Chepkwony v Republic (Criminal Appeal 198 of 2020) [2024] KECA 310 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 310 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 198 OF 2020

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

LOISE CHEBET CHEPKWONY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya Kitale (H. K. Chemitei, J.) dated 23rd May, 2019inH.C.CR.C. No. 13 of 2014)

JUDGMENT

1. The appellant was convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were that on 6th December 2013 at Sergoit Area in Uasin County within the Republic of Kenya, the appellant jointly with Luka Khamasi Busula, murdered Joel Kimeli Biwott. The said Luka Khamasi Busula was the second accused before the trial court.
3. As the accused persons denied committing the offence, the prosecution produced evidence, through a total of 9 witnesses, in an effort to prove the case against them.
4. The learned trial Judge gave consideration to the testimony of the prosecution witnesses and concluded that the accused persons had a case to answer.
5. Both the appellant and her co-accused gave unsworn testimonies when responding to the prosecution case. After each of them had testified, both accused persons closed their respective cases, without calling any other witnesses.
6. Ultimately, after the trial court had taken into account both the prosecution case and the defences, it concluded that the appellant was guilty of the offence of murder, and therefore the appellant was convicted.

7. Meanwhile, the trial court found that there was not much evidence against the appellant's co-accused. The said co-accused was therefore acquitted, due to the insufficiency of the evidence tendered against him.

8. Following the conviction of the appellant, the learned trial Judge sentenced her to 20 years' imprisonment.

9. The appellant was dissatisfied with both the conviction and sentence; and she lodged an appeal to this Court.

10. In her memorandum of appeal, the appellant raised a total of 9 grounds of appeal as follows;

"1. That the Honourable trial judge erred in law and fact in convicting and sentencing the Appellant for the offence of murder while relying on shaky circumstantial evidence.

2. That the Honourable trial judge erred in law and in fact when he misdirected himself on the essential ingredients of murder contrary to section 203 as read with section 204 of Kenya Penal Code.

3. That the evidence adduced by the prosecution witness number 8 was inadmissible and insufficient to sustain a conviction against the appellant.

4. That the learned trial judge erred in law and fact when he failed to consider that the case was not fully investigated and if investigations were done then the same was shoddy.

5. That The learned trial judge erred by failing to hold that unknown third parties who had transaction (sic) with the deceased had not been excluded.

6. That the learned trial judge erred in convicting the appellant in total disregard of the appellant's defence and particularly the alibi.

7. That learned trial Judge failed to appreciate that the love triangle theory did not apply and all factors pointed to the innocence of the appellant.

8. That the prosecution did not establish the nexus between the appellant and the second accused.

9. That the prosecution failed to establish corroborative evidence against appellant."

11. The appeal was canvassed by way of written submissions, which were filed by the appellant and the respondent.

12. On 8th November 2023, the appeal came up for hearing before us. Mr. Kraido advocate represented the appellant, whilst Miss Kiptoo represented the respondent.

13. Both counsel informed the Court that they felt no need to make any oral submissions, as their written submissions were sufficiently comprehensive.

14. As this is a first appeal, this Court is enjoined by law, to review all the evidence on record, and to make its own conclusions therefrom. However, as we did not have the benefit of observing any of the witnesses when they gave their testimonies, this Court is obliged, when making its conclusions, to take into account that fact. Therefore, if the trial court pegged any particular finding upon the demeanor of the particular witness, this Court is to give an allowance to such conclusion, unless the conclusion derived

therefrom was clearly untenable when considered within the wider context of the evidence on record. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), the court stated as follows:

> "However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno v R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw and observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun v Republic [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary."

15. PW1, Henry Biwott was a brother of the deceased. He testified that on 5th December 2013, he met the deceased at Kachibora. On that occasion, the deceased was in the company of the appellant, who PW1 described as a girlfriend of the deceased.

16. PW1 testified that the deceased left with the appellant, and the two of them spent the night at the home of the appellant. Since that day, PW1 did not see the deceased. Efforts to trace the deceased did not yield positive results.

17. On 27th December 2013, PW1 received information concerning a body that had been recovered in Uasin Gishu County. On the following day, PW1 identified the body as that of the deceased.

    The body had been ferried to the Moi Teaching and Referral Hospital.

18. PW2, Benjamin Kibet Biwott is a brother of the deceased. On 9th December 2013, he learned that the deceased had gone missing on 6th December 2013.

19. He was one of the relatives of the deceased, who identified the body at the mortuary, at Moi Teaching and Referral Hospital.

20. According to PW2, the appellant was a girlfriend of the deceased, but their relationship was not good. He told the court that the deceased had found a new girlfriend and that that was what soured the relationship between the appellant and the deceased. Secondly, the appellant suspected that the deceased was connected to the loss of Kshs. 200,000/=, which disappeared from the appellant's house.

21. During cross-examination, PW2 testified that the relationship between the deceased and the appellant became sour because the deceased wanted to marry another girl.

22. PW3, David Kiptoo Biwott, is a brother of the deceased. On 6th December 2013, PW3 he was given a lift in the deceased's vehicle. He testified that both he and his other brother, Shadrack (PW4) were dropped off at Kachibora. That was the last time when PW3 saw the deceased alive.

23. It was the evidence of PW3 that he did not know about any sour relationship between the appellant and the deceased.

24. PW4, Shadrack Biwott was a brother of the deceased. He told the court that on 6th December 2013, the deceased gave him a lift. On the said day, the appellant alighted from the deceased's vehicle leaving PW4 who was later dropped off at Kachibora.

25. Both PW3 and PW4 testified that they were unaware of how the deceased met his death.

26. PW5, Stella Cherop testified that the deceased was her friend for 7 years. Out of their relationship, the two of them had been blessed with a daughter.

27. PW5 was aware of the fact that the appellant was a friend of the deceased. She testified that the appellant had sent an SMS message to her, saying that PW5 ought to leave the deceased and that she should concern herself with her daughter.

28. Although PW5 wanted to ask the deceased why the appellant was sending messages to her, the attempts to reach the deceased by phone, failed.

29. PW6, PC Gabriel Wanyama was a Police Officer who was attached at the Moiben Police station at the material time. On 26th December 2013 PW6 went to the scene, where they found the body. The said body had both his hands tied from behind.

30. Later, during post-mortem, an ATM Card, and ID and a driving licence, all of which belonged to the deceased, were recovered.

31. PW7, PC Michael Olunga, was the Investigating Officer. The investigations conducted by the police revealed that the deceased had two lady friends, Stella Cherop (PW5) and Loice (the appellant).

32. It was the evidence of the investigating officer that on 6th December 2013, the deceased spent the night at the house of the appellant. On the following morning, the deceased was together with his brother and the appellant, when he was driving to Kitale.

33. Whilst on the way, the appellant alighted first, once she got to the school where she was a teacher. The deceased proceeded to Kachibora, where he dropped off his brother; and he then went on to Kitale.

34. Whilst the deceased was in Kitale, he received a phone-call, requesting him to go to Talai.

35. According to PW7, the communication records showed that the appellant was in Talai.

36. PW8, Dr. Macharia Benson is a pathologist based at the Moi Teaching and Referral Hospital Eldoret. He conducted the post- mortem on the body of the deceased.

37. According to him, the body had decomposed to a skeleton, and therefore the identification was based on the documents that were found in the pockets of the deceased.

38. Due to the fact that the decomposition of the body was extensive, PW8 said the cause of death could not be ascertained.

39. PW9, ASP Yusuf Nzioka was the Investigating Officer. He took over the investigations from Owango, the DCIO Kitale, in 2013.

40. Although 2 suspects had been arrested and charged with the murder of the deceased, the said suspects were later discharged.

41. PW9 requested for call data used by the appellant and the deceased. From the data, PW9 verified that on 6th December 2013, both the appellant and the deceased were at Kaplamai at about 6.54 am. Later that morning, at about 10:00 am, the data indicated that both the appellant and the deceased were in Talai.

42. According to PW9, the appellant decided to kill the deceased because of the relationship between Stella (PW5) and the deceased.

43. During cross-examination, PW9 said that the appellant and the deceased were cohabiting as husband and wife.

44. After PW9 testified, the prosecution closed its case.

45. When she was put to her defence, the appellant said that she was married to Joseph, who was a friend of the deceased. Whilst conceding that the deceased used to visit her regularly, she denied the contention that she had been planning on getting married to him.

46. The appellant also acknowledged that on 6th December 2013, the deceased spent the night at her house; and that on the next morning, the deceased dropped her off at Koilel, near the school where she worked as a teacher.

47. The appellant denied committing the offence.

48. Having analyzed the evidence, the learned trial Judge first noted thus;

> " 24. What is apparently clear is that there was no eye witness to the incident and all that is there is purely circumstantial evidence."

49. The trial court was alive to the requirement that a conviction can only be properly founded upon circumstantial evidence when;

> "Firstly, the exculpatory facts had to be incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis but that of guilt, and, secondly, it was necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilt."

50. In Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, the court stated that:

> " 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: -
>
> '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.'"

51. The conditions for the application of circumstantial evidence were laid down in the case of Abanga alias Onyango v Republic, Criminal Appeal No. 32 of 1990 (UR), where the court held that:

> " 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."

52. Similarly, the court in Sawe v Republic [2003] KLR 364, stated thus:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

53. The learned Judge went on to make a finding in the following terms;

> " 30. Turning now to the 1st accused I am satisfied that based on the evidence on record, and contrary to his (sic!) denial in her unsworn evidence the two were actually lovers. That explains why the deceased was with her that evening in his bar playing the game of pool in the presence of the deceased's brother, and later retired together. It is also on record that they left together that morning, and she alighted on the way."

54. In his considered opinion, the learned Judge believed that the appellant ought to have called one Roda as her witness, to verify the fact that the appellant visited the home of Roda on that material morning. The appellant had testified that she was going to see Roda, for the purposes of getting a house help for her mother.

55. The trial court also faulted the appellant for choosing to ignore the assertion that she was within the Talai area, on the material morning.

56. From our analysis of the evidence on record, we find that the appellant testified thus;

> " I don't know a place called Talai. I heard it for the first time."

57. In our understanding, the appellant was disputing the contention that she was at the place called Talai. In other words, the appellant did not simply ignore the assertion that she had been at Talai.

58. Meanwhile, as regards the question about whether or not the appellant visited the home of one Roda, we note that the prosecution witnesses confirmed the fact that the appellant alighted from the deceased's vehicle at the place where she worked as a teacher.

59. PW4 testified that the appellant alighted, leaving the deceased with his two brothers.

60. PW5 was aware of the fact that her alleged rival used to work as a teacher at the local primary school.

61. PW7, who was one of the investigating officers, testified that;

> " On the road, the 1st accused, a teacher, alighted in a school where she teaches."

62. In the circumstances, there is no doubt that although the appellant did spent the night with the deceased, on the following morning she alighted from the deceased's vehicle, leaving the deceased with his two brothers.

63. Thereafter, the deceased went missing, and his body was recovered more than 20 days later.

64. The prosecution alluded to a love triangle as being the trigger for the murder of the deceased.

65. We find, as did the learned trial Judge, that the appellant and the deceased were lovers. It is also clear that PW5 was a close friend of the deceased; the two of them had even begotten a child.

    There is every possibility that the deceased intended to marry PW5.

66. However, it cannot be overlooked that the person who the deceased chose to be with on the night before his disappearance was the appellant. In those circumstances, we hold the considered view that the appellant would have had no reason for wanting to kill the deceased.

67. Furthermore, the Investigating Officer (PW9) testified that when the body of the deceased was found, one of the documents which was recovered was;

68. The existence of that agreement suggests that the appellant might still have been alive as of the date when the agreement was executed.

69. The prosecution did not lead evidence to demonstrate the investigations, if any, which were carried out in relation to the agreement. Such investigations might have yielded information about whether or not the deceased was alive as of the date appearing on the face of the document. Secondly, the persons from whom the vehicle was being purchased, could have provided some potentially useful leads about the deceased.

70. The period between 6th December 2013 when the appellant was together with the deceased; and 27th December 2013 when the body of the deceased was recovered, is in excess of 20 days. Nobody is aware of where the deceased was throughout that period. It is cited in the charge sheet, that the appellant was murdered on 6th December 2013. But the prosecution led no evidence to prove that contention.

71. In the post-mortem report it is indicated that the date and the time of death were unknown.

72. In conclusion, we find that the circumstances demonstrated by the prosecution were not cogently proved, nor do they point un- erringly toward the guilt of the appellant. Furthermore, the prosecution didn't establish a chain of events that was unbroken, and which linked the appellant to the death of the deceased.

73. Indeed, even the learned trial Judge appears to have been unconvinced about the guilt of the appellant. We so find because in paragraph 33 of the judgment, it is stated thus;

    > " This court concludes that, based on the evidence presented, there is every possibility that the 1st accused had a hand in the disappearance and subsequent death of the deceased."

74. In our considered opinion, the trial court erred when it convicted the appellant on the basis of the said possibility. An accused person ought to be convicted only when the prosecution has proved the case against him, beyond any reasonable doubt. In this case, the prosecution did not discharge the onus.

75. Accordingly, the appeal is allowed. We quash the conviction and set aside the sentence.

76. We order that the appellant be set at liberty forthwith, unless she is otherwise lawfully held.

Dated and delivered at Nakuru this 22nd day of March, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR