JKK v Republic (Criminal Appeal 118 of 2011) [2013] KECA 241 (KLR) (3 October 2013) (Judgment)

JKK v Republic [2013] eKLR

Neutral citation: [2013] KECA 241 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 118 OF 2011

ARM VISRAM, MK KOOME & JO ODEK, JJA

OCTOBER 3, 2013

BETWEEN

JKK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Meru, (Lesiit, J.) dated 5th May, 2011 in H.C.CR.C. No. 22 of 2009)

Whether a person who committed the offence of murder while a child ought to serve a custodial sentence where he was an adult at the time his appeal against the conviction and sentence was determined.

The appellant was convicted of the offence of murder and sentenced to death. The court noted that a death sentence could not be imposed on a person who was under the age of 18 years. The court further found that the appellant who at the time of committing the offence was a child but was now of the age of majority could not be released to the society before he was helped to understand the consequences of his mistakes, which could only happen after serving a custodial sentence.

Reported by Kakai Toili

***Criminal Law** – child offenders – sentences to be imposed on child offenders – death sentence - whether a death sentence could be imposed on a person who was under the age of 18 years - whether a person who committed the offence of murder while a child ought to serve a custodial sentence where he was an adult at the time his appeal against conviction and sentence was determined - Children Act, 2001 Part XIII.*

Brief facts

The appellant was charged with the offence of murder at the High Court. After considering the appellant's evidence, the High Court dismissed the defence of provocation and self-defence. It was claimed that the appellant chased the deceased while holding a knife and stabbed her leading to her demise. The appellant was

convicted of the offence of murder and sentenced to death. Aggrieved, the appellant filed the instant appeal against both the conviction and sentence. He raised various grounds of appeal including that the offence of murder was not proved because none of the witnesses gave evidence on how the quarrel started, in other words the defence of provocation was not displaced.

Issues

i. Whether a death sentence could be imposed on a person who was under the age of 18 years.
ii. Whether a person who committed the offence of murder while he was a child ought to serve a custodial sentence where he was an adult at the time his appeal against the conviction and sentence was determined.

Held

1. Being a first appeal, the court was duty bound to subject the evidence on record to a thorough evaluation and to make its own conclusions in the matter but with the usual caution that it was the trial court that saw and heard the witnesses.
2. Given the distance the appellant chased the deceased, which was confirmed by PW 1 and PW 2, the appellant had ample time to recollect his emotions and regain his self-control. Moreover while chasing the deceased he was followed by PW1 and PW2 who were screaming, the deceased was also screaming in distress. The facts of the case did not occasion a threat to the appellant as the deceased was running away screaming and therefor the defence of self-defence was totally misplaced. The offence of murder was proved. The appeal on conviction was therefore without basis.
3. The appellant was probably a minor when he committed the offence. A death sentence could not be imposed on a person who was under the age of 18 years. The prosecution did not help matters as they failed not only to subject the appellant to medical examination but also the age assessment. The way the matter was left, the trial court should have followed the matter of age assessment so as to ensure a legal and appropriate sentence was passed. As per the provisions of Children Act 2001 a death sentence or life imprisonment for that matter could not be imposed on a person who was below the age of 18 years.
4. Under the Children Act, any person below the age of 18 was a child and if found guilty of an offence, he was supposed to be sentenced according to the provisions of Part XIII of the Children Act which made provisions on how a court should punish a child offender.
5. The appellant was about 17 years when he was first arraigned in court in March, 2009, four years had since passed, which meant he was over the age of 18 years, therefore, he was not suitable to be subjected to any of the sentences provided for under the Children Act. The purposes of the sentences provided for under the Children Act were meant to correct and rehabilitate a young offender. A death sentence or a life imprisonment were not provided for but when dealing with an offender who had attained the age of 16 years, the court could sentence him in any other lawful manner.
6. The offence committed by the appellant was very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. The appellant who was now of the age of majority could not be released to the society before he was helped to understand the consequences of his mistakes, which could only happen after serving a custodial sentence.

Appeal partly allowed.

Orders

i. *The death sentence was substituted with twelve years imprisonment.*
ii. *Appeal on conviction is dismissed.*

Citations

Cases

Kenya

Mkunzo, Kazungu Kasiwa & another v Republic Criminal Appeal 239 of 2004; [2006] KECA 381 (KLR) - (Explained)

Regional Court

1. *Alipayo Lol s/o Acuda v Republic* EACA Criminal Appeal 121 of 1959 - (Explained)
2. *Doto s/o Mtaki v Republic* [1959] EA 860 - (Explained)
3. *Pandya v Republic* [1957] EA 338 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 191(1); part XIII — (Interpreted)
2. Penal Code (cap 63) section 35(1); 203; 204 — (Interpreted)
3. Probation of Offenders Act (cap 64) In general —(Cited)

Advocates

Mr Gathiga Mwangi for the appellant

Mr Kaigai, Assistant Deputy Public Prosecutor, for the respondent

JUDGMENT

1. The facts of this matter regarding the cause and who caused the death of HKR (deceased) are not in dispute. What is in dispute is whether there was motive for the killing. These are the brief facts as gathered from the evidence before the trial judge. On February 15, 2009, at about 2 PM, at Muthara location, JRNK, testified that she was at her home when she heard somebody screaming in distress. On checking, she saw people running towards her home. It was HKR (deceased), being chased by JKK (appellant). The appellant was holding a knife. Sensing danger, PW 1 started screaming as she moved towards the two people. By the time she reached them, the deceased was lying down and the appellant had stabbed him with a knife. PW1 held the appellant to restrain him from stabbing the deceased again as she continued screaming.

2. Soon PW1 was joined by CN (PW 2) also a neighbour who had also seen the two people chasing each other. They had passed through her compound and the appellant was holding a knife in his hand. PW 2 followed them for a distance of about 1 ½ Kilometres while screaming. She caught up with the duo at PW1's homestead by that time the deceased was lying down. He had been stabbed and PW 1 was holding the appellant. They were soon joined by Geoffrey Miriti Mitu (PW 3), who was on his way from church and was attracted by the commotion. He followed and saw the appellant chasing the deceased and PW 1 was following them the appellant was holding a knife

3. By the time PW3 caught up with the duo, they had reached PW 1's homestead, the deceased was lying down and as PW1 was struggling to restrain the appellant, PW 3 managed to grab the knife from the appellant and threw it behind the house next to a banana plantation. The deceased was still breathing so PW3 with the help of other people tried to carry him to the road but soon they realized he had stopped breathing. A large group of members of public also gathered in response to the commotion and upon realizing the appellant had stabbed the deceased and inflicted upon him fatal injuries, they descended on the appellant and beat him until he was unconscious.

4. The police were called by Peter Miriti (PW 4) who had also responded to the commotion. The report was received by Police Constable Maric Kipkoech (PW5). He visited the scene and found the deceased lying down on the side of the marram road dead. He had been stabbed on the back. The appellant was also lying beside the body of the deceased. The appellant had been seriously assaulted by the members of public. PW 5 took the body to Meru General Hospital Mortuary. The appellant was admitted at

Nyabene Hospital for four days. PW5 as the investigating officer interviewed the witness and preferred the charges against the appellant.

5. The appellant was finally arraigned before the High Court in Meru on March 3, 2009. He was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence stated that on February 15, 2009, in Tigania District, within Eastern Province, the appellant murdered Henry Kairichi Runga. The Prosecution called a total of five witnesses who gave evidence in support of the charge. In addition to the evidence of PW 5, as the Investigating Officer in this matter, he had taken possession of the knife from PW 3 which he produced in court as an exhibit. A post mortem examination was carried out on the body of the deceased by Dr Macharia. However, the doctor could not attend court to give evidence without unreasonable delay and there having been no objection from the defence counsel, the post mortem report form was produced by PW 5.

6. After the evidence of the five prosecution witnesses, the court was satisfied that the appellant had a case to answer. He was placed on his defence and he gave a sworn statement in his defence. In his defence, the appellant alluded to a defence of provocation and self-defence. He stated that on the material day, he met with the deceased. He greeted him but the deceased kept quiet. As he was walking away, the deceased held him by the hand and threatened him that he would know who he was. The deceased then produced a knife and stabbed the appellant on the right arm near the elbow. While struggling in self-defence, he took the knife from the deceased and stabbed him on the back. He later found himself in hospital after three days.

7. After considering this evidence, the learned trial judge dismissed the defence of provocation and self-defence. This is what the Judge observed in pertinent part of the judgment:-

> The evidence by the Prosecution establishes that the accused was the one seen chasing the deceased and that he did so for at least one and half kilometres before he finally stabbed the deceased. If the accused had been attacked and provoked by the deceased, the danger that may have been caused to the accused by the attack and provocation had long waned by the time that he stabbed the deceased. It is clear from the overwhelming evidence adduced by the Prosecution that the accused had an opportunity to safely escape an attack by the deceased if any.

I am satisfied from the evidence adduced that the accused was in no danger in life and that, therefore, self-defence is not available to him.

As no malice aforethought, the knife the accused used to stab the deceased was presented before the court. It was a dagger with a long blade. The stab wound was found to have penetrated right through the lungs and the heart. Even though it was a single stab, it was well calculated stab at a most sensitive part of the body. By stabbing the deceased on that part of the body, the accused must have known that the injury inflicted was likely to cause either grievous harm or death to the deceased.

I am satisfied that the prosecution has established beyond any reasonable doubt that the accused was motivated by malice aforethought when he stabbed the deceased in the afternoon on question."

8. The appellant was convicted of the offence of murder and sentenced to death. The appellant has now appealed against both the conviction and sentence. He raised five grounds of appeal by his home grown memorandum of appeal. Those grounds were adopted during the hearing of this appeal and were ably argued by Mr Gathiga Mwangi, learned counsel for the appellant. According to counsel, the offence of murder was not proved because none of the witnesses gave evidence on how the quarrel started, in other words the defence of provocation was not displaced. All the witnesses testified that they all saw the appellant chasing the deceased with a knife, none of them knew how the fight started.

9. The appellant raised the defence of provocation which the court did not give due regard. According to Mr Mwangi the court seemed to have shifted the burden of proof of provocation to the appellant. He cited the authority in the case of *Doto s/o Mtaki vs R*, 1959 EA 860, which established the principle that a burden of proof does not shift to an accused person to establish his defence of provocation. The appellant did not have any burden to prove provocation. The circumstances on how the deceased was stabbed were set out by appellant in his defence which was not challenged by the prosecution's evidence. The other important anomaly pointed out in this appeal was the age of the appellant. The court on two occasions observed that the appellant was aged 17 years or was under the age of 18 years respectively. At one time the court on its own motion did make an order directing the appellant to be subjected to an age assessment at the Meru District Hospital. Apparently, that order was not effected and the appellant was not subjected to age assessment.

10. Mr. Mwangi went on to argue that since the appellant was below the age of 18 years, when he committed the offence, he could not be convicted and sentenced to death. Counsel referred to a decision by this Court differently constituted in the case of *Kazungu Kasiwa Mkunzo & Another v R*, Mombasa Court of Appeal Criminal Appeal No 239 of 2004. In that case, a minor who was convicted of the offence of robbery with violence and sentenced to death, the death sentence was quashed and substituted with imprisonment at the President's pleasure.

11. This appeal was opposed by Mr Kaigai, learned Assistant Deputy Public Prosecutor. He submitted that the evidence against the appellant was overwhelming and met the required standards. The appellant stabbed the deceased to death from his own admission and also from the evidence of PW 1. On the issue of whether the appellant possessed the requisite malice aforethought, he was seen chasing the deceased for about 1 ½ Kilometres which was enough distance for him to cool his anger if he had been provoked by the deceased. Going by the post mortem report, the appellant stabbed the deceased on a very delicate part of the body which inflicted a fatal injury and was consistent with the fact that the appellant had formed the intention to kill the deceased or he was reckless that he did not care about the life of the deceased. Mr Kaigai conceded that the appellant was not subjected to medical examination; therefore, his age was not ascertained. Counsel left the issue of sentence for the Court to determine in view of this anomaly.

12. This is a first appeal, and that being so, we are duty bound to subject the evidence on record to a thorough evaluation and to make our own conclusions in the matter but with the usual caution that it is the trial court that saw and heard the witnesses. This Court stated in *Pandya v R*, [1957] EA 338 at page 337:

> On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellant court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellant court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellant court must be guided by the impression made on the Judge or magistrate who saw the witnesses but there may be other circumstances, quite apart from manner and demeanour which show whether a statement is credible or not which may warrant a court in differing from the Judge or Magistrate been on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal, it

becomes a question of law as to whether the first appellant court on approaching its task, applied or failed to apply such principles."

13. We discern two points of law that are raised in this appeal for our determination. Firstly, was the defence of provocation and self-defence available to the appellant? Secondly, what was the effect of the observation by the trial court that the appellant appeared below the age of 18 years, an order was made for him to be subjected to an age assessment but the prosecution failed to subject the appellant for a medical examination to ascertain his age and mental status?

14. On the first issue, we are satisfied that the judge interrogated the Prosecution's evidence against the defence and correctly arrived at the conclusion that given the distance the appellant chased the deceased, which was confirmed by PW 1 and PW 2, the appellant had ample time to recollect his emotions and regain his self-control. Moreover while chasing the deceased he was followed by PW1 and PW2 who were screaming, the deceased was also screaming in distress. We also agree that the facts of this case did not occasion a threat to the appellant as the deceased was running away screaming and therefor the defence of self-defence was totally misplaced. See the case of *Alipayo Lol s/o Acuda v R*., EA CA Criminal Appeal No 121 of 1959 (unreported):

    A killing may be manslaughter in spite of an intention to kill if the intention was formed and executed in the heat of passion. For the defence of provocation reduces to manslaughter what would otherwise be murder, that is to say, a killing with malice aforethought, one kind of malice aforethought being an intention to kill. Section 187 of the *Penal Code* makes this clear".

15. Upon re-evaluation of the entire evidence, like the trial court we have no doubt in our minds that the offence of murder was proved. The appeal on conviction is therefore without basis. However, the sentence imposed on the appellant has caused us some anxiety as the age of appellant was not ascertained and the court had remarked that he looked like he was under the age of 18 years. The death sentence imposed on the appellant is not a legal sentence. When the appellant was arraigned in court on March 3, 2009, before Emukule, J, this is what the learned judgeordered:-

    1. Appoint counsel for the accused (17 years mentally sound).
    2. Be taken to Meru General Hospital for age assessment.
    3. Accused remanded in custody at Meru GK Prison.
    4. Plea on March 23, 2009."

    However, the appellant was not taken for age assessment. He appeared in court so many other times and on November 23, 2010, he appeared before Lesiit, J, and she observed:

    Accused appears below 18 years."

16. Going by these observations by the judges themselves, the appellant was probably a minor when he committed the offence. A death sentence cannot be imposed on a person who is under the age of 18 years. The prosecution did not help matters as they failed not only to subject the appellant to medical examination but also the age assessment. The way the matter was left, the trial court should have followed the matter of age assessment so as to ensure a legal and appropriate sentence was passed. If we have to go by the law governing the child offenders as per the provisions of *Children Act 2001* a death sentence or life imprisonment for that matter cannot be imposed on a person who is below the age of 18 years.

17. Under the Act, any person below the age of 18 is a child and if found guilty of an offence, he is supposed to be sentenced according to the provisions of part XIII of the *Children Act* which makes provisions on how a court should punish a child offender. section 191(1) of the *Act*, provides:

191. (1)In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the followings ways –

a. by discharging the offender under section 35(1) of the *Penal Code*;

b. by discharging the offender on his entering into a recognisance, with or without sureties;

c. by making a probation order against the offender under the provisions of the *Probation of Offenders Act*;

d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments.

f. by ordering the offender to pay a fine, compensation or costs, or any of them;

g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

h. by placing the offender under the care of a qualified counsellor;

i. by ordering him to be placed in an educational institution or a vocational training programme.

j. by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act*;

k. by making a community service order; or

l. in any other lawful manner."

18. The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, ie any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

19. For the aforesaid reasons we are inclined to interfere with the death sentence imposed by the trial court and substitute it with imprisonment for a period of 12 years. We allow the appeal to the extent that the death sentence is substituted with twelve years. To that extent the appeal partially succeeds on sentence but the appeal on conviction is dismissed.

DATED AT NYERI THIS 3RD DAY OF OCTOBER, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

Deputy Registrar