Mwangi v Republic (Criminal Appeal 1 of 2015)
[2023] KECA 246 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 246 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 1 OF 2015

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MARCH 3, 2023

BETWEEN

PETER MWARIRI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Maureen A. Odero, J.) delivered and dated 17th October, 2017 in HC. CR. C. No. 106 of 2014)

JUDGMENT

1. The appellant, Peter Mwariri Mwangi, is before us on a first appeal challenging the judgment on conviction and sentence of the High Court in Criminal Case No 106 of 2014. The appellant was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Subsequently, he was sentenced to life imprisonment. The particulars of the offence were that he murdered one Joseph Maina Kamithi on October 8, 2014 at Tausi Bar in Njoro Town, Njoro Sub-county within Nakuru County.

2. Being dissatisfied with the conviction and sentence by the trial court, he raises the following grounds of appeal, namely, that the ingredients of the offence were not proved beyond reasonable doubt, that the evidence of the prosecution witnesses was not corroborated, the learned judge did not apply caution when dealing with the evidence of a single witness, and that the sentence was excessive and unlawful in nature.

3. This being a first appeal, our mandate under section 379(1) of the *Criminal Procedure Act* and Rule 31(1)(a) of the *Court of Appeal Rules, 2022* is to re-evaluate and analyze the facts and evidence that resulted in the decision in the High Court and then arrive at our own decision. A similar view has been adopted by this Court in many of its decisions including in *Dickson Mwangi Munene & Another v Republic [2014] eKLR*.

4. In discharging our mandate, we set out here below a summary of the evidence presented before the trial court. The case for the prosecution was made of 7 witnesses.

5. PW1 Simon Nganga Kunuthu testified that he was a brother to the deceased. He gave an account of how he was called on October 8, 2014 and upon reaching Tausi Bar, he found the deceased naked. Upon interrogating him, the deceased told him that he had been assaulted by the appellant on the abdomen. He then asked the appellant what the issue was,the appellant told him that the deceased had refused to pay for his beer worth Kshs 50 and that he would take care of the medical expenses. PW1 then escorted the deceased to the police station and then to Njoro Health Centre. The deceased's condition deteriorated and he succumbed at Nakuru Hospital.

6. Paul Githuki Muiruri took the stand as PW2 testifying that on the material day, he received a call from his friend, James Nganga who informed him that his nephew, the deceased had been assaulted at Tausi Bar. Alongside PW1, they went to the scene and found the deceased lying naked. The deceased was experiencing pain in his abdomen. He told them he had been assaulted by the appellant and he couldn't walk upright; he was bending at the waist. The appellant told them he beat up the deceased because he had drunk keg worth Kshs 50 and did not pay. They took the deceased to Njoro Police Station and then to Njoro Clinic and the deceased later succumbed at Nakuru Provincial Hospital.

7. Peter Njoroge (PW3) testified that on the material day, he went to Tausi Bar for a drink. He found the appellant assaulting the deceased by stepping on him and jumping on the deceased's abdomen. He then called Macharia who in turn called PW1. PW4, Mburu James Nganga remembers finding the deceased lying naked near Tausi Bar. Upon asking the bar owner, the appellant, what the deceased had done, the appellant informed him that the deceased had consumed Keg worth Kshs. 50 and declined to pay. While at the scene, he heard the deceased cry and saying his abdomen was paining. The appellant also declined to give him the deceased clothes which he had held as ransom for the unpaid debt.

8. Virginia Wambui testified as PW5 and in her account, she narrated that she met the deceased's wife who informed her that the deceased had been assaulted. On arriving at the deceased's house, she found the deceased lying on a chair and he informed her that he had been assaulted by the appellant for failure to pay a debt of Kshs 50. She then took the deceased to Nakuru Provincial Hospital where he succumbed as a result of injuries to the abdomen as established by PW7. She also attended the postmortem.

9. PC John Chacha took to the stand as PW6 testifying that on October 8, 2014, while he was at the Police Station, the deceased who was in the company of his relatives reported that he had been assaulted by the appellant. After the deceased had died, he launched investigations and established that the accused assaulted the deceased after the deceased failed to pay him Kshs 50 for a cup of keg he had consumed. On October 13, 2014, he took the deceased's relatives to the mortuary where a postmortem was conducted.

