FMM v Republic (Criminal Appeal 101 of 2020)
[2023] KECA 754 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 754 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 101 OF 2020

MS ASIKE-MAKHANDIA, S OLE KANTAI & GW NGENYE-MACHARIA, JJA

JUNE 22, 2023

BETWEEN

FMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (L. Mutende J.) dated 27th January, 2015 in Machakos HCCRC No. 18 of 2008)

JUDGMENT

1. This is an appeal from the judgment of Mutende, J. delivered on 27th January, 2015 in Machakos High Court Criminal Case No. 18 of 2008 in which the trial court made a special finding that although the appellant was guilty of the offence of murder, was nonetheless insane when he committed the offence. Accordingly, it sentenced him to be detained at the pleasure of the President.

2. The appellant had been charged with two counts of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of count 1 were that: on 4th March, 2004 at Kakulutuini village in Kangundo District within Eastern Province, the appellant murdered Grace Wavinya Nzioka. With regard to the second count, the particulars were that on the same day and place, he murdered Anne Mbinya Nzioka.

3. The appellant pleaded not guilty to both counts and after a full trial, he was found guilty, convicted and sentenced as aforesaid. Aggrieved by both the conviction and sentence, the appellant filed this appeal on the grounds that the trial court erred in fact and law: in basing the conviction on circumstantial and contradictory evidence; in sentencing the appellant to be held at the pleasure of the President; and, in not finding that the entire prosecution case was not proved.

4. During trial the prosecution called a total 6 witnesses, PW1, Francisca Munyiva Kituu, testified that the appellant was her son who had on several occasions been hospitalized for mental illness. He had

last been treated at Kangundo Hospital before the incident. On 3rd March 2008, PW2, Peter Nzioka Mwanzia, a brother to the appellant informed her that his house had been broken into, ransacked and items stolen. He suspected the appellant and that he wanted to go and look for him at their grandmother's home. He proceeded thereat in the company of one, Lucas Mutua. At 11.00pm, PW2 came back and told her that he had found his grandmother, the deceased in the 1st count, dead. The deceased lived with a daughter, Anne Mbinya Nzioka, the deceased in the 2nd count and son, Boniface Musembi. In the company of Boniface Musembi, they had reported the incident to the local Assistant Chief. At this time, the appellant was at home burning charcoal and had a panga. Thereafter, the appellant was apprehended. PW2, reiterated the evidence of PW1 above, suffice to add that he found the 1st deceased dead with a huge stone on her chest.

5. PW3, Michel Kiragu a doctor based at Kangundo District Hospital examined the bodies of the two deceased persons. The 1st deceased had a deep linear laceration which went through the frontal lobe of the brain,lacerations in the upper jaw and her anterior neck was severed from the spinal cord. He opined that the cause of death was extrangulation due to severed carotid arteries and other major blood vessels. The 2nd deceased, had minor bruises on her back, her wind pipe had been crashed at the 4th and 5th positions and had nearly separated at the first and second positions. According to his opinion, the death was consistent with strangulation.

6. PW4, Joseph Kagunda Kimani, a Government analyst received items from CPL Catherine Kinoti, being, a panga, blood sample of the 1st deceased and the appellant's blood sample. Upon analysis, he found that the panga was moderately stained with human blood of group A which belonged to the 1st deceased.

7. PW5, CPL Virginia Wanjiku, attached to CID headquarters, crime scene support services was asked by IP Wafula and CPL Mwenda to take photographs of exhibits that had been recovered in a coffee plantation which included a bag containing clothes and a kitchen knife with a black handle, a red suitcase containing more clothes, a mosquito net and photographs. Apparently, the appellant had told police officers upon arrest that he hid the items there, after the commission of the offence before proceeding to his home. Thereafter, and still in the company of the two police officers, they proceeded to the scene of crime, a residential house, where they found bodies of the 1st and 2nd deceased aged 90 and 59 years respectively. The body of the 1st deceased had deep visible cuts and lay in a pool of blood in the first room of the residential house. The naked body of the 2nd deceased suspected to have been suffocated using a polythene bag was found in the bathroom tied with polythene paper.

   The appellant then disclosed to them that he had hidden a panga in a pit latrine that was within the compound which was recovered.

8. PW6, CPL Solomon Mwendwa of CID Kangundo office, proceeded to Kangundo Police Station in the company of IP Wafula and PW5 where they found the appellant under arrest by the local Chief and his assistant on the allegation that he had killed the two deceased. They took him to the scene of crime and found the deceased bodies. The appellant then led them to the pit latrine where they retrieved a blood-stained panga suspected to have been used in the commission of the offences. Subsequently, the appellant offered to confess to the offences but when taken before the Principal Magistrate, Kangundo, the magistrate declined to take the confession and instead referred them to hospital for the appellant's mental assessment.

9. Placed on his defence, the appellant gave unsworn testimony in which he stated that in February, 2008 he became sick with malaria and was taken to hospital, treated and discharged. Later, he suddenly fell ill, collapsed, became paralyzed, lost consciousness and when he came to; he found himself in police custody but could not remember anything.

10. At the end, the trial court was satisfied that the appellant committed the offences but was insane at the time, such that he could not be said to have been responsible for the acts. Accordingly, and as already stated, the trial court found him guilty as charged but pursuant to section 167(1)(b) of the Criminal Procedure Code, ordered that he be detained at the President's pleasure.

11. The appeal was canvassed by way of written submissions. At the virtual hearing, the appellant was represented by Mr. Sanjay Bhansali, learned counsel, whereas the State was represented by Ms. Matiru, learned prosecution counsel.

12. Counsel for the appellant submitted that the evidence led by the prosecution was insufficient and contradictory, none of the witnesses witnessed the commission of the offence and the court merely relied on circumstantial evidence. There was no forensic evidence adduced showing that the appellant's fingerprints were found on the murder weapon. That whereas, PW2 testified that the appellant was holding the panga, PW6 however, testified that the panga was found in the pit latrine. Further, witnesses disagreed on whether the said panga had blood stains. The appellant further submitted that the prosecution failed to establish that the appellant had the necessary malice aforethought or reason to kill the deceased. He maintained that the appellant suffered from a mental disorder and could not recall the events of the material day.

13. It was submitted that the evidence led by the prosecution was insufficient to justify the conviction. Counsel relied on section 162 of the Criminal Procedure Code to advance the argument that the appellant was not conscious of the events that took place on the material day. That the trial court failed to enquire into the errors and mistakes made by the police in their investigations. He therefore prayed that the appeal be allowed in its entirety. However, in the event that we sustained the conviction, the appellant pleaded that the sentence be reviewed from the current indeterminate and unconstitutional sentence, to a more certain and predictable sentence. That the High Court had in several decisions of late held that a sentence where an accused is sentenced to be held at the pleasure of the President was unconstitutional. Counsel urged us to be guided by those persuasive authorities and interfere with the sentence.

14. In response, Ms. Matiru submitted that although the prosecution relied on circumstantial evidence, the deaths of the deceased were proved by the evidence of the post mortem reports. That although the appellant had a history of mental illness, nonetheless, the chain of events and evidence pointed directly at his acts being the cause of the deaths of the deceased. That the appellant led police officers to a pit latrine where he had hidden a panga, and also to a coffee farm where a bag with a knife were recovered. That the prosecution proved that there was nobody else who could have taken the lives of the deceased other than the appellant. No other coexisting circumstances which could have weakened or destroyed the inference of guilt on the part of the appellant were established. That the panga and the kitchen knife were taken to the Government chemist for forensic analysis which established that they contained human blood that matched the blood type of the 1st deceased. Counsel however, did not submit on the question of sentence.

15. It was further submitted that all the ingredients of the offence of murder were proved beyond reasonable doubt, save for the fact that the appellant was suffering from a mental affliction when he committed the acts. We were therefore urged to dismiss the appeal in its entirety.

16. As this is a first appeal, the duty of this Court was set out in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic [1957] EA. (336) and the appellate

court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

17. In a case of murder, the prosecution is called upon to prove the death of the deceased and its cause, that the death was caused by the accused and that he caused the death with malice aforethought.

18. The deaths of the deceased and their cause were not in dispute going by the evidence of PW1, PW2, PW3, PW5 and PW6. Indeed, even the appellant did not dispute the fact. The contestation is whether the death of the deceased resulted from unlawful act or omission on the part of the appellant. Nobody saw the appellant commit the offences. The prosecution therefore relied on circumstantial evidence to nail the appellant. The question is whether the circumstantial evidence presented met the requisite legal threshold to hold the appellant responsible for the deaths of the deceased.

19. As held by the court in *Rex vs. Kipkering Arap Koske* [1949] 16 EACA 135, to sustain a conviction against an accused person based on circumstantial evidence, such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. The evidence should point irresistibly to an accused as having committed the offence and to no other person. Indeed, in *Sawe vs. Rep* [2003] KLR 364, this Court expressed itself thus on the issue:

> " 1. In order to justify on circumstantial evidence, the inference of guilt, and the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
>
> 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
>
> 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

20. From the record, the circumstantial evidence relied on was that of PW1, PW2, PW3, and PW4, whose testimony was clear and concise. PW1 talked of the previous mental status of the appellant and his strange request on the day of the murders, to go live with his grandfather who was already deceased. She obliged and off he went. Later, he gets to know of the death of the deceased at the home that the appellant had gone to. In the meantime, PW2 reported that his house had been broken into and items stolen therefrom. He suspected the appellant and went looking for him at the 1st deceased's house. Upon arrival, he was confronted with the body of the 1st deceased with a huge stone on her chest. The appellant was nowhere to be seen.

21. Back home and after informing PW1 what he had come across, they suddenly saw the appellant burning charcoal whilst holding a panga and was dressed in a sweater belonging to his deceased grandfather. He could only have got that sweater from the home of the 1st deceased. When confronted, he begged PW1 and PW2 not to harm him. From the panga retrieved at the instance of the appellant,

blood stains thereon matched those of the 1st deceased. From this evidence, there was no other person to place at the scene of the crime other than the appellant. That evidence was corroborated by the evidence of the investigating officers PW5 and PW6, who were led by the appellant to the bush where he had hidden items that he took from the house of the deceased, and or PW2, and to the scene of the crime where the bodies of the deceased were recovered as well as the weapons that were used in committing the offences, including but not limited to the panga

22. On the evidence on record, we are satisfied that the trial court properly reached a proper conclusion that the appellant was responsible for the murders based on circumstantial evidence, far from what the appellant alleges.

23. On the inconsistencies alleged by the appellant in the evidence adduced by the prosecution, we agree with the observations made by this Court in *Phillip Nzaka Watu vs. Republic* [2016] eKLR as follows:

> "...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

24. Having gone through the record, we find no substantial inconsistencies that would have tilted the verdict of the case in favour of the appellant. The inconsistencies regarding whether the panga was recovered in the pit latrine or was being held by the appellant, blood stained or not were minor, and did not go to the root of the prosecution case.

25. As to the last ground, again having gone through the record, it is clear that the prosecution proved the case to the required standard against the appellant. Apart from proving their deaths, the cause thereof, and that it was the appellant who had committed the offences, the prosecution equally proved malice aforethought. The 1st deceased was crushed by a stone, whereas the 2nd deceased was suffocated and strangled besides being stabbed severally. In doing all these, in a normal case, there could not have been any other intention other than to kill the deceased and or cause grievous harm to them. However and as correctly found by the trial court, because of his mental status he was incapable of forming such an intention. The trial court therefore correctly adverted to section 166(1) of the *Criminal Procedure Code* in finding that the appellant was at fault but insane with which we wholly agree.

26. On sentence, the appellant faults the trial court for sentencing him to be held at the pleasure of the President without considering the circumstances in which the offence was committed. Further, he questioned the constitutionality of the sentence.

27. When one is detained at the President's pleasure, he does not know when the pleasure will be exercised or when he will be released. The matter has to be brought to the attention of the President by the concerned authorities. In the persuasive case of *A.O.O & 6 Others vs. Attorney General & Another* [2017] eKLR, Mativo J. (as he then was), dealt with the issue, citing the case of SVTCOEIB (1966) (1) SCAR, 390 where the court observed as follows:

> "It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what

they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left un invaded".

Mativo J. then proceeded and stated as follows:

> " Imprisonment at the President's pleasure is a legal term of art referring to the indeterminate sentences of some prisoners. Originating from the United Kingdom, it is based on the concept that all legitimate authority for government comes from the Crown. The term is used to describe detention in prison for an indefinite length of time. Prisoners held at Her Majesty's pleasure are frequently reviewed to determine whether their sentence can be deemed complete. Prisoners' sentences are typically deemed to be complete when the reviewing body is "satisfied that there has been a significant change in the offender's attitude and behavior."
>
> Indefinite imprisonment or indeterminate imprisonment is the imposition of a sentence by imprisonment with no definite period of time set during sentencing. Its length is instead determined during imprisonment based on the inmate's conduct. The inmate can be returned to society or be kept in prison for life. In theory, an indefinite prison sentence could be very short, or it could be a life sentence if no decision is made after sentencing to lift the term. It has neither a minimum nor a maximum term that can be served allowable by law. The main rationale for imposing indefinite as opposed to fixed sentences is to protect the community. An offender can then be kept behind bars until it is determined the offender would not pose any danger to the society. .....
>
> Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts. 'Sentence' is defined to mean a dispositive order of a criminal court consequent upon a finding of guilt, whether or not a formal conviction is recorded. It also includes indefinite sentences of imprisonment imposed immediately following conviction as well as extended supervision and detention orders which, although not imposed by a sentencing judge immediately following a finding of guilt or conviction, are indirectly founded upon a conviction. The definition of 'sentence', compared with other forms of sanctions and penalties, is constitutionally critical, as sentencing is a judicial power that, can only be constitutionally vested in a court."

The Judge finally determined:

> " b) A declaration be and is hereby issued declaring that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and or an undetermined period of time at the pleasure of the President, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provision of separation of powers, their imprisonment at the Presidents pleasure is unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed Constitution and *the Constitution* of Kenya, 2010."

We are persuaded by the above reasoning and are inclined to adopt and apply it in the circumstances of this case. See also *Wakesho vs. Republic* [2012] eKLR and *KCK vs. Republic* [2016] eKLR.

28. The appellant was convicted on May 12, 2016. The lengthy incarceration of such convicts erodes their human dignity provided for under article 28 of *the Constitution*. The appellant did not know that he ought not to have committed the act. He was mentally sick and the law acknowledges that mental status. The indeterminate nature of the sentence is harsh and excessive. Further, the fact that the decision has to be made by the Executive as opposed to the Judiciary does not sit or accord well with the concept of separation of powers that has underpinning in *the Constitution*.

29. Accordingly, we are satisfied that this limb of appeal succeeds and the sentence imposed that the appellant be held at the President's pleasure is set aside and is substituted with a sentence of twenty-five (25) years' imprisonment from the date he was presented in court. As he serves the sentence, the appellant shall be subjected to psychiatric treatment at a mental facility in the prison in which he will be held.

30. The final orders we make are that the appeal on conviction fails and is dismissed. We set aside the sentence imposed and substitute thereof with imprisonment of 25 years from the date he was presented to the trial court.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR