



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), MURGOR & KANTAL, JJA)

CRIMINAL APPEAL NO. 80 OF 2011

BETWEEN

ANTHONY KINYANJUI KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Nairobi High Court at Nairobi (Ojwang, J

(as he then was)), delivered on 18th September, 2007 in High Court Cr. No. 63 of 2005)

JUDGMENT OF THE COURT

The unfortunate events resulting in the brutal and untimely demise of the deceased, **Francis Kamanja Ndubai** on 22nd March 2005 at Dandora Phase IV in Nairobi arose from the alleged theft of a jacket and Kshs. 600 and led to the appellant, **Anthony Kinyanjui Kimani** being charged with the offence of Murder of the deceased contrary to **section 203** as read with **section 204** of the **Penal Code**.

It all began on the fateful morning of 22nd March 2005, when the appellant went to **Tabitha Muthoni Mwangi (PW1 Tabitha)** and **David Waiti Mugo Kamau's (PW2 David)** house, to complain that his house guest, the deceased who was staying with him had stolen his jacket which had in it Kshs. 600. He asked David to go to his house to resolve the problem.

Tabitha and her husband David resided in Dandora phase IV on a plot which hosts three other units, with the appellant residing in one of them. David and the appellant then left together. A little while later, they returned with the deceased, and went to the appellant's house, after which David left for work. Soon after his departure, two young men, who Tabitha said she had seen before, entered the appellant's house. When she peered through the house's wooden walls, she saw the appellant and the young men beating the deceased. She also heard the deceased saying that he had left the money with Michele. After a while, they stopped beating him and left, but soon returned and continued beating the deceased, who began to scream uncontrollably. His screams attracted curious neighbours, causing them to stop. The two men then moved the deceased into the neighbouring unoccupied unit, shut the door and left.

The appellant returned later, and Tabitha told him that she had peeped into the room, and could see that the deceased was not breathing. This prompted the appellant to enter the unoccupied house to check on the deceased, and when he came out, he assured Tabitha that the deceased was drunk, and, giving himself as an example, claimed that when drunk, he would also sleep the whole day; that the appellant had added that in any event, he had reported the incident to the police, and he showed her an Occurrence Book (OB) number, but did not disclose the nature of his report. Tabitha said that she was satisfied with his explanation and continued with her chores.

At about 8.00 p.m that evening, Tabitha heard movement outside her window and when she checked, she saw the young men carrying a mattress from the house where the deceased was, put it into a hand cart, which they pushed out of the compound. Tabitha also heard the appellant quietly speaking to the men.

At 9.00 p.m, her husband who had gone to Kariobangi Water and Sewerage where he worked as a Nairobi City Council employee returned home. He had barely made himself comfortable for the evening when the appellant came in. As her husband asked her to leave them to talk, she went over to a neighbours house. About an hour later, her husband who was with the appellant called her. Both were dripping wet as it had been raining. They had bought some meat, which she was requested to prepare. While preparing the food, the appellant and her husband began to quarrel, and when the appellant became abusive, David ordered him to leave the house. He pushed the appellant out of the gate and firmly closed it behind him. The appellant threatened him that, "*Utajua mimi ni mwanaume, na nitakufunza adabu leo.*" (You will know that

I am a man and I will teach you a lesson today) and he went off.

Hardly a half an hour had gone by when they heard a knock on the door, and when David looked through the window, he saw that it was the police. He opened, and they came into the house and conducted a search. They also searched the appellant's house, and finally they were all told to accompany the police to the police post. On the way there, they passed by the Dandora dump site near the Texas Garden Bar, and her husband showed the police where the body of the deceased had been left, whereupon they proceeded to the Dandora Police Post.

When cross examined, Tabitha added that the young men had used a metal bar to beat the deceased, and that it was the appellant who was hitting the deceased, while the others were boxing him.

David corroborated Tabitha's evidence and went on to state that after the appellant informed him that the deceased had stolen his jacket and money, he accompanied the appellant to the house of the deceased where they interrogated the deceased about the missing jacket. The deceased had stated that he did not know anything about it, and that thereafter, they went to a chang'aa place, where the proprietor, Michele had informed them that the deceased did not have any money. They returned to the appellant's house where the appellant and the deceased started fighting. David explained that he had told the friends that if they could not solve the problem, they should report the matter to the police. From there, he left to meet with one Mr. Onuko whom he said owed him some money. On arriving at Kariobangi Water and Sewerage, he found that Mr. Onuko had been transferred to Ngungumu near Korogoshi, and that it had taken him a long time to locate Mr. Onuko, which was why he did not return home until 9.00 p.m.

On his return, his wife informed him that the deceased had been beaten by some 'Mungiki' boys, who had returned in the early evening to remove his things; that as he was speaking to her, the appellant came into the house to inform him that the deceased had died, and that he should not be shocked as he had reported the matter. According to David, the appellant had taken him to the Dandora dump site near the Texas Garden Bar where he saw the deceased body with no clothes save for his underwear lying on a mattress; that the appellant had told him that this was to be their secret, and he should never tell anyone. On the way to his house the appellant had told him that he needed to drink chang'aa after seeing what he called a 'bad sight'. They also bought some meat to take home. On reaching the house, the appellant became abusive towards David who then ordered him to leave, whereupon, the appellant left threatening to teach him a lesson. A short while later, the police arrived and searched their house. They also went to the Dandora dump site where the deceased's body was recovered.

PC Muyekho Wamela PW 4 attached to Dandora Police Post stated that on 22nd March, 2005, the appellant reported that he had seen his landlord, David in company of other people beating a fellow tenant, the deceased, and that they had carried the tenant away in a hand cart to an unknown destination. PC Wamela booked the report in the O.B, and then accompanied by Inspector Maya and PC. Ahmed went with the appellant to his place in Dandora Jua Kali (an estate); that they arrived, and found the landlord and his wife; that when asked if he had tenants on his plot, David had answered that he had only one tenant – namely the appellant, but that the appellant had insisted that they were two tenants; that further questioning of Tabitha revealed that two tenants – the appellant and deceased resided on the plot. PC Wamela confirmed that as a result of further questioning, David and the appellant led them to the Dandora Dump site where the half -naked body of the deceased, was found lying on a mattress. Thereafter they arrested the two.

Ex-Inspector of police **Francis Sembe PW5**, formerly based at CID – BuruBuru received a report from **Jane Wairimu Ndubai** that her brother, the deceased was found dead on 22nd March, 2005 within Dandora Estate. Together with the deceased's uncle **John Mutahi Wangari** they identified the body of the deceased to **Dr. Peter Muriuki Ndegwa PW 6** a Pathologist who conducted the postmortem. Dr. Ndegwa observed that the deceased had been hit by sharp and blunt objects, as a result of which he had multiple bruises all over the body. There was sub – craterous hematoma on the left leg muscle, and subcutaneous and intravascular hematoma on both hands. He also observed that, ex – sanguination was present following multiple blunt traumatic injuries; that there was loss of blood or hemorrhage leading to death. He indicated that a blunt weapon would have been used – something with no sharp edge – like stone, or rungu.

The appellant denied committing the offence and stated that he left his house to go to the shop, and when he returned, his jacket was missing. So he went to David's house to complain, and that David had told him that the deceased might have taken his jacket; that thereafter he returned to his house, prepared tea, and then left for work. He stated that he then went to Kinyago Police Station to report that his jacket was stolen, and landlord saw the thief; that after he returned to the plot that evening at 7.30 p.m, he found David in a group of about 8 people beating the deceased; that he went again to Kinyoga Police Station to report the beating incident; that later he returned to the plot with the police and visited the dump site from where the deceased's body was retrieved. He was arrested thereafter and charged with the offence.

On cross examination he explained that he had made the report at Kinyago Police Station at about 10.00 a.m. and thereafter proceeded to carry out his hawking work of selling radios and other small things along Moktar Daddah Street near tea room; near stage 32; near Kencom House where Kirinyaga vehicles ply; near the BuruBuru stage No. 58, and also indicated that Moktar Daddah is close to Moi Avenue. He contended that Tabitha had implicated him after the arrest of her husband, David.

In its judgment, the High Court (*Ojwang, J. (as he then was)*) found that both the direct and circumstantial evidence pointed to the appellant's guilt and in so finding sentenced him to death as by law prescribed. The appellant was aggrieved and has brought this appeal on grounds set out in a supplementary memorandum of appeal to the effect that the trial court;

i) failed to appreciate that the prosecution failed to prove its case to the required standard

ii) failed to appreciate that the prosecution failed to establish malice aforethought on the appellant's part;

iii) erred in wrongly relying on the evidence of a husband and wife which evidence was not corroborated by an independent witness;

iv) in failing to consider the appellant's defence; and

v) in upholding the sentence of death which was harsh and excessive, and in disregarding the appellant's mitigation.

The appellant filed written submissions which were highlighted by **Mr. Karuku Wachira**, learned counsel for the appellant, via a virtual platform owing to the Covid- 19 Pandemic, where it was submitted that the appellant was convicted on the evidence of Tabitha and David's evidence who are husband and wife; that though Tabitha testified that several young men were battering the deceased, the evidence did not specify that the appellant battered the deceased; that further since her husband had been arrested and detained for three months, she was incapable of giving independent evidence on the case.

On sentencing, counsel argued that the death sentence imposed was harsh and excessive, and urged the Court to review it on account of the Supreme Court's decision in **Francis Karioko Muruatetu vs Republic case 2017 eKLR**.

Appearing on behalf of the State, learned counsel **Ms. Ngalyuka** opposed the appeal and submitted that the court relied on the evidence of Tabitha and David to convict the appellant; that Tabitha had seen the deceased enter the appellant's house, where the deceased was beaten by two men, and that the appellant was hitting him with a metal bar; that later when she had asked the appellant why the deceased was not breathing, the appellant had replied that the deceased was sleeping off the effects of changaa, only to find out later that he had died.

Counsel submitted that the trial court had found that an intention to kill was established, and that malice aforethought was made out on the part of the appellant and his accomplices; that no reason was given to doubt that the witnesses were telling the truth, even though they were husband and wife-their evidence was consistent.

Counsel further argued that the alibi defence was considered by the court but disregarded as it found it to be untrue.

We have considered the grounds of appeal, the parties' submissions and the record of appeal. This is a first appeal. In the case of **David Njuguna Wairimu vs Republic [2010] eKLR** this Court's duty was reiterated thus;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.

Considering our mandate, we consider that the issues for us to determine are;

i) whether the prosecution proved its case to the required standard;

ii) whether malice aforethought on the appellant's part was established;

iii) whether the trial court was wrong to rely on the evidence of Tabitha and David as husband and wife which was not corroborated by an independent witness;

iv) whether the trial court failed to consider the appellant's defence; and

v) whether the sentence of death was harsh and excessive, particularly in view of the appellant's mitigation.

In determining whether the prosecution proved its case to the required standard the trial court had this to say;

"Has that standard of proof been achieved in the instant case?"

It is for certain, that no witness observed the delivery of the fatal stroke that caused the death of the deceased; but there is evidence of a series of strokes which were served upon the deceased, for a rather continuous period of time, beginning some moments after 8.00 a.m on the material day. The chain of battery upon the deceased went on, inside the house of the accused, intermittently upto to about 10.00 a.m, when the accused and others now lifted the deceased, alive or dead, and dumped him in a disused house in the compound of PW2, in which the accused also lived. The many instances of battery delivered upon the deceased that morning, I would hold, constitute one transaction; they qualify as res gestae...

The court further found that,

"the accused was well aware of the death of the deceased, during the whole period of day time, on the material date. Though, however, during daytime his attitude on the fate of the deceased was somewhat brash, reality began to dawn on him as evening approached; there was the question of disposing of the body; and responsibility might come to be apportioned. Hardly surprising is it that, at 8.00 p.m. the deceased's body was secretively being carted away; and at that moment PW 1 peered at those removing the body through the gate, and among them was the accused, the lot of them talking in hushed tones.

About an hour since the carting away of the deceased, an anxious accused visited his landlord's house, bearing great burdens on his face. He took his landlord out in the rain – and again they took just about one hour out there. This Court believes PW 2's testimony, that during that one hour of absence, the accused had gone to show him where the body of the deceased had been dumped.

... The accused became extremely irritable and issued threats of undefined consequences against his landlord; and later, after 11.00 p.m. on the material night, the accused thought it better to lodge false allegations at the Dandora Police Post, against PW 2; but his malicious report to the Police happens to carry the signal that he had all along known that Francis Kamanja Ndubai was no longer alive. Indeed, the accused, clearly, could already have known that, by about 10.00 a.m. on the material day.

The learned judge concluded;

“It is, therefore, a case of murder, in a proper sense; and it has been established by evidence that the accused was the culprit. I hold it to have been proved beyond reasonable doubt, that the accused caused the death of the deceased, as charged. No evidence has been adduced by the accused which makes any dent at all on the prosecution evidence”.

To determine whether the evidence proved to the required standard that the appellant was responsible for the murder of the deceased, the prosecution must demonstrate that the prerequisites for murder were established beyond reasonable doubt. **Section 203** of the **Penal Code** sets out the prerequisites as; (i) the death of the deceased and the cause of that death;

(ii) that the appellant committed the unlawful act which caused the death of the deceased; (iii) and that the appellant had malice aforethought, as required by **section 206** of the **Penal Code**, when the offence was committed.

In re-evaluating the evidence, there can be no doubt that on the morning of 22nd March 2005, a visibly enraged man, that being the appellant herein, went to Tabitha and David’s house to complain that the deceased had stolen his jacket and money. The appellant requested David to go to his house located in the same compound to resolve the issue. The evidence is clear that a fight ensued between the appellant and the deceased, and after advising them to report the theft to the police, David left the deceased in the appellant’s house, and went to work. This was to be the last time that he saw the deceased alive. Thereafter, Tabitha saw two young men enter the appellant’s house, and as she spied through slits in the house’s wooden walls, she saw the appellant mercilessly beating the deceased with a metal bar, while the two young men boxed and buffeted him. She then saw the appellant briefly leave the deceased in the house, and when he returned he continued to batter him. It was only when his screams attracted neighbours that they left him alone.

The deceased was thereafter left for dead, and when Tabitha enquired from the appellant as to why the deceased had not moved, he was quick to explain that the deceased had fallen into a drunken sleep, and needed to sleep off the effects of alcohol. The situation was to become more disturbing when Tabitha saw the appellant return later in the evening with the young men to carry away a mattress in a hand cart from the house where the deceased was last seen. The appellant’s disclosure to David when he returned at about 9.00 pm that the deceased had died from a severe beating, and his having taken David to the location in the dump site where the deceased’s body was left lying on a mattress, and Tabitha’s testimony that the appellant together with the two young men carted away a mattress from the appellant’s house leaves no doubt that the deceased died at the appellant’s hands following a severe beating.

The evidence of Dr. Ndegwa lends further support to the prosecution’s case when he observed that there were multiple bruises all over the body with the presence of sub-craterous haematoma on the left leg muscle, and subcutaneous and intravascular haematoma on both hands. He concluded that the cause of death was ex-sanguination following multiple blunt traumatic injuries and loss of blood due to haematoma or blood clotting of tissues where, “...blood will not then flow in vessels and circulate oxygen.” The injuries sustained were therefore consistent with Tabitha’s evidence that she had seen the appellant beating the deceased with a metal bar.

As was the learned judge, we too are satisfied that the prosecution proved its case to the required standard, that the deceased died, and that the appellant was responsible for his murder.

Concerning the appellant’s argument that the evidence of Tabitha and David who were husband and wife was inadmissible since it was not corroborated by other independent evidence, a consideration of the submission does not disclose the basis of this complaint. It is also observed that the same ground was raised in the trial court, where the learned judge pointed out that counsel did not provide any legal basis for such assertion. Nevertheless, after affirming that both witnesses had the full competence and capability to testify, notwithstanding their spousal relationship, the trial judge considered their evidence, and was satisfied that it was consistent, credible and believable.

For our part, having regard to the facts and circumstances, we too can find no legal bar to their testimonies, particularly as nothing in the evidence showed that it ought to have been treated with circumspection.

Section 125 (1) of the **Evidence Act** is explicit. It provides;

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”

As such, without a basis upon which to disregard their evidence, we find the complaint to be unsubstantiated, without legal basis or merit and it is accordingly dismissed.

Additionally, we do not accept the contestation that the trial court did not take into account the appellant’s alibi defence that he was at work in City Centre on Moktar Daddah Street and had left town at 7.30 pm by which time the deceased had died. The learned judge clearly considered the appellant’s defence, and after weighing it against the prosecution’s case found it to be an after thought. With respect to the claim that he was at the Police Post reporting the incident, the learned judge concluded that “...this could not be a true account, as there was more credible evidence of PW4. Police Force No. 67955 Police Constable Muyekho Wamela, that the accused had visited Dandora Police Post after 11.00 p.m when he sought to implicate his landlord in the death of the deceased”; the court found that there was no credible evidence that between 7.30 pm and 11.00 p.m. he was idling around the Dandora Police Post conveniently waiting to make a report, since he

was simply not there given Tabitha's evidence that at the time, he was engaged in carting the deceased's body away to the dump-site. Essentially, what this meant is that there was nothing in the appellant's defence that unraveled the prosecution's case which remained unassailed, and the learned judge was right in so finding. As such, we dismiss this ground.

On the issue that malice aforethought was not established, the trial court had this to say;

“There can be no doubt that the accused, driven by grudges and malice, consorted with his accomplices to bludgeon Francis Kamanja Ndubai to death. The manner in which the deceased was killed is clear from the testimony of the Government pathologist (PW6 Dr. Peter Muriuki Ndegwa); the deceased was hit with blunt objects causing instant death; the body of the deceased had bruises everywhere; the body had sub-cutaneous haematomae; the death was occasioned by loss of blood. This is consistent with the testimony of PW1, that an iron bar had been used in the commission of the crime.”

This ground too fails.

In so far as proof of malice aforethought is concerned **section 206** of the Penal Code which provides: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c) ...***
- d) ...”***

To establish malice aforethought in the case of ***Nzuki vs Republic [1993] KLR 171*** this Court stated thus;

“a) Intention to cause death

(a) b) Intention to cause grievous bodily harm

(b) c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

The appellant must have known that by repeatedly and vengefully striking the deceased over his body he would suffer grievous bodily harm or even death. As such, like the learned judge we too are satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the appellant, conclusively illustrate the presence of malice afore thought. As such, the ingredients for murder having been established beyond reasonable doubt, we uphold the conviction.

The final issue was on the death sentence. The appellant has complained that the sentence of death imposed was harsh and excessive. Owing to the Supreme Court decision in the ***Francis Muruatetu case*** (supra) which was delivered after the appellant's sentence was imposed, wherein the court determined that the mandatory death sentence was unconstitutional, in view of his mitigation for leniency as a first offender; that he was 52 years old was diabetic, married with 5 children of which the eldest was 20 years and the youngest 7 years, and having a 70 years old mother, we would interfere with the death sentence imposed.

For the reasons aforestated, the appeal against conviction is dismissed, and we set aside the death sentence and substitute it therefore with a sentence of twenty years' imprisonment from the date of conviction.

And it is so ordered.

Dated and Delivered at Nairobi this 6th day of November, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

A.K. MURGOR

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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