Republic v Oluoch (Criminal Case E127 of 2021)
[2023] KEHC 25971 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE E127 OF 2021

SC CHIRCHIR, J

NOVEMBER 30, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOEL SAYA OLUOCH ..... ACCUSED

JUDGMENT

1. Joel Saya Oluoch , the Acussed herein 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 are that on the 4th day of August,2021 at Emungweso village, Eshirali sub-location in Khwisero sub-county within kakamega county murdered Isaac Chirande.

2. The accused person pleaded not guilty to the charges and the trial began.

The Evidence

3. PW1 was the grandfather to the deceased. He testified that on 27/7/2021 the deceased was burnt at Buchero, was taken to Khwisero and later to kakamega ,where he died while in hospital. He was able to identify the deceased since he was with him in hospital. He produced the post mortem report as PMFI 1. He told the court that the deceased was burnt by the accused Saya who is a "nephew in their clan".

4. On cross examination, he stated that he witnessed the incident, but he did not see who started the fire.

5. PW2, testified that the accused was his cousin and the deceased was his nephew. He recalled that on 27/7/2021, he left Khwisero at 3.00 P.M and headed home. On the way, he found a crowd beating the accused. Beside the road was a body, burning. He got water from a neighbour and poured it on the body. He noticed that the person burning was the deceased herein. Boda Boda operators were on the scene. One of the uncles to the deceased came and took him to hospital. He further stated that the Boda boda operators were beating the accused, in the believe that he had burnt the deceased. The

police came to the scene and took pictures of the burning body. The police then went to the home of the Accused. The deceased died a week later while undergoing treatment.

6. On cross- examination, he stated that the neighbour who gave him the water to pour on the deceased was Evan Okongo. He reiterated that he saw people beating the accused. He could not recall their names; they were many. He however managed to identify the accused. He further stated that the accussed was wearing black trousers, white shirt and a black " kabuti". He admitted that he did not know who lit the fire. The police found him at the scene; he told them that he heard people saying it was the accused who lit the fire. He further testified that it was the deceased uncle one Otawa who got a motorcycle and took the deceased to the hospital. He knew both the deceased and the accused.

7. PW3, was the pathologist who performed the post-mortem on the deceased 's body . The autopsy was conducted on 5.8.2021. He told the court that the deceased suffered 45% burns,; there was evidence of medical intervention. He formed the opinion that the cause of death was shock from severe infection secondary to infected heat burns. He produced the post-mortem report as prosecution Exhibit 1

8. PW4 testified that the accused was his nephew. He told the court that on 27/7/2021, he was at home when he heard some commotion from road; he went there and found the accused being beaten, and a body burning by the roadside.

9. He claimed that he saw PW2, trying to put off the fire from the deceased body while there were some young people assaulting the accused accusing him of having set the deceased on fire. He further stated that he saw PW2 on the scene, trying to put off the fire. He noticed that the deceased was still alive when he was being pulled out.

10. On cross examination, he testified that he did not know who took the deceased to hospital since he was not around when the police came to the scene. After the fire was put off, he left. The deceased was still at the scene when he left. He did not know who reported the incident to the police. He stated that it was only PW2 who went to get the water from the neighour. He did not identify the people who were beating up the accused. But he saw the accused. He later came to know that the accused is the one who lit the fire. He further testified that the accused surrendered himself to the police. He told the court that the accused was his long-time neighbour.

11. PW 5, told the court that he was an uncle and a neighbour to the deceased. He recalled that on 27/7/2021 when he came home, he was informed that the deceased was found burnt on the roadside and had been taken to hospital; that the deceased succumbed to the burns on 4/8/2021, and an autopsy was conducted on 5/8/2021. He told the court that the accused was also his relative. He was not aware of any personal differences between the deceased and the accused.

12. On cross- examination he stated that Geoffrey Otaro is the one who told him that the accused was the one who had burnt the deceased. He further told the court that he had known the deceased from the time he was born and never knew him as a trouble maker.

13. PW6 was Geoffrey Otaro . He testified that the deceased was his brother's son; that he last spoke to the deceased either on 1/8/2021 or 2/8/2021 and the deceased told him that the Saya had burnt him. He identified Saya as the accused person in court. (identified the accused by pointing at him). He was not aware of any differences between the deceased and the accused. Both the deceased and the accused were his relatives and both used to drink alcohol. He did not know how the Accused was arrested.

14. On cross examination, he told the court that it was Michael and Andrew who informed him that the accused is the one who set fire on the deceased.

On re-examination, he claimed that the deceased had been in "bad shape" when they spoke in hospital.

15. PW7, testified that the deceased was his brother's son and he was informed that he had been burnt; she was told by his sister faith that the Saya burnt the deceased.

16. PW8 was the investigation's officer. He told the court that he took up the case, when the accused was already in custody. He had initially preferred charges of grievous harm but had to change to murder when the deceased died. He testified that in the course of investigation, he came to learn that the deceased had been drunk and was lying on the road side when the accused took advantage of the situation, took the dry leaves and lit the accused on fire. Good Samaritans tried to put off the fire; the same crowd also tried beat up the accused. The accused managed to flee. He further stated that none of the eye witness came to the station to report what had happened.

17. On cross examination, he told the court that the deceased presented himself at the station on 27/7/2021, and he was assigned the case on 29/7/2021; he visited the crime scene after "some days" and he could not collect any pieces of evidence then as the scene had been tampered with. He admitted that none of the witnesses was present when the fire was being put off. He knew both the deceased and the accused as neighbours. He never met the deceased before he died. None of the witnesses was willing to record statements.

18. The Accused was put on his defence at the close of the prosecution's case.

19. The Accused gave a sworn testimony and did not call any witness. He testified that he knew the deceased as they were from the same place, although they were not related. On the material day, he had gone to get food for his children and was on his way back home. He saw fire on the roadside and on close inspection, he saw that it was ' Boyi" burning. He tried to put off the fire. He was joined by boda boda riders and they tried removing the deceased clothes. He further stated that he had found the deceased sited on the fire and had tried pulling him out. A crowd began to form and they started beating him. He ran away. He later went to the police station and he was put on the cell. He remained there until 2 P.M, the following day. That was the time he came to know that he stood accused of burning someone. He had known the deceased since birth. He had no differences with him.; He told the court that on the day of the incident he was sober but the deceased was drunk. He insisted that he never killed the deceased and that he was found when he was trying to help him

20. On cross examination, he stated that he had come from his brother's place, as that is where he did his casual work that day. He denied that he had come from drinking. He claimed that he went to the hospital, but he was told to go to the police. At the police station, he reported that he had been beaten while trying to rescue someone. when shown OB entry No. 38/27/7/27, he admitted that he had gone to report that he had feared for his life. He had no evidence showing that he had been beaten. He further stated that he was not burnt and he was never treated. He told the court that he got hold of the deceased on the underarms while trying to pull him out of the fire.

21. On re-examination, he told the court that he made the report when he heard about the thread to his life. He reiterated that he was not harmed during the incident.

22. The defence closed its case.

Accused submissions

23. While the accused does not contest the fact that the deceased died as a result of burns sustained, he contends that there was no prove that h e is the one who caused the death of the deceased. He further submits that, there was no direct evidence linking him to the death of the deceased and the circumstantial evidence relied on by the prosecution fell short of supporting a conviction. In this regard, he has relied on the case of *Ahamad A Mohammed & Ano v Republic*(2018) e KLR .

24. The defence further submit that there was no malice aforethought demonstrated; that none of the prosecution witnesses testified of any feud between the deceased and the accused.

25. The prosecution did not file any submissions.

Determination

26. Section 203 of the *penal code* provides as follows: "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

27. The offence of murder is complete when, "malice aforethought" is established if, pursuant to section 206 of the *Penal Code* evidence proves 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."

28. The standard of proof, as always, is beyond reasonable doubt and the state must prove the following:

    (i) That there is a victim of that murder

    (ii) That there is an unlawful act or omission causing that death or what we often refer to as actus reus.

    (iii) The identity of the person causing that unlawful act or omission.

    (iv) That there was malice aforethought, intention to cause that death, what we refer to as mens rea.

29. The demise of the deceased and and what caused it is not in dispute. The post-mortem form was filed and Dr. Dixon Muchana, the pathologist testified that he carried out a post-mortem on the body of the deceased on 5th August 2021. He formed the opinion that the deceased died of septic shock secondary to infected dry heat burns of a degree of 49%. The post-mortem report was produced as prosecution Exhibit 1. The fact that the victim was one Isaac Chirande is also not in dispute.

30. What is in issue is whether the accused caused the death of the deceased. It clearly emerged from the evidence of the prosecution witnesses that none of them saw the accused igniting the fire .Though PW1 during his examination in chief sated that he saw the accused burn the deceased , in cross- examination, he admitted that that he did not see him , and in fact he could not tell who lit the fire.

31. PW2 got to the scene when the Accused was being beaten and the deceased body burning. Thus, PW2 got there after the event, namely the lighting of the fire which eventually caused the deceased's death.

32. PW4' s testimony was similar to that of PW2, he found the deceased burning and the Accused being beaten; PW5 was told and therefore his evidence is not admissible pursuant to the provisions of section.... Of the *Evidence Act*.

33. PW6 told the court that he was with the deceased either on the 1st or 2nd of August 2021 and the deceased told him that it was the accused who burnt him.. He said that though the deceased was in "bad shape" , he managed to name the person who had burnt him.

34. Should the testimony of this witness be treated as a dying declaration? A dying declaration, as provided as set out under section 33(a) of the *Evidence Act*, is an exception to the Rule against hearsay evidence. The section provides as follows:

> Statements, written or oral or electronically recorded, 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) relating to cause of death – when the statement is made by a person as to the cause of 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"

35. In *Moses Wanjala Ngaira v Repulic* [2019] eKLR, the Court of Appeal while citing the decision in Philip Nzaka Watu v Republic [2016] eKLR, held as follows with regard to the provisions of section 33(a) of the *Evidence Act*:

> " 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. .....

36. The testimony of PW6 is relevant in this regard. Some extracts of his statement are worth repeating. In examination in chief he stated: "I had been informed of who burnt him. The deceased told me Saya burnt him...." On cross- examination he stated: "I recorded my statement with the CID. What am telling the court is what I told the police My statement does not say so. What am telling the court is true. I would like the court to look at the statement,". A look at the statement recorded with the police shows that the witness did not mention having been with the deceased or/ and the deceased telling him who had burnt him. This was a critical piece of evidence; it was still fresh in the mind of the witness and this was the appropriate time to provide the information to the police, yet he did not.

37. In the above case of Moses Wanjala(supra) the court went on to State: "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."

38. There is inconsistency in the witness account as told to the police and what he gave to the court. To my mind, it appears this was an afterthought.

39. Further in cross- examination, he stated that when he spoke to the deceased, the deceased was "fairly unstable literally weak, perhaps he did not know what he was telling me". The court of Appeal had this to say on the issue of perception the above case of Philiph Nzaka (supra) :

> "Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable".

40. For the aforesaid reasons, I find it unsafe to use the testimony of the dying declaration as a basis of conviction.

41. The other available evidence is circumstantial. A court may convict on circumstantial evidence but the said evidence must meet the certain criteria. In *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) the court of Appeal held: "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form 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."

46. Further, in the case of *Mwita v. Republic* (2004) 2KLR 6 it was held :

> "It is trite that in a case depending exclusively upon "circumstantial evidence" the court must, before deciding upon a conviction, find that the inculpatory facts are incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt

47. The circumstances in this case were that both the deceased and the accused were in the same place at that exact time. This much was admitted by the accused. The two prosecution witnesses found the deceased burning, and the accused being beaten by a crowd of people. The accused however told the court that he was found trying to pull the deceased from fire and was mistaken for the one who had lit the fire. None of the prosecution witnesses refuted this testimony, as none was present when the beatings began. Further this court cannot take the fact of being beaten by the crowd as evidence of having committed the act, for that would be a matter of assumption.

48. It is also my observation that the conduct of the accused as can be gauged from his report to the police, and his testimony in court is inconsistent with his guilt. He presented himself to the police, and told the police that he feared for his life. This was recorded under OB No. 38/27/7/27; he also readily admitted that he was beaten on suspicion that he was the culprit. He made no attempt to make a blanket denial of the events. He also impressed me as being forthright as he gave his testimony.

49. The prosecution attempted to pour water on his testimony to the effect that he was from his brother's house where he had done a casual job for the day, considering that he had not summoned his brother as a witness. However, where he had come from is immaterial I would add that not even the suggestion

that he had come from drinking would suggests his guilt. Being drunk per se does not necessarily dispose one to commit a crime. Also, the fact that his children, whom he alleged he was living with, did not testify, is immaterial as the incident is said to have taken place on a road not in the accused house, or in the presence of his children.

50. Finally, there was no evidence of any motive on the part of the accused to murder the deceased. There was consistency in the witnesses who knew the two that there was no differences between the two . It appears they were both known drunkards, were related, but there was no feud between them.

51. In conclusion I wish to cite Mativo J in in *Elizabeth Waithiegeni Gatimu v. Republic* [2015] e KLR where he expressed himself as follows:

> " to my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. if there is any reasonable possibility consistent with innocence, it is the It is necessary that guilt duty of the court to find the defendant not guilty..... to give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

52. Am not satisfied that the prosecution has discharged its duty. The prosecution has failed to prove that the Accused herein is guilty of the murder of Isaac Chirande, as charged, and I hereby acquit the accused under section 215 of the *criminal procedure code*. I order that the accused be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER , 2023

S. CHIRCHIR

JUDGE.

In the presence of :

E. Zalo- court Assistant.

Accuse- present

Ms. Lucheli for the Accused

No appearance by DPP