



**Luvisia & another v Republic (Criminal Appeal 78 of 2017)
[2022] KECA 1424 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1424 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 78 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
DECEMBER 16, 2022**

BETWEEN

MILTON AMUGUNE LUVISIA 1ST APPELLANT

HASTING NGARAMA MBOHI ALIAS BOYI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega
(Sitati, J) dated 26th October, 2016 in Criminal Case No. 34 of 2014)*

JUDGMENT

1. The appellants, Milton Amugune Luvisia and Hasting Ngarama Mbohi alias Boyi were charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information against them stated that on the June 28, 2014 at Gaigedi sub-location within Vihiga county, they murdered Emmanuel Lihanda Kisango.
2. The appellants denied the charge and following a hearing before the High Court in Kakamega (Sitati J) in which the prosecution called 9 witnesses, the appellants were found guilty as charged in the judgment of the court dated October 26, 2016. They were sentenced to death as provided under section 204 of the [Penal Code](#).
3. Aggrieved by both their conviction and sentence, the appellants have filed the present appeal in which they raise the following grounds of appeal in their memorandum of appeal dated September 15, 2020:
 - i. That the learned trial judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.



- ii. That the learned trial judge erred in points of law and fact by relying on circumstantial evidence of identification, without observing that the conditions prevailing at the scene of crime were absolutely difficult, for a witness to make any significant identification.
 - iii. The learned judge in analyzing the evidence presented by the prosecution witnesses failed to come to the conclusion that the required standard and burden of proof that was on the prosecution and the threshold that would lead to a conviction of the murder charge were not met as the ingredient of murder, mens rea was absent so as to satisfy a charge and conviction of murder.
 - iv. The learned judge in analyzing the evidence presented by the prosecution witnesses failed to come to the conclusion that the required standard and burden of proof when convicting the appellants based on a dying declaration which was not corroborated.
 - v. The trial court erred in law and fact by sentencing the appellants to death without exploring other forms of punishment.
4. The evidence presented before the trial court was as follows. Timona Kisago Aluvi (PW1), the father of the deceased, was asked by his houseboy, Laban, to go and see the deceased in the kitchen. He went to the kitchen and found the deceased lying on Laban's bed, looking weak. The deceased then told PW1 that he had been thoroughly beaten by the appellants, Milton and Hastings, both of whom PW1 knew as they had been casual workers at his home. The deceased told him that the two had beaten him because his elder brother, one Robert, had killed the 2nd appellant's father.
 5. The deceased then got up and walked, with bended back, to the toilet. On coming back from the toilet, the deceased went into PW1's main house where his mother was sitting. PW1 noticed that the deceased had a swelling on the right cheek and his T-shirt was muddy on the right side of the abdomen. When PW1 pulled up the deceased's T-shirt to see what was under the muddy patch on the T-shirt, he saw a clear mark of a foot. When questioned about it, the deceased told PW1 that he had fallen.
 6. PW1 testified that the deceased could not eat but sat and remained silent on the sofa set. He had blood oozing from his mouth. He then stood up, knelt down with his head on the sofa, and by 10.00pm, he was dead.
 7. PW2 had been requested by the deceased's mother to take him to hospital. When he arrived at the home, he found that he was already dead. He went with PW1 to report the matter at the Mudete Police station.
 8. PW3, Laban Chagwi, worked in PW1's home. He was in the kitchen on the material day when the deceased entered and asked for water. The deceased then told him that he had been beaten by Milton and Boyi, then fell from the chair where he had been sitting. PW3 rushed to the main house to call PW1 and they returned to the kitchen to find the deceased lying on PW3's bed. The deceased then went to the toilet with his back bent, then returned and went to the main house. PW3 was left in the kitchen but later went to assist in placing the deceased on a mattress after he died.
 9. PW4, Victor Salano Udiaga was at his shop at Nabwani market between 7.00 – 8.00pm on June 28, 2014 when the deceased came to the shop and asked for Sona Moja pain killers. After the deceased bought the pain killers, he stepped aside and immediately thereafter, a young Luo woman also appeared at the shop and bought unga. Before she left, the 1st appellant started talking to her. When the deceased saw the 1st appellant talking to her, he asked the 1st appellant why he was seducing the young lady while he was aware that his (1st appellant's) uncle was a friend of the young woman. A scuffle then ensued between the deceased and the 1st appellant. PW4 could see the two pushing and pulling each other as



though they wanted to fight. He could see them clearly with the help of electric light at his shop as they were only 2-3 metres away from where he was. Thereafter, the two moved away from PW4's view.

10. At about 9.00 pm when PW4 prepared to close the shop and go home, he saw the deceased sitting alone outside the shop. The deceased stood up and told him that "those boys have beaten me and have injured me." The deceased told PW4 that the boys he was referring to were Milton and Hastings, and that they had beaten him on allegations that his elder brother had killed Hasting's father. PW4 advised the deceased to go home and take his medicine. He learnt of the deceased's death the following morning at about 6.00 am PW4 did not see the 2nd appellant at the shop on the evening of June 28, 2014 when the deceased and the first accused had a scuffle.
11. The evidence of PW5, Gilbert Juma Muhangala, was that on the material day at about 8.20 pm, he had just returned home from Nabwani market and was cleaning his motorcycle. The deceased passed by the gate and told him that he had been beaten by Milton and Hastings, and that he was feeling much pain. The deceased further told him that the appellants had beaten him because of a grudge pitting the family of the deceased and that of the 2nd appellant. PW5 also advised the deceased to go home and take his medicine.
12. Phineas Ayodi (PW6), the Assistant Chief of Gaidedi Sub-location, was informed by PW1 that it was the appellants who had assaulted the deceased. He advised PW1 to make a report at Mudete Police Station while he mobilized villagers to arrest the appellants. The 2nd appellant was arrested at his home while the 1st appellant was arrested later after PW6 telephoned him and asked him to report to where the assistant chief was. The two were later handed over to administration police from Mudungu AP Camp and later to the Mudete police who had collected the deceased's body from PW1's home.
13. A post mortem on the body of the deceased was conducted by Dr Emirundu on June 30, 2014. Her report was produced in evidence by PW7, Dr Kiriza Nelly of Vihiga County Hospital. The report indicated that the deceased was about 35 years old. His spleen was found to be deformed and there was blood in the abdomen from a ruptured spleen. PW7 testified that the deceased died as a result of cardiopulmonary haemorrhage into the abdomen.
14. No 226108 corporal Willy Keter (PW8) from Mudungu Administration Police Post was informed on June 29, 2014 at about 7.00 am by Phineas Ayodi (PW6) about the death of the deceased on the previous day, and that the appellants had been arrested. He later handed them over to police from Mudete police station.
15. PW9, No 75819 Inspector Chacha Fanuel Muinuki, was the Deputy Officer Commanding Station (OCS) in charge of crime at Mudete Police Station. On June 29, 2014, at about 7.00 am, he was summoned by the OCS, Chief Inspector Peter Kiema, and informed about the report of the murder of the deceased. With the OCS, PW9 proceeded to the scene and found the body of the deceased lying on a mattress. The deceased had clotted blood at the mouth, as well as bruises on the right side of the ribs which also had a swelling. PW9 took possession of the black T-shirt which the deceased was dressed in before the body was taken to Mbale District Hospital for preservation. The appellants were handed over to the CID Officer at Vihiga.
16. PW10, No 74578 PC Joshua Ngao, a CID Officer from Vihiga, was instructed to investigate the murder of the deceased by the DCIO. The appellants had been arrested by then. He accompanied the family of the deceased for the post mortem examination and charged the appellants on the basis of the statements recorded from witnesses. He produced the black T-shirt that the deceased had been wearing at the time of the assault.



17. Upon considering the evidence from the prosecution witnesses, the trial court found that the accused had a case to answer and placed them on their defence. The 1st appellant stated that he did not know what led to the death of the deceased. While admitting that he was a former employee of PW1, he denied killing the deceased. He also denied having gone to PW4's shop on the evening of June 28, 2014, asserting that he had been at home throughout the material day.
18. The 1st appellant further denied being in the company of the 2nd appellant on the material day, though he admitted knowing him. It was his testimony that he had no grudge against the deceased and the entire case against him was a frame up by PW1 because the 1st appellant had abandoned his employment with PW1.
19. The 2nd appellant also denied killing the deceased. He testified that on June 28, 2014, he was on duty at Serem Market until about 4.00 pm when he left for home where he arrived between 6.00 – 7.00 pm. He denied meeting the deceased on the material day. He did not know what caused the death of his father as he was still very young when his father died. He too denied going to PW4's shop on the evening of June 28, 2014. He wondered why he was arrested when even PW4 had said he did not see him at his shop on the said evening.
20. The appellants filed submissions dated September 15, 2020 in support of their appeal which their counsel, Ms Miheso, indicated she would rely on. They submit that the prosecution failed to prove the case against them beyond reasonable doubt, arguing that there was no direct evidence linking them to the death of the deceased. They submit that it was only PW4, Salano, who saw the appellants and the deceased outside his shop engaging in pulling and pushing each other. He had not, however, seen a fight between the 1st appellant and the deceased.
21. According to the appellants, since PW4 was the only identifying witness, his evidence ought to have been tested with greatest care especially where the life of an accused person is at stake. The appellants rely on the case of *Maitanyi v Republic* [1986] eKLR 198 and *R v Turnbull and others* [1976] 3 All ER 549.
22. The appellants further submit that they had been charged under section 203 as read with section 204 of the *Penal Code*. They submit that under section 206 of the *Penal Code*, malice aforethought, an essential ingredient to establish the offence of murder, was required to be established by evidence. Their submission is that in the present case, the circumstances as explained by the witnesses did not bring out the motive of the murder, if any, or, even if there was a fight, whether there was an intention to kill. They further submit that the prosecution failed to prove the reasons for the fight and thus mens rea was not proved beyond reasonable doubt.
23. The appellants further submit that they were convicted on the basis of the dying declaration of the deceased who stated that they had beaten him. They cite the case of *Republic v M. G Msa* Hcr 12/2003 in which Maraga J (as he then was) cited the case of *Kihara v Republic* (1986) KLR 473 on the circumstances that the court should consider in relying on a dying declaration and stated:

“Though there is no rule that dying declaration must be corroborated, the court needs to caution itself that in order to obtain a conviction on a dying declaration it must be satisfactorily corroborated (*Republic v Said Abdalla* (1945) 12 EACA 678). Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and weapon used. It may be that the dying person may not remember all that and may not be telling the truth.”



24. According to the appellants, the evidence before the trial court was not sufficient to convict both appellants; and that it was too convenient for all the witnesses to claim to have met the deceased who told them that the appellants had beaten him up.
25. Regarding their sentence, the appellants submit that they have been in custody for 6 years, having been charged in July 2014 and remained in custody throughout their trial. They cite the Supreme Court decision in *Francis Karioko Muruatetu v Republic* (2017) eKLR (Muruatetu) and pray that the penalty imposed on them be revisited.
26. The respondent opposes the appeal and filed submissions dated June 29, 2022 which were highlighted by learned prosecution counsel, Ms Vitsengwa. The state's case is that the trial court analyzed the prosecution evidence and the appellants' defence before concluding that the appellants were guilty of the offence charged.
27. While conceding that none of the prosecution witnesses saw the appellants kill the deceased, the respondent submits that the trial court relied on the evidence of PW4 and PW5 to find a nexus between the death of the deceased and the unlawful acts of the appellants. The respondent cites in support of this submission the decision in *Josephat Manoti Omwancha v Republic* (2021) eKLR.
28. It is the respondent's submission further that the essential ingredients of the offence of murder were proved. It notes that PW4 had narrated what transpired outside his shop on the fateful night and clearly stated what provoked the fight. Thereafter, the deceased had informed him that he had been injured by the appellants because of an existing grudge between his family and the 2nd appellant over the death of the 2nd appellant's father.
29. Regarding the deceased's dying declaration, it is submitted that while outside PW4's shop, the deceased informed PW4 that he had been assaulted by Milton and Hasting over an allegation that the deceased's brother had killed Hasting's father. When the deceased met PW5, he informed him that he had been assaulted by the appellants, Milton and Hasting. When the deceased arrived home, he informed his father, PW1, that he had been assaulted by the appellants. The deceased was consistent in the identification of the persons who had assaulted him; he had given the information to PW1, PW4 and PW5 and his words amounted to a dying declaration as the same words were said by the deceased to three different persons at different times and were therefore spontaneous, support for this submission being sought in the case of *Peter Kimathi Kanga v Republic* (2015) eKLR.
30. In response to the appellants' submissions regarding their sentence, the respondent submits that the appellants were sentenced to death since, at the time of their sentence, the decision in *Muruatetu* had not been determined. It was the respondent's submission that in light of the said decision, the death sentence imposed on the appellants is not lawful, and Ms Vitsengwa asked this court to remit the matter to the High Court for review of sentence. We observe that the submissions with respect to the *Muruatetu* decision by the respondent is not correct: The Supreme Court held the mandatory nature of the death sentence for the offence of murder unconstitutional; however, it found that the death penalty is a lawful sentence for the offence, depending on the circumstances and upon consideration of the guidelines set by the Supreme Court.
31. As this is a first appeal, we have an obligation to re-evaluate the evidence presented before the trial court and reach our own conclusion. In *Okeno v Republic* [1972] EA 32, this court held that:

“ 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 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 v Sunday Post* [1958] EA 424.”

32. See also the decision of the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 and *Kiilu & Another v Republic* [2005]1 KLR 174.
33. We have considered the evidence presented before the trial court which we have set out above, and the decision arrived at in the judgment, the subject of this appeal. In determining the appeal before us, we do so upon a consideration of two issues against the prosecution evidence. These are:
 - i. Whether the prosecution evidence established the ingredients of the offence of murder;
 - ii. Whether the circumstantial evidence and the deceased's dying declaration were sufficient to base the appellants' conviction upon.
34. In order for the offence of murder to be established, the prosecution must establish three elements. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought.
35. Section 206 of the *Penal Code* defines 'malice aforethought as requiring proof of:
 - i. 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.
 - 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.
36. In its decision in *Bonaya Tutut Ipu and another v Republic* [2015] eKLR this court observed as follows:

“malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.”
37. The death of the deceased in this case is not in contention. The post mortem report produced by Kiriza Nelly (PW7) showed that the deceased died as a result of cardiopulmonary haemorrhage resulting from a ruptured spleen. The report also showed that he had two broken ribs on the left and three on the right, and bruises on both the left and right sides of the thorax. It is reasonable to infer from the extent of the injuries that the deceased sustained that his assailant(s) intended to kill him or cause him grievous harm, or was indifferent as to whether death resulted or not.
38. The question is whether the prosecution evidence established beyond reasonable doubt that it was the appellants who were responsible for the assault on the deceased that resulted in his death. There was no direct evidence linking the appellants to the death of the deceased. However, the evidence of



PW4 linked the 1st appellant to the deceased. His testimony was that PW4 had observed an altercation between the deceased and the 1st appellant, whom he had observed outside his shop, a few hours prior to the deceased's death, pushing and pulling each other as though they were about to fight. Further, the deceased had declared to PW1, PW3, PW4 and PW5, shortly before his death, that he had been attacked by the appellants.

39. In considering whether a dying declaration can be properly relied on in finding an accused person guilty of an offence, the court in *Peter Kimathi Kanga v Republic* [2015] eKLR stated as follows:

“Dying declarations are a legally accepted exception to the rule against hearsay. Their statutory basis is in section 33 of the *Evidence Act* which provides that a statement of a person who is dead whether written or oral is admissible when it relates to the cause of his death. It is instructive that the statement (referred to as a dying declaration) is admissible under the Act whether or not the deceased was at the time of making it under expectation of death.

Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement.”

40. The evidence before the trial court was that the deceased had declared to four different people, at different times but within an hour or so before his death, that it was the appellants who had attacked him. PW1, PW3, PW4 and PW5 testified that the deceased had told them that it was the appellants who had attacked him. In reaching the conclusion that it was the appellants who had attacked the deceased and after considering their respective evidence with respect to the deceased's declaration prior to his death, the trial court observed as follows:

“During cross examination, both Salano and Gilbert denied that they had manufactured the evidence against the accused persons. I therefore do find and hold that the statement of the deceased to both Salano and Gilbert remained consistent even as he repeated the same to Laban and to PW1. That statement is corroborated by Salano's

testimony who saw Milton and the deceased engaged in a fight and about half an hour later the deceased told him that Milton and Hastings had badly assaulted and injured him. All the witnesses were in close proximity to the deceased when the deceased was making his statements.”

41. We are satisfied that the trial court made no error in arriving at the conclusion that it was the appellants who had assaulted the deceased, an assault that was so vicious that it led to his death, barely two hours after the assault. We are therefore satisfied that the appellants' appeal against conviction is without merit, and it is hereby dismissed.

42. The appellants have also appealed against their sentence. They urge this court to reconsider the death penalty imposed on them in light of the Supreme Court decision in *Muruatetu* which has since outlawed the mandatory nature of the death sentence. As observed earlier, the Supreme Court did not outlaw the death penalty but declared its mandatory nature unconstitutional. The Supreme Court further made amendments to the Judiciary Sentencing Policy Guidelines and directed that in considering whether to impose the death penalty, the court should consider:



- a. the age of the offender;
 - b. being a first offender;
 - c. whether the offender pleaded guilty;
 - d. the character and record of the offender;
 - e. commission of the offence in response to gender-based violence;
 - f. remorsefulness of the offender;
 - g. the possibility of reform and social re-adaptation of the offender;
43. The Supreme Court also underscored the need for a convicted person to have the right to mitigate before sentencing. We note that in this case, both appellants offered mitigation and pleaded for leniency through their counsel. On the orders of the trial court, a social inquiry report was prepared in respect of the appellants.
44. It was stated in mitigation on behalf of the 1st appellant that he was 25 years old, very remorseful, a first offender and a neighbour of the deceased. He had been in remand for 2½ years at the time of his sentencing, and had learnt a lesson. He is still young and if given an opportunity, he may change to become a good citizen. The 2nd appellant also prayed for leniency; that he was aged 27 years and had also spent time in remand and learnt from the period spent in custody. The Probation Officer, Kakamega Central, recommended a non- custodial sentence, though she recognized that no sentence other than death was provided in the *Penal Code* for the offence of murder.
45. In sentencing the appellants to death, the trial court noted that there was no other sentence prescribed by law. As correctly observed by counsel for the appellants and the respondent, the sentence in this case predated the Supreme Court decision in *Muruatetu*. The decision allowed trial courts to impose sentences other than death upon considering an accused person’s mitigation and the guidelines set by the Supreme Court.
46. We are satisfied that in this case, the mitigation offered on behalf of the appellants and the pre-sentencing report are sufficient to enable us review the sentence imposed on the appellants. While the appellants’ assault on the deceased resulted in his death, we note that it appears to have arisen as a result of the altercation between the 1st appellant and the deceased. There was no evidence, other than the deceased’s dying declaration, to show how it degenerated from an altercation relating to a woman to the vicious assault that resulted in the deceased’s death.
47. While the vicious nature of the appellants’ assault on the deceased demonstrated that they had malice aforethought as defined in section 206 of the *Penal Code*, they do not merit the ultimate sentence imposed in the *Penal Code*. In the circumstances of this case and taking into account their age, we are satisfied that a sentence of fifteen (15) years from the date of their sentence is sufficient. The appeal on sentence is accordingly allowed.
48. The final order of the court is that the appeal on conviction is dismissed while the one on sentence is allowed to the extent that the sentence of death is set aside and substituted with a term of fifteen (15) years imprisonment with effect from the date the appellants were first sentenced.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 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

