



REPUBLIC OF KENYA



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**Miruga v Republic (Criminal Appeal 149 of 2014)
[2022] KECA 1369 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 149 OF 2014
F SICHALE, FA OCHIENG & LA ACHODE, JJA
DECEMBER 8, 2022**

BETWEEN

JOSEPH MARIGA MIRUGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction/sentence of the High Court at Nakuru
(Emukule, J.) on the 11th day of December 2014) in Criminal Case Number 107 of 2008)*

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court at Nakuru (Emukule, J) dated December 11, 2014, in Criminal Case No 107 of 2008.

Background

2. The background of the appeal in summary, is that Joseph Mariga Maruga (the appellant herein) was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the charge were that on the October 21, 2008 at Mwireri village in Nyandarua District within Central Province, he murdered Mercy Lorunye the deceased herein.
3. The appellant denied the charge prompting a trial in which the prosecution tendered evidence through ten witnesses to prove their case against him. The appellant on his part gave sworn testimony in which he maintained his denial of the charge. He did not call any witnesses.
4. The brief facts of the prosecution's case were that on the ill-fated day, PW1, Rose Lameuri a sister to the deceased, PW3 Roseline Mubemba a daughter to PW1, PW4 Samuel Ngolong Arape a nephew to the deceased, PW10 Rose Kure and a man they referred to as 'Mzee'(old man), were all sheltering from the rain in the deceased's house when the appellant came in and demanded Kshs 10/- from the old



- man. He roughed up the old man, prompting the deceased to offer him Kshs 20/- with instructions to him to take his Kshs 10/- out of it and give her back the balance of Kshs 10/-.
5. The appellant left saying he was going to look for the change of Kshs 10/- but he did not return. As a result, the deceased went after him to get her Kshs 10/- balance back and when she took a considerable amount of time before returning to the house, PW1 sent her daughter, PW3 to check on her. Presently, PW3 rushed back and informed the other witnesses that as she approached the appellant's house, she had seen him stab the deceased with a knife five times.
 6. Consequently, all the four witnesses ran to the appellant's home where PW4 managed to apprehend the appellant as he was trying to escape and brought him back to his house. Meanwhile the deceased was still in the appellant's house, unable to talk and she was bleeding from her neck, and her rib cage behind the left arm. The deceased died as PW1 tried to move her.
 7. All four witnesses testified that although the deceased was an alcohol vendor, on the material day there was no alcohol being sold and none of them was drinking.
 8. Members of the public who were attracted to the scene by PW1's wailing administered mob justice upon the appellant. PW7 Cpl Joash Mugeno the investigating officer, PW5 David Kiragu and two other officers went to the scene of crime and rescued the appellant from the irate mob.
 9. The officers took the appellant to the police station. They also recovered the body of the deceased from the bed in the appellant's house, together with the knife that was said to have been used to stab her. PW5 produced in evidence the scene of crime photographs that he took of the body of the deceased.
 10. The government analyst testified as (PW6) and stated that he received a knife and a black jacket from one PC Michael Kinundu No XXXX on December 2, 2008, accompanied with an exhibit memo form. He however testified that although the two items were heavily stained with human blood of group 'A' he was unable to tell whether the blood belonged to the deceased, since no sample was taken from the body of the deceased.
 11. PW8 Dr Fredmill Kamilki produced the post mortem report pursuant to section 33 of the *Evidence Act*, on behalf of Dr Macharia who conducted the post mortem on the body of the deceased on April 27, 2008. The report confirmed that the deceased had a deep stab wound on the left side of the back measuring about 4cm x 10cm, and bruises on the left side of the neck measuring 2cm. The cause of death was indicated to be severe chest injury and external hemorrhage caused by a sharp object. A death certificate was produced in evidence.
 12. The appellant's version of events in his sworn testimony during examination in chief was that indeed, he was at the deceased's house on the date of her demise, drinking and making merry with everyone else in honour of their friend John who had returned home after two years of absence. A fight erupted when someone asked John where he had disappeared to, and John declined to discuss his whereabouts.
 13. The deceased's husband got into a fight with a man called Peter, who was wielding a knife and in the process of separating the two, the appellant was injured on the forehead. In the ensuing melee the deceased too was felled by a blow to the head, but she got back up and also hit PW1 who in return, stabbed her three times before she ran out of the house.
 14. In cross examination however, the appellant now asserted that the stated incident occurred at his house, where they were all drinking chang'aa. He denied ever going to the deceased's house that day.
 15. At the conclusion of the trial, the learned judge believed the version of events as presented by the prosecution and found the appellant's narrative to be contradictory. The appellant was thus convicted for the offence of murder and sentenced to serve a term of 40 years imprisonment.



Grounds of appeal

16. aggrieved by the outcome at the trial, the appellant lodged an appeal in this court against both conviction and the sentence imposed. He filed a notice of appeal and grounds of appeal which he erroneously titled supplementary grounds of appeal.
17. The gravamen of his appeal is that the learned trial judge was in error of law for several reasons namely, by:
 - i. Conducting the trial to its finality without complying with the mandatory provisions of section 200(3) *CPC*;
 - ii. Being impressed by the testimonies advanced by the 'crown witnesses' and failing to notice that all the civilian witnesses were hostile and their testimonies ought to have been impeached under section 163 of the *Evidence Act*;
 - iii. Failing to find that investigations were poorly conducted;
 - iv. Dismissing the appellant's defense.

Submissions

18. This appeal was disposed of by way of written submissions. The appellant's submissions are undated, while those of the respondent are dated September 23, 2022.
19. In his written submissions, the appellant urged that his case was conducted in an irregular manner for the reason that it was heard by three judges and his consent was not sought before the orders to start de novo, or proceed from where the case had reached were made. Hence the court did not comply with section 200 (3) CPC.
20. The appellant also urged this court to disregard the evidence of PW1, PW2 and PW3 for not being credible, since it contradicted the observations made by the doctor who conducted the autopsy on the deceased's body, concerning the injury suffered by the deceased. Further that the evidence was also contradictory on where the murder weapon was recovered. He further argued that the prosecution left out the most crucial witnesses, while the superior court failed to duly consider his evidence.
21. On behalf of the state it was submitted that the matter was heard to conclusion by four judges, and in all the instances where the matter was taken over by a different judge, directions were given in accordance with section 200 of CPC in the presence of the appellant and his advocates.
22. It was also submitted that PW1, PW2 and PW3 gave overwhelming, consistent, credible and reliable evidence that was corroborated by all the other witnesses. Further, that proper investigations were conducted by the investigating officer and all crucial witnesses required to prove the offence of murder were called. The respondent urged that the superior court analyzed the appellant's defence at length as is captured in the record of appeal.

Analysis

23. We have perused the record of appeal, the parties' written submissions, the authorities cited and the law. This being the first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial to draw our own conclusions and make our own findings. In doing so, we must bear in mind the fact that we



did not have the benefit of seeing and hearing the witnesses first-hand and, accordingly, gave allowance therefor.

24. In the often-cited case of *Okeno v R* (1972) EA 32-36 the East Africa Court of Appeal enunciated the duty of the court on first appeal thus;

' An appellate 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 and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA p570). It is not the function of the 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* (1958) EA 424.'

25. The offence of murder is defined under section 203 of the Penal Code, Cap 61 Laws of Kenya as:

' Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.'

26. In order to prove a charge of murder the prosecution must tender evidence sufficient to prove beyond reasonable doubt:

- i. The fact as well as cause of death of the deceased.
- ii. That the deceased met his death as a result of an unlawful act or omission on the part of the accused – which constitutes the 'actus reus' for the offence of murder.
- iii. That the said unlawful act or omission was committed with malice aforethought- which forms the 'mens rea' for the offence.

27. We have therefore, analyzed and re-evaluated the evidence on record and distilled the following issues for determination. That is, whether:

- a. The superior court complied with section 200 (3) of the Criminal Procedure Code.
- b. The evidence from the prosecution witnesses was credible and sufficient to prove the ingredients of the offence set out above.
- c. The appellant's defence was considered.

28. This section is also applicable in the High Court by dint of section 201 (2) of the Criminal Procedure Code which provides as follows:

201 (2).The provisions of section 200 of this act shall apply mutatis mutandis to trials held in the High Court.

29. This court has pronounced itself on numerous occasions concerning the duty of the court under section 200 (3) of the Criminal Procedure Code. The provisions of section 200 (3) are mandatory and a succeeding judge or magistrate, must inform the accused person of his right to recall witnesses if he or she so desires. The magistrate or judge complies with it as a statutory duty and it does not require that there first be an application by the accused person. Failure of the court to invoke the section when required will render the trial a nullity.



30. The record of the proceedings before the High Court in the instant appeal indicates that this matter followed a circuitous route to reach its conclusion. It was heard by three judges commencing with Koome, J (as she then was), who heard three prosecution witnesses. On October 22, 2009 the matter was placed before Maraga J (as he then was) and he gave directions for it to start *de novo*. The matter did commence *de novo* before Mugo J who went on to hear two prosecution witnesses, PW1 and PW2, before it was taken over by Emukule, J on the February 8, 2010.

31. When the matter came up for hearing before Emukule J the appellant and counsels for both parties were present in court. Mr Orange, counsel for the appellant indicated to the court that the matter being partly heard the parties were seeking the court's directions on how they should proceed. Counsel then informed the court what his client the appellant herein preferred thus;

' we are comfortable if we proceed from where Lady Justice Mugo stopped'

Counsel for the state agreed with the appellant's counsel, whereupon the court ordered as follows:

' the matter is to proceed from where it had reached before Lady Justice Mugo.'

32. Without indicating what provision of the law was being adverted to, it is nonetheless clear that both counsels and the court were acting in compliance with section 200 of the Criminal Procedure Code. There is also nothing on record to suggest that learned counsel Mr Orange did not take instructions from his client, the appellant, before he told the court that the appellant would be comfortable proceeding with the case from where Mugo, J had reached.

33. In stating the foregoing, we take into account the decision of this court in [Mosobin Sot Ngeiywa & Anor vs Republic \[2016\] eKLR](#), and quote Maraga JA (as he then was) Musinga and Kairu, JJA in extenso as follows:

' We are aware that this court, differently constituted, has held that the use of the words that 'the succeeding magistrate shall inform the accused person of that right' in section 200 (3) of the Criminal Procedure Code implies that it is a peremptory duty that must be performed and accorded to the accused personally, even if he is represented by an advocate. In *David Kimani Njuguna v Republic, Nakuru Criminal Appeal No 294 of 2010*, the court reviewed a number of authorities relating to compliance with section 200 (3) and came to the conclusion that:-

'All of these decisions declare that the provisions of section 200 (3) of the Criminal Procedure Code are mandatory and a succeeding judge or magistrate must inform the accused directly and personally of his right to recall witnesses. It is a right excisable by the accused person himself and not through an advocate and a judge or magistrate complies with it out of a statutory duty requiring no application on the part of the accused. Further, failure to comply by the court always renders the trial a nullity.'

27. Likewise, in [Henry Kailutha Nkarichia & Another v Republic, Criminal Appeal No 21 of 2013](#) the court held:

'The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates



the trial since it goes to the very heart of an accused person's right to a fair trial.'

27. While we entirely agree that a trial court has to comply with the provisions of section 200 (3) of the Criminal Procedure Code whenever a succeeding magistrate or judge takes over the conduct of a criminal case from another, in our view, where an accused person is represented by an advocate, we do not think that the communication should strictly be between the trial magistrate or judge and the accused, to the total exclusion of the defence counsel. Unlike a plea, to which an accused person must personally plead, one way or the other, the accused's advocate may communicate his/her client's instructions to the court on the issue of compliance with Section 200 of the Criminal Procedure Code.
28. Article 50 (2) (h) of the Constitution of Kenya, 2010, guarantees every accused person the right to have an advocate assigned to the accused by the state and at state expense if substantial injustice would otherwise result. Such an advocate plays a critical role in a criminal trial. We do not think that any prejudice or miscarriage of justice is likely to be occasioned where the trial court informs the accused of the right prescribed under section 200 (3), then the advocate explains to the accused the implications thereof; takes instructions and notifies the trial court whether the accused wishes to have any witness recalled, and if so, the particular one. Either way, the record must show that there was due compliance with that provision of the law.
34. In the instant appeal the appellant was represented in the High Court by an advocate, who addressed the court on how his client wished to proceed and in our view this was in exercise of his right under section 200 (3) of the Criminal Procedure Code. The matter had already started de novo before therefore that the appellant had already heard PW1 and PW2 testify twice. He asked the court through his counsel on record to let the matter proceed from where it had stopped before Mugo J and the court allowed it. We are therefore satisfied that section 200(3) CPC was complied with.
35. The appellant's second issue of concern was that the prosecution witnesses were not credible and that the judge ought not to have relied on their evidence. This position was challenged by the respondent. We therefore looked at the testimonies and the evidence that was presented before the superior court to establish whether the three ingredients of murder had been proved, or whether there were discrepancies or gaps which might create reasonable doubt from which the appellant could benefit.
36. On the first ingredient, the fact of death and the cause of the death of the deceased were not in dispute. The postmortem report produced in evidence by PW8 Dr Fredmill Kamilki confirmed that the deceased had a deep stab wound on the left side of the back measuring about 4cm x 10cm, and bruises on the left side of the neck measuring 2cm. The cause of death was indicated to be severe chest injury and external hemorrhage, caused by a sharp object.
37. The second ingredient is whether the appellant was the author of the unlawful act-'actus reus'- that cost the deceased her life.
38. From the evidence on record, it all started from the moment the appellant was said to have pounced on an old man, who was taking shelter from the rain together with the witnesses in a house. The appellant roughed up the old man demanding Ksh 10/- from him and perhaps out of pity for the hapless old



