



REPUBLIC OF KENYA



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**Malau & 2 others v Republic (Criminal Appeal 68, 69 & 70 of 2020)
[2022] KECA 1387 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 68, 69 & 70 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

NDOKOLANI MALAU 1ST APPELLANT

KITSAO KAHINDI 2ND APPELLANT

DAMA NYAMBU MZUNGU NZOMBO 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeals from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 18th June 2020 in High Court Criminal Case No. 5 of 2017)

JUDGMENT

1. The appellants, Ndokolani Malau, Kitsao Kahindi and Dama Nyambu Mzungu Nzombo were charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). Based on an Information dated February 22, 2017, placed before the High Court at Malindi by the Director of Public Prosecutions on behalf of the Republic, the particulars of the offence were that on the January 17, 2017 at Kitengwani Market in Magogoni Sub-Location, Sokoke Location, Ganze Sub-County within Kilifi County, the appellants jointly with others not before court murdered Charo Ndala (the deceased).
2. Following a trial before the High Court at Malindi that began before W Korir, J (as he then was) and concluded before Nyakundi, J, the appellants were convicted in a judgment delivered on June 18, 2020 and sentenced to imprisonment for a term of 45 years each. Aggrieved, the appellants lodged this appeal.
3. The prosecution case was built on the testimony of three witnesses. On January 17, 2017, the deceased, his wife Kavumbi Charo (PW2) and their son James Charo Ngala (PW1) were all at home in Kamani



Village, Ganze. At about midday, according to the testimonies of PW1 and PW2, they were outside their house when a crowd of about 10 people visited them. Among them were the appellants and a village elder named by PW1 as Dama Kitsao. The village elder informed them that they were required at a Chief's meeting and asked them to dress up and accompany them, which the deceased and PW1 did leaving PW2 at home. It is necessary to reproduce the narration by PW1 at length:

“My mother remained behind and I went with my father who is the deceased. All the people accompanied us. After crossing the river near Sakoke Primary School we saw a group of about thirty people with rungs and stones. They were on the road. We had just crossed the river and turned a corner when we saw the people. They said that is “Charo Ndala, the witch.” I identified three of them by their physical appearance. I did not know their names. My father started running. Ndokolani and Kazungu Kitsao held him by his arms. Kazungu Kitsao boxed him on the mouth. Kitsao (court-points at accused 2) hit him with a stone on the forehead. Ndokolani (court-points at accused 1) is the one who held him. There were a few metres from where I was. There was nothing preventing me from seeing them. Dama Nyambu (court-points at accused 3) said that “old man is a witch.” The group of twenty people arrived and I beseeched them to spare my father. They told me they would finish with him and also finish me. I ran away. I went and boarded a vehicle and proceeded to Ganze CID office and reported the incident. Police officers accompanied me to the scene. We found they had killed my father and burned his body.”

4. He went on to state that they did not find anybody at the scene, but the body of his father was still on fire which they put off and took the body to Kilifi County Hospital Mortuary.
5. PW1 recalled that earlier, in January 2014, the village elder Dama Kitsao had informed him that he (PW1) was wanted at the office of the Assistant Chief at Kitengwani; that on reaching there on January 5, 2014, he found a group of people and among them was the 1st appellant; that they informed him that his father (the deceased) was a witch and ought to go for “cleansing otherwise nobody should be blamed for whatever would happen to him”. That on the same day the appellants had gone in search of the deceased at home but did not find him but said they wanted to finish him and left; that PW1 made a report on January 6, 2014 at Bamba Police Station *vide* OB number 14/6/12014.
6. Under cross examination, PW1 stated that the village elder Dama Nyambu was not arrested; that the 1st appellant is an uncle to the 2nd appellant; that when the deceased was attacked, the 1st appellant “held him so that he could not escape” and that the 2nd appellant also held the deceased and is the one who hit him on the forehead with a stone.
7. In her testimony, Kavumbi Charo (PW2), the wife of the deceased, stated that on January 17, 2017, at about midday, she, her husband (the deceased) and their son PW1 were having a meal at home when the appellants, to whom she referred by their names, came and “told us to go to Kitengwani where there was a demonstration” and that the deceased told her not to go; that the deceased left with PW1 leaving her at home; that she later heard screams and went to Kitengwani to find out what was happening and found her husband already dead. She stated that she knew all three appellants prior to that date.
8. Chief Inspector of Police Raymond Kibu Malel (PW3) was the investigating and arresting officer. He stated in his testimony that on January 27, 2017 (should be 17th ?) he was in his office at about 3.00 pm when PW1 reported to him that the appellants together with others had lured his father under the pretext that there was maize to be distributed to the public at the Chief's office; that after crossing a river, a group armed with sticks headed towards them and accused the deceased of being a witch; that the deceased attempted to run away but was restrained and attacked; that on rushing to the scene, PW



- 3 and PW1 found the deceased burning and everyone had ran away; that he took photographs at the scene which he produced and thereafter arrested the appellants within the village and charged them with the offence of murder.
9. In addition to a sketch plan of the scene of crime and the photographs, PW3 also produced a postmortem report compiled by Dr. Abdi Shikiri who opined that the deceased died of cardiorespiratory failure due to severe burns. Also produced was an OB report number 14/6/1/2014 relating to witchcraft allegations that had been made at Bamba police station.
 10. In his defence, the 1st appellant, Ndokolani Malau, denied killing the deceased, stating that he was called to the office of the Chief but did not know the reason. The 2nd appellant, Kibao Kahindi, stated that he is a farmer and a resident of Kitengwani Ganze; that on February 17, 2017 he was at home and was called to visit the Chief; that he woke up early, did a bit of charcoal burning and at about 4.00 pm he saw three women from the Chief's office who informed him they could not get food rations because the Chief was not there and he went home. The 3rd appellant, Dama Nyambu Mzungu, also stated that he is a farmer and a resident of Magogani Ganze and that he did not participate in the murder of the deceased; that on the day in question a village elder went to his home and wanted him to go to another clan elder, but they did not get anything and he went back home; that he came to know of the incident during his arrest and was escorted to Bamba Police Station not having been involved in the killing of anybody.
 11. The learned judge, as already stated, found that that all ingredients of the offence of murder were established, and that the prosecution had proved its case beyond reasonable doubt and convicted the appellants. In their respective home-made memoranda of appeal, each of the appellants complain that the learned judge erred by failing to consider that the postmortem report was produced as an exhibit by a police officer who was not authorized by law; that the conviction is against the weight of the evidence; that the defence was not considered; and that the sentence imposed is manifestly excessive.
 12. However, during the hearing of the appeal, the appellants were represented by learned counsel Mr Geoffrey Were who submitted that the learned trial Judge failed to properly evaluate the evidence; that the judge failed to appreciate the defence of alibi raised by each of the appellants in their testimonies; that the weapons allegedly used to assault the deceased were neither retrieved or recovered or produced before the trial court; that based on the post mortem report, the injuries on the deceased were inflicted by a sharp object which was not produced and the injuries do not match with the weapons allegedly used by the appellants on the deceased; that the appellants were not linked to the act of mob justice that is said to have led to the death of the deceased; that there was no evidence clearly identifying who in the mob beat up the deceased or who set him on fire; that the area Chief, who should have been called as a witness, was not called; that all in all, the prosecution did not prove the ingredients of the offence of murder and the conviction should be quashed and the appellants set free.
 13. Mr Kirui, learned counsel, in opposing the appeal relied entirely on the written submissions filed by learned Principal Prosecution Counsel Mr Nyoro. It was submitted that all the ingredients of the offence of murder were proved through the testimonies of the witnesses and production of the post mortem report; that the evidence demonstrated that the appellants were in the company of others who visited the home of the deceased and requested him to accompany them; that on the way they were joined by a mob and were involved in assaulting the deceased and later set him on fire; and that the element of malice aforethought was also established.



14. We have considered the appeals and the submissions by learned counsel. This is a first appeal. As stated by the predecessor to this court, the East Africa Court of Appeal in *Okeno v Republic* [1972] EA 32 at 36:

“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] EA 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] 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 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] EA 424.”

15. With that in mind, the issues for determination in this appeal are whether the prosecution established to the required standard, the ingredients of the offence of murder, namely: the death of the deceased; and whether the appellants were positively identified as part of the assailants that unlawfully caused the unlawful death.
16. As regards the death of the deceased, the evidence shows that PW1, the son of the deceased accompanied his father from the time they left their home, having been informed they were required at the Chief’s meeting, until the time when they crossed a river and saw a group of about thirty people who claimed that the deceased was a “witch” whereupon he was restrained and assaulted. PW1 then ran off to report the incident and on returning to the scene with PW3, found the deceased burning having been set ablaze. In the words of PW1, on returning to the scene, they “did not find anybody at the scene but the body was still on fire” and that they put off the fire and took the body to Kilifi County Hospital Mortuary.
17. PW2, the wife of the deceased, also stated that after hearing screams and upon going to the scene, she said that “I found my husband already dead.” PW3 confirmed the same stating that, “I rushed to the scene on arrival we found the deceased burning and everyone had run away.” PW3 also produced photographs that he took at the scene showing the body of the deceased which he produced as an exhibit alongside the postmortem report (exhibit 6) in which the medical officer opined that the deceased died due to cardiorespiratory failure due to severe burns.
18. Based on the foregoing, we are therefore in agreement with the learned trial judge when he expressed that “the testimonies of PW1, PW2 and as corroborated by the post-mortem leaves no room to doubt” that the deceased is dead.
19. The appellants have however complained that the admission of the postmortem report was erroneous having been produced by PW3, a police officer, in violation of section 77 of the *Evidence Act*. However, apart from the fact that there was other compelling and unchallenged evidence, namely the testimonies of PW1, PW2 and PW3 of the fact of death of the deceased, no objection was raised by the appellants, who were represented by counsel before the trial court, regarding the production of the postmortem report by PW3. It was open to the appellants’ counsel to apply, under section 77(3) of the *Evidence*



Act, to have the maker of the postmortem report attend court for purposes of cross examination but did not do so. section 77(3) of that Act provides that:

“(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

20. There not having been any objection to the production of the report by PW3, and the fact of death of the deceased not having been in question, there was no basis for the trial court to demand the attendance of the medical officer, the maker of the postmortem report. The appellants’ complaint in that regard has no merit.

21. As to the identification of the appellants, undoubtedly, evidence of identification requires scrutiny to ensure that it is free from possibility of error, or mistake as pronounced by the court in Wamunga v Republic [1989] KLR 424. See also Ogeto v Republic [2004] KLR 19, where the court stated:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

22. In their evidence, both PW 1 and PW2 mentioned the appellants by their names as being among the group of “about ten” persons who visited their home on January 17, 2017 and required them to accompany them to the Chief’s meeting. PW1 went on to state that he and the deceased did accompany the appellants and on crossing a river met a group of about thirty people who claimed the deceased was a witch and when the deceased started running, the 1st appellant restrained him while the 2nd appellant “boxed him on the mouth” and “hit him with a stone on the forehead” while the 3rd appellant said that “old man is a witch” and his pleas for them to spare his father were not heeded.

23. The learned Judge found, correctly in our view, that the prosecution was able to demonstrate through the evidence of PW1 and PW2 that on January 17, 2017, the appellants “were among a mob which visited the homestead of the deceased with an intention to prosecute common purpose jointly with others not before court”; and that there was cogent evidence from PW1 and PW2 “placing the accused persons at the scene of the murder”. We are also in agreement with the judge when he stated:

“With regard to this evidence (PW1) he knew the accused persons very well and others not before court. There was no room for mistaken identity given the prevailing favourable conditions. In consonant with the guidelines in the case of Abdalla Bin Wendo [1953] EACA and Roria v R [1957] EA 583 there are no gaps in the evidence of PW1 as taken together with that of PW2 which renders their evidence unworthy of believe and persuasion.”

24. The appellants were persons well known to PW1 and PW2 who recognized them when they called in at the home of the deceased. Indeed, based on the testimony of PW1, three years earlier in January 2014 the appellants had visited the home of the deceased wanting “to finish him” but failed to find him and the incident reported at Bamba Police Station. Having scrutinized the evidence on record, we are satisfied that the finding that appellants were positively identified is well founded and we have no basis for interfering with the same.

25. As regards sentence, the learned judge took into account that “the deceased was physically assaulted before his body was engulfed in fire fumes” and sustained 95% burns, and that “having been burnt



alive, the deceased died a very painful death; that the level of participation by a number of people in the commission of the murder demonstrated “the planning” and malice aforethought; that in the circumstances “a death penalty could have been just and proper” but exercising his discretion sentenced each of the appellants to 45 years imprisonment. It has not been demonstrated that the judge wrongly exercised his discretion. We have no basis for interfering with the sentence.

26. The appeal fails and is dismissed.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

