Republic v Kudate & another (Criminal Appeal 103 of 2017)
[2025] KECA 837 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KECA 837 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 103 OF 2017

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 16, 2025

BETWEEN

REPUBLIC ..... APPELLANT

AND

KOOL KUDATE ..... 1ST RESPONDENT

MENTI KUDATE ..... 2ND RESPONDENT

(Being an appeal against the Judgement of the High Court of Kenya at Nakuru (M. Odero, J.) dated 10th November 2017inCriminal Case No. 84 of 2010)

JUDGMENT

1. This is an appeal by the State against the judgment rendered on 10th November 2018 by Odero, J. in Nakuru High Court Criminal Case No. 84 of 2010 in which the learned judge acquitted the respondents of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. The principles to guide an appellate Court while determining an appeal against an acquittal were aptly stated by the Supreme Court of India in Mallappa & Ors. v State of Karnataka (Criminal Appeal No. 1162 of 2011) [2024] 2 S.C.R. 288, 2024 INSC 104 (12 February 2024), were, while appreciating that in the exercise of appellate powers, there is no inhibition on the appellate Court to re-appreciate the evidence on record, the said power is "a qualified power, especially when the order under challenge is an acquittal." The Court stated:

> "The first and foremost question to be asked is whether the Trial Court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence – The second point for consideration is whether the finding of the Trial Court is illegal or affected by an error of law or fact

If not, the third consideration is whether the view taken by the Trial Court is a fairly possible view – A decision of acquittal is not meant to be reversed on a mere difference of opinion – What is required is an illegality or perversity." [Para 25]. (Emphasis added).

3. Bearing the above statement of the law in mind, we will briefly examine the evidence tendered before the trial court, the impugned judgment and the law. In a nutshell, Kool Kudate and Menti Kudate (the respondents), were on 19th August 2010 arraigned before the High Court at Nakuru charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* in High Court Criminal Case No. 84 of 2010. The accusation against them was that they jointly murdered Elijah Liaram on 31st July 2010 at Naroosura reserve in Narok South District within the Rift Valley Province.

4. The prosecution case rested on the evidence of 6 witnesses, three of whom claimed that they were at the scene and witnessed what happened. These are PW1, PW2 and PW4. The totality of their evidence was that on the material day and time, Masai elders were listening to a land dispute pitting three families, namely, Kasai, Kudate and Diareen families. PW1 testified that after hearing the dispute, the elders returned a verdict that the land did not belong to any of the protagonists, and, immediately after the decision was communicated, the deceased stood up to speak, but as he spoke, the 1st respondent jumped up and hit him with a rungu on his head and he fell down. PW2 testified that the deceased supported the elders' decision, but the 1st respondent stood and hit him with a rungu. PW4 stated that the 2nd respondent held the deceased as the 1st respondent hit him on the head and the deceased fell on the ground unconscious. He was rushed to the hospital where he was admitted but later passed on while undergoing treatment. PW5 is the doctor who performed the postmortem. We need not state his findings since the fact of death is un disputed. Lastly, PW6 is a police officer whose testimony essentially confirmed that the incident was reported to the police and that the police initiated the process that led to the respondents' arrest and arraignment in court.

5. In his defence, the 1st respondent who was at the scene at the material time stated that after the elder's verdict, the deceased moved towards him and hit him on the head with a rungu, after which he was rushed to the hospital where his head was stitched. He produced a treatment card which was marked as defence exhibit 1.

6. On his part, the 2nd respondent who was also present at the scene denied that the 1st respondent hit the deceased. It was his evidence that during the fracas, he saw the deceased hit the 1st accused on the back of his head, and that they rushed the 1st respondent to hospital where he was treated after which he remained at home only to be arrested 7 months later which he claimed was an afterthought.

7. The respondents called two witnesses in support of their defence.

   The first was DW3 whose evidence was that during the fracas, he saw the deceased hit the 1st respondent at the back of his head. He denied that it was the 2nd respondent who attacked the deceased. Similar evidence was tendered by DW4 who also testified that during the fracas, it is the deceased who hit the 1st respondent.

8. After evaluating both the prosecution and the defence evidence, the trial court was satisfied that the respondents' defence was consistent and unshaken and at proceeded to state as follows:

   "It would appear that this was not a situation where the two accused persons launched an unprovoked attack on the deceased. The witnesses have all stated that a fracas arose after the Masai elders rendered their verdict on a land dispute. People were all fighting and Masai men ordinarily carry swords and clubs on their person. In such a situation, it would be difficult to pin point exactly who hit the deceased. The 1st accused has proved that he was

also injured during the melee. As such, I find that the actus reus of the offence of murder has not been proved beyond reasonable doubt. I enter a verdict of "Not Guilty" and I acquit both accused. Each accused is to be set at liberty forthwith unless otherwise lawfully held."

9. Aggrieved by the above verdict, the State appealed to this Court seeking to overturn the decision citing 5 grounds of appeal in its memorandum of appeal dated 23rd May 2024, essentially faulting the leaned judge for: (a) acquitting the respondents despite overwhelming evidence, (b) failing to appreciate that the evidence tendered identified the respondents as the offenders, (c) failing to consider the identification evidence holistically, (d) considering the defence evidence on identification in isolation without relating it to the rest of the evidence, and, (e) finding that the respondents were provoked before the killing and that the provocation excused the killing. The appellant prays that this appeal be allowed, and the acquittal be substituted with an order convicting the appellants for the offence of murder and that the appropriate sentences be imposed.

10. During the virtual hearing on 25th February 2025, learned counsel Mr. Omutelema appeared for the appellants, while learned counsel M/s Ndeda appeared for the respondents.

11. In support of the appeal, Mr. Omutelema highlighted written his submissions dated 3rd June 2024, essentially maintaining that the ingredients of the offence of murder as provided in Section 203 of the *Penal Code* were proved to the required standard. In support of this assertion, Mr. Omutelema briefly highlighted the testimony tendered by PW1, PW2 and PW4 and submitted that the said evidence was not shaken by the defence and faulted the learned judge for not properly evaluating the entire evidence and in particular failing to consider the testimony tendered by the above three witnesses.

12. In addition, counsel cited the case of Okethi v R [1965] EACA 555 in support of the holding that a court should not consider the prosecution and defence evidence separately. Lastly, counsel argued that the conduct of both respondents was not consistent with innocence, therefore, the trial court erred in failing to dismiss their defence.

13. The respondents' counsel M/s Ndeda relied on her written submissions dated 24th February 2025 and termed PW1's evidence as contradictory and therefore unreliable. In particular, counsel singled out PW1's evidence in chief where he stated that the 1st respondent hit the deceased and he fell down, and contrasted this with his evidence on cross-examination that the deceased had a walking stick, and after he was attacked, he went home, armed himself with a panga, returned to the meeting and waited for the decision. Counsel maintained that the said contradiction means that the witness is unreliable. In addition, counsel argued that PW2's testimony was materially different from the evidence of PW1 and maintained that the prosecution evidence does not support a conviction and relied on Miller v Ministry of Pensions [1947] 2 ALL ER 372 in support of her assertion that the prosecution did not discharge the burden of prove.

14. This appeal will turn on one key ground, that is, whether the evidence adduced by the prosecution proved the respondents' guilty to the required standard. Undeniably, one fundamental principle has evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. This principle of the law was elegantly affirmed by the House of Lords in the celebrated judgement of Viscount Sankay in D.P.P v Woolmington AC 462, a landmark United Kingdom case that established the principle of the "golden thread" in English criminal law, emphasizing the prosecution's duty to prove a defendant's guilt beyond reasonable doubt. This case affirmed the presumption of innocence, meaning, the burden of proof always rests with the prosecution, and the accused does not have to prove their innocence.

15. Perhaps the most eloquent statement of reason for the above statement of the law is to be found in the opinion of Brennan J. in the United States Supreme Court decision in Re Winship 397 US 358 [1970], at pages 361-64 who stated:

> " the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

16. The above decision underscored that the reasonable doubt rule has constitutional force under the due process provisions. A lucid exposition of the rationale for establishing the guilty of an accused person beyond reasonable doubt and an erudite judicial definition of the meaning of the phrase "beyond reasonable doubt" was well-explained by the Supreme Court of Canada in R v Lifchus [1997] 3 SCR 320 as follows:

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that youare satisfied of his guilty beyond reasonable doubt."

17. Reasonable doubt 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. (See Duhaime, Lloyd; Duhaime's Criminal Law Dictionary). The issue at hand now narrows to whether the respondents' defence before the trial raised doubts on the prosecution case. Earlier, we summarized both the prosecution and defence evidence. It will add no value for us to rehash it here. It will suffice for us to state that three families were engaged in a feud over ownership of land. Clan elders called to adjudicate the dispute returned a finding that none of the combatants were entitled to the land. This decision elicited a fierce scuffle and in the ensuing melee, the deceased was hit, and he fell down unconscious. He was taken to hospital where he died. It is admitted that in this community, it is normal for men to attend meetings armed with rungus and swords. Therefore, it cannot be said that any one attended the meeting anticipating a fight. But more important, while, the prosecution maintained that it is the respondents who attacked the deceased, the respondents and their witnesses account was that it is the deceased who attacked the 1st respondent and hit him at the back of his head. He sustained a cut and he was treated in hospital where his head was stitched. From the record, we see nothing to suggest that this evidence was challenged.

18. The question begging for an answer is whether the learned judge erred in accepting the respondents' defence. The Supreme Court of India in the earlier cited decision in Mallappa & Ors. v State of Karnataka (Supra) laid down the following principles to be considered before overturning a decision acquitting an accused person:

    i. Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;

    ii. Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

    iii. If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

    iv. If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

    v. If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

    vi. In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court. [Para 36] (Emphasis added).

19. Similarly, the Supreme Court of India in Sanjeev v State of [2022] 6 SCC 294 summarized the approach of the appellate Court while deciding an appeal from the order of acquittal and observed as follows:

    " a) While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned.

    b. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced.

    c. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal." (emphasis added).

20. It is settled law that an accused persons defence of alibi must be weighed against the evidence offered by the prosecution and that for it to be rejected, it must be incredible. We have addressed our minds to version tendered by the prosecution and the respondents' version. We find nothing to suggest that the respondents' defence is incredible.

21. Undisputedly, the accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as of the strength of the prosecution case. As was held in Uganda v Sebyala & Others [1969] EA 204), when the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts.

22. The duty of the court is to test the evidence tendered by the defence against the prosecution evidence and if there is doubt in the mind of the Court, the same is resolved in favour of the accused. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never

shifts. The proper approach is to weigh all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

23. To sustain a conviction, the Court must be satisfied that the prosecution evidence proved the accused's guilty beyond reasonable doubt and that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. In the circumstances of this case, it cannot be said with certainty that the respondents were responsible for causing the deceased's death. The presence of doubts, which in any event must be resolved in favour of the accused persons, justified an acquittal in the circumstances of this case. Accordingly, we agree with the reasons provided by the learned judge in the excerpt reproduced earlier while acquitting the respondents. We find no misdirection, illegality, perversity or error in the said reasoning. Even on a fresh appreciation of evidence, we find ourselves totally agreeing with the trial judge's findings. Accordingly, we affirm the impugned judgment and dismiss this appeal.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF MAY, 2025.

M. WARSAME

JUDGE OF APPEAL

.....

J. MATIVO

JUDGE OF APPEAL

.....

M. GACHOKA CIArb, FCIArb.

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.