man, the deceased intervened and handed the appellant her Ksh 20/- and he left saying he was going to look for change.

39. When the appellant did not return, the deceased went after him to extract her balance of Ksh 10/- from him. PW3, the young girl who was sent to go and find out what was taking the deceased so long to return was the eye witness to the murder. Her report to her mother PW1 was that she had seen the appellant stab the deceased five times. That too was her testimony.
40. PW1, PW3, PW4 and PW10 ran to the house of the appellant where they all testified that they found the deceased. Upon seeing them the appellant tried to flee but was apprehended by PW4. All the four witnesses that saw the deceased's dead body testified that they found her in the appellant's house and she was bleeding from the injuries stated above when they arrived, and PW3 had seen him stab her.
41. The evidence of the appellant was that the deceased was stabbed by someone else with whom she fought. We find however, that the testimonies of the four witnesses was not shaken on cross examination. In any case, by what stretch of imagination would the appellant expect the court to believe that there was a man called Peter, who wielded a sharp knife and stabbed the deceased three times in full view of the people in the house, but they let him leave and instead pinned the murder on the appellant?
42. In our view, the contradictions of the witnesses as to the nature of injuries the deceased sustained in the attack, or where the murder weapon was found in the house, were not material enough to create a doubt whose benefit the appellant could enjoy. We were minded of what this court differently constituted had to say in the case of *Richard Munene v Republic [2018] eKLR*, in regard to contradiction or inconsistency in evidence:

' Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

43. The final ingredient that required to be proved was that of mens rea which in other words is malice aforethought. Under section 206 of the Penal Code, Malice aforethought shall be deemed to be established by evidence proving any, or more of the following circumstances:

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- (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.

By the very act of plunging a knife 4cm x10cm deep into Mercy's chest, leaves no doubt that the intention of the appellant was to cause her death, or in the very least, grievous harm.

44. The last issue for consideration is whether the trial judge did not consider the appellant's defence as he argued. Counsel for the state on the other hand urged that indeed the trial judge did consider the appellant's case at length.



45. This being a criminal case the burden of proof rested squarely on the prosecution. Indeed, the appellant had the option of electing to keep quiet in his defense and leaving it to the court to decide the case on the evidence from the prosecution witnesses. Having however exercised his right to offer a statement in his defence it was the duty of the trial court to consider that evidence in the context of all other evidence on record.
46. It was not lost on us that the record indicates that in examination in chief the appellant testified that they were all in the deceased's house when a fight erupted and PW1 stabbed the deceased. In cross-examination however, he contradicted himself, and asserted that they were at his house and not the deceased's house when the incident occurred.
47. In the end we find that the prosecution presented a credible, reliable and consistent narrative that flowed through the chronology of events, comprising the last moments of the deceased at the hands of the appellant. We are satisfied that all the ingredients of murder were properly proved by the evidence tendered by the prosecution. We also find that the trial judge considered the appellant's version of events and found that it was not credible. We too have considered it and reject it as such.
48. Consequently, we are satisfied that the appellant's conviction for the offence of murder was safe and the sentence was commensurate with the offence. We therefore uphold both the conviction and the sentence. The appeal is found to have no merit and is hereby dismissed.
49. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF DECEMBER, 2022.

F SICHALE

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JUDGE OF APPEAL

F OCHIENG

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JUDGE OF APPEAL

LA CHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

