



REPUBLIC OF KENYA



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**Kitti v Republic (Criminal Appeal E012 of 2023)
[2024] KECA 664 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 664 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E012 OF 2023
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 25, 2024**

BETWEEN

KAULY DZOMBO KITTI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Mombasa (Ong'injo, J.) dated 24th November 2022 and sentence on 20th January 2023 in High Court Criminal Case No. 12 of 2020)

JUDGMENT

1. The Appellant, Kauly Dzombo Kitti, was on 4th June 2020 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 11th May 2020, at Vwevvesi village in Kizingo Sub-location, Chonyi Sub County within Kilifi County, jointly with others not before court murdered Gabriel Munga Mwaidza. He was tried before the High Court at Mombasa and convicted in a judgment delivered by A. Ong'injo, J. on 24th November 2022. He was subsequently sentenced to a prison term of twenty years.
2. In her judgment, the subject of the present appeal, the learned judge of the High Court found that there was no dispute as to the cause of death of the deceased and that the death was caused by an unlawful act actuated with malice aforethought. As to whether it was the appellant who committed the unlawful act that caused the death of the deceased, the judge expressed:

“What came out is that accused person’s goats were stolen at night and that he suspected the deceased and he lured the deceased to where he and his goons attacked and injured him before he was forcefully carried on a motorbike and taken 2 kms away away in Kizingo where he was beaten more and his body abandoned after being set on fire.



The accused was the author of the plan to kill the deceased. He was the first to trigger the assault by slapping the deceased before others joined and fatally injured the deceased. It therefore does not matter that he was not seen at Kizingo that he did not go to Kizingo (sic). It is the plan he hatched by luring the deceased out of the club that was executed and finished at Kizingo.”

3. In his memorandum of appeal, the appellant complains that the judge erred in: making a finding that the case against the appellant was proved beyond reasonable doubt despite evidence indicating the appellant did not murder the deceased; failing to critically analyze the evidence presented which exonerated the appellant from the offence; failing to make a finding that the offence facing the appellant was not investigated and the prosecution evidence lacked credibility; finding, without evidence, that the appellant murdered the deceased because of his lost goats; failing to appreciate that the evidence led by the appellant disconnected him from the offence; failing to appreciate that there was no evidence linking the appellant with the mob that was beating the deceased; relying solely on the evidence of PW1 to convict the appellant when it was not safe to do so; and in sentencing the accused to a prison term of 20 years which was excessive in the circumstances.
4. During the hearing of the appeal before us on 19th July 2023, Mr. Okanga, learned counsel, appeared for the appellant. The appellant was also present, virtually, from Shimo La Tewa Prison. Learned Principal Prosecution Counsel Mr. Mwangi Kamanu appeared for the respondent.
5. Counsel for the appellant submitted that the finding that the appellant hatched a plan to kill the deceased is baseless as there is no evidence to support it. It was urged that the conviction hinges on the evidence of PW1 whose testimony was that he witnessed a quarrel between the appellant and the deceased and that he saw the appellant assault the deceased before a crowd descended on the deceased; and that it was PW1’s testimony that the appellant did not accompany the crowd to Kizingo where the deceased was said to have been killed. Counsel urged that it was inconceivable that the appellant was linked to the death of the deceased which occurred some two kilometers away, and yet the appellant was not part of the mob implicated.
6. It was submitted further that apart from the fact that no evidence was presented in support of the alleged plan to kill the deceased, the investigating officer, who had the duty to collect evidence and to explain the basis of the decision to charge the appellant, did not testify. It was urged that there was no evidence that the mob that allegedly killed the deceased was controlled or commanded by the appellant; that the finding that the appellant hired goons, forced the deceased on a motorbike that took him to his death is based on conjecture and the conviction should be set aside and the appellant be set free.
7. Counsel concluded by urging that sentence meted out is in any case harsh and excessive and this is a proper case for the Court to interfere with it.
8. Opposing the appeal, counsel for the respondent submitted that the conviction is well founded; that PW1 placed the appellant at the scene and identified him as the first person to assault the deceased; that there is evidence that the appellant lured the deceased to the place where a mob arrived and attacked him; that PW1 witnessed the appellant assisting the mob in placing the deceased on a motorbike; and that there was a common intention between the appellant and the mob.
9. It was submitted that the learned Judge made a note in the proceedings regarding the appellant’s demeanor and observed that he took too long to answer questions and was inconsistent in his testimony which oscillated from denying that he was not near the deceased and then later agreeing that they were together thereby discrediting his defence.



10. It was also submitted that even though the investigating officer did not testify, his testimony would merely have repeated the recorded evidence already given by the other witnesses; and that it was not fatal that the investigating officer did not testify.
11. On the sentence, counsel submitted that the 20-year jail term was lawful and lenient and that this Court should not interfere.
12. Our duty, on a first appeal such as this, is to review and evaluate the evidence with a view to drawing own conclusions. In that regard, the Court of Appeal for East Africa, the predecessor to this Court, expressed in the often-cited case of *Okeno vs. Republic* [1972] EA 32, that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court’s own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings 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...”

13. With that in mind, the critical question for determination in this appeal is whether the High Court was right in concluding that the prosecution established the appellant’s guilt for the offence of murder beyond any reasonable doubt. If the answer to that question is in the affirmative, there is the question whether the appellant’s 20-year jail sentence was excessive.
14. We turn therefore to consider the evidence on record.

Joseph Kiti Chilemu, PW1, was the main prosecution witness on whose evidence the conviction was substantially based. His testimony was that he is a traditional liquor brewer and the appellant’s friend; that he met the deceased on the road on 11th May 2020 and engaged him in conversation. Shortly thereafter they both (PW1 and the deceased) boarded a motorbike to attend a burial in Katikieni. On the way there, it started raining. They took shelter “to take mnazi” at a club at a place he referred to as Mwanakaeni where they took a table and ordered bottles of Mnazi. It was 2.00 p.m., and they took drinks up to about 4.00 p.m., he said.

15. PW1 went on to say that at 6.00 p.m., the deceased was joined by his girlfriend and together, they all left for the deceased’s “place of work in Vwevvesi” where they went to a club nearby and ordered mnazi. After about half an hour, the appellant, who is a neighbour to PW1 and well known to him, arrived and called the deceased. The appellant and the deceased went to the road and spoke for over 30 minutes. Upon his return, the deceased’s girlfriend inquired from him why he took so long, and in response, the deceased “said it was man talk.”
16. They continued drinking and after another thirty minutes the appellant returned and asked the deceased that they should go to the deceased’s place of work, about 10 minutes’ walk. PW1 explained further that:

“After they left the deceased girlfriend remained but immediately thereafter, we heard noise. I decided to go to where there was noise but found accused and Gabriel were quarrelling. The accused was asking about a goat. A crowd had gathered at the scene but could not count the number (sic). Accused then started slapping Gabriel. When he slapped Gabriel other people also joined in to attack Gabriel. The people who attacked Gabriel were about 10. They were



armed with crowbars, knife and stones. The accused was among the people who attacked the deceased. There was light at the deceased person's place of business which made me see what was happening. The accused and his group made the deceased bond (sic) a motorcycle while demanding to know whereabouts of goats. All the residents of Viwewesi stood aside as the attackers attacked everyone who approached to intervene. The attackers had come with their motorbikes about six of them and they boarded and went towards Kizingo. We followed them on foot. The entire crowd followed the attackers. When we arrived at Kizingo we found the deceased had been killed and burnt. The attackers had already escaped after killing the deceased."

17. Under cross examination, PW1 stated that the deceased did not appear agitated when he returned to the club after the first encounter with the appellant and neither did he disclose what he had discussed with the appellant; that when the appellant returned a second time to call the deceased, he was not armed but that after five minutes after the deceased had accompanied the appellant, they heard noise at the road, and when they went there, the appellant started slapping the deceased and that is when other attackers joined in attacking the deceased; that he was not able to identify the other attackers; that the appellant did not go with the people who took the deceased to Kizingo and he did not find the appellant at Kizingo.
18. On re-examination, he stated that the appellant did not go to Kizingo and that "when he saw things were becoming noise(sic) he disappeared in the crowd and did not go with us to Kizingo."
19. Nicholas Mzungu Mwakwende, PW2, stated that on 11th May 2020 at 6.00 p.m., he was at a palm wine den with many other customers. The deceased was also there. Later, the appellant joined them and after a while left with the deceased and moved to a shed about 10 meters away where they spoke for about 15 minutes. Thereafter the appellant left, and the deceased returned and continued drinking. The deceased then left the den at 6.30 p.m. PW2 left shortly thereafter and went to his house at about 6.45 p.m. While at home, PW2 heard boda boda riders talking in high tones about 20 meters away. He did not pay attention and slept. He learnt the following day that the noise he had heard was generated by "people who came and attacked Gabriel after which they abducted him and went to kill him elsewhere." The appellant and the deceased were well known to PW2.
20. On 11th May 2020 at about 8.00 p.m., Penina Kaloko Rimba, PW3, was in the house at home when she heard screams along the road. She got out to see. She got to the scene, two minutes away, and saw six people beating the deceased who was her cousin using poles. She could not identify who they were. She stated that "there was no light at the scene" but she was able to recognize the deceased's voice and the "white shirt he had worn on that day." The assailants continued beating the deceased for over thirty minutes after which they put him on a motor bike and rode away. PW3 went and informed the deceased's brothers. They later found the body dumped in Kizingo, which is two hours away from her house. She stated further that the appellant is a brother to her husband and that she did not "see him on the material day."
21. The wife of the deceased, Mariam Mbodze Gonyo, PW4, a resident of Vwewesi and a fruits vendor left the house on 10th May 2020 at 8.00 a.m. and went to the farm with her children. In the evening after returning home from the farm and preparing super, at around 10.00 p.m., she heard people talking outside and when she opened her door she heard people saying that someone had been killed. She followed the people to where the body was and found it was her husband's body. She stated that she learnt that the deceased was killed because of a goat.
22. Ibrahim Shera Saidi, PW5, a boda boda operator and a relative of the deceased was at home on 10th May 2020 at 11.00 p.m. when he received information that the deceased was being beaten in Leba area



junction of Vwevvesi School. He joined the deceased brothers and proceeded to Leba area but did not find the deceased. They met people who informed them that “the person had been finished.” They walked ahead and found the deceased had died, the body had burn injuries and was tied and the clothes the deceased was wearing had been burnt. He went on to say that:

“...we remained at the scene up to down and made phone calls to Kauly Dzombo Kiti to establish if he was aware of the incident as he was a close family friend. I got Kauly Dzombo and he confirmed he was aware of the murder and he said he was at home sleeping.”

23. PW5 stated that when he learnt that the deceased was killed because of goats, he asked the appellant and he said that “it is true the goats were his and they were stolen the previous day and he had not recovered them.” Under cross examination, he explained that the allegation that the deceased was killed because of theft of goats “was said by those who attacked the deceased” and that it is members of the public who were at the scene who said the deceased was killed because of stealing goats.
24. Dr Ruth Nyangi Walunge, Pw6, a consultant pathologist based at Kilifi County Hospital conducted the postmortem in respect of the deceased on 14th May 2020 at Kilifi Hospital Mortuary. The postmortem revealed that the deceased had rigor mortis on the upper and lower limbs; 4 lacerations breach tear on the skin; there were 1st, 2nd and 3rd degree burns occupying 54% of the total body. The burns were on the head, thigh, both upper limbs, genitalia and both lower limbs. There was extensive head bleeding on the scalp; base scalp fracture; brain laceration; and extensive hematoma on both parts of the brain. Her conclusion was that death was caused by head injury due to blunt force trauma and the burns.
25. Despite having been granted adjournments to procure the attendance of the investigating officer, the prosecution was unable to do so and was constrained to close the prosecution case without him. The court found that a prima facie case was established against the appellant who was put on his defence.
26. In his sworn defence the appellant denied killing the deceased. He stated that on the material day he was not at home the entire day; that he learnt that his goats, which were kept in a different place, had been stolen; that the caretaker of the goats, Samuel Changa Katana, reported to him at 4.00 a.m. that his four goats had been stolen; that the appellant went and informed a friend John Chilovi, about the theft; that at 7.00 a.m., after milking he left and went to the road and met the deceased who enquired from him if it was true that his goats had been stolen; that the deceased said he would held with investigations and that they should meet in the evening.
27. The appellant testified further that in the evening, he met the deceased at the Palm wine club; that the deceased informed him that he had gone round but required more time as he was with a lady at the club; that he then left the deceased at the club and went home and while at home he heard screams and people saying that the thief had been found; that he then received a call from one Ibrahim who told him that the deceased had been apprehended by a mob and taken to Kizingo.
28. The appellant stated that he did not see the deceased being beaten; that the next day he learnt that the deceased had been “finished at Kizingo and burnt”; that he did not go to Kizingo and was not involved in the murder and that he did not quarrel with the deceased who was a neighbour.
29. Under cross examination, the appellant stated that the deceased was his very good Samaritan neighbour. He stated that it is not true that he left the club together with the deceased but later stated that he could not recall whether they left the palm wine club together and neither could he remember whether he was injured-prompting the Judge to note that “the accused person’s demeanor is questionable-taking too long to respond to questions.”



30. As already indicated, the learned judge in her judgement found that the appellant guilty of the offence. In doing so, the Judge relied on the evidence of PW1, who, based on his own testimony, was engaged in drinking palm wine from 2. 00 p.m. until the evening. PW1 testified that after the appellant and the deceased left the club to go to the deceased place of work, “about 10 minutes’ walk”, he heard noise and decided to go where the noise was and found the appellant and the deceased quarrelling; that the appellant asked the deceased about a goat; that a crowd gathered, but he could not count the number, and that the appellant then started slapping the deceased before other people joined in the attack. He said the “attackers had come with their motor bikes about 6 of them and they boarded and went towards Kizingo.”
31. The evidence of PW1 is disconcerting. On his own testimony, he began drinking palm wine at 2.00 p.m. and continued to do so into the evening raising questions as to reliability of his evidence. Further, he stated that the appellant was enquiring from the deceased about a goat and slapped the deceased and a crowd gathered and that “when [the appellant] saw things were becoming noise(sic) he disappeared...” and did not go to Kizingo. No evidence was led that the appellant was present at the scene in Kizingo where the deceased was said to have been killed and burnt.
32. Furthermore, the Judge expressed that the appellant lured the deceased to the place where he and his goons attacked the deceased and injured him, then ferried him to Kizingo where he was beaten more and his body abandoned after being set on fire; that the appellant was the author of the plan to kill the deceased as he slapped the deceased and was joined by persons who injured the deceased. In that regard, the learned judge had this to say:
- “...the appellant lured the deceased to the place where he and his goons attacked the deceased and injured him, then ferried him to Kizingo where he was beaten more and his body abandoned after being set on fire; that the appellant was the author of the plan to kill the deceased as he slapped the deceased and was joined by persons who injured the deceased.”
33. On our part, and based on our review of the record, we are unable to find any evidence on the basis of which the learned Judge inferred that the appellant lured the deceased out of the club to be beaten up and later killed. The evidence on record shows on two occasions at the palm wine club, the appellant and the deceased had discussions, the nature of which none of the witnesses could speak to. The appellant on his part stated that the deceased had offered to assist in locating the goats. The imputation that the appellant lured the deceased or that he was in concert with the mob that attacked the deceased is not backed by any evidence. It is based on suspicion which cannot form the basis of conviction. See *Sawe vs. Republic* [2003] KLR 364.
34. Moreover, there is no evidence of the role the appellant played in ferrying the deceased to Kizingo where he was apparently killed, and neither is there evidence placing the appellant at Kizingo. Had the investigating officer interrogated persons present at the scene in Kizingo and presented evidence linking the appellant, perhaps any doubt in the mind of the court would have been cleared. In *Peter Ngure Mwangi vs. Republic* [2014] eKLR the Court expressed that in instances where the evidence on record is barely adequate, then the court can make a finding that the failure to call the investigating officer weakened the prosecution case.
35. Overall, based on our review of the evidence, we entertain doubt that the appellant was involved in inflicting the injuries that caused the death of the deceased and neither are we satisfied that there is evidence that demonstrates that he was placed at Kizingo, the scene of crime where the deceased is said to have been killed and burnt. No doubt the appellant, by engaging the deceased on the matter of his stolen goats, may have set in motion or triggered a chain of events that were capitalized upon by the



attackers. Obviously, this is not to say that the appellant is innocent, but as it is, there is reasonable doubt the benefit of which must be extended to the appellant.

36. Consequently, we allow the appeal and set aside the conviction and the sentence. The appellant shall be set at liberty unless otherwise lawfully held.

37. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

