting forth the grounds that the learned Judge erred: in making a finding that the prosecution had established the ingredients of murder against the appellant; in rejecting the appellant's defence of provocation and intoxication; and that the sentence imposed upon the appellant was in contravention of Articles 19 (3), 20 (1), 25, 26 (3), 27 (1), 28, 48, and 50 of the *Constitution* and was not the only sentence which the High Court on exercising its discretion could have imposed upon the appellant and the same should be reviewed.

19. Ms. Ntaragwi submitted that the trial court failed to take into account the defence of intoxication as required under Section 13 (4) of the Penal Code, citing the authority of *Bernard Mwenga Wilson v Republic* [2016] eKLR. Counsel cited the authority of *Elphas Fwamba Toili v Republic* [2009] eKLR for the proposition that it is not in all cases where the attacker inflicts multiple injuries on the victim that a determination that there was malice aforethought should be made. Counsel also asserted that the death sentence is not the only sentence or penalty and the court ought to exercise its discretion with regard to the mitigation, circumstances of the case, the period the appellant has been in custody and the fact that the Court can set aside the sentence and impose an appropriate sentence.

20. In written submissions Mr. Ondimu submitted that the ingredients of the offence of murder were proved to the required standard. Counsel relied on the authority of *Republic v Mohammed Dadi Kokane & 7 others* [2014] eKLR for the proposition that malice aforethought comprises not only intentional acts, but also comprises reckless acts likely to cause death and/or grievous bodily harm with indifference of the consequences of such acts. Counsel pointed to the multiple stab wounds inflicted on the deceased by the appellant as sufficient to show that the appellant had malice aforethought.

21. With regard to sentencing, counsel submitted that the death sentence would not be appropriate, based on the Supreme Court decision in the *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR case which declared the mandatory aspect of the death sentence unconstitutional; the appellant was a first offender aged 32 years and remorseful; and the fact that the appellant has been in custody since his arraignment on 20th November 2012. Counsel proposed a sentence of 20 years from the date of the appellant's arraignment.

22. The duty falls upon this Court, as a first appellate court, to consider and evaluate the evidence afresh and draw its own conclusions; taking into account the fact that the trial court had the advantage of observing the witnesses. As was held in *Okeno v Republic* [1972] EA 32:

> " 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 v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E.A. 424."

23. On the question whether the appellant was rightly convicted for murder, Section 203 of the Penal Code provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. As to what constitutes malice aforethought, Section 206 of the Penal Code provides:

> " 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; ..."

24. The evidence of PW1 and the admission of the appellant leaves no doubt that the appellant stabbed the deceased with a weapon. The post mortem report produced by PW5 indicated that the deceased had been stabbed on the left side of the neck, on the near chest region, and multiple times on the thigh. The post mortem report concluded that the cause of death was severe haemorrhage due to stab wounds on the abdomen and punctured carotid artery.

25. Counsel for the appellant raised the issue of intoxication as a defence, and that the appellant was intoxicated to an extent that he was unable to form the specific intention, or the malice aforethought required to sustain the charge of murder in terms of Section 13 (4) of the Penal Code. Regarding the defence of intoxication, Section 13 of the Penal Code provides that:

> " 1. Save as provided in this section, intoxication shall not constitute a defence to any criminal charge;
>
> 2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
>
> a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission;
>
> 3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply;
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> 4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence;"

26. In *Bakari Magangha Juma v Republic* [2016] eKLR this Court held that Section 13 (4) of the Penal Code affords a distinct defence of intoxication where by reason of intoxication the appellant is

incapable of forming a specific intent, which is an element of the offence charged; and in the case of murder the specific intent being malice aforethought or mens rea.

27. In *Said Karisa Kimunzu V Republic* [2007] eKLR, this Court rendered itself as follows:

> " But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

28. In the instant case, the appellant stated that he took one glass of chang'aa but, according to him, two glasses were enough to make a person drunk. It was also the assessment of PW1 that he, the deceased and the appellant were not drunk on the material day and that after stabbing the deceased, the appellant approached PW1 and threatened to stab him the way he had stabbed the deceased. In the learned prosecution counsel's view, the appellant had the clarity of mind to leave the scene after stabbing the appellant and alert PW2 of what he had done. The evidence paints the picture of a person with a clear mind who was aware of what he was doing. The trial court therefore rightly found that the appellant could not benefit from the defence of intoxication.

29. The other defence raised by the appellant was that he was provoked by the deceased. Section 207 of the Penal Code provides that:

> " When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

30. Section 208 (1) of the Penal Code then proceeds to define "provocation" as follows:

> " The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

31. This Court in *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR further elucidated on the elements of provocation as follows:

> " So what is provocation? In the case of Duffy (1949) I ALL ER 932; provocation was defined as "some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ..."

32. Inherent in this definition at common law is the requirement of two conditions to be satisfied for the defence to be made out, namely: -

    a. The "subjective" condition that the appellant was actually provoked so as to lose his self-control; and

    b. The "objective" condition that a reasonable man would have done so."

33. In *Thithio v Republic* [1988] KLR 796, it was held that:

> " It is not every provocation that will reduce murder to manslaughter. To have that effect, the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death. An unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did."

34. The appellant claimed that the deceased had held him from the back and taunted him that as his wife had left, his mother would provide him with food and anything else that a woman could provide. PW1, the only eyewitness, testified that the appellant and the deceased started arguing but he did not divulge the specific words used in the argument. Those words, if at all they were uttered by the deceased, may have been enough to provoke the appellant more so in his state of stress after his wife left him. However, the implausibility of the appellant's other allegations, the state of the scene of the incident, and the conduct of the appellant all point towards malice aforethought.

35. PW1 was categorical that the appellant and the deceased were not carrying anything in their hands as they walked home, and that the appellant bent down and retrieved a weapon from his socks which he used to stab the deceased. The appellant claimed that the argument led to a scuffle with the deceased in which he stabbed the deceased with a knife that had loosened from a nail cutter that he was carrying together with a torch. It is implausible that a knife on a nail cutter would inflict a stab wound 6cm deep and 3cm wide as indicated in the post-mortem report. Nor can it explain the multiple stab wounds inflicted by the appellant. The appellant also claimed that in the scuffle with the deceased, they fell three times. The Investigating Officer and Scenes of Crime officers did not find any sign of a struggle at the scene that was said to be muddy.

36. The claim of provocation cannot account for why the appellant would chase after and threaten to inflict harm on PW1 if his quarrel was only with the deceased. It also does not account for why the appellant fled the scene and could not be traced for 11 days, despite the knowledge that the police were looking for him, before being finally apprehended on 17th November, 2012 in another District. This conduct is not consistent with a person driven by a sudden and temporary loss of self- control. The trial court therefore rightly found that the prosecution had proven its case beyond reasonable doubt.

37. The upshot of our findings above is that the appellant's appeal against conviction is without merit, and it is hereby dismissed.

38. Regarding sentence, counsel for the appellant submitted that the death sentence imposed by the trial court was in contravention of Articles 19(3), 20 (1), 25, 26 (3), 27 (1), 28, 48 & 50 of the *Constitution* and was not the only sentence which the trial court could have imposed.

39. The appellant in mitigation stated that he was remorseful and has now changed his life. He however murdered his cousin, in cold blood. While he was indeed a first offender and this should have been taken into account in his sentencing, we are satisfied that in the circumstances of this case, he merits a custodial sentence.

40. In the circumstances, we allow his appeal against the death penalty imposed on him by the trial court, and substitute therefor a term of imprisonment of 20 years, the same to run from the date he was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR