



**Otieno v Republic (Criminal Appeal 25 of 2020)  
[2022] KECA 1319 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1319 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 25 OF 2020  
AK MURGOR, S OLE KANTAI & KI LAIBUTA, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**ERICK OMONDI OTIENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court at Nairobi (Wakiaga, J.)  
delivered on 9th November 2017 in Criminal Appeal No. 34 of 2014)*

**JUDGMENT**

1. The appellant, Erick Omondi Otieno, was charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the charge were that, on October 8, 2014 in Mwiki Area of Kasarani District, Nairobi County, he murdered Samson Musembi Musyoka, the deceased. The appellant pleaded not guilty to the charge. The prosecution called 14 witnesses.
2. Upon hearing the prosecution and the defence's case, the trial judge convicted and sentenced him to death as by law prescribed after finding that the offence was proved to the required standard. The appellant was aggrieved by that decision and has appealed to this court on grounds as set out in a supplementary memorandum of appeal which, in summary, are that the trial court was in error: when it failed to appreciate that the prosecution withheld crucial witnesses and evidence; when it failed to take into account the contradictions and inconsistencies in the witness evidence when arriving at the conviction; in relying on the evidence of identification that was not free from error or mistake; in dismissing the appellant's defence; and in imposing a punitive sentence without considering the appellant's mitigation, or appreciating that it was unconstitutional.
3. During the hearing of the appeal, learned counsel Mr Angaya appeared for the appellant, and Mr Wan'gele appeared for the State. Both counsel informed us that they had filed written submissions, which they would be relying on in their entirety.



4. In his written submissions, the appellant submitted that the circumstantial evidence relied on by the trial court was insufficient to prove any guilt on his part; that the witness evidence alleged to have identified him was contradictory and inconsistent, and ought not to have been relied upon by the trial court; that the learned judge believed that the appellant murdered the deceased because he had been interdicted; that an identification parade was not conducted and, therefore, there was no concrete evidence linking the appellant to the deceased's murder; and that the prosecution withheld evidence, including the fingerprints report, the forensic examination report of the blood samples found on the appellant's t-shirt, and the Safaricom call data report, which was prejudicial to the appellant.
5. It was argued that his defence was not challenged or rebutted, and that he had explained why he left Nairobi for his rural home. Regarding the allegation of his having been seen on the road within the timeframe of the incident, the appellant submitted that he was a victim of circumstances, and that someone else who was suspected of murdering the deceased was exonerated. On resentencing, the appellant pleaded that this court take into account the decision of the Supreme Court in *Francis Karioko Muruatetu vs Republic* [2017] eKLR.
6. On its part, the respondent submitted that the prosecution relied upon circumstantial evidence to prove its case to the required standard, and that the appellant was responsible for the deceased's death. It was stated that the deceased received a phone call from the appellant, and then went to meet him at 12:00 pm; that, soon thereafter, the deceased was found dead; that, further, PW3, John ole Koilel and PW 12 John Maisodo, who were in the vicinity, saw the deceased's motor-vehicle a Probox white in colour, parked along the road; that they saw a well built, tall man wearing a red cap, a red T-shirt and black trousers and a brown jacket enter the vehicle, and come out after a short while, lock the door of the vehicle and walk away; and that, thereafter, PW5 Thomas Orgullo met the appellant dressed in a brown jacket and a red cap coming from the direction where the deceased motor vehicle was found. It was further submitted that PW 13 Dr Peter Ndegwa, who conducted the post-mortem report on the deceased, observed that both chest cavities were penetrated between the 3<sup>rd</sup> and 4<sup>th</sup> ribs; that the percedian was perforated, left lung was perforated. The right diaphragm had been perforated. The liver had been stabbed, and that there was blood in the abdomen. The respondent asserted that the circumstantial evidence relied on unerringly pointed to the appellant's guilt.
7. On his alibi defence, it was submitted that the appellant attempted to accuse one, Obedi Olubanda as the person suspected of committing the offence; that this was dislodged by the evidence of PW 4 Henry Omondi Agutu, who testified that he was with Obedi Olubanda with whom he had gone to the scene. On the issue of malice aforethought, it was submitted that this was clearly established from the extent of the injuries suffered by the deceased as indicated by the medical report where the doctor concluded that the diseased died of haemorrhage due to multiple stab wounds.
8. Turning to the sentence, the respondent submitted that the death penalty was not declared unconstitutional by the Supreme Court, but that the court had declared the mandatory nature of the sentence provided under section 204 of the *Penal Code* to be unconstitutional; that the trial court conducted a comprehensive hearing on sentence, and upon considering the appellant's mitigation, the probation office's report and the pre-sentence report, the sentence as prescribed by law was imposed on the appellant; that since no material was placed before the court to warrant interference with that decision, this court should similarly not interfere with the sentence.
9. This is a first appeal and the duty of this court was outlined in the case of *Kamau vs Mungai* [2006] 1KLR 150 where it was held that in a first appeal, it was the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions, bearing in mind that we have not seen or heard the witnesses;



and in the case of *Njoroge vs Republic* [1987] eKLR 19 it was emphasised that the court is under an obligation to lay out the evidence as a whole and reach its own independent conclusions.

10. In respect of the above, we consider that the issues for determination are:
  - i. whether the offence was proved to the required standard;
  - ii. whether the prosecution witnesses' evidence that identified the appellant was contradictory or inconsistent;
  - iii. whether crucial evidence was not called by the prosecution;
  - iv. whether the High Court properly evaluated the evidence.
11. We begin by briefly outlining the evidence that was before the trial court. PW1 Dedacus Ochieng Augo stated that the deceased went to the scene driving a motor vehicle registration number KPL 945D Toyota Probox. Before he left, he had requested PW1 to bring him the week's collection which PW1 had done. While they were together, the deceased received a mobile phone call after which the deceased had told him that the appellant had called requesting to know when he would resume his duties. That the deceased went to meet the appellant. At 12:30 pm, he was informed that the deceased had been killed in his car. He proceeded to the scene and confirmed that the deceased had died.
12. PW3 and PW 12 John Maisodo were herdsman tending to their goats and sheep in the vicinity. PW3 saw the deceased's motor-vehicle stop and, shortly thereafter, a man dressed in a red cap, a red T-shirt and jacket entered the motor vehicle from the co-driver side. The man remained in the vehicle and, after a few minutes, came out and left. PW3 and PW 12 then decided to go and check whether the occupants wanted to buy goats, only to notice blood coming from the driver-side and the body of the deceased leaning on the co-driver's seat. PW12 further stated that, soon after the person entered the vehicle, he heard a cry coming from inside the vehicle; that the person who had entered the motor vehicle got out, closed the windows and walked away; that people came to the scene and the police were called. He stated that the appellant had greeted the deceased as if they were well known to each other.
13. PW 4 confirmed that he went to the scene with one of his friends, Obedi Olubanda, who was pointed out by PW3 and PW12 as the person who had killed the deceased since he was wearing sports shoes. The witness stated that Olubanda had been with him throughout and could not have killed the deceased.
14. Between 12 and 1 pm when PW5 Thomas Orgullo was going for lunch, he met the appellant along the road heading in the direction of Mwiki Estate; and that the appellant was wearing a green brown jacket and red cap. They greeted each other and each went their own way. It was after meeting the appellant that he received a telephone call from a colleague informing him of the death of the deceased. They proceeded to the scene where they confirmed that the deceased had been murdered.
15. PW2 PC Joseph Kipsam, the scene of crime officer processed the scene and confirmed that the deceased's body was in the driver seat and had been stabbed severally. There were stab wounds on the chest, abdomen and right arm. PW6 PC Peter Nyongesa received the report from the manager of the quarry, Anthony Njoroge, and proceeded to the scene with PW9 Sergeant Joseph Wambua, where he interviewed PW3 and PW 12. PW 14 PC Joseph Nampaso took a sketch plan of the scene, and also spoke to witnesses, who informed him that the appellant was suspended from the quarry and wanted to talk to the deceased who had agreed to meet him along the quarry road; that he thereafter proceeded to the appellant's house, but did not find anyone; that they searched the house and recovered a bloodstained T-shirt with the appellant's name on it.
16. The deceased's body was taken to the mortuary where a post mortem was conducted by PW 13 in the presence of PW7 Lucas Oyier the deceased's brother and PW8 Grace Akoth, the deceased's wife. The



- doctor observed that the deceased had two penetrating wounds on the left and right chest wall. Both chest cavities were penetrated between the 3<sup>rd</sup> and 4<sup>th</sup> rib. The pericardium was perforated, as was the left lung and the right diaphragm. The liver had stab wounds, and there was blood in the abdomen. He formed the opinion that the cause of death was exsanguination or haemorrhage due to multiple stab wounds.
17. PW 11 Boaz Munga Kemo together with PW14 arrested the appellant at Usenge Beach, in the same area where the appellant's mobile phone was located, and brought him back to Nairobi. PW 11 knew the appellant and the deceased as they all belong to Gor Mahia football club supporters' group. He was able to track down the appellant using his mobile phone number; that at some stage his mobile phone was located in Uganda. It was his evidence that the appellant, who also knew him well, was shocked to see him at Isiaka. He was at his wife's shop when he was arrested.
  18. In his defence, the appellant testified on oath and confirmed having worked with the deceased at the quarry where he had been a security guard until he was suspended. He stated that, on the material day, he was a trader at the quarry from 7.00 a.m to 12.00 when he left to go and look for lorry at the gate; that he loaded it with hard-core up to 4 pm then went to Mwiki where he resided. He had left his mobile phone at home and, when he switched it on at 4 p.m., he found several missed calls. He was informed that the deceased had died at lower quarry, and that a mob had arrested and beaten one Olubanda. He denied calling the deceased on the material day, and further stated that his wife had called to inform him that she was sick and could not continue running the shop. He then decided to go to Osieko Beach and assist her to look after their children, and would return to Nairobi after she had recovered. He denied absconding to Uganda, but confirmed having met PW5 on the day the deceased died. He denied committing the offence.
  19. Returning to the issues raised, we begin with the question as to whether the offence of murder was proved to the required standard.
  20. In this regard, the learned judge stated:

“There is evidence which is unchallenged to the effect that the accused had arranged to meet with the deceased so that the issue leading to his interdiction would be sorted out and having listened to most of the prosecution witnesses who were friends of both the accused and the deceased, I have no doubt on the truthfulness and credibility and therefore find that the accused was known to PW5 was positively placed at the scene and having been interdicted by the deceased find the accused had the necessary mens rea and indeed caused the death of the deceased with malice afterthought”.
  21. Section 203 of the *Penal Code* sets out the pre-requisites for the offence of murder as: i) the death of the deceased and the cause of the death; ii) that the appellant committed the unlawful act which caused the death of the deceased; and iii) that the appellant had malice aforethought as required by section 206 of the *Penal Code* when the offence was committed.
  22. In the instant case, the fact of the deceased's death is not in dispute. The post-mortem report of PW 13 concluded that the deceased died from stab wounds to the chest, and that the cause of the death was haemorrhage due to a chest cavity injury.
  23. Was the appellant responsible for the deceased's death? The prosecution's case that was grounded on circumstantial evidence pointed to the appellant as the person who murdered the deceased. In order



to reach a finding of conviction based on circumstantial evidence, this court in the case of *Musili Tulo vs R* [2014] eKLR outlined the criteria thus:

“It follows that the evidence linking the appellant to that offense is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency and unerringly pointing towards guilt of the accused;
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

24. In addition, courts are also enjoined to take into account the requirements set out in *Simon Musoke vs Republic* [1958] EA 71 that:

“The circumstances must be such as to produce moral certainty to the exclusion of any other reasonable doubt... that there are no other coexisting circumstances which would weaken or destroy the inference.”

25. After re-evaluating the evidence, it becomes clear that the evidence of PW 1, PW3, PW5 and PW12 were critical to the appellant’s identification and subsequent conviction. Not only did the evidence place the appellant at the scene where the deceased died, the evidence of PW1 and PW5 served to identify him as the person who killed the deceased. According to PW1, the deceased received a phone call from the appellant requesting a meeting to discuss his interdiction. The deceased left PW 1 at about 12.00 and drove in motor vehicle KPL 945D Toyota Pro box to meet with the appellant along the road to the quarry. At that time, PW3 and PW12 were herding goats and sheep in the area. They saw a motor-vehicle Probox white in colour park along the road. After a short while, they saw a well-built tall man wearing a red cap enter the deceased vehicle. PW 12, who was closer to the vehicle heard someone cry. Two minutes later, the person who entered the vehicle came out, closed the door and left. Both PW 3 and PW12 described the person as tall and well-built, and was wearing a red cap, red T-shirt and black trousers; and that he also wore a brown jacket. PW12 stated that the distance between him and the person was about 20 to 30 metres. Shortly, 1 p.m, PW5 met the appellant whom he knew, as they both worked at the quarry, walking towards Mwiki Estate from the direction of the quarry. He stated that:

“... there is a path used by people on the lower side of the quarry. I saw a man called Erick Omondi joining the road. I think he is the accused. He is known as “jalweny” He is the accused on the dock... he was joining the side road to enable him go to Mwiki estate. He is a person I have known before, I used to work with his father but did not know that he was the accused father. I greeted the accused and we parted ways. He had a green brown jacket and a cap red in colour. I cannot recognise the shirt since he had a jacket on and I did not talk to him for a long period of time. We only greeted each other and parted ways”.

26. The evidence of PW1 showed that the deceased went to meet the appellant on the road to the quarry, whereupon PW3 and PW12 saw him entering the deceased’s motor vehicle on the quarry road. They also saw him coming out of the vehicle and, immediately after he left, blood was seen seeping through



- the door of the motor vehicle. As he walked away from the scene towards Mwiki Estate, he met PW5. Both PW1 and PW5 identified him as a person known to them as they had worked with him at the quarry.
27. Of significance is that the witnesses who saw him that day consistently described his physical appearance and the clothes he was wearing as a brown jacket and red t-shirt and a red cap. The description that PW5 gave of the clothing the appellant was wearing was identical to the description PW3 and PW12 gave of the clothes worn by the person they had seen entering and leaving the vehicle. In our view, the witness evidence identified the appellant and sufficiently connected him to the murder of the deceased. And as was the trial court, we too are satisfied that the circumstantial evidence unequivocally linked the appellant to the deceased's death.
  28. The appellant has complained that there were contradictions and inconsistencies in the description given by PW3, PW5 and PW 12 of the clothes that he was wearing. We have carefully reconsidered the evidence and are satisfied that the descriptions enumerated were consistent and cogent. If at all there were any inconsistencies, we find that they were minor and did not in any way discredit the prosecution's case. This ground therefore fails.
  29. The appellant also complained that he was not properly identified as no identification parade was conducted. As stated above, the prosecution relied on circumstantial evidence which placed him at the scene. PW3 and PW 12 provided a physical description of the assailant. They also described the clothes he was wearing. The descriptions matched that of PW5, who saw and recognised him as he was returning from the scene on the material day. Having been identified by PW1 and PW5 through recognition, we consider that the conduct of an identification parade was unnecessary, and consequently, this ground fails.
  30. As concerns the complaint that the prosecution failed to produce the forensic test results for the blood stains recovered from a red T-shirt found in the appellant's house, the appellant's phone records and the finger prints results, we have been through the record and find that no reasons were provided for this failure to call this evidence. Needless to say, the appellant has not demonstrated what prejudice the omission caused to him. But this notwithstanding, we are satisfied that all the evidence that was before the trial court sufficiently pointed to the appellant as having committed the offence as a result of which this ground also fails.
  31. Turning to whether malice aforethought was proved. The case of *Republic vs Tubere S/O Ochen* [1945] 12 EACA 63 explained malice aforethought to have been established in the following manner:

“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted the manner in which the weapon was used and the conduct of the accused before during and after the attack”.
  32. There is no doubt that the deceased was found dead in his motor KPL 945D Toyota Probox along the road to the quarry. The post mortem conducted by Dr Ndegwa showed that the deceased died from stab wounds to the chest. His lungs, diaphragm and liver were perforated and blood had accumulated in his abdomen. In effect, the injuries suffered demonstrated the vicious and cold blooded manner in which they were inflicted and point to the callous and calculating way that the appellant stabbed and killed the deceased. Given this evidence, we have no hesitation in concluding that malice aforethought was properly established.
  33. The appellant also complained that his alibi defence was not considered, that he was not at the scene, but was otherwise engaged in loading a lorry, and that someone called Olubanda was responsible for the murder.



34. In considering his alibi defence, the trial court had this to say:

“I have further taken into account the defence of the accused person here in and find at the same has not dislodged the prosecution case and having confirmed that the accused and the deceased were friends before he was interdicted and having taken into account the fact that the accused admitted having communicated with PW 11 during the same period I find his defence unbelievable and hereby dismiss the same”.

35. When the appellant’s defence is weighed against the prosecution’s evidence, we find that nothing turns on it since he did not deny being at the quarry on the material day up to the time when the deceased died, and even admitted that he had met PW5 walking from the scene to Mwiki Estate.

36. Nothing also turned on his denial that he did not have his mobile phone by the time he met with the deceased. Essentially, his defence did not in any way water down the prosecution’s evidence which squarely placed him at the specified time in question at the scene of the deceased’s demise. In the circumstances, the trial judge rightfully dismissed his evidence.

37. On the issue that the trial court did not properly evaluated the evidence, the judgment shows that the trial court took into account the prosecution witnesses evidence, analysed it and weigh it against the appellant’s defence. After so doing, it came to the conclusion that the appellant murdered the deceased. Clearly, the totality of the evidence proved that the appellant committed the offence to the required standard which, in our view, has rendered the conviction safe.

38. On the final issue of whether the sentence of death imposed on the appellant was rendered unconstitutional by the Supreme Court in the *Francis Karioko Muruatetu* (supra) case, as submitted by the respondent, and we agree, the death penalty was not declared unconstitutional by the Supreme Court; that the court only declared the mandatory nature of the sentence provided under section 204 of the *Penal Code* as unconstitutional. After taking into consideration the appellant’s extensive mitigation, and the sentencing guidelines, the trial court sentenced the appellant to death after satisfying itself that:

it is clear that the accused premeditated, planned and executed his plans hearing by calling the deceased on phone, setting a meeting with him and instead of amicably settling in the disputes between them, inflicted fatal injuries on the scene and walked away leaving the same bleeding to death in his car and as if that was not enough taking off from the city”.

39. Guided by the above we find that we have no reason to interfere with the sentence which we consider to have been lawfully imposed.

40. In sum, we uphold the conviction and sentence. The appeal is without merit, and is dismissed as such. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**DR. K.I. LAIBUTA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