10. PW7 was Dr Titus Ngulungu who testified that he conducted a postmortem examination on the body of the deceased. He noted faint bruises on the deceased's abdomen. Internally, the intestines and abdomen had multiple bruises, intestinal loop rupture, inflammation of gut, 100 mls blood inside the abdomen, semi digested material and blood mixed in the abdominal cavity. He formed the conclusion that the deceased died of abdominal organ injury attended with blood loss and periodontist due to blunt force injury to the abdomen. He presented the postmortem report as Pexbh. 1. PW8, Cpl Abdi Ali produced photographs of the scene of crime and the deceased injuries at the mortuary as Pexbh. 2 and his certificate as prosecution Pexbh. 2a.

11. Placed on his defence, the appellant gave sworn testimony with no witness.

    The appellant produced his statement under inquiry as Defence Exhb 1. He denied the charges facing him. He also denied ever owning or working at Tausi Bar at the time of the offence. He further denied

ever assaulting the deceased. As for his whereabouts on the material day, he stated that he was arrested from his house while asleep at 9 pm on allegations of having beaten and killed the deceased. He also stated that he was assaulted during and after arrest and he sought medical attention at Njoro Health Centre. He produced the treatment sheets as Dexhb. 6.

12. This appeal came up for hearing in plenary on October 25, 2022. Mr Kirimi and Mr Ondimu appeared before us for the appellant and the respondent respectively. Both counsel had filed their submissions and also proceeded to highlight them orally before us. We summarise the submissions as follows.

13. For the applicant, Mr Kirimi held the view that the prosecution had failed to prove all the elements of the offence of murder against the appellant, beyond reasonable doubt. Counsel pointed out that the evidence linking the appellant to the act of murder was of a single witness, PW3, whose evidence he terms as insufficient in discerning the identity of the appellant as the perpetrator. Counsel further submitted that the evidence of the only eye witness was skewed and left gaps hence could not be relied upon to totally establish the offence against the appellant. It is also his view that the circumstances of identification were not favourable as the incident happened at night and there was no evidence to support a favourable environment under which PW3 could have identified the appellant. To this end, counsel relied on the decisions in *Pola & 3 Others vs R (2021) KECA 66 (KLR)*, *Gikonyo Kuruma & Another vs R (1977) eKLR*, among others to buttress this position and in urging the need to subject the evidence of PW3 to careful test.

14. Turning to the next issue, counsel submitted that the prosecution failed to call a critical witness. Counsel held the view that failure to call the watchman who was alleged to have been on duty on that day is fatal to the case because his evidence would have shed more light on what transpired, as the events took place in his presence. Counsel also said that the apparent owner of Tausi Bar, Mbuthia Kinondu, was not called as a witness. It is also counsel's view that there were other patrons in the bar at the time of incident whose evidence would have shed more light on what transpired. Counsel therefore urged us to find that the failure to call these witnesses was fatal to the case as they left a gap in the appellant's culpability and identity. Counsel also submitted that from the evidence on record, malice aforethought was not established thereby falling short of proving the offence of murder. In this regard, counsel relied on section 206 of the Penal Code and the case of *Bonaya Tutu IPU & Another vs R [2015] eKLR* to submit that the death sentence ought to be vacated as there was no evidence that the appellant intended to murder the deceased.

15. Counsel also took issue with the learned Judge's reliance on the deceased's dying declaration. According to counsel, even though the learned Judge was cognizant of the guidelines relating dying declarations, the Court erred in finding that the evidence was corroborated as is required. Instead, counsel submitted that there was evidence that the appellant had been assaulted by the deceased's brother which could be construed to amount to a grudge between the appellant and the deceased's relatives. Counsel also pointed out that the demeanor of PW3 and PW4 was questionable and that the evidence of PW3 was contradictory.

16. The final issue submitted on for the appellant was on sentence. Counsel submitted that mandatory death sentence is illegal and that it was in the interest of justice that the sentence of death be set aside by this Court. Counsel relied in the decision in *Francis Kioko Muruatetu & Another vs R [2017] eKLR* and *Jonathan Lemiso Ole Kini vs R [2017] eKLR* to buttress this line of submissions. Counsel further urged that the appellant was a first offender and that section 333(2) of the *Criminal Procedure Code* ought to apply thereby taking into account the time already spent in custody. In relying in the decision of *Bernard Otieno Okello vs R* [2019] eKLR, counsel urged us to reduce the appellant's sentence to 30 years. In summary, counsel urged that the appeal should be allowed.

17. For the respondent, Mr Ondimu set off his submissions by reminding us of our duty as the first appellate court and the elements of the offence of murder. He reiterated that the evidence of PW1 and PW7 alongside Pexhb. 1 confirmed the fact of death of the deceased. Mr Ondimu further relied on the case of *Uganda vs Lydia Draru alias Atim*, HCT-00-CR-SC—0404 to submit that every homicide is presumed as unlawful unless circumstances make it excusable. Counsel reasoned that the evidence on record showed that the deceased died of the injuries sustained from the incident as opposed to natural death. To counsel, this therefore proved that the death was unlawful. On whether the appellant participated in causing the death of the deceased with malice aforethought, counsel submitted that PW3 was an eye witness to the offence and he confirmed in his evidence that it was the appellant who assaulted the deceased.

18. Counsel also submitted that the trial court was not barred from convicting the appellant based on the evidence of a single witness. To buttress this point, he relied on the decision in *David Kivande Mwangi vs Republic [2017] eKLR*, and pointed out that the trial court indeed took into considerations the relevant factors prior to relying on the evidence of PW3. Mr Ondimu also rebuted the appellant's claims that PW3 was drunk pointing out that the witness in his evidence stated that although he entered Tausi Bar with the intention of buying a drink, he had not consumed any alcohol when the incident occurred. Counsel further refuted the claims of contradictory evidence noting that the appellant fell short of identifying the alleged contradictions.

19. On the evidence of dying declarations, Mr Ondimu placed reliance on this Court's decision in *Moses Wanjala Ngaira vs Republic [2019] eKLR*, and submitted that this chain of evidence complied with section 33(a) of the *Evidence Act*. He acknowledged that it was mandatory that the same be corroborated; and counsel submitted that the evidence of PW1, PW2 and PW3 corroborated the evidence of the dying declaration.

20. Lastly, Mr Ondimu addressed us on the issue of the sentence, pointing out that the decision in Francis Karioko Muruatetu & Another vs R [2017] eKLR was delivered after the impugned judgment had been delivered. He argued that in the circumstances of this case, death sentence was warranted as the appellant acted in impunity, therefore calling for the imposition of the maximum sentence provided for in law. In conclusion, Mr Ondimu urged us to dismiss the appeal in its entirety.

21. We have duly considered the record of appeal and the rival submissions of both parties. In our view, the evidence implicating the appellant can be classified into two; first a dying declaration by the deceased; and that of an eye witness. This appeal therefore raises the following four issues for consideration, namely, whether the deceased made a dying declaration; whether the prosecution failed to call an essential witness; whether the offence of murder was proved against the appellant; and whether the death sentence was lawful.

22. A dying declaration can loosely be defined as a statement made by a person concerning what he believes to be the cause or circumstances of his death, when knowing that death is imminent. The statement so made earns its credibility and evidentiary value from the general belief that most people, upon realizing that they are about to die 'will not lie'.

23. Several witnesses, PW1, PW2 and PW5 testified that the deceased, told them, separately, that he had recognized the appellant as the person who assaulted him. Section 33(a) of the *Evidence Act* permits admission, as evidence, the statements made by a person who is dead where:

> ' The statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person

who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.'

24. The learned Judge conducted a substantive analysis of the ingredients necessary for statements to be regarded as dying declarations in the face of section 33 (a) of the *Evidence Act*. The ultimate test arrived at by the judge at page 52 paragraph 1 is that for dying declarations to have full probative value, it must be supported by corroboration. The appellant and the respondent are both in agreement that the learned Judge properly appreciated the law on admissibility of dying declarations. We agree with the learned Judge as to the applicable principles surrounding the admissibility of dying declarations.

25. The only issue therefore is whether the dying declaration was corroborated as it ought to have been. Guidance can be obtained from *Philip Nzaka Watu vs Republic [2016] eKLR*. In this case, the evidence of PW1, PW2 and PW6, all who spoke to the deceased on the day he was assaulted, was that the deceased told them that he had been assaulted by the appellant. PW5, the sister to the deceased also stated in her evidence that when she saw the deceased the next day, the deceased informed her that he had been assaulted by the appellant. The fact that the deceased died a day later in hospital while seeking treatment for the assault qualifies these statements as dying declarations. This evidence is related to the deceased's cause of death. Further, the evidence of PW3 and PW4 corroborates the statements contained in the dying declarations. PW3 saw the appellant assault the deceased. PW4 on his part, found the appellant naked and beaten, and upon inquiry from the appellant, he learnt that the deceased had taken beer and not paid for it. PW2 recovered the deceased's clothes from the appellant who was at the counter of Tausi Bar. PW4 also stated that the appellant declined to give him the deceased's clothes.

26. Considering this line of evidence, we do not find any impropriety on the part of the learned Judge in holding that this evidence amounted to a dying declaration. The deceased made a dying declaration, not to one person butto many, and the same is corroborated by the evidence of eye witnesses and those who were at the scene of the incident.

27. Next, we render ourselves on the second and third issues identified for determination being, that a critical witness was not called by the prosecution and whether the evidence on record established the offence against the appellant. The starting point is section 143 of the *Evidence Act* which provides that there is no specific number of witnesses required to prove a fact. This Court has always stated that the prosecution is vested with the discretion to determine the persons it should call as its witnesses. In the case of *Julius Kalewa Mutunga v Republic [2006] eKLR* the Court stated as follows:

> ' As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R (1950) 23 EACA 493.'

28. Therefore, the bottom line is that the prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. Oblique motive may be inferred, or adverse inference will only be drawn by the court if the evidence tendered by the prosecution is not or is barely adequate. However,if the evidence is adequate or sufficient to prove the particular matter in issue or the entire case, adverse inference will not be drawn by the Court.

29. On proof of the offence of murder under section 203 of the Penal Code, three elements ought to be proved; the fact of death, the fact that the death was caused by the actions of the appellant and that the appellant had malice aforethought.

30. The fact of the deceased's death was not contested. The evidence of PW7 is clear that he conducted a postmortem examination on the body of the deceased. After his examination, he concluded that the deceased died of abdominal organs injuries attended by intestinal bruising/lacerations with bleeding due to multiple abdominal trauma. It is also not disputed that the deceased's death was not lawful in the circumstances.

31. On whether the appellant caused the death of the deceased, we have held earlier in this judgment that the deceased made a dying declaration. In the dying declaration, the appellant was mentioned by the deceased as the person who assaulted him leaving him with the injuries that resulted into his death. Other than the evidence of this dying declaration, PW3 testified that he witnessed the appellant assault the deceased, kick him and once the deceased was lying down, the appellant jumped on his belly severally. PW4 on his part found the deceased lying at of Tausi Bar, naked. He proceeded to talk to the appellant who was at the counter of the bar and the appellant informed him that the deceased had consumed beer and not paid for it. PW2 testified that he collected the deceased's clothes from the counter of Tausi Bar.

32. PW1, PW2, PW3 and PW4 all placed the appellant at the scene of crime.

    The argument advanced by the appellant's counsel that it would have been someone else cannot therefore hold. Based on this evidence, we find, just as did the trial court, that the evidence on record sufficiently placed the appellant at the scene of crime and at the same time proved that he is the one who assaulted the deceased.

33. As regards to malice aforethought, section 206 of the Penal Code provides as follows:

> ' 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. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.'

1. Section 206(a) and (b) of the Penal Code provides the definition of what amounts to malice aforethought. The intention to cause death or grievous harm or the knowledge that an act or omission might cause death or grievous harm amounts to malice aforethought. For factors to be considered, this Court in *David Wekesa Namachanja v Republic [2021] eKLR* while citing with approval the case of Republic v Tumbere S/O Ochen [1945] 12 EACA 63 stated thus:

> > ' The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/ wound or multiple injuries; the conduct of the accused before, during and after the incident.'

35. In the instant case, no weapon was used, however the assault resulted in internal injuries in the deceased's abdomen. There were raptures in the abdominal organs. Surely, the same would not have occurred on a single blow. Furthermore, PW3 testified that he saw the appellant repeatedly jump on the deceased's belly. PW3 further stated that they offered the appellant the Kshs 50 owed by the deceased but the appellant declined the money, and instead continued to assault the deceased. We have no doubt that the appellant not only had knowledge that his actions would cause death or grievous harm to the deceased, but he also harboured the intention to cause his death or to occasion him grievous harm. Was the appellant, by any chance, provoked? The answer is an outright no. When put to his defence, the appellant distanced himself from the occurrence of that day. His, in our view, was a mere denial and the trial court was right to dismiss his defence.

36. This leads us to the inevitable conclusion that the case against the appellant was proved to the required threshold, beyond reasonable doubt. In the circumstances, is it possible to infer adverse motive on the prosecution's failure to call both watchman as a witness and the bar owners as witnesses? We answer in the negative. The evidence on record was sufficient to sustain a conviction against the appellant. We are therefore not persuaded by this ground of appeal either.

37. The final aspect of our determination is with regards to the death sentence passed by the trial court. On this issues, we agree with the prosecution's view that the decision in Francis Karioko Muruatetu & Another vs R [2017] eKLR was rendered after the trial Court's judgment had been delivered. We cannot therefore fault the learned judge for passing the death sentence. However, we also wish to point out that only the mandatory nature death sentence was declared unconstitutional and not the death sentence itself. In deserving cases, death sentence is still warranted and should be passed.

38. The remit of an appellate court on sentence was stated by this Court in *Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR* as follows:

> ' As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.'

39. In this case, we note that the trial court issued the death sentence in the context of its mandatory nature as provided under section 204 of the Penal Code. It is on that basis that we deem it justiciable to reconsider the sentence.

40. The Sentencing Guidelines issued by the Kenyan Judiciary on April 29, 2016 through Gazette Notice No 2970 at Paragraph 7.19 provides the factors to be taken into account in deciding whether to impose a custodial or non-custodial sentence as follows:

    1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.

    2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance. Previous convictions should not be taken into consideration, unless they are either admitted or proved.

3. Children in conflict with the law: Non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate and would be in the child's best interest. Custodial orders should only be meted out as a measure of last resort.

4. Character of the offender: Non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.

5. Protection of the community: Where there is evidence that the offender is likely to pose a threat to the community; a non-custodial sentence may not be the most appropriate. The probation officer`s report should inform the court of such information.

6. Offender's responsibility to third parties: Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons, who depend on him/her, a court should consider a noncustodial sentence if, in light of the gravity of the offence, no injustice will be occasioned.

   Information on the offender's responsibility to third parties should be substantiated.'

41. Still on Sentencing Guidelines issued by the Kenyan Judiciary, paragraph 23.9 provides for how to conduct a balancing act between the aggravating and mitigating circumstances during sentencing. Paragraph 23.10 of the guidelines provide that even in instances calling for life sentence, courts should still endeavor to impose a sentence in keeping with the spirit of these guidelines, which includes the promotion of consistency and certainty in the sentencing process hence enhancing delivery of justice and promoting confidence in the judicial process. Further, section 333 of the Criminal Procedure requires that the period already held in custody should be taken into account by the Court when passing a sentence.

42. We are guided by these provisions. The appellant in mitigation stated that he was a first offender; that he acted out of provocation by the deceased, he was remorseful and was also the sole breadwinner of his young family and his parents. We have taken this into consideration. We also note that the appellant's actions resulted into the death of a man. The dispute was over Kshs 50 and alternative means other than causing death could have been deployed to recover the debt. The appellant was fast to anger and even upon being made an offer for the Kshs 50, he remained reluctant to allow reason prevail. In the circumstances, 30 years jail term would be appropriate punishment for the appellant.

43. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence succeeds. The death sentence is hereby set aside. The appellant is hereby sentenced to serve 30 years in prison.

44. The sentence to run from November 24, 2017 when he was sentenced by the trial court.

45. Those are the orders of this Court.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF MARCH, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR