Owino v Republic (Criminal Appeal 051 of 2022)
[2023] KEHC 1318 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL 051 OF 2022

RPV WENDOH, J

FEBRUARY 21, 2023

BETWEEN

JASPER OWINO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. Areri, Principal Magistrate in Chief Magistrate's Court Criminal Case No. 83'A' of 2020 delivered on27/4/2022)

JUDGMENT

1. Jaspher Owino, the appellant, was convicted for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

2. The particulars of the charge are that on August 7, 2020 at Milimani village in Sori location, Nyatike, in Migori county, unlawfully killed Berich Ochieng Owino.

   Upon conviction, he was sentenced to serve life imprisonment.

3. The appellant is dissatisfied with the judgment of the trial court and has preferred this appeal. The grounds of appeal are as follows:-

   1) That the court erred by failing to comply with article 50 (2) (g) and (h) of the *Constitution*;

   2) That the offence of manslaughter was not proved to the required standard;

   3) That the appellant wishes to adduce new evidence under article 50(k) of the *Constitution*;

   4) That the trial court failed to consider the appellants defence.

4. The appellant prays that the conviction be quashed and sentence set aside.

5. In his submissions, the appellant urged that the prosecution case was full of contradictions; that *mens rea* and *actus reus* were not proved; that malice aforethought was not proved; that he would like to give a sworn statement instead of the unsworn statement.

   The respondents did not file any submissions.

6. This being a first appeal, this court is required to re-examine, analyse the evidence afresh and draw its own conclusions. The court has to however, make allowance for the fact that it never saw the witnesses testify. I am guided by the decision of *Okeno v Republic*. The prosecution called a total of five witnesses. PW1 Victor Omondi knew Jaspher Owino alias Babuji (appellant) as a brother of the deceased Berich; that on August 7, 2020 about 4:00pm, he saw the appellant arrive from town on a motor cycle and went where PW1 stood; that the appellant was drunk staggering and had a knife and bag. He greeted PW1, asked for scrap metal to go and sell which PW1 did not have; that the appellant then vowed to kill somebody that day but did not say who; that about 7:30pm that day, PW1 heard screams from the appellants home, which is next to theirs. PW1 went there and on arrival he found the body of Berich lying on the ground in a poll of blood and the appellant was seated next to the body. He noticed a wound on the collar bone of Berich; that Berich was dead and the appellant was next to the body moaning; that police from Malcader arrived took the body. When he arrived at the scene, people had gathered and deceased's mother was there.

7. PW2 Hellen Anyango, an aunt to the appellant recalled that the appellant and deceased did not relate well; that on August 7, 2020, about 7:30pm She heard the deceased crying saying Babuji (appellant) had stabbed him. She went out of the house and found their mother with the appellant. The mother was trying to get means to take deceased to hospital. PW2 saw the appellant with a blood-stained knife. PW2 accompanied their mother, Sarah to go and look for a vehicle. Later she noticed that the appellant did not have the knife. She returned home and found that Berich had died and the appellant set next to the body. She saw a wound on the deceased's neck near the collar bone; that police did not recover the knife that the appellant had. PW2 said that it was Sarah who witnessed the incident but died on December 31, 2020.

8. PW3 Joseph Owino identified the appellant as his youngest brother while Berich was his immediate follower. PW3 recalled that on August 7, 2020 about 7:30pm while in his house, he received a call from his mother informing him that Jaspher had stabbed Berich with a knife. He tried to get help to take Berich to hospital but was later informed that he was dead. PW3 said that the appellant had been a very bad person and violent, had damaged property before and even assaulted their mother. He called police and reported the matter, proceeded home and saw the deceased's body at the mortuary with a stab wound on the left side of the collar bone. On August 10, 2020, PW3 identified the body of Berich to the doctor before post mortem was done. PW3 said that she was present when the mother who died on December 31, 2020 recorded her statement with the police and he is the one who did the translation.

9. PW4 Dr Evans Omondi, who carried out the post mortem found that the deceased had an old scar on the left temporal region and forehead, and a cut wound on the left jugular region, 6cm deep; that the left jugular vein and left carotid artery were cut through and there were bruises on the dorsal of the palms bilaterally. Internally, he found that the trachea was severed. PW4 formed the opinion that the cause of death was haemorrhagic shock secondary to cut wound with a sharp object.

10. PC Abdi Satav (PW5) of DCI Nyatike was the investigating officer. On August 7, 2020, about 8:00pm he was instructed by his boss to proceed to a murder scene in Nyatike. He visited the murder scene and found police from Karungu police post had already arrived and arrested the appellant. He removed the body to a mortuary and later attended post mortem. He caused the scene of crime to be photographed.

In his unsworn defence, he denied knowing anything about the case.

11. In his submissions, the appellant submitted that nobody witnessed the incident hence the offence was not proved; that malice aforethought was not proved; that the circumstantial evidence does not meet the threshold required to sustain a conviction and he urged the court to allow the appeal.

The respondent did not file any submissions in reply.

12. The first ground I wish to consider is whether the appellant's right to fair trial guaranteed under article 50(20(g) and (h) were violated. Article 50 of the *Constitution* guarantees an accused person's right to fair trial. Article 50(2)(g) and (h)provides as follows:-

> ""50(2)Every accused person has the right to a fair trial, which includes the right- (g)to choose, and be represented by an advocate, and to be informed of this right promptly.
>
> (h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

13. To confirm whether or not the right was complied with, one has to look at the court record. I have looked at the court record, and I have established that on December 16, 2020, before the hearing commenced, the court informed the appellant of his right to legal representation. The appellant indicated that he had understood the explanation and would proceed in person.

14. As regards the right under sub article 2 (h), the right is not automatic because it has to be established that substantial injustice will result if counsel is not assigned to accused by the state at state expense.

15. In the case of *Karisa Chengo v Republic* (2017) eKLR, the court considered circumstances that would amount to substantial injustice as:-

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The *Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result" and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

16. The appellant did not plead the kind of injustice he would suffer if the said right was not complied with.

17. According to the prosecution evidence, PW1 and PW3 did not witness the commission of the offence. Nobody saw the appellant stab the deceased. They all said that it is the appellants mother who was present when the incident occurred but she died on December 31, 2020 before the case was heard. Though it is said that she had recorded a statement with police, the same was never produced in

evidence though PW3 clearly stated that he even did the interpretation for his mother. This was a lapse on the part of the prosecution

18. The prosecution evidence therefore turns on circumstantial evidence in the case of *Ahmed Abolfathi Muhamed & another v Republic* 2018 eKLR, the Court of Appeal affirmed the fact that the guilt of an accused can be proved by either direct or circumstantial evidence and that circumstantial evidence is usually the best evidence. The court said:-

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr App R 21:
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> "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

19. In the case of *Abang'a alias Onyango v Republic* criminal appeal 32 of 1990, the Court of Appeal set out the conditions that have to be established before a conviction can be founded on circumstantial evidence. They are

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
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> (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
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> (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
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> (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

20. The court reiterated the same position in *Sawe v Republic* (2003) EKLR.

21. On the material day, PW1 had encountered the appellant at about 4:00pm. who was said to be drunk but was threatening to kill somebody that day; at 7:30pm when PW1 heard screams in the deceased and appellants home, he proceeded there, and found the appellant's mother, the appellant was present, seated next to deceased sobbing; PW2 corroborated PW1's testimony that she was in the same home and heard the deceased crying and saying that Babuji had stabbed him and on going out found the deceased injured and the accused was still there armed with a blood stained knife which she later noticed, he did not have.

22. The trial court found that PW2's testimony that the deceased was crying that the appellant had stabbed him was a dying declaration. Under section 33 (a) of the *Evidence Act*, a statement made by a deceased person relating to his cause of death is admissible in evidence. It provides:-

> " Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–
>
> (a) when 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 and 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;

23. In *Philip Nzaka Watu v Republic* (2016) EKLR the court said as follows regarding a dying declaration:

> " "Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ..... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

24. In this case after PW2 heard the cry, she came out of the house and found that indeed the deceased had been stabbed and was bleeding profusely. The appellant was seated next to deceased. The deceased died soon thereafter. I find that the deceased's statement amounted to dying declaration.

25. As earlier observed, the appellant was seen by PW1 while carrying a knife threating to kill somebody. About 7:30 pm, PW2 saw him with a blood stained knife after the deceased cried that the appellant had stabbed him. The appellant was at the scene and was arrested there. The appellant had an opportunity to cross examine the witnesses and did not ask them any question challenging their evidence. The testimonies of PW1, PW2 & PW3 stand unchallenged.

26. The appellant's defence was a bare denial with no explanation as to exactly what happened though he was not required to explain. There is totally no reason why the witnesses who are a neighbour and his family frame him. He has not alluded to any. To the contrary, PW3 told the court that the appellant has been a trouble shooter, had assaulted their mother and damaged property in the home there before evidence which the appellant did not challenge.

27. This court is satisfied that the circumstantial evidence unerringly points towards the guilt of the accused and all circumstances taken cumulatively form such a complete chain that there is no escape from the conclusion that the appellant was the perpetrator.

28. As to whether the appellant could call fresh evidence at this stage, he did not allude to what kind of evidence he intended to call and whether he said evidence was not available at the time the case was heard. The appellant did not lay a basis for calling of further evidence.

29. The appellant was sentenced to serve life imprisonment. Sentencing is the discretion of the court. The court in sentencing considers the circumstances of each case, the mitigating factors, whether accused is a first offender or not. The court has to act judiciously. In this case, the appellant was said to have been drunk and I believe that is why the charge was reduced to manslaughter.

30. The appellant took away the life of his own brother in cold blood. The court noted that he was not remorseful for what he had done. However, by giving him the maximum sentence, the sentence was on excessive.

31. I hereby set aside the sentence and instead sentence the appellant to twenty five (25) years imprisonment taking into account the time spent in remand. The sentence will take effect from the date the appellant was sentenced on April 27, 2022. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 21ST DAY OF FEBRUARY, 2023.

R. WENDOH

JUDGE

In presence of ;-

Mr. Oduor for state

Appellant - Present

Ms. Nyauke –Court Assistant