Ng'ang'a v Republic (Criminal Appeal E076 of 2023)
[2024] KECA 238 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 238 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E076 OF 2023

MSA MAKHANDIA, A ALI-ARONI & JM MATIVO, JJA

MARCH 8, 2024

BETWEEN

MARY NJOKI NG'ANG'A ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mutuku, J.) dated 13th November, 2018 in Nairobi HCCRA No. 11 of 2015)

JUDGMENT

1. This appeal is from the judgment of Mutuku, J. delivered on 13th November 2018 in Nairobi High Court Criminal Case Number 11 of 2015 in which the learned Judge convicted the appellant for the offence of murder and subsequently, sentenced her to death.

2. This is therefore a first appeal. In the case of Okeno vs. Republic [1972] EA 32, the jurisdiction of the Court on first appeal was delineated as follows:

> " 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 vs. 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 vs. 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 vs. Sunday Post, [1958] E.A. 424."

3. We shall bear in mind this remit as we consider this appeal. The appellant was charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the information were that on the night of 14th and 15th January 2015, at Marenga Road Kangemi in Nairobi County, jointly with others not before the court, murdered James Ng'ang'a Ritho, "the deceased".

4. The appellant denied the offence and her trial thereafter ensued in earnest. The prosecution called a total of twelve witnesses to prove its case against the appellant. From the evidence, Mary Njoki Ng'ang'a, the appellant, and the deceased, had been married for a period of 30 years. Both the deceased and the appellant lived together and were the only two people in their five-bedroomed house located along Marenga Road in Kangemi, Nairobi on the material day. Their son George Ritho Ng'ang'a (PW1) and his wife Jane Wambui Njuguna (PW5) lived a few metres away. On the evening of 14th January 2015, PW1 arrived home after work, had dinner with his family, and decided to check on his parents on his way to close his business. After staying with them for about 10 minutes, he left at about 8.00 p.m. telling the appellant, that he would pass by later to collect milk as was his daily routine. At about 11. 00 p.m., he passed by and found his parents' kitchen lights on. He knocked on the kitchen window and the appellant gave him milk and he left. At around 3.45 am that night as PW1 and PW5 were asleep, the appellant came calling. She was crying and told them that they had been attacked by three people who had kidnapped the deceased. PW1 and PW5 went to the house and did not find the deceased. PW1 contacted his uncles Peter Njenga Ritho, PW4, and George Hiro Ritho, PW7, and they all went to Kabete Police Station and reported the incident. Police officers immediately commenced investigations. In the course of one of their visits to the house, the police noted blood stains in the compound of the deceased near the gate and in the master bedroom. The master bedroom had blood spatter, the cabinet and the mosquito net, also had bloodstains. The police noted that the mattress in the master bedroom looked new and decided to search for the mattress that could have been on that bed prior. PW5, in the company of another relative, Lucy Nyambura found a bloodstained mattress in another room and showed it to the police. Bloodstains were also found on the foot of the bed after the police moved the bed from its original position. The evidence of PW3, PC Joseph Gathecha, the scenes of crime officer, confirmed that bloodstains were found in various parts of the bedroom aforesaid and the compound. He documented this evidence in the photographs that he took at the scene which he tendered in evidence.

5. The whereabouts of the deceased were still unknown. Police took about four hours combing the Kabete Campus Coffee Plantation looking for the deceased to no avail. Police officers thereafter, contacted other police stations, hospitals, and mortuaries in Nairobi and Thika in a bid to trace the deceased to no avail. The body of the deceased was subsequently found at Lukenya Quarry in Machakos County on the morning of 15th January 2015. Police at Athi River Police Station were informed of the deceased body and IP Lydia Mutinda, and PC Daniel Nyariki, visited the scene and moved the body to Machakos Hospital Mortuary. Led by SSP Joseph Ondoro (PW9) DCIO Dagoretti, police officers and relatives of the deceased travelled to Machakos Hospital Mortuary, and identified the body as that of the deceased. PW3 took photographs of the body which was later moved to Umash Funeral Home in Nairobi where the post-mortem was conducted by Dr. Peter Muriuki Ndegwa (PW2) on 21st January 2015 after it was identified to him by PW1 and George Hiro Ritho, PW7, son and brother of the deceased respectively. After police completed investigations, they concluded that there was sufficient evidence to support the information of murder against the appellant. They subsequently charged the appellant jointly with others, not before the court with the offence.

6. Put on her defence, the appellant in her unsworn evidence, denied killing the deceased. She stated that indeed on the material day, PW1 visited them in the evening before going to close his business and thereafter, passed by to collect milk. She stated that the deceased had gone to bed by the time

PW1 returned to collect the milk. However, as she went to bed she met a strange man on the stairs of their house who had covered his face, who immediately hit her on the chest and she fell screaming. The stranger then took her to the toilet and locked her therein whilst threatening to kill both the appellant and the deceased. He left her in the toilet but came back for her and took her to the bedroom where she found the deceased bleeding having been assaulted. The attackers continued to assault them demanding money. They were thereafter taken downstairs and bundled in the boot of a vehicle that had been parked outside and driven off. The vehicle stopped at a place called Welcome and the appellant was removed from the boot and left there while the deceased was taken away in the vehicle. She screamed for help and a man came by who escorted her home telling her not to report the matter to the police as yet but to wait in case the kidnappers called demanding some ransom. When she returned to the house, she went and told PW1 what had happened to her and the deceased. She testified further that after reporting the incident to the police, police officers later came to the house and found some bloodstains from the deceased's bleeding. They also found a mattress with bloodstains in another room where the deceased had been taken while the attackers were looking for money. She vehemently denied killing the deceased.

7. The trial court having considered both the prosecution and appellant's case, found that the prosecution had proved all the ingredients of the offence of murder beyond reasonable doubt against the appellant, convicted her, and sentenced her to death.

8. The appellant being dissatisfied with the conviction and sentence by the trial court, appealed to this Court against both conviction and sentence on three grounds; that the trial court erred in law and in fact by convicting the appellant when there was no sufficient evidence to warrant the conviction; finding that the prosecution had proved its case beyond reasonable doubt; and lastly, relying on circumstantial evidence and mere suspicion to convict her.

9. The appellant through Mr. Muga, learned counsel, during the plenary hearing on a virtual platform, collapsed the grounds of appeal into one broad ground being, whether the prosecution proved its case against the appellant beyond reasonable doubt.

10. Counsel submitted that the key ingredients for the offence of murder were not proved. It was submitted that though the deceased's death was not in dispute, the prosecution, however, failed to prove that it was the appellant who caused the death of the deceased. That there were no eye witnesses to the offence, and thus, there was no tangible evidence connecting the appellant to the murder. Based on the evidence, one person could not have killed the deceased, tied him up, stuffed his body in bags, carried him downstairs, and transported him to Lukenya Quarry. It was further submitted that though the appellant was charged together with others, not before the court, it was only the appellant who was tried and convicted for the offence. That this demonstrated that the other persons not before the court, could have been the ones who committed the offence and not necessarily the appellant. Counsel further submitted that the items collected from the appellant and deceased's bedroom were taken to the Government Chemist Laboratory for DNA profiling and none of them connected her to the offence. In the premises, the prosecution did not prove its case against the appellant beyond reasonable doubt. Relying on the case of Republic vs. Benard Gachau [2021] eKLR, it was submitted that the prosecution did not prove malice aforethought as no motive for the offence was established and the conviction was based on mere suspicion and speculation.

11. It was submitted further, that the trial court relied on circumstantial evidence to convict the appellant, which however did not meet the threshold. Counsel relied on the cases of Martin Karugu Nganga vs. Republic [2020] eKLR and Republic vs. Anthony Wambua Willy [2021] eKLR, to submit that suspicion, however strong, cannot form a basis for inferring guilt.

12. The respondent through Mr. Okatch, learned prosecution counsel opposed the appeal and submitted that the appellant was placed at the scene of the crime, which fact she conceded to. This left no doubt that entry into the residence could only have been made either voluntarily or forcefully. Having inspected the house, the police never saw any signs of any forceful entry, meaning, therefore, that the appellant could have voluntarily and freely allowed into the house the alleged attackers. Counsel submitted further, that the law was clear on the last person seen with the deceased doctrine. The only person last seen with the deceased was the appellant and no one else, save for the strangers she brought on board claiming that they were the ones who attacked them. Therefore, the doctrine of the last person with, applied. We were urged in the circumstances, to dismiss the appeal in its entirety.

13. We have considered the material placed before us and the only issue commending itself for our determination is whether the circumstantial evidence adduced before the trial court was sufficient to convict the appellant. First off, the undisputed fact is that the evidence relied on in convicting the appellant in this case was purely circumstantial as none of the witnesses who testified ever saw how or by whose act the deceased met his death. It has been said that circumstantial evidence is perhaps very often the best evidence. However, it is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must satisfy itself that the circumstantial evidence points irresistibly to the accused as the perpetrator of the crime and that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. See Sawe vs. Republic [2003] KLR 364 and Ahamad Abolfathi Mohammed & Anor vs. Republic [2018] eKLR. So what were the pieces of circumstantial evidence linking the appellant to the offence? First, the appellant and the deceased lived in the house alone; second, she was the last person seen with the appellant; third, there were bloodstains in the house and inside the house; fourth, there had been attempts to clean the house of the bloodstains; fifth, the DNA profiling on the clothes of both clothes of the deceased and appellant's all showed that the blood stains belonged to the deceased. So that if the appellant was assaulted as she claimed in her evidence, why were the bloodstains not found on the dress she was wearing on the material night? Further, if they were bundled in the boot of the motor vehicle by the attackers and driven off as she claimed, surely her clothes would have been soiled by her blood and that of the deceased. Lastly, as the search for the deceased was ongoing, she is the one who suggested that the search be extended to Machakos County direction where the deceased body was eventually found.

14. After re-analyzing and re-evaluating the entire evidence, we are satisfied that the prosecution evidence though circumstantial was well articulated and pointed irresistibly to the appellant as the prime mover of the crime beyond reasonable doubt. There are no other co-existing circumstances, which weakened or destroyed the inference of guilt. See Sawe vs. Republic (supra).

15. How about the elements of the crime? In our view, all the elements of the offence underlying the provisions of section 203 of the Penal Code were proved by the prosecution. The appellant has conceded to the death of the deceased in her defence and submissions. That concession was buttressed by the evidence of PW1 and PW7 who identified the body of the deceased to PW2 for purposes of post-mortem. PW2 in his report concluded that the cause of death was head injury and manual ligature strangulation due to blunt force trauma.

16. Turning to the perpetrator of the crime, in as much as the evidence was largely circumstantial, the facts were known to the appellant. She had the right under section 111 (1) of the *Evidence Act* to explain when and how the deceased met his death. This is the doctrine of the last person seen. Generally, the doctrine of last seen places a legal obligation on the person last seen with a deceased individual to explain the events leading to death. Failure to provide a satisfactory explanation can lead to the inference that the accused person was responsible for the death. See Republic vs. EKK (2018) eKLR and Kimani vs. Republic.

17. It is not in doubt that the appellant and the deceased lived together in the house. Before the disappearance of the deceased, the appellant was the last person who was with him as confirmed by herself and the evidence of PW1. The claim that the attackers had been in the house for three days, is a cooked-up story that would not find any truth even within the dead. Why were they not noticed, when did she know they had been in the house for three days and why did she not even inform the ever-visiting son, PW1, or raise any sort of alarm? From the evidence of PW12, it is the appellant who suggested that they extend the search to Machakos County, which indeed yielded fruits as the deceased was found in that direction. Further, the appellant never explained the attempts to clean the blood in the house. If her story was true that the deceased had been hit and bled, then the blood ought to have been self-evident other than being discovered by eagle-eyed police investigators. Further, if indeed she was also assaulted as she claimed and bled how come the DNA on her clothing did not disclose her blood sample?

18. Section 111 reads:

    1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

    2. Nothing in this section shall - a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity." (emphasis ours)

    Further, the Supreme Court in Republic vs. Ahmad Abolfathi Mohammed and Another - Petition No. 38 of 2018 stated as follows with regard to section 111 of the *Evidence Act*:

    > " Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction."

19. We are satisfied that the blood stains found in the bedroom, on the mosquito net, and the changed mattress, on the deceased's clothes found in the quarry where the body was found, were all facts within the appellant's knowledge. Having chosen to give a hollow and inexplicable explanation concerning those proven facts, we agree with the trial court that the only inference that the trial court could make was that the appellant was the one who committed the acts that led to the death of the deceased in the company of others. It matters not that the others who participated in the crime alongside the appellant were not brought to book. This does not absolve the appellant of the crime.

20. Was malice aforethought proved? The ingredients of malice aforethought are found in section of 206 of the Penal Code thus:

> "(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."

21. It is sufficient to say that the mental element required by section 206 above can be equated to broad guidelines set out in the case of Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:

> "The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."

22. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered whether the appellant foresaw the risk of the voluntary act he was about to carry out against the deceased. Whether the appellant was able to foresee the real or substantial risk and the consequences of targeting the part of the body that may result in the deceased suffering grievous harm. A similar statement of Law was made in the persuasive authority of S. vs. Sigwahla 1967 4 SA 566 in which the court stated:

> "The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as a dolus eventualis as distinct from dolus directus."

23. In this case, the fact that the deceased was pumpozzled to death, his body cut up in pieces and stuffed in bags, and transported to Athi River where it was dumped and later found can draw only one inference, that this was premeditated murder. There is no doubt just like it was held by the trial court that malice aforethought was thereby proved to the required standard.

24. We are satisfied just like the trial court that the circumstantial evidence together with the invocation of the doctrine of the last person seen pointed irresistibly to the appellant as the prime mover of the crime. It cannot therefore be said that the conviction of the appellant was based on mere suspicion and speculation.

25. The trial court on the aspect of sentence stated:

> "This court also called for a pre-sentencing report and victim impact statement from the probation office. The same was filed in court on 31st October 2018. It is detailed. I have carefully read it. In it the accused who was interviewed at length still denies taking part in her late husband's death and states that she lived peacefully with her husband. Her family is supportive of her and speak well of her. However, her late husband's family has a different view of the matter. They still have not come to terms with the death of the deceased. From the victim impact statement, it seems not true the assertion that the family has forgiven the accused.
>
> I did explain in detail the gruesome manner in which James Ng'ang'a Ritho was killed and his body suffered indignity in the way it was stuffed inside gunny bags. I have considered that the accused does not have previous criminal records. I have considered her mitigation through her defense counsel. I find her mitigation that she is very remorseful contradictory to her statement during the interview by the probation officer where she maintained her denial that she has nothing to do with the death of her later husband. In other words, in her interview as reported by the probation officer she negates her statement in her mitigation that she was remorseful. Having taken into account all the circumstances surrounding this case, the mitigation and the report containing the victim impact statement, it is my considered view that justice in this case will be served by sentencing the accused Mary Njoki Ng'ang'a, which I hereby do, to death this being the optimum penalty allowed by the law in respect of the crime of murder under section 204 of the Penal Code. She shall suffer death in the manner authorized by the law."

The appellant was sentenced to death because the court was of the view that was the only sentence available for that offence. In Francis Muruatetu & Another vs. Republic [2017] eKLR, the Supreme Court of Kenya outlawed the mandatory nature of death sentence. Courts are now at liberty to impose any other lawful sentence apart from death.

26. From the ruling of the trial court on sentence, it is apparent that it considered mitigating factors. The ruling spoke to the gruesomeness of the murder, the contradictory stands of the appellant from the pre-sentencing report and the mitigation in court, and the fact that she was a first offender, and not remorseful at all.

27. However, based on the current development of the law and in tandem with Muruatetu & Another vs. Republic (supra), we are persuaded to disturb the sentence. In the ultimate, the appellant's conviction for the offence of murder was safe, and we uphold it. We, however, allow the appeal against the sentence and set it aside, and substitute therefor with a sentence of thirty-five (35) years' imprisonment to run from the date of the conviction and sentence by the High Court.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR