Katana v Republic (Criminal Appeal 19 of 2019)
[2021] KECA 14 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 14 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 19 OF 2019

SG KAIRU, F SICHALE & S OLE KANTAI, JJA

SEPTEMBER 23, 2021

BETWEEN

MWENI NGUMBAO KATANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 23rd February, 2016 in HC. CR.C. No. 12 of 2014))

JUDGMENT

1. When this appeal came up for hearing before us on 12th May, 2021 Mr. Gicharu Kimani, learned counsel for the appellant appearing on a virtual platform due to the COVID-19 pandemic informed us that the appeal was against conviction only. This was confirmed by the appellant, Mweni Ngumbao Katana who also appeared virtually from Malindi prison. Mr. Alex Gituma, learned State Counsel, appeared for the Director of Public Prosecutions (DPP).

2. The unfortunate events that took place in the evening of 30th April, 2014 nled to the appellant being charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was stated in the Information that on that day at 2 a.m. the appellant murdered Agnes Kauye Mkutano (the deceased) at Kazuyuni village in Kilifi County. A trial took place before Chitembwe, J. who in a Judgment delivered on 23rd February, 2016 convicted the appellant and sentenced him to serve a sentence of twenty-five years imprisonment.

3. This is a first appeal and it is our duty to re-evaluate the evidence and reach our own conclusions of fact but must bear in mind that we do not have the advantage of seeing or hearing the witnesses, an advantage the trial Judge has.

4. We must, in a nutshell, retry the case – See the oft-cited case of *Okeno v Republic* [1972] EA 32 where it was held:

> "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 vs. 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 Vs. 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] E A 424."

5. Kitsoo Katana (Katana – PW3), a brother of the appellant and husband of the deceased finished his work on 29th April, 2014 (he was a fisherman) and went home where he found his wife (the deceased). The appellant visited at about 8 p.m. and was carrying two bottles of unnamed alcoholic drink. The appellant called the deceased by name. When she appeared at the door near where Katana was seated the appellant attacked her with a panga cutting her several times. Katana fled from the scene and alerted neighbours of the events that were taking place at his home. Those neighbours including Kitsao, Mzeem Mwarunga, Kazungu, Kizito and others went to Katana's home but he, fearing for his life, stayed away until the next morning. He visited the hospital where he was informed that his wife had died while being taken to hospital. He denied that the deceased had stolen money from the appellant and in crossexamination he confirmed that the deceased had warned the appellant to stop a sexual relationship he had with their daughter-in-law. On being re-called to give further evidence on application by the appellant Katana seemed to change tack stating that on the material day he had gotten home to find his wife and the appellant quarreling over money allegedly stolen by the deceased from the appellant's house. He also stated that his wife was using abusive language against the appellant and also against him which annoyed him. He said:

> "…. Every morning the accused asked the deceased for his money but deceased kept on abusing the accused……"

6. Samson Mwarago Kazungu (Kazungu – PW1) received a telephone call in the evening of 29th April, 2014 from his brother who informed him that the deceased had been assaulted and killed. While headed to the scene he met relatives who informed him that the deceased had died. When he visited Marereni Police Station to report the incident the appellant arrived armed with a panga. The appellant was arrested and detained in the police cells. When he visited the mortuary, he observed that the deceased's body had cuts on the neck below the ear, the leg and thigh had cuts. On 6th May, 2014 he identified the deceased's body for purposes of a post-mortem that was conducted on that day.

7. A village elder Gilbert Katana Chibo (Chibo-PW2) was at home on 29th April, 2014 in the evening when the appellant visited him to report that Ksh.30,000 had been stolen from his house by the deceased. While engaged in the conversation Katana arrived and reported that the appellant had assaulted his wife, the deceased. Presently another villager arrived on a motor bike and Chibo rode with that person to Katana's home where they found the deceased badly injured. They took the deceased to Malindi hospital where she was pronounced dead on arrival.

8. Karahai Fajo (Fajo – PW5) was at home in the evening of 29th April, 2014 when the appellant visited him and told him that he had killed "mama Kenye". He visited the deceased's home and found the

deceased outside the house and observed a cut wound on the neck. She could still talk. According to him:

> "... She told me it was Mweni Ngumbao who had assaulted her on allegations that she had stolen Kshs.30,000 ...."

The deceased died while this witness and others were taking her to hospital.

9. Dr. Salmin Omar Aboud of Malindi District Hospital worked with Dr. Amina at the said hospital. The latter had conducted post mortem on the body of the deceased where findings were a deep cut wound left side of neck and mandible extending to the major vessels, bruises on left side of the back and neck. There were minor cuts on both hands and cause of death was cardiopulmonary arrest secondary to bleeding severely.

10. The last prosecution witness was Chief Inspector James Gitau who at the material time was based at Marereri police station. He received a report on 30th April, 2014 that a person had been murdered. He visited the scene and found that the deceased had been taken to hospital. He saw a lot of blood outside the deceased's house and established that the appellant's house and that of the deceased were close, in the same compound. He drew a sketch plan of the scene which he produced in court as part of the evidence. The appellant had surrendered himself to police and alleged that the deceased had stolen his money. The appellant informed him that the money was meant for dowry to marry another wife as his wife had left him and that in family discussions it had been agreed that a witchdoctor be procured to establish who had stolen the money; the attack took place before this could be done.

11. That was the case made out by the prosecution and upon being put on his defence the appellant, in an unsworn statement, testified that he left home on 28th April, 2014 to collect poles for building a house and on returning back he overheard his sister-in-law (the deceased) talking about money that had been stolen from him. He was not happy. He left and went to look for his brother (Katana) who he informed that the deceased was talking ill of him and wished him (the appellant) to die. Upon returning to Katana's home with Katana he called the deceased and in his own words:

> "... I tried to go and hold her hand so that I could make her sit where we were. She hit me with the bucket on the head until I fell down. I got confused and cannot recall what happened later."

12. Further, that his wife had left him; he had sold a parcel of land to get money for dowry to marry another wife and it was this money (part of Ksh.50 000) that had been stolen.

13. The learned Judge analyzed the case by the prosecution and the defence offered by the appellant and convicted the appellant.

14. The appellant is dissatisfied with those findings and has in a homemade Memorandum of Appeal raised five grounds of appeal. These range from: that the Judge erred in law and fact by failing to consider that malice aforethought had not been proved beyond reasonable doubt; that no formal document was produced to prove cause of death; that the Judge should have found that the appellant's arrest had no link with the offence charged. In the penultimate ground the appellant faults the Judge for failing tom consider that the prosecution failed to prove its case beyond reasonable doubt and in the last ground the appellant says that the Judge failed to consider "... that my defense was not challenged by the prosecution case ...." At the hearing of the appeal learned counsel Mr. Gicharu Kimani who had not filed written submissions as required submitted that the Judge erred in finding that the appellant was drunk. According to counsel the appellant was provoked by the deceased as per evidence of Katana as she had stolen his money and kept abusing him.

15. Mr. Alex Gituma, for the DPP had filed written submission which he fully relied on. We have perused those submissions where counsel states that malice aforethought as defined by Section 206 of the Penal Code had been proved as the appellant had armed himself with a panga with which he attacked the deceased. Counsel submits that there was proof of death by the doctor; that the appellant was put at the scene by prosecution witnesses and that his defence was considered.

16. We have considered the whole record of appeal, the grounds of appeal raised, submissions made and the law.

17. All the grounds of appeal raised by the appellant are inter-related and we can take them together.

18 The learned Judge considered the allegation on theft of money; that theft had taken place several days before the killing and the killing occurred even after discussions had been held within the family and a way forward to resolve the issue proposed.

19. Katana was at home with his wife, when the appellant visited bringing along alcohol. Unbeknown to Katana the appellant was armed with a sharp panga. The appellant called the deceased and when she appeared he proceeded to attack her viciously inflicting such injuries that killed her as she was being rushed to hospital. The appellant alleged that the deceased had not only stolen his money but hurled abuses at him. He denied attacking the deceased alleging that he had held her by the hand but she hit him with a bucket making him fall to the ground where he did not know what was happening around him. The Judge analyzed this piece of evidence and found that there was no material placed before the Court to show that there was such provocation as would lead to an excuse of the reaction by the appellant.

20. Upon our own analysis we arrive at the same conclusion as the learned Judge. The appellant alleged that his money had been stolen. He did not report this to any authority. There were discussions within the family on a way forward and there can be no justification for the attack that occurred killing the deceased.

21. Section 206 of the Penal Code on "Malice aforethought" – it is established if there is evidence that the accused had an intention to cause death of or do grievous harm to any person; knowledge that the act or omission causing death will probably cause the death or grievous harm to some person; amongst other factors.

22. In the case of *Daniel Muthee v Republic* Criminal Appeal No. 218 of 2005 (ur) this Court while considering what constitutes malice aforethought observed:

> "When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code. I am guided by the above cases. Repeated assault with a weapon can be construed to prove the presence of malice aforethought on the perpetrator."

23. In the earlier case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 the predecessor of this Court held that 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.

24. The appellant armed himself with a panga, a dangerous weapon by any standard. He visited his brother's (Katana) house and attacked his sister-in-law killing her. The attack was witnessed by Katana who fled from the scene fearing for his life. Katana informed neighbours including the village elder who received the appellant who stated that he had attacked the deceased. The appellant surrendered himself to the police while still armed with the panga. Medical evidence showed serious injuries including a deep cut wound on the neck extending to the major vessels. A man who arms himself with a panga and attacks another as the appellant did must know that his action will lead to death or grievous harm upon the victim. There was sufficient evidence that the appellant attacked the deceased and the attack was accompanied with malice aforethought. The appellant's defence was duly considered and the conviction was sound. The appeal has no merit and we dismiss it accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

Signed

DEPUTY REGISTRAR