Turo v Republic (Criminal Appeal 157 of 2017)
[2023] KECA 1257 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1257 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 157 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

FRANK TURO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 21st September, 2017 in HCCRA No. 28 of 2013)

JUDGMENT

1. Magdaline Okinda (Magdaline) is the mother of Jackline Achieng Abuto (Deceased). The Deceased died on June 29, 2013. Sadly, Magdaline was there to witness what no parent should ever have to witness: the tragic end to her daughter's life at the hands of an intimate domestic partner. Magdaline gave her narrative at the High Court in Kisumu in *Criminal Case No. 28 of 2013*. Her son-in-law, Frank Turo (the "Appellant"), was the accused person in the case. She testified as PW1. Her testimony was as follows.

2. Magdaline resides in Manyatta, Kisumu County. On June 29, 2013, at about 5.00pm, the deceased and her husband, Frank Turo, arrived at her house. They found her outside the house roasting maize. The Deceased and the Appellant engaged in a conversation for a while and thereafter, the Appellant left the Deceased at Magdaline's house. Time went by as mother and daughter sat outside, roasting maize. At about 7.30pm, the Appellant returned on a motor bike. According to Magdaline, the Appellant was visibly annoyed. He, quite suddenly, began shouting at the Deceased in Dholuo saying, "Today I will kill you. Today I will kill you". He descended on her -- beating the Deceased with blows and slaps. Then, the Appellant picked up a stone and hit the Deceased on the head causing her to fall.

3. Alarmed, Magdaline tried to intervene. The Appellant would not agree to be mollified. He pushed her aside, causing her to fall too. He resumed beating the Deceased. Magdaline raised alarm to no avail. The

Deceased screamed twice and went silent. Magdaline then rushed to Kondele Police Station to report the incident and returned to the scene with PC Albert Micha (PW2), Corporal Samuel Sang (PW3) and one other police officer.

4. Upon arrival at Magdaline's house, they found a crowd of people gathered outside. The Deceased lay half naked on the sitting room floor, unconscious, with her face up. The appellant, who was in Magdaline's house, fled when he saw Magdaline in the company of Police Officers.

5. The Deceased was taken to Jaramogi Odinga Oginga Teaching and Referral Hospital (JOOTRH), where she was hospitalized. However, she died later that night. The Deceased and the appellant had been married and lived together since 2000. They had three children.

6. Dr. Mturi performed the postmortem on the Deceased's body. An external examination revealed that she had a swollen face with multiple bruises; the hair on the right side of her scalp appeared to have been plucked off with the hair piece; and she had a small stab wound on the right side of the gluteus. An internal examination of her head revealed extensive bruises on the scalp; extensive bleeding beneath the scalp; and a linear fracture on the left parietal region of the skull measuring about 6cm long with extensive bleeding. It was concluded that the cause of death was severe head injury due to blunt force trauma. Dr. Nelly Wanjala (PW 4) produced the post mortem report prepared by Dr. Mturi.

7. The Police launched a search for Frank and on July 9, 2013, eleven (11) days after the incident, Frank's father escorted and surrendered Frank to the Police and he was formally arrested.

8. Upon interrogation by PW3 (Corporal Samuel Sang), the Investigating Officer in the case, Frank stated that he and the Deceased had marital issues which led to the Deceased returning to live with her mother since December, 2012. On the material day, according to Frank, he had gone to reconcile with the Deceased and they had agreed to look for a house to rent. He gave her Ksh. 10,000 but later found out that she had squandered it all. Frank did not admit to assaulting the Deceased.

9. These events are what led to the Appellant becoming the Accused Person in the trial before the High Court at Kisumu in *Criminal Case No. 28 of 2013*. He was charged with the offence of murder contrary to Section 203 as read r with Section 204 of the *Penal Code*. It was alleged that on June 29, 2013, at Manyatta within Kisumu East District of Kisumu County, the Appellant murdered the Deceased.

10. The Appellant pleaded not guilty and a full hearing ensued. The narrative above is, in brief, the evidence that emerged from the four (4) prosecution witnesses who testified at the trial. At the conclusion of the trial, Majanja, J. convicted the Appellant and sentenced him to death, according to the law at the time.

11. The Appellant was aggrieved and has lodged the present appeal. He has raised three (3) grounds in his Memorandum of Appeal, which are that:

    a. The Learned Trial Judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt.

    b. The Learned Trial Judge erred in law and fact by disregarding the Appellant's defence and evidence tendered.

    c. The Learned Trial Judge erred in law and fact by sentencing the Appellant to death since its mandatory nature was declared unconstitutional as per the law.

12. The appeal was argued by way of both written submissions and oral highlighting by both parties. During the virtual hearing, learned counsel Ms. Anyango appeared for the Appellant, whereas learned counsel, Mr. Okango, appeared for the respondent.

13. Ms. Anyango contended that the Prosecution failed to prove its case beyond reasonable doubt and that the Learned Trial Judge disregarded the Appellant's defence and evidence. As we understand it, the Appellant's argument on appeal is that if the Learned Trial Judge had properly assessed the defence, he would have come to the conclusion that a proper defence of provocation had been established, and would, therefore, not have convicted for murder. Ms. Anyango, therefore, argued that the facts, at the very strenuous, only disclosed the offence of manslaughter and not murder. She based her proposition on two related arguments: First, that the Learned Trial Judge failed to properly assess the totality of the evidence produced during the trial, and, especially, the defence evidence. Second, that the Appellant had disclosed provocation as a defence as early as when he recorded his statement with the Investigating Officer and that, therefore, it was incumbent upon the Prosecution to mount evidence to displace the defence. The Prosecution, she argued, had failed to marshal specific evidence to displace that defence meaning that the Appellant was entitled to the full benefit of the defence. This would, in turn, mean, she argued, that the conviction should have been one for manslaughter not murder.

14. To elaborate on her dual argument, Ms. Anyango referred to the Appellant's testimony at the trial. The Appellant told the Court that he had lived with the Deceased in Nyalenda, within Kisumu County. At the time, he said, they had marital issues which were brought about by the fact that the Appellant had been transferred from Kisumu to Awasi by his employer in 2013 and he could no longer operate from Kisumu; and had to look for a house in Awasi. In addition, the Appellant claimed, the Deceased did not like living in Nyalenda as all their three children attended different schools, hence causing transport challenges. Consequently, the Deceased and the children went to live with Magdaline, her mother. In view of these difficulties, the Appellant said he took a few days off work to look for an appropriate house with the help of the Deceased. To facilitate this, the Appellant said he borrowed Kshs. 10,000 from a friend for house rent. The friend gave the money to the Deceased. Meanwhile, they both began looking for a house.

15. On the day the incident happened, the Appellant narrated that, at about 7.00pm, he went to Magdaline's house in Manyatta and found her roasting maize. He also found the children and gave them some items which he had brought from their house in Nyalenda. The appellant told the court that upon his arrival, he noticed that the Deceased was drunk. He asked her why she was drunk and expressed his disappointment. At that juncture, he claimed, an altercation ensued and the Deceased told the Appellant not to quarrel with her. He said that he asked her how much money she was left with. Instead of responding, the Appellant claimed, the Deceased "looked at him badly", became arrogant, and "threw words at him" and told him "not to disturb her". The Appellant conceded that he also "became arrogant" and he abused the Deceased. Their altercation caused people to gather around them but no one from the crowd intervened. This is how the Appellant narrates what happened next in his own words:

> We were fighting. We were using our hands. We were using blows and slaps. We fought. I slapped her on the face. I gave her a blow on the face and she fell. We were outside the house at this time.... My wife hit her head on the ground. I tried to talk to her. She did not respond..... I pulled her slowly up to her mother's house.... I left her in the house lying on the floor and I decided to leave.

16. Counsel for the Appellant insists that this defence disclosed the defence of provocation. She further argues that this position is accentuated by the fact that the Appellant had alluded to the defence in

his cautionary statement to the Police – a defence, she insists, it was incumbent upon the Prosecution to marshal specific evidence to overcome having been disclosed so early on. Finally, Counsel for the Appellant argued that the testimonies of DW2 and DW3 tended to support the defence offered by the Appellant. DW2 testified that the Appellant and his wife had been his tenants from 2005 to 2013, and he was aware that they were both house hunting. He also testified that the Appellant was a calm person and the Deceased "a lovely and welcoming woman." DW3, on the other hand, testified that the couple met with him with the intention of renting a house. According to him, they interacted well and there seemed to be no problem between them.

17. In short, counsel for the Appellant argued that by the act of the deceased "throwing words" at the Appellant after she had squandered money meant for rent was an act of provocation that led the Appellant to react since there was no time for him to cool down. Counsel relied on the provisions of sections 207 and 208 of the *Penal Code* and this court's decision in *VMK v Republic* (2015) eKLR.

18. Lastly, regarding sentence, counsel argued that in light of the Appellant's oral submission that this matter was fit for a charge of manslaughter, this Court ought to set aside the death sentence against the Appellant and instead hand down a term sentence.

19. In the written submissions, counsel had argued, correctly, that the mandatory nature of the death sentence meted by the trial court was unconstitutional. In this regard, counsel relied on the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, and this Court's decision in *William Okungu Kitty v Republic* [2018] eKLR. Counsel argued that both decisions outlawed the mandatory aspect of the death sentence in Kenya and unshackled the hands of Courts, thereby allowing them to exercise discretion during sentencing in murder cases.

20. Opposing the appeal, Mr. Okango denied that the trial court failed to evaluate the evidence as a whole or that the prosecution had failed to prove their case beyond reasonable doubt. Counsel urged this Court to peruse the judgment of the trial court and indeed see that it evaluated and considered all the evidence on record. Counsel contended that factual findings were made on the basis of the evidence on record and argued that the prosecution proved all the ingredients of murder.

21. Mr. Okango argued that the trial court relied on Magdaline's evidence on record in which she stated that she saw the Appellant hitting the Deceased with a stone on the head; and the same was corroborated by the postmortem report of Dr. Mturi who concluded that the cause of death was a severe head injury due to blunt force trauma. Further, Mr. Okango argued, Magdaline testified that she heard the Appellant saying to the Deceased that he was going to kill her. There was sufficient evidence, Mr. Okango added, that the Appellant hit the Deceased on the head with a stone and continued hitting her despite Magdaline's intervention. Counsel argued that additionally, even after the Deceased fell down, the Appellant dragged her by her hair to the house, which actions, the Court held, left no doubt that the Appellant intended to cause grievous harm to the Deceased. To this end, counsel urged that Magdaline's credibility as a witness was not shaken.

22. Secondly, counsel contended that the Appellant's defence and the evidence of his witnesses was keenly analyzed and considered by the trial court; and the same was further weighed against the evidence on record and was found wanting. Counsel urged that the fact that the trial court did not agree with the Appellant's defence did not mean that the same was not considered. He further stated that the failure of the trial court to be persuaded by the Appellant's evidence cannot be a primary reason for appeal.

23. Counsel contended that the argument put forth by the Appellant that this was a case of manslaughter based on provocation and not a murder case cannot suffice. This was because, Mr. Okango argued, Magdaline's evidence did not speak to a fist fight or a fight between the Appellant and the Deceased. Rather, Magdaline was categorical that the Appellant went to her house, picked a stone and hit the

Deceased on the head with it, causing her to fall down and when she (PW1) tried to intervene, the Appellant pushed her and she too fell down. Counsel argued that this particular evidence was not rebutted at all during cross examination and the question of whether there was a fist fight between the Appellant and the deceased was not put to Magdaline during cross-examination. In this regard, counsel submitted that the evidence on the question of fighting does not exist on record. In any event, counsel argued, the evidence demonstrated that the injuries were not merely caused by fists and blows but by a blunt force trauma.

24. Lastly, on sentence, counsel stated that the respondent stood guided by the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* (*supra*), and conceded that the mandatory sentence handed down to the Appellant was unconstitutional. Counsel further urged that if this Court upholds the Appellant's conviction, then this matter should be remitted back to the trial court for a resentencing hearing since, during mitigation, the Appellant expressed remorse and had informed the court that he had reconciled with the- family of the deceased. Additionally, he was a first offender.

25. This being a first appeal, this Court has a duty to re-evaluate and analyze the evidence in detail and come up with our own independent conclusions while bearing in mind that we neither saw the witnesses nor heard the evidence of parties during trial so as to see their demeanour. See *Okeno v Republic* [1972] EA 32.

26. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

27. The gist of this appeal turns on three issues of determination, namely:

    a. Whether the Learned Trial Judge evaluated and considered all the evidence on record as a whole;

    b. Whether the evidence on record disclosed the defence of provocation which would have reduced the offence from murder to manslaughter; and

    c. Whether the death sentence imposed on the Appellant should be set aside.

28. We have read the admirably pithy but comprehensive judgment by the Learned Trial Judge. We state at the outset that the Learned Trial Judge dealt with all the issues before him, and thoroughly evaluated all the evidence placed before him. Nothing at all comes out of the complaint that the judgment evinced a failure by the Learned Judge to evaluate the evidence on record as a whole.

29. The more substantial complaint by the Appellant is whether the evidence on record disclosed the defence of provocation. The Appellant insists that his defence coupled with his statement to the Police properly disclosed the defence of provocation. He also seems to insinuate that since he disclosed the defence of provocation quite early on in the investigations, it was incumbent upon the Prosecution to specifically disprove the defence.

30. We will begin with the latter argument by the Appellant. First, we wish to point out that the Appellant did not, as a matter of fact, raise the defence of provocation in his cautionary statement. As PW3 (Corporal Samuel Sang) testified, the Appellant did not, in fact, concede that he had hit the Deceased in the heat of passion. Instead, he said he had gone to reconcile with her only to find out that she had "squandered" the money she had been given for rent. Counsel for the Appellant says that this was enough disclosure of the defence of provocation. We think not. There could not be even a suggestion of provocation when the Appellant's statement did not even admit to having an altercation with the Deceased. In any event, there is no rule of law that the defence of provocation must be "specifically

disproved" by the Prosecution, if by this the Appellant means evidence called specifically geared to disproving the defence of provocation. Instead, the alleged evidence of provocation offered by an Accused Person is treated like all other defences: it is weighed against the Prosecution evidence with the requirement that the trial court be certain, beyond reasonable doubt, that the defence has not been established.

31. In the present case, it is true that the Appellant expressly raised the defence of provocation. He claimed that the Deceased provoked him in three ways: First, that she allegedly squandered the money for rent which he had givenher by buying alcohol with it, and was, in fact drunk at the time of the incident; second, that she allegedly arrogantly "threw words" at the Appellant; and third, that she allegedly engaged in a physical altercation with the Appellant during which the Appellant threw the fatal blow.

32. The defence of provocation is provided for under Sections 207 and 208 of the *Penal Code* as follows:

> " 207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."
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> 208
>
> (1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
>
> 2. When such act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid,the former is said to give to the latter provocation for an assault.
>
> 3. A lawful act is not provocation to any person for an assault.
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> 4. An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
>
> 5. An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

33. In *VMK v Republic* (2015) eKLR (*supra*), this Court aptly discussed the defence of provocation as follows:

> " Provocation was defined in the case of *Duffy* (1949) 1 ALL ER 932 as:-
>
> > " Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, sudden and temporary loss of self- control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind..."
>
> As deduced by this Court in *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR the above definition requires that two conditions be satisfied for the defence to be made out, namely:-
>
> a. The "subjective" condition that the accused was actually provoked so as to lose his self-control; and
>
> b. The "objective" condition that a reasonable man would have been so provoked.
>
> Indeed, Section 209(1) of the *Penal Code* also defines "provocation" to mean and include '....except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered...' Whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. See *Criminal Law by J. C. Smith and Brian Hogan, 7th Edn. Pg 352.*

34. In view of the above authorities, the two related questions that beg consideration is, first, whether the claimed facts could be, if proved, qualifying triggers for the defence of provocation; and, second, whether the facts were established to justify the application of the doctrine of justification.

35. First, the first two alleged sets of facts – that the Deceased allegedly squandered the money for rent and was drunk at the time of the incident; and that she allegedly arrogantly "threw words" at the Appellant – are not sufficient qualifying triggers to establish the defence of provocation even if they were, in fact, proved in evidence. For the defence of provocation to apply, an Accused Person must demonstrate that a person in his circumstances – who has a normal degree of tolerance and self- restraint – would have reacted in the same way. For this purposes, justifiable provocation must be distinguished from evidence of anger: anger could be both evidence of provocation and loss of control as well as indication of the reverse: evidence of a considered, controlled retaliation.

36. In the circumstances of this case, even if evidence was availed to show that the Deceased had "squandered" money for rent, that would never amount to a qualifying trigger for loss of self-control. Alleged misuse of money by one spouse can never justify a violent response by the other spouse. Similarly, alleged "throwing of words" and "arrogance" by one spouse cannot amount to a qualifying trigger for the defence of provocation to apply unless it is shown that the specific words uttered were "of such a nature as to be likely, when [said] to an ordinary person to another person as.... to deprive him of the power of self- control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom ..... insult is .... offered." In short, general claims that a

person "threw words" at the Accused Person; or was "arrogant" or "insulted" without specifying which specific words were uttered and demonstrating that they reached this threshold would not suffice.

37. In any event, as the Learned Trial Judge correctly concluded upon an analysis of the evidence, there was no proof that any of the three alleged things happened. We are in agreement that the Appellant's defence was merely self-serving and did not displace the cogent testimony by Magdaline about what happened. This is especially so because the Appellant did not ask any questions of the prosecution witnesses to suggest that the narrative as given was not true. In the end, Magdaline's testimony remained unshaken even in cross-examination. In particular, there was no evidence whatsoever that the Deceased engaged in a fight with the Appellant. Magdaline's testimony was quite categorical that it is the Appellant who attacked the Deceased and, among other things, hit her with a stone on the head. When Magdaline attempted to intervene, the Appellant pushed her away causing her to fall also. This was not evidence of a fight in which, in the heat of passion, the Appellant threw a blow too heavy or sharp resulting in an unintended death; this was evidence of a fully- fledged gender-based assault in which a husband who felt aggrieved by his estranged wife followed her to her mother's home and viciously attacked her. The post-mortem report corroborated the fact that death was not caused by blows by the fist or by a fall as the Appellant claimed; but by a blunt force trauma – consistent with Magdaline's testimony that the Appellant hit the Deceased with a stone. Further corroborative evidence from the post-mortem report is found in the plucked hair – which tallies with the Appellant's own testimony that he "pulled" the Deceased up to her mother's house after he had knocked her unconscious.

38. Finally, as the Learned Judge observed, further evidence of the Appellant's guilt is provided by his post-incident conduct. He not only fled the scene without attempting to assist the Deceased; but he fled the area altogether – and went to Eldoret. It was only his father who eventually prevailed upon him to surrender to the Police. This is conduct which is inconsistent with innocence or causing accidental death.

39. In the circumstances, we have no doubt that all the elements of the offence of murder were firmly established in this case and the conviction was justified and error-free.

40. Turning to the death sentence imposed for the offence of murder, we note that the Appellant relied on the holding of the Supreme Court in *Francis Muruatetu & another v Republic* (*supra*) on the unconstitutionality of the mandatory nature of the death sentence in murder cases. We also take note of the fact that the Respondent conceded to the said holding. We agree that the death sentence is one for setting aside.

41. We have looked at the record. Even though by the time sentence was passed the *Muruatetu Case* had not been decided, we have noted that the Appellant adequately mitigated. In cases where there is sufficient address on mitigation on record, this Court avoids needlessly congesting the High Court by remitting such cases for re-sentencing. We have noted that the Appellant was a first offender. We have further noted that he mitigated that he was remorseful; and that he has made peace with the family of the Deceased.

42. However, we note that this was a horrific gender-based violence perpetrated on a woman who had sought refuge in her own mother's home. The Appellant, an intimate partner, pursued her at probably the space she felt most secure at. He then proceeded to mete out atavistic violence on her in the presence of not only her mother, but, by his own reckoning, at least one of their children. The excuse that the Appellant gave for his vicious attack smack of probably the two most harmful beliefs that perpetuate violence against women in our part of the world: that women are expected to be submissive and not answer back when spoken to by their husbands; and that husbands have a right to exercise coercive

control over their wives. The offence is aggravated by the fact that it was committed in the Deceased's mother's home where she had sought refuge; and in reckless disregard of the children of the Appellant and the Deceased who witnessed the attack. We turn our face firmly against the anachronism that violence, even fatal violence as in this case, is an acceptable currency of spousal interaction.

43. The upshot is that the circumstances here point to a particularly disturbing homicide borne of gender-based violence; the kind of toxic masculine behaviour that requires vehement discouragement. Consequently, given all these factors, we hereby substitute the death sentence imposed with a sentence of imprisonment for thirty (30) years. The custodial sentence will begin running from the date of conviction (September 21, 2017) since the Appellant was out on bond during the pendency of the trial.

44. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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I certify that this is a true copy of the original

DEPUTY REGISTRAR