



**Kamau v Republic (Criminal Appeal 58 of 2013)
[2024] KECA 314 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 314 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 58 OF 2013
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 22, 2024**

BETWEEN

PAUL NJOROGE KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (R.P.V. Wendoh, J.) delivered on 19th July, 2013 in HCCRC No. 108 of 2010)

JUDGMENT

1. This is a first appeal by Paul Njoroge Kamau. The appellant was charged at the High Court with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The information was that on 16th October 2010 at Olkinyei area in the then Narok North District, the appellant murdered John Ole Sasire. The appellant denied the offence and after trial he was found guilty and sentenced to serve life imprisonment.
2. Being dissatisfied with the Judgment of the trial Court the appellant has lodged the present appeal raising the grounds which we condense as follows: that the offence of murder was not proved as the trial judge relied on the contradictory evidence of a single witness; that there was failure to call key/critical witnesses; and, that the trial court erred in rejecting the appellant's evidence despite the same not being displaced by the prosecution.
3. At the trial, the prosecution based its case on the testimony of 7 witnesses. Dr. Alan Soita of Narok District Hospital testified as PW1. He conducted the postmortem on the deceased's body on 26th October 2010. He observed that the deceased had a cord around his neck and his whole body was swollen save for his head. The deceased also had a fracture of the cervical bone at the neck and had suffered strangulation at the jugular and carotid vessels. He formed the opinion that the deceased died as a result of asphyxia due to strangulation or lack of oxygen to the lungs. He produced the



- postmortem report as an exhibit and also identified the rope which was later produced as an exhibit by PW7 Constable Leonard Cherwa. On cross-examination, PW1 testified that he did not observe that the deceased's eyes were dilated or that the tongue was hanging out.
4. Dr. Joseph Njau testified as PW2 stating that he conducted mental assessment on the appellant and found him fit to stand trial. He produced the mental assessment report as an exhibit.
 5. Next to testify was Dickson Sangkok (PW3) who told the court that he worked for Salash Dapash (PW4) as a herdsman while the deceased served as a farmhand for the same employer. He recalled that on 16th October 2010 at about 2.00 pm he passed by the deceased's house and found three people. Two of them were standing at the deceased's door. The third person, the appellant, was inside the house hitting someone with a stick. The two who were outside the house were Kamau and Mandefu. He continued with his duties and later learnt of the deceased's death.
 6. Salash Dapash (PW4) took to the stand and confirmed that the deceased was his farmhand while the appellant usually did casual jobs in the neighbouring farms. He stated that on the material day, he was away when he received a call from George Ole Kipury (PW5) informing him that the deceased had been murdered. He proceeded back home and informed the area chief. He went to the scene at the deceased's house, and noted that the deceased seemed to have been strangled with a rope, and had injuries on the body like those inflicted by a stick, coupled with burns on the head and stomach. He also noted that the household items had been thrown all over resembling a place where a struggle had ensued.
 7. PW5 on his part testified that he had paid the deceased, Mandefu and Njoroge (appellant) to undertake some assignment for him but the appellant did not do the work because he was unwell. He had then asked them to pay him back the money and the appellant and Mandefu went to the deceased to get the refund. The deceased took them to some other lady's house where he alleged to have left the money but the lady denied the claim. There and then, Mandefu got annoyed and made the deceased fall down. He stated that the appellant then opted to pay him KSh. 650 while the deceased left them at the lady's home where alcohol was being sold. He testified that they partook of the alcohol and while at it, Mandefu left threatening that somebody would die. He left Paul at about midday and later continued to partake of alcohol at the home of PW4 alongside Mandefu. And while at the home of PW4, they found Patita and Olesito also drinking. That Mandefu continued talking about someone dying and later left them at the home of PW4 while he did not see Paul again. He then proceeded home and slept from 2.00 pm until 5.00 pm.
 8. On his part Corporal Paul Kiilu (PW6) who was attached to CID Narok at the time of the incident stated that he proceeded to the scene of crime alongside PW7 on 17th October 2010 at about 3.00 pm where they found the deceased's body lying on the floor with a rope tied to his neck. He noted injuries on the deceased's neck, head and buttocks. He then took photographs of the scene and prepared a certificate for the same. He produced the photographs as exhibits.
 9. On his part, PW7 testified that he was the investigating officer alongside Corporal Benard Njiru, the OCS Narok and PW6. He gave an account of how they took the body from the scene to the mortuary at Narok District Hospital. He also arrested the appellant, Samuel Nyaga Owengi, Edward Mungai and Wilson Mbuthia Nyahia as suspects. And that upon investigating the matter he narrowed down upon the appellant as the person who killed the deceased and released the others. He produced a manila string (rope) as exhibit.
 10. At the close of the prosecution's case, the appellant gave sworn evidence without calling any other witness. He testified that he knew the deceased who worked in the home of PW4. He stated that there was no dispute between him and the deceased and neither were they friends. He stated that at the time of his arrest, one Samuel Onyango Mwangi, Edwin Nyabir Munga, Lillian and PW3 had all



been arrested but were later released. He denied ever assaulting the deceased and further stated that the deceased did not owe him any money. He also testified that he owed one John ole Kibuye KSh. 2,000 which he had been given alongside Mandefu to make frames and which he did not do because he was unwell.

11. In her judgment dated 19th July 2013, R.P.V. Wendoh, J held that even though the prosecution had failed to call some key witnesses, such failure was not detrimental to the prosecution's case. The learned Judge further found that the evidence of PW3 was cogent and was corroborated by that of PW5 and pointed to the appellant as the person who, perhaps alongside others, caused the death of the deceased. Consequently, the appellant was convicted of the offence of murder and sentenced to life imprisonment.
12. This matter was heard through the virtual platform on 1st November 2023. Learned counsel Mr. Sanjay appeared for the appellant while learned counsel Ms Kisoo was present on record for the respondent. Mr. Sanjay had filed written submissions dated 27th June 2023 in support of the appeal while Ms Kisoo had on her part filed submissions dated 27th October 2023 in opposition to the appeal. Counsel for the parties relied on the filed submissions and made brief oral highlights of the same.
13. Mr. Sanjay restricted his submissions to the three grounds raised in the supplementary memorandum of appeal dated 27th June 2023. Regarding the claim that the appellant was convicted based on shaky evidence, counsel submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt. Counsel argued that although the trial court mainly relied on the evidence of PW3, that evidence did not exclusively point to the appellant as the person who killed the deceased. Counsel argued that the evidence of PW3 did not fully establish the 3 elements of the offence of murder against the appellant. Further, counsel pointed out that during cross-examination PW3 exonerated the appellant from having malice aforethought when he stated that the manner in which the appellant hit the deceased resembled that of waking him up. According to counsel, the evidence on record did not surmount the burden of proof placed upon the prosecution for a conviction to ensue. According to counsel, the inconsistencies and discrepancies in the evidence of PW3 could not sustain the appellant's conviction. Counsel relied on the cases of Daniel Kuria Guyo v. Republic [2011] eKLR and Julius M'birithia v. Republic, Meru CR Appeal No. 111 of 2011 to underscore the need for caution when relying on the evidence of a single witness to convict an accused person. Counsel referred to the case of Ndung'u Kimanyi v. Republic [1979] eKLR to urge that the evidence of a witness should not be doubtful. Counsel also submitted that the evidence of PW4, PW5 and PW7 was contradictory with regard to the cause of the death of the deceased and as to the person who killed the deceased.
14. Turning to the second ground of appeal, learned counsel Mr. Sanjay asserted that the prosecution failed to call certain key witnesses. He submitted that the failure to call the members of public who were mentioned rendered the trial unfair thus contravening the provisions of Article 50(2) of *the Constitution*.
15. Finally, with respect to the 3rd ground of appeal, counsel pointed out that the evidence of the appellant himself left no doubt that he was not at the locus in quo on the material date. Counsel submitted that the prosecution did not rebut the appellant's alibi defence. Counsel referred to sections 212 & 309 of the Criminal Procedure Code as defining what amounts to an alibi defence. Relying on Kimotho Kiarie v. Republic [1984] eKLR, counsel argued that the trial court misdirected itself by disregarding the appellant's alibi whereas the appellant was not required to prove his alibi. According to counsel, the trial court failed in its duty of assessing the entire evidence adduced by the prosecution witnesses. In the end, counsel urged us to allow the appeal in its entirety.



16. Learned counsel Ms Kisoo on her part set off by referring to the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR to point out the scope of this Court’s mandate on a first appeal. In respect to the three grounds of appeal raised in the supplementary memorandum of appeal, counsel submitted that the prosecution proved its case against the appellant beyond reasonable doubt. Ms Kisoo referred to section 203 of the Penal Code and *Anthony Ndegwa Ngari v. Republic* [2014] eKLR to point out the ingredients of the offence of murder. In support of the assertion that the deceased died, counsel submitted that PW4, PW5, PW6 and PW7 all testified that they saw the body of the deceased. Further, that PW1 conducted the post-mortem on the deceased. As to the nexus between the death of the deceased and the appellant, counsel submitted that the evidence of PW3 not only placed the appellant at the scene of crime but also pointed to the appellant and his accomplices as the persons who caused the deceased’s death. As to whether malice aforethought was established, counsel argued that based on the nature of injuries suffered by the deceased, malice aforethought was indeed proved. In support of the assertion that malice aforethought can be proved by the nature of the injuries inflicted on the deceased, counsel relied on the case of *Rex v. Tubere s/o Ochen* [1945] 12 EACA 63 as cited in *Republic v Juma Kituko Mwambegu* [2020] eKLR.
17. In opposition to the appellant’s contention that the offence was not proved because crucial witnesses were not called to testify, Ms Kisoo submitted that the testimony of the witnesses availed was sufficient to prove the charge of murder against the appellant. Counsel argued that pursuant to the provisions of section 143 of the *Evidence Act*, the prosecution was obliged to call such witnesses as were sufficient to establish the charge beyond any reasonable doubt, which it did. According to counsel, even though the prosecution did not call those who participated in the arrest of the appellant, the issue of the appellant’s arrest did not go to the root of the case.
18. Finally, with regard to whether the trial court considered the appellant’s defence, counsel submitted that the appellant did not mount any plausible defence. According to counsel, the appellant’s defence was analysed and considered by the trial court and found to be without merit. In conclusion, counsel submitted that the appellant was rightfully convicted and given an appropriate sentence. She consequently urged for the dismissal of the appellant’s appeal in its entirety.
19. As this is a first appeal, we are required to delve into and consider afresh the evidence as presented before the trial court prior to arriving at our own independent decision. We are however conscious that unlike the trial Court, we did not have the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. We must therefore bear this limitation in mind as we conduct our analysis and reevaluation of the evidence. In that regard, we observe that the mandate of this Court on a first appeal has continuously been emphasized in several decisions, including *Dickson Mwangi Munene & another v. Republic* [2014] eKLR, where it was stated that:

“This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court’s decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge’s finding of fact unless it is supported by the evidence on record.”
20. We have duly reviewed the record of appeal, the submissions by counsel and the authorities relied upon. In our view, the main issue for determination in this appeal is whether the prosecution proved the offence of murder against the appellant. In addressing this issue, we note that the appellant has raised three grounds in this regard: first, that the trial court erred by relying on the contradictory evidence of



a single witness; second, that the prosecution failed to call key witnesses; and, third, that his defence was not considered.

21. In determining the appeal, it is prudent that we commence by stating that the offence of murder is found in section 203 of the Penal Code. To prove an offence of murder, the prosecution must establish the fact and cause of death of the deceased person; that the accused person is at fault for contributing to the deceased's death through an unlawful act or omission; and, that the accused person had malice aforethought in causing the deceased's death. The ingredients of murder were identified by this Court in *Roba Galma Wario v Republic* [2015] eKLR thus:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

22. The fact of the deceased's death is not in dispute. PW1 conducted post-mortem on the deceased's body and found the cause of death to be asphyxia due to strangulation. PW4, PW5, PW6 and PW7 also testified having viewed the deceased's body while at the scene of crime. PW6 took photos of the deceased's body and alongside PW7, they escorted the body to Narok District Hospital mortuary.

23. The next question is whether the appellant contributed to the death of the deceased. As pointed out by the trial court, the cause of the deceased's death is disputed. We say so because of the conflict between the evidence of PW1 and that of PW4, PW6 and PW7. While PW1 formed an opinion that the deceased died as a result of asphyxia due to strangulation, PW4 on his part viewed the body at the scene and observed that other than having a rope around the neck, it also had burns and injuries akin to those inflicted by sticks. PW6 and PW7 also testified having observed injuries on the shoulder and buttocks of the deceased's body. Even though the expert witness (PW1) affirmed that the cause of death was strangulation, we note that no evidence was led to establish whether the injuries on the shoulder and buttocks could have led to death of the deceased. While discussing the place of expert evidence in *Parvin Singh Dhalay v. Republic* [1997] eKLR, the Court stated that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so...

Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it.”

24. In our view, the discrepancies in the nature of injuries notwithstanding, we see no other evidence to make us depart from the opinion of PW1 as to the cause of the death of deceased.
25. With regard to whether the appellant was complicit in the murder, we note that the only witness who placed the appellant at the scene of crime was PW3. It is the evidence of this witness which the trial



court relied upon to return a conviction. The following excerpts from the evidence of PW3 are of importance to our subsequent analysis:

“I came back here at 2.00 pm... I was passing the home of Sasire (deceased) when I found three people. 2 were outside and 1 was inside... I saw Paul (appellant) hitting the deceased who was lying down... I pumped people and passed.”

In cross examination, PW3 further stated that:

“I was passing near the house about 10 meters away. The house is small. It did not have a door at that time. They had broken it. Two were besides the door. The one standing inside was standing inside the house-near the fire... the one lying down was in front of him... The one in the house was handling a stick hitting the one who was lying down. He was hitting the head. It was not hard. It was like he was waking him up. I saw him hit him lightly once.”

26. Further, the evidence of PW5 was that he went to the scene of crime at around 2.00 pm on the material day alongside Edward, Jane and Njenga. He also stated that on that material day, he had sought a refund from Paul, Mandefu and Njoroge. Paul and Mandefu then led him to the deceased’s house where Paul and Mandefu would get some money from the deceased and pay PW5 what they owed him. They found the deceased with Njenga. They then left the deceased’s house alongside Paul and Njenga and went drinking at the home of Mormejoli. While there, Paul paid PW5 KSh. 650 and was set free. Mandefu made the deceased fall. Mandefu then left threatening that somebody would die. At about 1.00 pm, Mandefu then followed PW5 to the home of PW4 and continued his talk of somebody dying. PW5 never saw Paul again while Mandefu left him at the home PW4.

27. The foregoing set of evidence begs the question as to whether PW3 and PW5 were accomplices in this case. Section 141 of the *Evidence Act* provides that:

“An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

28. In *John Bosco Ndwiga & 2 others v Republic* [2017] eKLR, the Court while elaborating on who an accomplice is stated that:

“Who is an accomplice? This Court in the case of *Antony Kinyanjui Kimani v Rep* [2011] eKLR said the following: -

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of *Watete v Uganda* [2000] 2 EA 559, the Supreme Court held that ‘in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial’. The same definition was restated by the same court in the case of *Nasolo v Uganda* [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of ‘accomplice’. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case”.



29. In Michael Muriithi Kinyua v Republic [2002] eKLR the Court, while stating that the evidence of an accomplice is indeed admissible, held that such evidence needs corroboration. In that regard the Court stated that:

“Under section 141 of the *Evidence Act*, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so.

Before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence.”

30. Similarly, in Evans Ongochi Odongo & another v Republic [1994] eKLR, the Court reiterated that:

“When considering the evidence of an accomplice, the first duty of a Court is to decide whether that evidence is credible. If such evidence is not at all credible, then the issue of warning oneself before acting on it, or looking for corroboration for it cannot and does not arise for a lie cannot be corroborated. Nor can one act on a lie on the pretext that one has warned oneself on the dangers of acting upon such lie. It is only when it has been found as a fact that the evidence of an accomplice or any other evidence requiring corroboration is credible that one starts to look for corroboration – see Geoffrey Nguku v Republic [1982 – 1988] 1 KAR 818. If the evidence given by the accomplice is credible and there is corroboration for it, then the question of a Court warning itself before acting on such evidence does not arise. The need for the Court to warn itself arises only on those rare occasions when the Court is prepared to base a conviction solely on the uncorroborated evidence of an accomplice.”

31. Was PW5 among the 3 people who were spotted at the deceased’s house by PW3 at about 2.00 pm? PW5 in his evidence acknowledged being at the deceased’s house alongside the appellant, Mandefu and Njenga. He was also placed in the periphery of the scene of crime alongside Njenga and Mandefu as they were seen partaking of alcohol before 2.00 pm. It also came out during the defence evidence that PW3 was also among those arrested and released in relation to this offence. As per the testimony of PW5, one Edward was with him when they went to the scene.
32. In our view, PW3 and PW5 were accomplices in the offence. In reviewing their evidence, we note discrepancies which leads us to question their credibility. For example, for what reason was PW3 arrested? If the said house was in the same compound where PW5 and one Njenga were taking their alcohol, how come PW5 failed to hear of the commotion emanating from the deceased’s house as PW4 stated that the scene looked disturbed as if there had been a struggle? These and many other questions linger in the mind of the Court. We note that the trial court did not address itself to complicity of



PW3 and PW5. On our part, only one conclusion arises, that PW3 and PW5 were accomplices whose evidence was not only contradictory but also incredible.

33. This leads to the next question as to whether there was a failure to call some key witnesses and whether such failure was fatal to the prosecution case. For starters, we are cognizant, and like the trial court, appreciate that under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any fact. Further, we also appreciate that the prosecution is only required to call the witnesses who are sufficient to prove a fact and no more; and, that the discretion to decide which witnesses to call remains with the prosecution. We therefore associate ourselves with the holding in *Julius Kalewa Mutunga v Republic* [2006] eKLR that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see *Oloro s/o Daitayi & others v R.* [1950] 23 EACA 493.”

34. Having stated the foregoing, we add that adverse inference will only be drawn by the court if the evidence tendered by the prosecution is barely adequate to establish a fact in issue beyond reasonable doubt. If, however, the evidence adduced by the called witnesses is sufficient to prove a fact in issue, adverse inference will not be drawn by the court.

35. In the appeal before us, both sides acknowledge that there were witnesses who were mentioned but were not called to testify. Edward, Mandefu and Njenga were among the witnesses who were not called to testify. From the evidence on record, it is clear that some of these witnesses were present at the scene of crime before, during and after the deceased met his death. They had information that would have aided the trial court in establishing how the deceased met his death. Some of these witnesses were even arrested by PW7 but later released. Neither the prosecution nor any of their witnesses tendered any explanation as to why these witnesses could not be procured to come and give their evidence. In our view, considering the loopholes we identified in the testimonies of PW3 and PW5, we are inclined to draw adverse inference on the prosecution’s failure to call these witnesses. In the end, we agree with the appellant and find that the failure by the prosecution to call the mentioned witnesses was fatal to their case.

36. Based on the foregoing analysis, we find that the offence of murder was not proved by the prosecution against the appellant. The evidence on record was not sufficient to establish all the three elements of the offence of murder under section 203 of the Penal Code. Consequently, the appellant’s conviction by the trial court cannot be sustained but must be vacated.

37. In the end, we find the appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence of life imprisonment set aside. Consequently, we order the appellant to be released from prison forthwith unless otherwise lawfully held.

38. It is so ordered.

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

