Makau v Republic (Criminal Appeal 165 of 2019)
[2024] KECA 297 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 297 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 165 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

ERICK MUSILA MAKAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu drafted and signed by (Majanja, J.), delivered and signed by (T. W. Cherere, J.) dated 9th April 2019 in HCCRA NO. 32 of 2016)

JUDGMENT

1. The appellant, Erick Musila Makau was charged jointly with another not in this appeal (having passed on in the course of the trial), with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the night of 30th and 31st March, 2012 at an unknown time at Ruseya area of Konoin District within Bomet County, they jointly, with others not before the court, murdered Eliud Kipchirchir Yego (the deceased).

2. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of twelve (12) witnesses and closed its case. Upon being placed on his defence, the appellant gave sworn testimony and called one witness. At the conclusion of the trial, the learned trial Judge, in a judgement dated and delivered on 9th April, 2019, convicted the appellant for the offence of murder. Upon consideration of the appellant's mitigation, the probation report and the victim impact assessment reports alongside the State's submissions, the appellant was sentenced to serve thirty (30) years imprisonment.

3. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now filed this appeal. This being a first appeal, this Court is mindful of its duty as was well articulated by this Court in Erick Otieno Arum vs. Republic [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."

4. Before the trial court, PW1, Samuel Kibet Rotich, a watchman at CIS Mara Guest House in Bomet, testified that while on duty on the day in question at around 6 pm he found a black saloon car at the parking lot, but he did not identify it as it was dark. As he got inside the guest house, he met Diana, the appellant's late co-accused, and a regular customer standing at the verandah. She informed him that she had booked room 6, for a male guest who was being followed by the police. She did not give details about the said guest, but requested the witness to take to him some water. He obliged, and found the said guest lying on the bed. Diana had requested PW1 to alert them the moment the police officers arrived.

5. At around 11.00 pm, two men, one in civilian clothes and the other in army uniform, arrived at the guest house, requesting to go to room 6 but PW1 declined to let them in. When PW1's colleagues, Wesley, Chepkoech and Peris arrived, he briefed them about the two men who then identified themselves as police officers, and showed their staff identity cards. PW1 and his colleagues escorted the two to the room but at the door, they were told to turn back. Shortly the witness saw the said police officers lead Diana's guest into the black saloon car. On cross examination this witness admitted that he did not see Diana's guest well.

6. PW7, Chief Inspector Isaac Musembi Gonga, testified that he received a call from the area chief that a body had been found along Mogogosiek Road near Rusenya River on the border of Kerocho/Bomet towns. He visited the scene with a colleague and found the partly burnt body of a male lying on his back with his hands cuffed at the back, around 3 meters from the road. On searching the scene two spent 9mm cartridges were found on the ground close to the body. The deceased's identity card as well as other documents were found on body of the deceased. The body was taken to the mortuary and the evidence collected sent to DCIO for further investigation.

7. Chief Inspector Judah Muthee Festus, PW10, the Investigating Officer, visited the scene and took some soil samples, and also recovered a white jerrycan with some liquid. Upon return to the police station, he was given one spent cartridge, a pair of black shoes and a wallet, whose contents included an identity card bearing the name Eliud Kipchirchir Yego, and some business cards which included that of the decease's wife, Romana Yego. On being informed about her husband's demise, Mrs. Yego inquired on the whereabouts of his motor vehicle registration No. KBK 363S, Toyota NZE. Eventually, the body was taken to Moi Teaching and Referral Hospital (MTRH), Eldoret, where PW2, Jacob Yego, identified it at the hospital mortuary and witnessed the post mortem.

8. PW5, Dr. Wekesa Nalianya, conducted the post mortem examination on 2nd April 2012 at MTRH. He observed a gunshot entry wound on the right side of the skull about 5cm in diameter, and an exit wound on the left side of the skull measuring 2cm. The deceased's body and clothes were badly burnt

and the deceased had deep burns which exposed his back muscles, and covered most of the body. This witness also observed multiple abrasions and bruises on the posterior wrist of both hands leading him to the conclusion that the cause of death was severe head injury due to the gunshot wounds and that the deceased was dead by the time he was burnt.

9. PW4, Dennis Owino Onyango, an analyst from the Government Chemist produced a report prepared by Habil Akech Omondi, who had since retired, confirming that the liquid in the white jerrycan found at the scene was kerosene which was detected on the burnt wallet.

10. PW6, Johnstone Mwongela, a fire arms examiner testified that the two spent cartridges, which had been recovered from the scene where the body was found by PW7, were fired from one gun upon concluding his examination based on the exhibits provided to him, that is the pistol and magazine.

11. PW8, Simon Lagat, who was in charge of the armoury in SGB, Nairobi confirmed that on 10th January 2012, APC Erick Makau, who was working with the AP in the VIP protection unit, was allocated one pistol, a Ceska Serial No. F9190 with one magazine and 12 bullets of 9mm caliber, according to Entry No. 3 in the Firearms Movement Register at page 130. The appellant (who was the APC referred to in the entry), personally signed for the pistol which he was to retain for 3 months. He did not return said pistol. The pistol and magazine produced in evidence was the one given to the appellant.

12. PW9, David Cheruiyot arrested the appellant and recovered his official pistol the said Ceska, which had 12 rounds of ammunition, and a Samsung mobile phone B77xxxx serial No. 3592xxxxx.

    Later on, they travelled to the appellant's home in Kibwezi where they found the deceased's motor vehicle registration number KBK xxxS.

13. PW11, Daniel Hamisi, working with the Law Enforcement Liaison office at Safaricom headquarters presented a report providing subscription details and links of communication between holders of account 0722xxxxx, 0715xxxxx and 0710xxxxx from 29th March to 1st April 2012. Based on data received from Safaricom the deceased's number 0722xxxxx had received a phone call from 0715xxxxx belonging to the appellant; the deceased's phone number had called the appellant's number at 23.49hrs on 30th March 2012, that the data showed that they communicated at Mogogosiek where the deceased' body was found on the next day. After the appellant and his co-accused were arrested, PW10 confiscated 2 mobile phones from the co-accused; and also received information that she had booked a room in the company of the deceased; and that the appellant and another person had been at the guest house where they purported to arrest the deceased. This witness was also informed that the deceased's vehicle was discovered in Nandi and the tyres recovered from a shop where Diana had sold them. The logbook and search certificate confirmed that the motor vehicle was registered in the name of the deceased.

14. In his sworn defence, the appellant confirmed that he was an AP officer stationed at Langata SGB assigned to guard a Principal Secretary (PS), who was strict and would never give off duty on a weekday, let alone not go anywhere without him; that on 30th and 31st March 2012, and the month preceding his arrest, the PS was involved in meetings in Nairobi and did not take any trips to Bomet and Rift Valley.

15. The appellant recounted his arrest, describing how several police officers went to his house at night, asked for his gun, and counted 12 bullets; he was then taken to Flying Squad unit, and informed that the deceased who was a friend to his wife, Diana, had been killed, and that Diana was under arrest. He conceded that the police found a motor vehicle covered in tarpaulin, without tyres in his Kibwezi home, but maintained that he had left his Kibwezi home to his brother, and moved to Makindu. The appellant testified that his wife who was a musician, had hired the vehicle for a show; it had broken down and was parked in the compound; that the only other person who had access to his firearm was

Diana; that he was not present when his firearm was taken for testing; nor did he assign anyone to attend on his behalf.

16. On cross-examination, the appellant admitted that his phone number was 0715xxxxx and that his gun was neither lost nor misplaced at the time. The appellant's brother, Dennis Mwongela Makau, DW2, testified that on 18th April 2012. Diana called him; told him that she had a show in Mombasa, and the car she was using had a mechanical problem; and requested him to take the vehicle's tyres. He was later on arrested and questioned about the vehicle.

17. The trial court was satisfied that the evidence put the appellant in locus in quo and that the gun that killed the deceased was in his hands. The trial court was also satisfied that all the circumstances taken cumulatively formed a complete chain, that there was no escape from the conclusion that the felonious act was committed by the appellant; found him guilty of murder; and sentenced him to serve 30 years imprisonment.

18. Aggrieved by the outcome, the appellant filed this appeal and raised 5 grounds in the memorandum of appeal which he summarized as follows, that: there was failure to consider the discrepancies and contradictions in the evidence adduced; the circumstantial evidence was shaky and the expert evidence un-analyzed and uncorroborated; malice aforethought was not established; that the burden of proof was shifted to the appellant; and the sentence imposed was harsh.

19. The first ground raises the issue that the prosecution's case was contradictory and full of discrepancies. Pointing out that PW10, in his testimony, said that he found one spent cartridge, whereas PW7 testified that that he found 2 spent cartridges; that the gun in question was in police custody; that according to PW8, he could not tell whether the gun was involved in an offence; and that there were two different serial numbers, KEAPFxxxx and F91xxxx. The appellant also submits that the evidence regarding the phone serial number, and make was contradictory as the prosecution stated that they took possession of a Samsung mobile phone B77xxxx Serial No. 35925xxxx, whereas what was produced was a different phone altogether IMEI 3592xxx Model Xitel (X62xxxx). According to the appellant, these contradictions are irreconcilable in the prosecution's case, and ought to be resolved in his favour. The State on the other hand argued that the contradictions, if at all, were not material enough as to render the conviction unsafe. Regarding the scene of crime, it is submitted that despite PW7 stating that he recovered 2 cartridges and PW10 saying he returned one cartridge, the entire evidence on record is that what was recovered were 2 cartridges; and that in any event those were the ones that were submitted for analysis to the firearm examiner for examination vide the exhibit memo; that the alleged inconsistency in the Serial No. of the firearm, referred to as KEAPxxxx vis-à-vis F9xxxx, should be understood in the context of evidence of PW7, who explained that serialization of the handcuffs the letters 'KP' stood for Kenya Police; and we are urged to find that reference to 'KEAP' in the Serial No. given by PW9 as KEAPxxxx referred to the same pistol that was used by the Kenya Administration Police, thus there was no contradiction. That in any event, the armourer who issued out the pistol and PW9 all identified the pistol they were referring to as the very one recovered, issued to the appellant, and produced as Exhibit 7A-B.

20. From the evidence on record, we agree with the respondent's submissions. PW6, the firearms examiner, testified there were two spent cartridges sent to him for investigation, and being the last to handle the evidence his testimony is believable.

21. On the issue of inconsistency of the serial number of the firearm, we are inclined to believe what, in our view is a very plausible explanation given by the respondent that the KEAP preceding the number F91xxxx stand for Kenya Administration Police Service. PW8, being an armourer, testified to this. We

are satisfied that KEAPFxxxx and F91xxxx refer to one and the same pistol which the accused freely admits to be his, and was in his possession at the material day.

22. We take note that the appellant was not identified by any of the prosecution witnesses thus the prosecution's case was hinged on circumstantial evidence. What this Court must, then, determine is whether the trial Judge made a sound and proper conviction based only on circumstantial evidence.

23. This Court in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR stated:

> " However, it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence."

24. Lord Heward CJ in R vs. Taylor, Weaver and Donovan [1928] Cr. App. R 21:-, stated:

> '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 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."

25. In the case of Abanga Alias Onyango vs. Republic CR. App No.32 of 1990 (UR), this Court set out the parameters to be met in the application of circumstantial evidence in securing a conviction as follows:

> i. "it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: 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 circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else."

26. In Sawe vs. Republic [2003] KLR 364 this court reiterated that:

> "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 circumstance 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 shifts to the accused."

27. Having regard to the above principles on circumstantial evidence, did the prosecution evidence meet the threshold? It is not in dispute that none of the prosecution witnesses identified the appellant. However, as discussed earlier, the appellant has admitted to having the gun which was used in the murder on the date in question; and also admitted his phone number, which the prosecution showed, was in communication with the deceased, on the date and place the incident occurred. Further, the appellant's fingerprints were found at the scene of the crime. As regards claims that PW6 said that a

firing pin can be altered, changed or tampered with, we refer to page 75 of the record where PW6 was categorical that:

> " Use or misuse of a firearm will affect the pin but, in my experience, this will rarely happen unless there is intentional interference with the pin".

28. We concur with the respondent that nothing was suggested in cross- examination of PW6 that the firing pin of the pistol, in issue, had been tampered with; the condition of the pistol, which was not rebutted thus:

> "I found the pistol was in good mechanical condition and it was complete in all its component parts including its 16- box detachable magazine. The pistol was capable of firing ammunition".

29. The circumstantial evidence sufficiently showed that it was the appellant's pistol that discharged the bullet that killed the deceased. More circumstantial evidence from the Safaricom data given by PW11 placed the appellant, first in communication with the deceased and at the same scene with the deceased where he was found killed. We further note that the appellant did not give any plausible explanation as to how his gun ended up being used to injure and kill the deceased; how the deceased's car was found in his house and it clearly was not a car for hire. Of significance is that the appellant was not an acquaintance of the deceased, and his family.

30. We are, therefore, satisfied that the parameters of conviction were duly considered, and met by the High Court; and, as such, the conviction was sound.

31. Finally, on sentence, the appellant urged the Court to review the sentence terming it as excessively harsh. On the other hand, the State urged us not to disturb the sentence as it was very lenient. The appellant herein was sentenced to 30 years' imprisonment for the offence of murder. Although Section 204 of the Penal Code CAP 63 of the Laws of Kenya provides for a mandatory death sentence for any person charged and convicted with the offence of murder, in Francis Karioko Muruatetu & Another vs. Republic SC Pet. No.15 &16 of 2015, the Supreme Court held that the mandatory nature of the death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional as it deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.

32. The manner in which the crime was committed, laced with wicked malicious scheming, injected with premeditation and murderous intent all rolled up in a scheme to snuff out the life of deceased and the deceased died as a result of gunshot wounds that have been unerringly linked to the appellant; and the learned Judge properly exercised his discretion in sentencing. We see no reason to disturb the sentence of thirty (30) years imprisonment that was meted out on the appellant. The same is hereby affirmed and upheld.

33. The upshot of the foregoing is that the appellant's appeal on both conviction and sentence is without merit. The same is hereby dismissed in its entirety.

DATED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR