**Bichanga & 3 others v Republic (Criminal Appeal 127 of 2016)**
**[2022] KECA 1365 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1365 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 127 OF 2016**

**PO KIAGE, HA OMONDI & F TUIYOTT, JJA**

**DECEMBER 2, 2022**

**BETWEEN**

**DENNIS ASWERA BICHANGA ..... 1ST APPELLANT**

**AMOS BICHANGA ..... 2ND APPELLANT**

**BICHANGA OMWANCHA ..... 3RD APPELLANT**

**FRED OKEKO JOHN ALIAS MGORO ..... 4TH APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***((An appeal from the Judgment of the High Court of Kenya at Kisii (J.R. Karanja, J.) dated 12th July, 2016 in HCCR No. 31 of 2014))***

## JUDGMENT

1. It baffles the mind and shocks the conscience that in an age where reason and enlightenment are taken for granted, pockets of deep darkness and superstition still exist. Consider this case. On the morning of February 25, 2014, at Getenge sub-location in Sameta District within Kisii County, two ladies Clemencia Bonareri Nyamao (first deceased) and Alice Moraa Mokua (second deceased) suffered gruesome and violent deaths on the suspicion that they were witches. On the material day, villagers were attracted to a commotion at one of the homesteads. It was alleged that Dennis Aswera Bichanga, the 1st appellant, who was found in a stupor, had been bewitched. Once he regained his senses, he claimed that the first and second deceased were the ones that bewitched him. This allegation, angered the villagers who descended upon the two elderly ladies with murderous intent before setting them ablaze. The duo were ultimately burnt to death. The villagers were led by the 1st appellant, Amos Bichanga, 2nd appellant, Bichanga Omwancha, 3rd appellant and Fred Okeko John, 4th appellant.

2. After investigations, the appellants were arraigned before the High Court at Kisii charged with 2 counts of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The appellants denied the charges which lead to a trial.

3. The prosecution, through its 7 witnesses, established that the appellants were at the scene and were at the forefront in the commission of the vicious crime. Both Rael Osebe Mokua, PW1, the daughter of the second deceased and Isabella Nyaboke Nyamao, PW2 the daughter of the first deceased were at the scene of the crime and witnessed the horrific murders of their mothers. Their accounts of the fateful day paint a picture of villagers who were baying for the blood of the deceased persons on the allegation that they were witches. The two witnesses beheld, aghast, as the 4th appellant attacked both deceased with a machete, the 1st appellant provided the matchsticks, the 2nd appellant provided the petrol while the 3rd appellant provided the tyres that they used to lynch the deceased persons.

4. Attempts by George William Mabeya, PW3, to rescue the deceased persons from the appellants' attack were futile. He was chased away by the 3rd appellant and assaulted with a club by the 1st appellant and with a machete by the 4th appellant. He later heard that the deceased persons were burnt to death. Dr. Nyabera Omari, PW5, detailed that the cause of death for the first and the second deceased was 65% and 95% body burns, respectively. Police Constable Zakaya Kipcheum, PW7, discovered, in the course of investigations, that one Jared Bosire, the son of the first deceased, had, in a macabre twist, recorded a video of the lynching. The phone and the memory card containing the recording were produced in court as evidence. The recording, which only captures the 1st appellant, was played in court without any objection from the appellants' advocate.

5. At the close of the prosecution's case, the learned Judge found the appellants had a case to answer and placed them on their defence.

6. All the appellants gave unsworn statements. The 1st appellant insisted that, to his knowledge, both deceased persons unsuccessfully tried to turn him into a wizard, and that is why he made the allegation. He confirmed his presence at the scene of the crime, but denied participation in the lynching. The rest of the appellant's statements consisted of mere denials and grievances that they were arrested without cause.

7. Karanja J, delivered the judgment on July 12, 2016. He found that the prosecution proved its case beyond any reasonable doubt. He convicted the appellants on both counts. He then sentenced them to death on both counts, but ordered that, the sentence on second count be held in abeyance.

8. Aggrieved by the judgment and sentence, the appellants have preferred the instant appeal based on 2 grounds. They charge that the learned judge erred in law and fact by;

    a. Holding that the identification by recognition was conclusive yet the conditions for identification were unfavourable.

    b. Passing a harsh and excessive sentence against the appellants.

9. At the hearing of the appeal, learned counsel Ms. Imbaya appeared for the appellants while the State was represented by Mr Okango, the learned Senior Principal Prosecution Counsel. Both had filed their respective written submissions.

10. Ms Imbaya argued PW1 testified that it was a bit dark when the incident occurred, yet there was no evidence led on the effect of the intensity of the darkness on the identification of the appellants, considering that the incident involved a mob. Further, the evidence that the deceased persons were burnt means there was a possibility that the smoke from the burning tyres could have led to an error

in the appellants identification. Therefore, in her view, the court's holding that the identification was by recognition was erroneous as the conditions were not conducive for proper identification.

11. On the second ground, counsel submitted that in light of the Supreme Court's holding in *Francis Muruatetu & Another vs Republic* [2017] eKLR on the unconstitutionality of the mandatory nature of the death sentence, the learned Judge ought to have evaluated the mitigation offered and meted out a lesser, more appropriate sentence.

12. In opposition to the appeal, Mr Okango argued that apart from PW1's testimony that it was a bit dark when the incident occurred, the rest of the testimonies, taken cumulatively, show that the crime actually took place in broad daylight. The second deceased went to the shamba at 6am, while PW1 did her usual chores, only to return later with the news of the 1st appellant's alleged bewitching. The first deceased was at the shamba before heading to the scene of the crime. Finally, PW3 was at a board meeting when he heard the commotion and rushed to the scene where he found the persons being assaulted by the appellants. Moreover, the identification was by recognition as the witnesses knew the appellants as their fellow villagers. And PW3 stated that all the appellants were his relatives.

13. On the sentence, counsel contended that, it is trite the Supreme Court in Francis Muruatetu & Another vs Republic (*supra*) did not declare the death penalty unconstitutional rather faulting only its mandatory nature. He submitted that in the present case the High Court considered the mitigation and pronounced an appropriate sentence which, according to Counsel, was not excessive. He urged this Court to uphold the conviction and sentence.

14. We have carefully considered the entire record of appeal freshly and exhaustively as well as submissions made by the appellants and the respondent. We appreciate our role as a first appellate Court as was stated in, among an endless line of cases, *Reuben Ombura Muma & Another vs Republic* [2018] eKLR;

> "This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

15. The appellants object to the finding of the High Court that they were properly identified. They claim that since PW1 stated that it was a bit dark when the crime occurred, then the learned judge should have taken the issue of proper lighting into consideration, as well as the possibility of the smoke from the burning tyres affecting the visibility of the witnesses and the fact that there a mob assaulting the deceased persons. All these portray, in counsel's view, that the circumstances surrounding the crime were not conducive for proper identification.

16. The factors to be considered in the assessment of whether evidence by identification is watertight were well articulated by this Court in *Alex Boniface Muliungi vs Republic* [2014] eKLR;

> "In the famous English case of *Regina v Turnbull* [1976] 3WLR 445, the court set out factors for consideration in that regard including the length of time the witness had the accused under their observation; the distance between the witnesses and the accused person; the lighting situation; whether the observation was impeded in any way; whether the witness had ever seen or knew the accused person before or knew him; the length of time that had elapsed between the original observation and the subsequent identification to the police and whether there was any material discrepancy between the description of the accused given to the Police by the witness when first seen and his actual appearance." (Our emphasis)

17. The learned Judge held that the crime occurred in broad day light thereby providing favourable conditions for proper identification of the appellants. The evidence adduced demonstrated the chain

of transaction from when the deceased persons were accused of casting the spell to their lynching. Together, PW1, PW2 and PW3 identified the appellants as the ring leaders of the assault and the subsequent lynching. The learned Judge noted that the witnesses knew the appellants very well, and were very firm, credible and corroborative in their implication of the appellants. They did not impress the court as having acted without good reason or out of any malicious motive.

18. On our own evaluation of the evidence, we are satisfied that the cumulative evidence, shows that the crime took place in broad day light as the learned Judge deduced. As we have already pointed out the witnesses came to the scene of the crime out of activities that were ordinarily carried out in the hours of daylight. They could not have been at their shambas and attending board meetings before sunrise. We take judicial notice that does not usually happen in Kisii County. Furthermore, the evidence indicates that the entire transaction took some time hence gave PW1, PW2 and PW3 adequate time to discern the identity of the appellants. Additionally, PW2 in her testimony stated;

> " I had previously known the four accused. They are all from my village."
>
> Likewise, PW3 in his testimony stated;
>
> "I know all the four accused in the dock..... All the four accused are my relatives and so are the two deceased"

19. We are therefore satisfied beyond peradventure that there was no possibility of mistaken identity, hence the appellants were convicted on sound evidence of identification by recognition in circumstances that were conducive. It is trite that identification by recognition is more reliable than the identification of a stranger. See *Hashon Bundi Gitonga vs Republic* [2016] eKLR. We are thus satisfied with the High Court's holding in this regard.

20. It is trite that sentencing is a judicial function at the discretion of the court per the now notorious decision of the Supreme Court in Francis Karioko Muruatetu & Another vs Republic & 4 OTHERS (*supra*). The Supreme Court brought to light the unconstitutionality of the mandatory nature of the death sentence as it impedes judicial discretion in the determination of sentences. However, it does not prohibit, deter or limit the imposition of the sentence in deserving cases. And if ever a case deserved the pronouncement of the sentence of death, this one does.

21. The manner in which the crime was committed is a study in rank malice, premeditation and murderous intent. The appellants worked the mob into a frenzy in an orgy of incendiary violence. They violently attacked the hapless duo without a drop of human kindness or pity. They subjected the victims to torturous and traumatic torture. They also repulsed with the thread of violence any attempt by PW3 to rescue the deceased. Such bold and impetuous conduct threatens the very safety of every member of society. They had no regard for the life of the two women whom they made a bonfire of in the helpless presence of their children. Courts of law must never be seen to condone such a descent to Hobbesian chaos.

22. We therefore affirm the death sentence. We direct further that in the event that sentence is by common practice commuted to life imprisonment, the appellants must never be released to blight the safety of the happy and the free. They should be held for the remainder of the natural lives with no possibility of parole.

23. The appeal is devoid of merit and is dismissed in its entirety. Orders accordingly.

**Dated and delivered at Kisumu this 2nd day of December, 2022.**

**P O KIAGE**

.....

**JUDGE OF APPEAL**

**H A OMONDI**

.....

**JUDGE OF APPEAL**

**F TUIYOTT**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**