



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CRIMINAL APPEAL NO. 125 OF 2016

BETWEEN

ELISHA OGUTU ATIENO APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay, (Majanja, J.) dated 27th June, 2016

HCCRC NO. 44 OF 2014)

JUDGMENT OF THE COURT

On 21st September, 2013, at around 10.00am **VOO** aged 12 years then and son to **Simeon Omollo Nyanga “the deceased”** was accompanying the deceased to his farm. He was walking about two metres behind when he suddenly saw the appellant whom he knew very well as a neighbor, assaulting the deceased with a panga and a spear. The appellant was with another person. The appellant cut the deceased on the right hand and right leg. When the two assailants realized that he had seen them they started pursuing him. He ran home and informed his brother’s wife, **Mary Akinyi Okello, (PW2)** what he had seen.

PW2 confirmed that she was at home on the material day when PW1 came running and told her that the appellant was killing the deceased who was her father in law. Together with PW1 and another sister in law, **Ann Anyango** they rushed to the scene. As they approached the scene she saw the appellant and another assailant **Omollo** at a distance of about 20 metres running away carrying pangas. When she found the deceased, she noted that he had been injured on the leg. PW2 and her sister in law raised alarm causing many people to come to the scene. In the meantime, PW2 called her husband **Fredrick Otieno Omollo (PW4)**.

PW4 was then at Mirogi Centre when PW2 called to inform him that his father had been killed by the appellant. He immediately proceeded to the scene and found the deceased lying on the ground surrounded by PW1, PW2 and other neighbours. He observed that the deceased had cuts on the back, right leg and right side of the chest and the ribs. He immediately rushed to Ndiwa Police Station and reported the incident and came back with police officers. The police officers took photographs of the scene of crime and evacuated the deceased’s body to the mortuary.

One of the officers who arrived at the scene that fateful morning was **PC Shadrack Melly, (PW7)**. Upon arrival he was directed to the scene which was about 10 metres from the homestead of the deceased. He turned the body of the deceased and noted two deep cuts on the back which went through the clothes and a deep cut on the right foot which went through the gumboot he was wearing. He took photographs of the scene which he later handed over to **Corporal Shem Ondiek Mogaka, (PW6)** for processing. After interrogating members of the public who were present, he left with the deceased’s body accompanied by PW1, PW2, PW3 and PW4. The body of the deceased was later transferred to Homa Bay District Hospital Mortuary to await post mortem.

The post mortem examination was conducted by **Dr. Ayoma Ojwang** on 26th September, 2013 after the body was identified to him by PW3 and PW4. Since Dr. Ojwang had passed away during the trial, the post mortem form was produced by **Dr. Fredrick Ochieng, PW5** under the provisions of **section 77** of the Evidence Act. Dr. Ojwang recorded that the deceased had two very large extensive wounds on his back posteriorly, one at the back of his right lower limb just above the archiles tendon and the fourth cut on his head anteriorly. He concluded that the cause of death was severe bleeding due to extensive panga cuts as a result of violent trauma from other persons.

On 31st October, 2014, the High Court at Homa Bay was informed that on 21st September, 2013 at Loser Kwandiku Sub-location,

Kanyamwa Central location, Ndhiwa, jointly with others not before court, the appellant murdered the deceased contrary to section 203 as read with section 204 of the Penal Code. The appellant denied the information and was tried. When put on his defence, he elected to give a sworn statement and called two witnesses. He told the court that he lived in the same village as the deceased but denied that he killed him. He stated that he used to sell chicken in hotels in Sori. On 21st September, 2013 he had gone to Sori to sell chicken and since it was a Friday, he decided to stay at his uncle's place to await payment. He denied that he had fled from the area after the incident and stated that he had remained at home but would continue to do business in Sori. He recalled that he was arrested on 24th October, 2014 on his way from church.

Loise Achieng Okeyo, DW2 testified on behalf of the appellant. She stated that she was an elder of the Faith Church which the appellant attended. She stated that between 2013 and 2014, she would see him coming to church every Sunday.

Charles Okech Otieno, DW3 similarly testified that the appellant was his nephew. He confirmed that the appellant used to supply water to hotels in Sori. That around the time of the alleged murder he was with the appellant at Sori. He testified that the appellant would come to Sori on Friday to sell chicken and stay at his house until he was paid on Tuesday the following week or until such time as he would be paid.

The trial court (Majanja, J) evaluated the evidence tendered before court by both prosecution and defence and reached the conclusion that the appellant had committed the offence charged. He accordingly convicted and sentenced him to death.

Aggrieved by the conviction and sentence, the appellant filed the instant appeal, on four grounds through Davin's Taremwa Advocate complaining that the learned Judge erred in law and fact in:

(a) *Disregarding his defence of alibi;*

(b) *convicting and sentencing him when the prosecution case was not proved beyond reasonable doubt;*

(c) *failing to adequately evaluate all the material evidence adduced at the trial, and*

(d) *Imposing on him a sentence that was excessive in the circumstances given that the mandatory death had been declared unconstitutional by the Supreme Court.*

The appellant prayed that the appeal be allowed, the conviction quashed and sentence set aside.

Through written submissions, the appellant reiterated that our jurisdiction as a first appellate court was to re-appraise the evidence before the trial court and reach our own independent conclusion. For this proposition, the appellant referred us to the oft-cited case of **Okeno v Republic [1972] E.A 32**. Thereafter the appellant collapsed the four grounds of appeal into three broad limbs; Evidence, standard of proof and sentence.

On evidence, the appellant submitted that the court did not exhaustively scrutinize the evidence tendered by the prosecution witness. Further that the *voire dire* conducted by the trial court in respect of PW1 was not as thorough as required.

It was therefore unjust for the trial court to rely largely on his evidence to convict him.

The appellant further submitted that the prosecution had failed to produce any evidence sufficient enough to prove that the appellant had the necessary *mens rea* to commit the offence. That being the case, it was uncertain whether malice aforethought was proved against the appellant beyond reasonable doubt. For this proposition, the appellant relied on the cases of **Peter Kiambi Muriuki v Republic [2013] eKLR** and **Joseph Kimani Njau v Republic [2014] eKLR**. It was the appellant's further submission that the prosecution did not produce any evidence from the local administration showing that he and the deceased had any dispute. Though the prosecution had advanced a land dispute as the motive behind the crime, it did not tender any evidence to prove the same.

The appellant further submitted that the evidence on record had several gaps which should have been resolved in his favour. Accordingly it was his submission that the evidence the trial court relied on in convicting him was inconclusive, inconsistent and contradictory and therefore below the standard of proof required in criminal cases.

On standard of proof, the appellant submitted that it was settled law that the burden of proof lies squarely with the prosecution and must be beyond reasonable doubt. In aid of this submission, the appellant relied on **Lord Denning's** dicta in the case of **Miller v Minister of Pensions [1947] ALL E.R 372**. To the appellant, the evidence led by the prosecution did not prove beyond reasonable doubt that he had committed the offence. That from the totality of the evidence tendered by the prosecution, it was crystal clear that the trial court largely relied on circumstantial evidence. However, that evidence did not meet the threshold for the trial court to rely on to convict the appellant. The appellant referred to the case of **Republic v Michael Muriuki Munyuri [2014] eKLR** in support of this proposition. Lastly, on this aspect, the appellant submitted that he was convicted on mere suspicion. He pointed out that courts have on several occasions held that suspicion may be strong but the same cannot provide the basis for inferring guilt on an accused person which must be proved by evidence. The appellant referred us to the case of **Joan Chebichi Sawe v Republic** for this proposition.

On sentence, the appellant submitted that the decision of the trial court to sentence him to death under section 204 of the Penal Code was bad in law. That in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, the Supreme Court held that the mandatory death sentence as provided for in section 204 of the Penal Code was unconstitutional. Cognizant of the fact that the Supreme Court decision came after the trial court had passed the sentence, the appellant urged us to remit the case back to the trial court for re-sentencing based on the Constitution and Supreme Court decision in the event that we dismissed the appeal on conviction.

The appeal was vehemently opposed. **Mr. Muia**, learned Prosecution Counsel. In his written submissions he reiterated our role as a first

appellate court to re-evaluate the evidence afresh. On identification of the appellant, learned counsel submitted that the appellant was well known to PW1, PW2 and PW3 who recognized him at the scene as they were neighbours and had known each other over a long period of time. Turning to circumstantial evidence, it was the respondent's submission that from the evidence of all the witnesses together with doctor's report, it could be safely concluded that the appellant committed the offence. The respondent made reference to the case of **Isaac Muiruri Wairimu & Another v Republic, Nairobi Criminal Appeal Numbers 64A & 64B** in support of the proposition.

The respondent denied that the evidence tendered by prosecution was inconsistent or contradictory. As far as it was concerned, its witnesses were consistent on the fact that the appellant was seen by PW1 assaulting the deceased, thereafter he was seen at the scene by PW2, that the appellant speared the deceased and as a matter of fact a spear was collected at the scene. As for the ingredients of the offence, the respondent submitted that the essential ingredients of the offence of murder were proved. The death of the deceased, the cause thereof, and malice aforethought were all proved beyond reasonable doubt. Neither the cross-examination of the prosecution witnesses nor the evidence tendered by the appellant before the trial court poked holes in the prosecution case in any aspect. It was therefore urged that we find the appeal unmeritorious and dismiss it.

As already alluded to by both parties to this appeal, this is a first appeal. Being so, our jurisdiction pursuant to rule 29(1) (a) (b) and several decisions of this Court and in particular **Okeno v Republic** (supra) and **Kiilu & Another v Republic [2005] KLR 174**, is to re-evaluate the evidence tendered before the trial court, assess it and reach our own conclusion remembering that we neither heard nor saw the witnesses and therefore make due allowance. This was succinctly restated in the case of **Kiilu & Another v Republic** (supra) thus:

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

2. 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 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...”

The four grounds of appeal set out in the memorandum of appeal can actually be collapsed further into two broad thematic areas; whether the prosecution proved its case against the appellant beyond reasonable doubt, and secondly, whether the death sentence imposed on the appellant was warranted in view of the recent developments on the question of mandatory death sentence brought about by the decision of the Supreme Court in **Muruatetu case** (supra).

The trial court stated that: **“... In order to secure a conviction for the offence of murder under section 203 of the Penal Code, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought as defined under section 206 of the Penal Code...”** That is the correction position in law. We did not hear the appellant challenge that exposition of the law. A reading of the appellant's submission seem to concede that the appellant died. Neither does he challenge the cause of the death. His main challenge appears to be whether he was the person responsible for the offence and secondly *mens rea*.

As to whether the appellant was the one who inflicted the fatal injuries that led to the death of the deceased turns on the credibility of the evidence of PW1 as the trial court correctly observed. PW1 was a minor aged about 12 years at the time. He gave unsworn evidence after *voire dire* examination after the trial court ruled that **“... Although I am satisfied that the child has sufficient understanding, he does not understand the nature of the oath. He shall give unsworn testimony...”** The appellant complains that the *voire dire* examination was not properly conducted and therefore the evidence of PLW1 lacked credibility.

Section 19(1) of the Oaths and Statutory Declarations Act provides as follows with regard to receiving evidence of a child:-

Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

We have carefully perused and considered the record of the trial court with regard to the *voire dire* examination. We are satisfied the trial court conducted a proper *voire dire* examination that enabled it to make a decision as to the manner in which his evidence should be taken. We hasten to add that there is no set format as to how *voire dire* examination should be conducted. A judicial officer is given latitude as to how to conduct the same. However, the record should show and reflect the questions put and the answers they elicited. In this case though the questions put are not on record, however going by the answers given for instance, his name, age, school he attends to and the class he was in, where he was during his testimony and the need to speak the truth, that he did not go to church frequently and finally, that he did not know what happened to people who do not tell the truth, we are satisfied that relevant and appropriate questions were put to the witness.

The appellant has further complained that because the court ruled that PW1 was ignorant of the consequences that lying to the court would attract, he ought not to have been allowed to testify. This submission has no basis at all either in law or fact. It is obvious that the appellant is not aware that the answer to that submission is contained in section 19(1) of the Oaths and Statutory Declaration Act, which allows for such evidence to be admitted and how it should be treated. The trial court was thus right in receiving his evidence though not on oath. We further note that appellant's counsel intensely cross-examined this witness. What prejudice then did the appellant suffer by PW1 testifying? None in our view.

PW1 narrated in detail how he saw the appellant in the company of another person cut with a panga and spear the deceased. The incident

occurred at about 10.00am in the morning. It was therefore in broad daylight. By his own account, when all happened PW1 was very close by. Indeed he was hardly 2 metres behind. The appellant was a person well known to him as a neighbor. Given the distance between PW1 and the scene of crime, the time of the day as well as the appellant being a neighbour, we are satisfied just like the trial court that PW1 could not have mistaken the appellant for someone else, more so since the appellant was not disguised at all.

The trial court was convinced that PW1's evidence was credible, as it was consistent, detailed and not shaken at all. This is a finding on the credibility of a witness which we cannot disturb. In any event, PW1's evidence was sufficiently corroborated by PW2. When the appellant whilst in the act of assaulting the deceased saw PW1, he and his cohort turned on him but he was too fast for them as ran to the house of PW2 with the duo in hot pursuit but was too fast for them. He immediately informed PW2 that he had witnessed the appellant assault the deceased. PW2 rushed to the scene immediately and 20 metres away saw the appellant run away from the scene. She recognized the appellant as she knew how he walked, always wearing a cap that looked like a police cap that she was familiar with. He also provided the motive for the killing of the deceased; a land dispute between the appellant's family and deceased. Since the appellant was a person she had known for a long time, and were indeed neighbours, she would easily have recognized him.

Contrary to the submissions of the appellant this was not a case of circumstantial evidence. It was a case of direct evidence as well as recognition. PW1 saw the appellant in the company of another person cut and spear the deceased. PW2 saw the appellant together with another person fleeing from the scene with pangas. Small wonder, the description of the injuries sustained by the deceased were consistent with the manner PW1 described the attack; particularly the cut on the right leg through the gumboot. This being a case of recognition as opposed to circumstantial evidence or visual identification of a stranger in difficult circumstances, it is as stated in Anjoni & 2 Others v Republic [1980] eKLR thus:-

“This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

The record does not show that the appellant denied that both PW1 and PW2 did not know him nor that they were neighbours. We are thus satisfied just like the trial court that the evidence of PW1 and PW2 placed the appellant at the scene of crime contrary to his alibi defence.

We are aware that an accused person does not have to establish that his alibi defence is true. All he has to do is create doubt as in the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts. See Uganda v Sebyala & others [1969] EA 204. The reasons given by the trial court to disbelieve the alibi defence raised by the appellant, and which we agree with, are that there was no evidence of the deceased's family framing the appellant with the case; PW1, 2, 3 and 4 all knew the deceased and it was not suggested to them in cross-examination that he used to operate from Sori and that he would have been there at the time of the incident, and finally, though DW3 testified in support of the appellant's alibi, his evidence only showed that the appellant occasionally used to go to Sori to sell chicken or is it water as the other witness testified. It is therefore more likely than not that the appellant was not at Sori but at the scene of the incident as testified to by PW1 and PW2.

As soon as the deceased was killed, the appellant disappeared from the neighbourhood. He only resurfaced a year later when he was arrested. It is instructive that the appellant's house was about 800 metres from scene of crime and the deceased's house as well. If at all he was always around PW1, PW2 PW3 and PW4 would not have failed to see him. Indeed PW7 confirmed that when he visited the home of the appellant so as to arrest him, he had fled. Obviously this conduct of the appellant also points to his guilt further dislodging his protestations of innocence.

The appellant has also raised the question of inconsistencies and contradictions in the prosecution case. However, it is noteworthy that in his submissions, he did not point out any such inconsistency or contradiction. We are only too aware that in criminal proceedings, there are bound to be inconsistencies and contradictions for people or witnesses appreciate things differently. As long as the contradictions and inconsistencies are inconsequential, not material and do not go to the root of the prosecution case or cause prejudice to the appellant, they can be ignored. Having not pointed out any aspect of inconsistency or contradiction in the prosecution case, we can only treat this complaint as an afterthought.

We are therefore satisfied just like the trial court that the totality of the prosecution evidence was that the appellant acting with another person inflicted the injuries on the deceased which led to his death. It is also clear that the cuts inflicted on the deceased's body demonstrated malice aforethought. These injuries could only have been intended to cause the death of or do grievous harm to the deceased. Accordingly, the prosecution proved malice aforethought within the meaning of section 206(a) of the Penal Code contrary to the submissions by the appellant that *mens rea* or intent to kill was not proved.

The appeal on conviction is for all the aforesaid reasons bereft of merit and is dismissed accordingly.

As for the appropriate sentence, we appreciate as it is evident from the record that the appellant mitigated after conviction. He was found to be first offender with no previous criminal records. The trial court however intimated that it had no choice but to follow the decision of the Court of Appeal in Joseph Njuguna Mwaura and 2 others v Republic [2013] where it was held that the offence of murder contrary to section 203 as read with section 204 of the Penal Code and all other capital offences carry the mandatory sentence of death. This was the correct jurisprudential position in law as it obtained then. Appellant's counsel has urged us not to ignore the current jurisprudential trend resulting from the Supreme Court's decision in Francis Karioko Muruatetu case (supra), in which the Supreme Court provided guidelines *inter alia* as follows:

“The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of the Constitution”.

Our take on the above guideline is that, this decision is not a panacea for setting aside each and every death sentence that may have either

been handed down against an accused person by a trial court or affirmed on appeal. The correct position in law is that each case has to be considered on its own set of facts. This is not the first time the court has been confronted with such dilemma. The trend has been either to set aside the death sentence and substitute it with an appropriate sentence of imprisonment for a specified period or remit the matter to the High Court or the trial court for resentencing, or lastly, to affirm the death sentence where appropriate. The relevant factors taken into consideration are among others; existence on the record of mitigation by the affected appellant, the nature of injuries suffered by the victim and any other either aggravating or ameliorating circumstances.

In light of all the above, we find that the ends of justice in the circumstances of this appeal to warrant the exercise of our discretion to tamper with the death sentence handed down against the appellant by the trial court. Consequently, we allow the appeal against sentence, set aside the death sentence and substitute it with a sentence of Twenty-Five (25) years imprisonment effective from the date of sentence by the trial court.

It is so ordered accordingly.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, J.A. passed on before he could sign the judgment.

Dated and delivered at Kisumu this 3rd day of April , 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR