Kingi v Republic (Criminal Appeal 88 of 2022)
[2024] KECA 223 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 223 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 88 OF 2022

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

THOMAS KALUME KINGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) dated 30th March, 2022 in H.C.C.C. No. 9 of 2018)

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) where the appellant, Thomas Kalume Kingi, was convicted on a charge of murder, it being alleged in the information that he had, on 16th June, 2018 in Kilifi, murdered Kache Mzomba Kimenje. He was sentenced to serve 30 years imprisonment in the Judgment delivered on 30th March, 2022. It is our duty to re-examine the evidence and reach our own conclusions in the case, but must remember that we do not have the advantage that the trial court had of seeing and hearing the witnesses as they testified, and must give allowance for that – See *Okeno v Republic* [1982] EA 32 where it was held on that mandate:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 conclusions; 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, see Peters v. Sunday Post, [1958] E. A. 424."

2. The prosecution case was through the evidence of 7 witnesses.

3. Priscilla Luvuno (PW1 – Luvuno) testified that, on 15th June, 2018 she retired home after attending a burial for a relative. She lived in the same compound with the grandmother (the deceased) and the appellant. Late that night, the appellant knocked at the door and requested to be allowed in and, when she (Luvuno) opened the door for him, he went to talk to the deceased. She left and went to her room and later heard the deceased calling for help. She left her room and was going to neighbours to ask for help when she met the appellant who asked her where she was going. She retired to a neighbour's house where she slept as she was tired and, when she went to the deceased's house in the morning, she found many people gathered, and the deceased was dead. In her own words:

> "... The accused started looking for me. I was locked in the house for my own safety and comfort. The body was collected by police "

4. According to her, she did not witness who killed the deceased and there were many people in the neighbourhood, including one Kennedy and his wife.

5. Kennedy Safari Kingi (PW2 – Kingi) was nephew to the deceased and a brother to the appellant. He testified that on 15th June, 2018 he, the appellant and other relatives were at a mortuary in Mombasa to remove the body of a relative who they later buried at a place called Tezo. The next morning he was woken up by a commotion and when he went to check, he found the deceased dead and observed fresh injuries on her body. He had heard a rumour about witchcraft where the appellant had been bewitched but he knew of no dispute between the appellant and the deceased.

6. Nelly Rehema Kingi (PW3 – Rehema), a granddaughter of the deceased and sister to the appellant attended the funeral at Tezo and then retired home to the, compound she shared with the appellant, the deceased and other relatives. The next morning, she learnt that the deceased had died and, when she went to the deceased's house, she found a covered body with blood oozing out.

7. Elijah Chigiti Kiti (PW5 – Kiti), a neighbor of the deceased and the appellant was milking cows on 16th June, 2020 at 5 a.m. when he heard a voice calling for help. He flashed his torch and identified Luvuno who informed him that:

> " ... while in company of the accused he started stressing the grandmother. She wanted me to go and assist. She insisted that I go and provide help. I had to wake up Timothy Kithi and Kigula Rodgers who went to find out what was the problem. Luvuno remained with us. She was very apprehensive of going back to the grandmother's house. They took about 40-45 metres (sic). They came back and told me there is nothing unusually at the house of Luvuno's
>
> ..."

8. He visited the home of the deceased and found the appellant sitting at a veranda and according to him (Kiti) there was nothing unusual in that home. In the morning he heard screams from the deceased's compound and when he went there he found the deceased dead. He stated in cross-emanation:

> "... Luvuno is my cousin. She came from the accused's house. It was 5.00 a.m. She did not explain the nature of the disturbance against the deceased. Rodgers and Timothy went to

> the accused's home but came back with no information. I do not know what happened to the grandmother deceased ..."

9. Rodgers Kiti Mbura (PW6 – Mbura), a grandson to the deceased, was asleep on 16th June, 2018 when he was awoken by one Timothy Kithi. He did not know what had happened.

10. Dr. Shella Mikary of Kilifi County Hospital conducted post mortem on the body of the deceased on 21st June, 2018. She found a deep cut on parietal region; a skull fracture and a cut on the anterior aspect of the skull.

11. The last prosecution witness was Corporal John Masi of Kilifi District Criminal Investigations office. He was directed to conduct investigations in the murder case and, according to him the Officer Commanding Kilifi Police Station had already arrested three suspects: Thomas Kalume, Pauline Baya and Priscilla Jira (PW1). He visited the scene and drew a sketch plan, which he produced in evidence. He testified that the decided to charge the appellant:

> "... because of the background information conflict with family. It was all about witchcraft. The deceased had bewitched him. I feel that this was malice. There was circumstantial evidence that the accrued person killed the grandmother. He is the one who killed the deceased ..."

12. At the case of the prosecution case, the appellant was put on his defence and, in an unsworn statement, he denied killing the deceased, explaining that he had attended the funeral at Tezo on 15th June, 2018 where he took a lot of alcohol. On returning home, he was let in by Luvuno and they went to visit the deceased, who complained of pain in the chest and, when he massaged her to ease the pain, she complained that the massage was painful. He left her house and left her (deceased) with Luvuno. When he went outside for fresh air, he met Kiti (PW5), who entered the deceased's house. Kiti re-emerged to claim that he had found the deceased dead. They visited the house and confirmed the information.

13. As we have seen, the appellant was convicted and sentenced.

14. In home-made "Memorandum Grounds of Appeal", the appellant states that he pleaded not guilty to the charge; that he was not identified as the perpetrator of the offence; that electricity light at the house of the deceased was not sufficient to allow identification; that the Judge did not consider that he (the appellant) had left Luvuno with the deceased; that post-mortem report did not link him with the murder; that *actus reas* and *mens rea* were not proved as required in law; that no murder weapon was produced; that malice aforethought was not proved and, finally, that his defence was not considered.

15. When the appeal came up for hearing on a virtual platform on 25th October, 2023 that appellant appeared from Manyani prison, and was represented by learned counsel Miss Nzamba who appeared with Mr. Muriithi. The office of Director of Public Prosecutions was represented by learned counsel Miss Nyawinda. Both sides had filed written submissions and did not wish to highlight the same, but left the whole matter to us.

16. The appellant, in his written submission collapse grounds of appeal to two themes:

    i. whether the trial court applied the law on circumstantial evidence correctly, and

    ii. whether the court correctly applied the concept of "last seen with".

17. On circumstantial evidence the appellant cites the case of *Kipkering Arap Koske & Another v Republic* [1949] EACA 135 where it was held:

> "In order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt."

18. He also cited the case of *Abanga alias_ Onyango_ v_ Republic* _ Criminal Case No. 32 of 1990 where it was held by this Court on the same issue of circumstantial evidence:

> "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."

19. It is submitted for the appellant that the trial court erred in dealing with the evidence of Luvuno without evaluating the evidence of the investigating officer who had testified that Luvuno had been arrested as a suspect in the case, and that the said officer did not explain to the trial court when Luvuno had ceased to being a suspect and became the star prosecution witness. Further, that the arresting officer and the officers who received the first report were not called to clarify that information. It is submitted that, apart from the investigation's officer who alleged witchcraft, none of the other witnesses had testified to the existence of witchcraft, or any conflict in the family of the deceased.

20. On the "last seen with" doctrine, it is submitted for the appellant that there was considerable time gap between when the appellant was last seen with the deceased and when the deceased's body was discovered, which time gap had not been explained by the prosecution.

21. The respondent gives facts of the case before the trial Judge and submits that the case was based on circumstantial evidence. The same cases cited by the appellant are relied on, and it is submitted by the respondent that the trial Judge was right to find that evidence produced by the prosecution proved by circumstantial evidence that the appellant killed the deceased. It is further submitted on the doctrine of last seen that the appellant was the last person to be seen with the deceased before her death, and that he had not given any plausible explanation as to how she met her death.

22. It is submitted by the respondent on the issue of identification that Luvuno had identified the appellant when she opened the door for him and that Kiti (PW5) had also identified the appellant when he flashed his torch.

23. On failure to produce the murder weapon, the respondent cites the case of *Kyalo Kalani_ v_ Republic* _ [2013] eKLR for the proposition that failure to produce the murder weapon is not fatal to the prosecution case.

24. It is submitted that the prosecution proved the case of murder beyond reasonable doubt, and that we should dismiss the appeal.

25. We have considered the whole record, submissions made by both sides and the law.

26. Section 203 of the *Penal Code* defines the offence of murder and, to prove that offence, the prosecution must prove that there was malice aforethought in committing that offence. Section 206 of the said Code provides for the presumption of malice aforethought thus:

> 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
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> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

27. The trial Judge analysed the circumstantial evidence in the case and, on analyzing the testimony of Luvuno, concluded that:

> "... In the end, (PW3), (PW5) and (PW6) evidence pointed to the fact a deceased person who had been fatally assaulted it followed from what (PW1) said that the deceased and accused person were at the same scene in which her body was discovered bearing multiple injuries to the head ..."

28. As we saw earlier in this Judgment Luvuno testified that upon opening the door for the appellant he (the appellant) went to talk to the deceased and she (Luvuno) retired to her room in the same house. For some unexplained reason, she then left her room and went to sleep at a neighbour's, and it is then that she heard screams from the deceased's house. Luvuno did not go out to investigate why there were screams her explanation being that she was tired. She did not visit the deceased's house until the following morning when she found many people gathered and the deceased dead.

29. Then there was the evidence of Kiti who testified that whole milking cows he heard some noise and, when he flashed his torch, he saw Luvuno, a person who he knew before (they were relatives).

30. The investigation's officer testified that Luvuno had been arrested as a suspect in the case. This witness did not explain what factors led to Luvuno being released from custody and being made a prime witness by the prosecution. The situation was not helped by the prosecution which did not call the officer who first received the report, or the officer who arrested the appellant and Luvuno.

31. The appellant testified in defence that he was drunk on the material night; that he was in the company of the deceased and Luvuno; and that he had left the latter with the deceased when he went out to get some fresh air. This theory on whether Luvuno could have been involved in committing the offence was no pursued in any way, and was not considered by the Judge. There was in fact testimony by Luvuno

herself that she had to be locked in a room for her own safety. There was no explanation why she thought that her safety was at stake.

32. The allegation that the deceased had bewitched the appellant was made by the investigation's officer, and there was no such testimony by any other prosecution witness. There was testimony by prosecution witnesses that there was no bad blood in the family of the deceased; and that there was no conflict on any issue.

33. There were many unanswered questions in the case, and it seems to us that the investigating officer decided to charge the appellant with the offence on mere suspicion that he could have murdered the deceased. As was held in the case of *Joan Chebii Sawe v Republic* [2003] eKLR:

> "We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

34. The conviction of the appellant was not safe in those circumstances and we therefore find that there is merit in this appeal. We hereby quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR