Case Number:	Criminal Appeal 160 of 2014
Date Delivered:	31 Jan 2020
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, Hannah Magondi Okwengu, Jamila Mohammed
Citation:	Zadock Otieno Nyamhore v Republic [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.Cr. C. No 13 of 2009
Case Outcome:	Appeal dismissed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 160 OF 2014

BETWEEN

ZADOCK OTIENO NYAMHORE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Kisumu (Ali-Aroni, J.) dated 3rd July 2012

in

H.C.Cr. C. No 13 of 2009)

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JUDGMENT OF THE COURT

BACKGROUND

1. **Zadock Otieno Nyamhore** (the appellant) 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 were that on 8th day of February 2009, at East Yimbo location, Bondo District within the then Nyanza Province, the appellant murdered **Prisca Ogollah Nyamhore** (the deceased).

2. At the trial, the prosecution called eight (8) witnesses. In a nutshell, the prosecution case was that **Macrine Akinyi** (Macrine) was a granddaughter to the deceased and she lived with her grandmother. The appellant, who was the deceased's son, had been living with the deceased since February 2009; he would eat in the main house and then sleep in the boys' *simba (house)*. On 8th April 2009, **Macrine** and the deceased were at home sleeping when the appellant came to their home and called out to the deceased to open the door as he headed to drink water. The deceased refused to open the door. The appellant kept calling out to the deceased, urging her to come out and see what was happening outside. Shortly thereafter, the appellant broke the deceased's door with a *jembe (hoe)*, and entered the deceased's house. The appellant hit the deceased with the *jembe*, and when she fell down, he hit her an additional two times. He then went towards **Macrine**, and she pushed him down, causing him to fall. She ran towards the house of a neighbour, **Charles Osonga Omondi's** (Charles) and met **Charles** had heard screams from the deceased's house, and was going to find out what was happening. **Macrine** informed Charles that the appellant had killed the deceased.

3. **Seline Ochieng** (Seline), the deceased's daughter in law, was at home sleeping when she heard someone breaking down her door. After the door fell in, the appellant jumped on her and attempted to strangle her. Seline saw him and started to scream which caused the neighbours to come to her rescue. The neighbours arrested the appellant and escorted him to his home. Selina accompanied the procession and when they reached the main home, she and the neighbours accompanying her found the deceased lying on the ground, dead. Her body was by the door, and had cuts on her head and ear.

4. **Caleb Ochieng Nyamhore** (Caleb), is the appellant's younger brother and husband to **Seline** testified that on the material night, he was at his second wife's house when he received information pursuant to which he proceeded to the deceased's home. He found

her body lying at the door, with the upper part outside the door while her legs were inside the house. She had cuts on her head.

5. **George Matema Nyamhore** (George) a son to the deceased was on the material night at his home resting when he heard noises. He went out of his house and met with **Vitalus Muga** and **Charles Wesonga** who asked him to accompany them to his father's home. The two informed George that his brother, the appellant, had killed their mother. When they got to the deceased's home, they found the deceased's body lying at the door. With the assistance of the Assistant Chief and police officers from Usenge Police Station, they took the deceased's body to Siaya District Mortuary, while the appellant was taken to the police station. **George** identified the body of the deceased for the purpose of a post-mortem examination that was conducted by **Dr Esiaba**. The post-mortem report was produced by **Dr Kennedy Rapenda** (Dr. Rapenda), a Medical Officer at Siaya District Hospital. The post-mortem examination showed that the deceased suffered "a severe head injury caused by a sharp object which led to her death".

6. **Chief Inspector Juma Kwoba** (Chief Inspector, Juma) the Officer then Commanding Usenge Police Station (OCS) received a report of the incident on the material night from **Patrick Ochola,** the Assistant Chief of Otach Sub-location. He called his officers including **Corporal Joseph Kigen** (Corporal Kigen) and they proceeded to the scene of the crime. They found the body of the deceased lying on the floor by the door; she had cut marks on her head and was lying in a pool of blood. **Chief Inspector Juma** arrested the appellant and recorded statements from witnesses and charged him with the offence. The body of the deceased was taken to the Siaya District mortuary where a post-mortem examination was carried out. **Chief Inspector Kwoba** also recovered a *jembe* that was alleged to have been used in the attack and he produced it in evidence in court.

7. When placed on his defence, the appellant gave two conflicting statements. In his first sworn statement given on 29th February 2012, the appellant stated that on the night in question, he went to a disco. While there he remembered that his mother had told him about food. He returned home but he was angry, and he broke his mother's hands. He then found a *jembe* and knocked on his mother's door. When she refused to open, he told both his mother and **Macrine** (PW3) that he would break down the door. Once they opened the door, he hit his mother three times on the head until she died.

8. After the appellant gave this statement, **Mr Oyuko**, at the time counsel for the appellant, applied to have him examined by a psychiatrist as he was of the opinion that the appellant had a mental disorder. The court allowed this application, directing that he be taken for a medical assessment to ascertain his mental state. A medical report was filed pursuant to the examination which showed that the accused was mentally fit to stand trial.

9. Thus, the appellant continued with his sworn statement on 24th April 2012. In this later statement, he denounced his earlier testimony, claiming that he had been under the influence of bhang. This time, he denied killing his mother and stated that on the date that she died, he had been away in Nairobi.

10. After the defence closed its case, the court heard submissions from counsel. **Mr. Meroka** for the prosecution urged the court to consider not only the demeanour of the appellant, but the totality of the evidence adduced which pointed to him as being responsible for the unlawful death of his mother. **Mr Oyuko** on his part urged the court to consider the alibi raised by the appellant which had not been challenged by the prosecution. He argued in the alternative that should the court rely on the evidence of the appellant given on 29th February 2012, the court should find that he committed the offence due to provocation and reduce the charge to one of manslaughter under section 179 of the Criminal Procedure Code.

11. After considering the evidence tendered by the parties, the court found the appellant guilty in the following terms:

"The bottom line here is that this court has before it overwhelming evidence by both the prosecution and the defence against the accused person. It is clear that the accused had formed a clear intention to kill his own mother, he executed the intention by cutting the deceased 3 times.

As for the alibi this came as an afterthought with no notice to the prosecution. The same in my view, in any event did not dislodge the otherwise cogent evidence mounted by the prosecution.

The defence also raised the issue of provocation this defense does not hold any water…. The accused knocked and kicked open his mother's door at 11pm ostensibly seeking water. It is most unusual to knock on one mother's door looking for water at 11pm and armed with a jembe. The accused from his own evidence had an intention as he armed himself and went to the mother's house; he indeed thereafter carried out his mission. The ingredients of the offence of murder was no doubt proven. I accordingly

therefore convict the accused person…."

After considering the mitigation, the trial court sentenced the appellant to suffer death as provided in section 204 of the Penal Code.

12. Aggrieved by the conviction and sentence the appellant appealed to this Court raising six (6) grounds of appeal. These were: that the learned Judge erred: in failing to properly analyse the evidence before convicting him; in relying on suspicion to convict him; in convicting the appellant against the weight of the evidence; in passing a harsh sentence without considering his mental disorder; in relying on the evidence of witnesses who were not present at the scene of the crime; in failing to consider the defence evidence which was strong enough to secure an acquittal; and violating the appellant's constitutional right by failing to allow him to mitigate.

SUBMISSIONS

13. In addition to his memorandum of appeal, the appellant filed written submissions which **Mr. Mwesiga**, his learned counsel, wholly adopted. On the other hand, **Mr. Sirtuy,** learned Public Prosecution Counsel (PPC) who appeared for the respondent, opposed the appeal. He submitted that the conviction was safe as the High Court properly analysed the evidence; that the appellant was recognized by **Charles,** and that this account was corroborated by **Seline** who was also assaulted by the appellant; that the appellant's defence was a mere denial and that he had previously admitted to having committed the offence but later changed his mind and gave a different account as to where he was on the material day. Counsel urged us to find that the learned Judge reached the correct decision and delivered a meticulous ruling on sentence taking into account the appellant's mitigation and giving reasons why the appellant should be sentenced to death. Counsel therefore submitted that the sentence imposed on the appellant was proper, and urged me to dismiss the appeal devoid as it is devoid of merit.

DETERMINATION

14. My duty in this first appeal is to analyse afresh the evidence that was tendered before the trial court afresh, evaluate it and come up with our own independent conclusion on the charge. This duty was restated in ***Mark Oiruri Mose v Republic [2013] eKLR*** where this Court stated that:

"It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

15. To prove the offence of murder, there are three crucial ingredients that the prosecution must prove. The first is the fact of the death of the deceased, the second is that the cause of the death of the deceased was due to an unlawful act or omission on the part of the accused person, and, thirdly, that the said unlawful act was committed with malice aforethought.

16. The fact of death of the deceased is not disputed. Ample evidence shows that the deceased met her demise as a result of a severe head injury. According to **Dr. Rapenda** who was present at the post mortem examination and who produced the post mortem report written by **Dr. Esiaba**, the deceased suffered a deep cut on her scalp, and the conclusion reached was that she had been hit by a sharp object such as a *jembe*.

17. Was the deceased death caused by an unlawful act on the part of the appellant" The evidence of **Macrine** was that on that fateful night, she saw the appellant break the door to the deceased's house and upon entering, hit the deceased three times with the *jembe* and **Macrine** had to run to a neighbour's house. This was the only direct evidence linking the appellant to the death of the deceased. In this appeal, the appellant argued that any evidence adduced by **Macrine** ought to be disregarded for two reasons: first is that at the time of her giving evidence, she was a child of tender years who ought to have been subjected to a *voir dire* examination, and secondly is that her evidence of recognition was unsafe. In the appellant's view, the circumstances were not favourable for a positive recognition of the appellant.

18. We note that in her evidence, **Macrine** stated that she was at 18 years old at the material time. The appellant claims that her father had testified that she had been born in 1997, but the record does not bear this out. In actual fact, the record shows that Caleb is

Macrine's uncle, not her father as claimed by the appellant. In his testimony, he referred to her as his sister's child. In addition, he never claimed that Macrine had been born in 1997. In fact, his words as borne out by the record were that ***"My eldest Child Elly Oduor is the one who told me Zaddock has killed my mother. He was born in 1997."*** As matters stand, **Macrine** was 18 year old and who was at the time, capable of giving sworn evidence. Nothing therefore turns on this ground of appeal.

19. With respect to the circumstances surrounding the recognition of the appellant, we have seen that in cross examination, **Macrine** testified that there was no light inside the house, and that when the door was closed, it was not possible to see in the dark. Counsel for the appellant relied on the authority of ***Francis Mbijiwe Itere & 5 Others v Republic [2013] eKLR (Criminal Appeal No 230 of 2008)*** for the proposition that when it is not clear as to the nature of the light that enables a victim recognise an assailant, then the reliance of such recognition would be unsafe. In that appeal, this Court held that:

"[18] There was also no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry of the sort of lighting, its size, and its position vis a vis each of the appellant, the evidence of recognition may not be free from error." *[emphasis supplied]*

20. Identification by recognition is better than the identification of a stranger. In ***John Muriithi Nyagah v Republic [2014] eKLR*** this Court pronounced itself on this issue, stating that:

"… it is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger."

However, before the court accepts the evidence of recognition, it must test it carefully because even such evidence may be tainted by an honest mistake. In ***Paul Etole & another v Republic [2001] eKLR (Criminal Appeal No. 24 Of 2000)*** the Court restated the need for caution while receiving all forms of identification evidence because:

"[identification] evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

21. We have considered these authorities in analysing the circumstances under which the appellant was recognised, and we have no doubt that he was positively recognised by **Macrine**. She and the appellant had been living together for a few months prior to the incident. In addition, she heard him breaking down the door and she saw him hit the deceased. When he attempted to hit her as well, she pushed him away and ran away. She also testified that she was able to see since there was moonlight, and that she clearly saw the appellant run towards **Seline's** house. As such, we are satisfied that the recognition evidence tendered by **Macrine** was safe.

22. This evidence is fortified by the circumstantial evidence led by the other witnesses. In particular, when **Charles** stated that on that night, at around 11pm, he heard screams from the deceased's house, and that when he went outside, he met **Macrine** running towards his house. She stated that the appellant had killed her grandmother; shortly after, he heard screams from **Seline's** house and when he got there, he found the neighbours struggling with the appellant. When they took him back to the deceased's house, they found the deceased's body lying in the doorway. From this account, as well as that of **Seline**, **Caleb** and **George**, all of who gave similar testimony, the testimony given by **Macrine** is fortified and it leaves no doubt in our minds that the appellant was the one who broke down the door to the deceased, attacked her with a *jembe*, killed her, and then ran off to **Seline's** house to attack her as well.

23. The appellant raised a complaint about contradictions in the prosecution evidence, particularly when **Macrine** testified that the younger children had been asleep during the incident. While **Seline** testified that when they arrived at the deceased's house, they found the children asleep, **Charles** on his part testified that when he arrived at the scene, he did not find any of the children in the house. The appellant submits further that these contradictions are material to the case against him, and that these three children ought to have been called as witnesses to either corroborate or discredit the single eye witness testimony rendered by **Macrine**. On our part, we note that these contradictions are minor, and had no bearing on the charge before the appellant. We are fortified in this finding by the decision of this Court in ***Erick Onyango Ondeng' v Republic [2014] eKLR (Criminal Appeal No. 5***

of 2013) which adopted with approval the sentiments of the Court of Appeal in Uganda in **Twehangane Alfred v Uganda [2003] UGCA, 6** where it was stated that:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

24. Similarly, nothing is borne out of the appellant's complaint that the younger children ought to have been called to either corroborate or refute the evidence of the prosecution. For this, we turn to section 143 of the Evidence Act which provides that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The responsibility of the prosecution is to call witnesses who are sufficient to prove its case. In this appeal, the prosecution called sufficient witnesses to show that the accused has committed the crime for which he is charged. In ***Keter v Republic [2007] EA 135*** this Court stated:

"That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."

24. In his actions, did the appellant act with malice aforethought" **Section 206** of the Criminal Procedure Code provides for malice aforethought in the following terms:

"206. Malice aforethought 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."

25. In the instant appeal, the uncontroverted evidence was that the appellant hit the deceased on the head three times. The post mortem examination showed that the deceased suffered a severe head injury, caused by a sharp object such as a *jembe*. The fact that the appellant hit his mother three times with the *jembe* was an indication that he, at the very minimum, intended to do grievous harm to his mother, and he must have known that his action would cause her such harm or even result in her death. We say so because, first, by his admission that he attacked his mother, it is clear that he had the intention to kill her. Even if we were not to consider his admission, it is clear from the prosecution's evidence, and in particular the testimony from **Macrine** who was present at the scene of the crime that the appellant went to the deceased house, and after being denied entry, he not only threatened to break down the door but he followed through on this threat. We therefore find that the appellant was properly convicted as both *actus reus* and malice aforethought with regard to the offence of murder were proved to the required standard. The appellant having used a *jembe* to hit the deceased on the head three times, he knew that his action was likely to cause the deceased serious injury or death. The appellant's action of hitting the deceased with a *jembe* on the head three times is sufficient to infer malice under the provisions of Section 206 (b) of the Penal Code.

26. In a bid to controvert these facts, the appellant first pleaded the defence of alibi, claiming that on the

night his mother had been killed, he had been in Nairobi. In ***Athuman Salim Athuman v Republic [2016] eKLR*** this Court noted that**:**

"It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case…. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution …. the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act."

27. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. However, should the accused person raise it late or during the trial, it must still be considered alongside the evidence that has been adduced by the prosecution. See ***Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR*** where this Court stated that the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, then the correct approach is for the trial court to consider the defence of alibi against the prosecution evidence.

We have done so in this appeal, and find that the prosecution evidence displaced the appellant's alibi: the prosecution witnesses implicated the appellant as not only having attacked the deceased but also having been arrested at the scene of the crime on the material night, and there is therefore no doubt that the appellant was present at the scene on the material night. We therefore reject the appellant's defence of alibi or the assertion that he was in Nairobi on the material night.

28. We have considered the submissions made by the appellant's counsel regarding the defence of provocation. The purport of the appellant's defence to the charges was that he did not commit the offence as charged. In any event, there is nothing in the evidence to suggest that there had been any incident or any circumstances that could amount to the deceased having provoked him. By all accounts, the appellant went to the deceased's home, broke down the door and then attacked her. This defence fails as well. Bearing all the circumstances in mind, we find that the conviction of the appellant was safe.

29. We now turn to consider the final issue in this appeal, which is whether the sentence of death meted out on the appellant was excessive or was passed without taking into consideration the appellant's mental state. We shall deal with this latter question first. After the appellant gave testimony admitting to committing the crime that he had been charged with, on application of his advocate, a mental assessment was carried out on him. The report of this assessment was filed in court and forms part of the record before us. According to this assessment, the appellant was found mentally fit to stand trial. As such, there is no question as to whether he was mentally ill, and the trial court was well aware of this while meting down his sentence.

30. As to whether the sentence meted out against the appellant was manifestly harsh and excessive, sentencing is at the discretion of the trial court. The Supreme Court of Kenya in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR (Petition 15 of 2015)*** in which the Supreme Court declared that the death penalty is not mandatory in all capital cases. In a considered ruling, the trial court set out reasons as to why it passed down the death sentence, including the nature of the injuries suffered by the deceased. The appellant herein killed his mother, an innocent old lady who did not deserve to die. On our part, we find that we have no basis upon which we can interfere with the trial court's discretion on sentence. In the circumstances, the sentence passed upon him was proper and it shall stand.

The upshot is that this appeal is devoid of merit, and we hereby order it be dismissed in its entirety.

31. This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

Dated and delivered at Kisumu this 31st day of January, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR