Ahmed v Republic (Criminal Appeal 118 of 2018)
[2022] KECA 1336 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1336 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 118 OF 2018

MSA MAKHANDIA, PO KIAGE & F TUIYOTT, JJA

DECEMBER 2, 2022

BETWEEN

HASSAN SHARIFF AHMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya (E. N Maina J.) dated 19th December, 2019 in Nyamira HCCR. Case No. 13 of 2018)

JUDGMENT

1. Hassan Shariff Ahmed, the appellant herein, was one of the two accused persons charged with the murder of Robert Carlos Ouma (hereinafter "the deceased"). It was alleged in the information that, on October 3, 2018in Nyamira Township, Nyamira South Sub-County within Nyamira County, they murdered the deceased. The appellant and co- accused were after a full trial, found guilty of manslaughter instead, convicted and sentenced to serve five years' custodial sentence.

   Dissatisfied with the conviction and sentence, the appellant proffered this appeal on five grounds; that the trial court erred in law and in fact by: failing to properly evaluate the evidence before it, thus reaching an erroneous decision; convicting and sentencing the appellant whereas the evidence on record did not meet the requisite standard of proof; disregarding the cogent defence advanced by the appellant; failing to take cognizance of the conduct of the deceased before the commission of the crime, and, faulting the appellant for whatever steps he took to repulse the deceased's attacks.

2. It appears that the co-accused did not lodge any appeal against the conviction and sentence aforesaid.

   In the trial court and in a bid to prove its case against the appellant, the prosecution marshalled a total of ten witnesses. PW1, David Ochieng Opondo, a friend of the deceased testified that they left work in the evening on the fateful day and had supper at the deceased's house before proceeding to a club within Nyamira township known as 'The Seasons' arriving there at around 10.00pm. and had

drinks. At some point, the deceased left PW1 at the table and went out. He immediately followed the deceased only to find between six and seven people surrounding him. PW1 called the deceased back to the club but as tried to get back, the 1st appellant grabbed him and a fight ensued. He grabbed the deceased by the waist pulling him back to the bar but part of the group followed and got him out and continued with the fight. The group had split into two and one of the groups was wrestling with the witness. He then heard one of the assailants say that 'watajua mimi ni waria askari from Somalia'. They assaulted the deceased who became helpless and was crying for help KSM Criminal Appeal No. 118 of 2018 Judgment of the Court Page 2 of 16 from the ground but this did not stop them as they continued assaulting him. Fearing for his own safety, the witness ran towards the police station to report the incident. However, during the fracas, he had identified the person who was calling himself Waria as the appellant. As he approached the police station, two motorcycles carrying some of the assailants came up to him and when they recognized him, they pursued him but he managed to escape. He later learnt that the deceased had succumbed to the injuries while at Nyamira County Hospital.

3. PW2, James Ouma Achanja, the father of the deceased, received information of his son's death when some people came to his house on August 30, 2018and informed him about it. He proceeded to the Nyamira County Mortuary where he confirmed the fact and later attended the postmortem.

PW3, Geoffrey Ondiek Bosire a guard at the said Seasons Bar, recalled that he was called by his colleague who guards inside the club who told him that there was a fight outside the bar at around 2 am. However, he only witnessed the deceased being taken to hospital and the presence of two police officers and later learnt that the deceased had succumbed to the injuries sustained in the fight.

PW4, Simeon Nyamwaro Otango a guard at the same club stated that: as it approached 2 am he heard noises from outside and when he went to find out, he came across a fight, and when one person was overpowered, he went to his parked motorcycle and collected a panga which was immediately snatched from him before he could make use of it, by the appellant and the other assailants. He identified the appellant and the co-accused as among those who were fighting with the deceased; he pleaded with the appellant to stop fighting as he had called police officers, but the appellant responded by slapping him and queried why he was defending a criminal who wanted to kill him with a panga. The two police officers' the appellant had called arrived; he was able to see clearly and identify the appellant because of the security lights that were bright at the scene; and, that he later learnt that the man who was being assaulted had died.

4. PW5, William Ayodo Okinyi stated that he received information that PW1 had called him the previous night. They later met and he narrated to him what had transpired regarding the deceased. Later, he went to the hospital to check on him only to be told that he had passed on and his body was at the mortuary.

PW6, APC Samuel Matanda stated that on the fateful night, he and APC Lawrence Nyangara were on night patrol duties when they received a call from the appellant informing him that he had been attacked by someone with a panga and injured at the club. As they left the police station, they met with a motorcycle carrying the appellant. They asked the appellant why he had lied to them about being injured but received no answer. They all left for club. They found a huge crowd which disappeared immediately they arrived leaving them with PW4 and another man on the ground with injuries on the head and was bleeding profusely. PW4 tried to explain to them about what had happened but the appellant slapped him prompting him to leave. The appellant took the deceased to hospital using his motor cycle, while the motor cycle belonging to the deceased was pushed to the police station and the panga retrieved as an exhibit.

PW7, APC Lawrence Nyagaki merely reiterated and corroborated the testimony of PW6 above.

5. PW8, Sgt Jerida Nyatichi attached to Nyamira police station testified that she was at the police station at 4:20a.m when the appellant, the co-accused, PW6 and PW7 came through. The appellant was very arrogant, unsettled and agitated and was wearing a grey jumper which was stained with blood.

   PW9, Cpl Kariuki Njeru the investigating officer told the court that he was called by the DCIO Ochuka and his deputy who informed him that PW6 and PW7 had reported a murder case and was instructed to investigate the crime. He interrogated PW1 who narrated to him the happenings of the previous night leading to the death of the deceased. He later attended the postmortem conducted by Dr. Samuel Ombati on 3rd September, 2018. He observed that the injuries had not been caused by a firearm and there was nothing from the investigations which would suggest that the appellant acted in self defence.

   PW10, Dr. Samuel Ombati conducted the postmortem on the deceased and established the cause of death to be bleeding to the brain. The type of weapon used was said to be a sharp object.

6. The appellant and the co -accused were found with a case to answer and were placed on their defence. The appellant elected to give a sworn statement. His testimony was that he was at his place of work as an administration police officer at Nyamira. At around midnight, he called the co-accused whom he had employed to ride his motor cycle so that he could take him to the shop to buy a soda. When they got to the shop, they found it closed. They decided to go to the club. Whilst there, an unknown person came to him and started slapping him whilst holding his collar. After receiving several blows from the strange person, he even fell down, after which the person went for a panga from a motor cycle and tried to cut him. The appellant got hold of the panga and a fight ensued but he managed to disarm the person and called colleagues for assistance. However, when they delayed, he went to the house of APC Matanga a fellow police officer to whom he narrated the whole incident, after which they went back to the scene in the company of two other colleagues. He maintained the he and the co-accused did not assault the deceased. He was therefore charged for an offence he did not participate in.

   The trial court upon considering the evidence placed before it, was of the view that, it was the appellant and the co-accused who had occasioned the death of the deceased by assaulting him repeatedly without lawful cause and thereby inflicting upon him injuries that ultimately led to his death. However, the court found no evidence of malice aforethought and proceeded to reduce the charge from murder to one of manslaughter contrary to section 202 as read with section 205 of the *Penal Code* and convicted them accordingly. They were then each sentenced to five years' imprisonment. As already stated, the appellant was dissatisfied with the outcome and hence this appeal.

   During the hearing of the appeal, the appellant was represented by Mr. Otieno, learned counsel while Mr. Okango, learned Prosecution Counsel, appeared for the respondent. They all relied on their respective written submissions that they had filed.

7. The appellant condensed the five grounds of appeal into three main grounds which are, evaluation of evidence, disregarding cogent defence tendered by the appellant and lastly, failing to take cognizance of the conduct of the deceased prior to the encounter. On the first issue, it is the appellant's submission that his guilt was anchored on the evidence of PW1 and PW4 which the court considered to be reliable, trustworthy and corroborative regarding the events of the fateful day. However, the trial court failed to appreciate the discrepancies, contradictions and inconsistencies in their testimonies which meant they were economic with the truth. If the trial court had properly evaluated the evidence before it as required, it would have reached the conclusion that the prosecution did not prove its case against the appellant beyond reasonable doubt. Further, the discrepancies, contradictions and inconsistencies noted in the prosecution case ought to have been resolved in favour of the appellant.

8. On the second issue, the appellant submits that the court failed to realize that from the proceedings, the deceased had come to the club with an intention and or motive which was exhibited by his movement

in and out of the bar and further buttressed by the fact of his carrying a panga to the bar and what the appellant did was to defend himself from the vile actions of the deceased.

On the last issue, it is the appellant's submission that it was only PW4 who painted a picture of someone who was at the scene of crime but left to report to the police station on the assault of the deceased by the appellant. Therefore, the extent of the injury sustained by the deceased at the time PW4 left cannot be said to have caused the death of the deceased. The appellant acted in good faith by first not using the panga on the deceased even though the deceased had wanted to harm him with it, and further by taking him to the hospital. The injuries on the deceased might have been inflicted by different people from the bar. The confirmation that the appellant was not a reveler at the club on the fateful day was a clear testimony that he had been provoked by the deceased.

9. The respondent on the other hand, submitted that the prosecution proved all the ingredients of murder beyond reasonable doubt, that is: the death of the deceased and the cause of the death; the death was caused by an unlawful act of the appellant and he acted with malice aforethought. It was common ground that the appellant was at the scene of crime, a fight ensued at the scene of crime involving the deceased and the appellant. As a result of the fracas, the deceased was fatally injured. This being the case the appellant cannot escape culpability. It was in the light of the foregoing that the trial court reduced the information from murder to manslaughter and rightly so according to learned counsel for the respondent. The trial court evaluated the evidence tendered in respect of each ingredient and the defence advanced as well as the law and made a determination on each. Therefore, the allegation that there was no evaluation of evidence is not true.

On the second issue, the respondent submits that from the judgment of the trial court, the defence by the appellant was duly considered. However, the court did not find it convincing as to remove him from the scene of crime. Indeed, it is his defence that persuaded the court to arrive at the fact and finding that indeed the appellant was at the scene of the crime. Further, there was no evidence on record to suggest that it was the deceased who started the fight. So, the issues of self defence and or provocation do not arise.

10. On sentence, the respondent while relying on the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR urges this court not to interfere with the same as there are no sufficient grounds adduced to warrant such interference.

As this is a first appeal, the mandate of this court was set out in the case of *Okeno v Republic* [1972] EA 32 as follows:

> " 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."

11. In deciding this appeal, we deem it necessary to consider the following issues: whether the trial court properly evaluated the evidence before reaching its verdict; whether the offence disclosed was

manslaughter and finally, whether a defence of provocation and or self- defence was available to the appellant.

On the first issue, we are satisfied that the trial court properly evaluated the evidence before reaching the decision of convicting and sentencing the appellant. We say so because the record before us shows that the trial court before arriving at its decision set out the issues for determination, decided each issue and gave reasons for the determination. The framed issues were whether: there was death which was unlawful and if the same was caused by appellant and the co accused; and, lastly, whether there was malice aforethought which were all answered after detailed evaluation of the evidence tendered. It was after this evaluation that the trial court reached the verdict that the facts and evidence led by the prosecution did not prove the offence of murder but rather manslaughter. Accordingly, the claim by the appellant that the trial court did not evaluate the evidence tendered is obviously far- fetched and cannot stand scrutiny.

12. On the second issue, we are satisfied that the offence disclosed on the facts, evidence and the law was manslaughter. The appellant and the co-accused were charged with the offence of murder, and given the circumstances in which the offence was committed, the offence disclosed was manslaughter as rightly held by the trial court. For the prosecution to secure a conviction on the charge of murder, three elements against an accused person must be proved. These are: the fact and the cause of death, the death was the direct consequence of an unlawful act or omission on the part of the accused, which constitutes the 'actus reus' of the offence; the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

The appellant in his own defence testified that he had gone to a shop near the club to buy a soda and whilst there a fight ensued between him and the deceased. Although this was the prosecution's case vide the evidence of PW1 and PW4, the burden was lessened by the appellant putting himself at the scene of crime. Further, the appellant and the co-accused took the deceased to the hospital. The person who was taken to hospital is the same person they had a fight with and as a result had called his colleagues claiming that he had been attacked by him. The appellant is said to have engaged the deceased in a continuous fight even after he had been pushed inside the club by PW1 to avoid further escalation of the fight but he got hold of him and continued to assault him with his co-accused and others even when he had become helpless and lying on the ground. From the evidence on record, it is clear that there was death and the said death was caused by the unlawful act of the appellant and others.

13. The record does not show that the fight had been pre-planned or that the appellant deliberately provoked the fight. The record is not clear as to the motive for the fight. We agree with the trial court when it stated that: -

> " I could not however find evidence that they had planned this assault or that they intended or had knowledge that the same could lead to the death of the deceased or cause him grievous harm. It was an assault in which no weapons were used and so malice aforethought was not established."

14. The appellant has alluded to the fact that he was provoked and had to act in self defence as the deceased went further to get a panga from his motorcycle so that he could use it against the appellant. From the evidence presented, it is clear that the deceased was attacked by both the appellant and his errand boys and when he was overwhelmed, he went for the panga from his motorcycle in order to defend himself. However, the same was taken from him immediately he got it and before he could make any use of it. Was the appellant provoked in the circumstances?

Provocation was succinctly defined in the case of *Duffy* [1949] I ALL ER 932 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 ..."

15. This is also provided for in section 208 of the *Penal Code*. Simply put, this defence is to the effect that at the time he committed the offence he was under a diminished capacity and acted in the heat of anger or passion. It therefore, follows that for such a defence to suffice two conditions must be satisfied as deduced by this court in the case of *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR namely: -

> " The "subjective" condition that the accused was actually provoked so as to lose his self-control; and The "objective" condition that a reasonable man would have been so provoked."

16. From the foregoing, we ask ourselves, was the defence available to the appellant? Whether the appellant was provoked so as to lose self-control is a question of fact which is to be determined on the evidence presented. In our view, having appraised the evidence on record, we are not satisfied that the appellant could call upon the defence of provocation. This is clear as we have stated above that indeed there was no iota of truth in the allegation that the deceased provoked the appellant. Indeed, the appellant had already injured the deceased at the time he went for the panga. There was nothing to show that the appellant's actions on the fateful night were as a result of diminished responsibility.

Equally, the appellant's defence of self defence does not hold water whatsoever. This is because it was correctly observed by the trial court that there was no mention that the deceased had attempted or threatened to attack the appellant with the panga that he alleged he was armed with. In point of fact, in his own testimony, the appellant stated that the deceased

> " ...then he went to his motor cycle and brought a panga. He told people to move away. He attempted to cut me with the panga but I ducked and he missed me. Then as he made a second attempt I got hold of his hand. we both fell down and rolled on the ground. We were separated by bystanders."

17. Thus, there was no evidence that the appellant found the deceased with the panga with the sole intention of assaulting him. Our position is further fortified by the case of *Victor Nthiga Kiruthu & another v Republic* [2017] eKLR wherein this court while discussing self defence stated:

> " The principles that have emerged from these and other authorities are as follows: -

i. Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

18. The post-mortem report indicated that the deceased died as a result of an injury caused by both blunt and sharp objects and that the injuries caused blood clot on the brain of the deceased.

All in all, we, like the trial court, are satisfied that the appellant's actions and more specifically the vicious nature he and his colleagues attacked the deceased and the resulting injuries are not indicative of any self defence or provocation. How is it possible that the deceased single handedly provoked the appellant and a hoard of his handlers? How could they have rained blows on the deceased under the guise of self defence? From the circumstances of this case, the deceased died as a result of assault inflicted upon him by the appellant and his accomplices. A life was lost and the trial court properly exercised its discretion in convicting and sentencing the appellant for the offence of manslaughter. We see no reason to disturb the conviction and sentence of five years meted out on the appellant which, in our view, may have been a slap on the wrist, in the circumstances.

19. The upshot of the foregoing is that the appeal on both conviction and sentence is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR