Olum v Republic (Criminal Appeal 225 of 2018)
[2024] KECA 386 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 386 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 225 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 12, 2024

BETWEEN

DANIEL AYIETA OLUM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Homabay (D. S. Majanja, J.) dated 1st December 2015 in HCCRA 42 of 2013))

JUDGMENT

1. Before us is a first appeal on both conviction and sentence.

   David Kwabi Olum and Daniel Ayieta Olum were charged before the High Court in Criminal Case No. 42 of 2013 with the offence of the murder of Elly Akida Asawa contrary to section 203 as read with section 204 of the Penal Code. The incident occurred on 30th April, 2013 at Ramula village, Tonga sublocation, in Suba District within Homa Bay County.

2. Upon entering a plea of "Not Guilty", the trial proceeded to a hearing where the prosecution called thirteen (13) witnesses in support of its case; and the appellant and his brother gave unsworn evidence. In a judgment dated and delivered on 1st December, 2015, the trial court (Majanja, J.) found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant, Daniel, as charged whereas his brother cum co-accused, David Kwabi Olum was acquitted. The learned Judge, then, sentenced him to suffer death as provided for under section 204 of the Penal Code.

3. The appellant being dissatisfied with the outcome, has appealed to this Court. He has listed two grounds of appeal as follows:

4. This being a first appeal, we are obligated to re-evaluate the evidence, assess it, weigh it as a whole and reach our own independent conclusions [See Okeno vs. Republic [1972] EA 32].

5. In brief, the prosecution's case was that the deceased, his wife, Rebecca Anyango Akida(PW1), and their 24 year old grandson, Calvince Otieno (PW2), (who worked as a bursar at Gembe Secondary School) were at home taking tea on the night of 30th April 2013 when, at around 9.00p.m, PW2 heard someone hit the iron sheet roof. The deceased, who had also heard the noise, opted to go outside and check what was causing the noise. He took a torch and panga; went outside, but he did not find anything, so he got back into the house. A few minutes later he heard the kitchen door being shaken, He went out again; then PW1 heard the deceased screaming. She, too, begun screaming; and as she walked to go outside and find out what was happening to her husband, PW2 pulled her back into the house.

6. On cross examination, PW1 told the trial court that the deceased and the appellant's father, one Mzee Olum, had a dispute over a land parcel which had culminated in Criminal Case No. 2684 of 2011.

7. When PW2 heard the screams, he opened the door, flashed his torch and spotted one tattooed person who was right in front of him, together with two other people whom he could not see clearly. He feared to go outside, as the person he saw tried to cut him with a panga. Later, PW1 and PW2 went outside and found the deceased lying in front of the door, in a pool of blood, his throat having been slit., He also had a cut on the forehead and ear. PW2 was unable to fully close the door as a bucket lid had fallen there, so he grabbed PW1, and pushed her to the bedroom, where they locked themselves in, and raised an alarm.

8. PW2 informed his father, Robert Odhiambo Akinda(PW3), who was in Magunga, about the incident. Shortly, police officers arrived at the scene. PW2 had never seen the appellant before the incident, but he described to the police as well as those who responded to their distress calls, the person he had seen outside the door. Later, he was called to the police station where an identification parade was conducted, and he was able to pick out the 1st accused (who was acquitted) as the person on whose face he beamed his torch, and saw on the fateful night. On reexamination, he testified as follows:

> " When I opened the door, I saw three people. I described the one I identified as having a black jacket and black T-shirt. It was at night and I could not see clearly the colour. I could not see clearly. Blue and black may look the same at night. What I saw was blackish in colour. The person was wearing darkish jacket. The person was like a ninja. He had long hair and he had black things on the face. It took me 2 to 3 seconds to make my observation. He was attacking me. I closed the door because he was attacking me. By saying he was "like a ninja like the ones you see in films" I meant that his face was brown but he had dark marks on the face."

9. PW3 told the police that he knew someone who fitted that description, so police requested him to accompany them as they mounted a search for the attackers. At Sori, the officers stopped a minibus, searched; and, from the description PW2 had given, PW3 spotted the appellant's co-accused, whom he knew as a neighbour; and their fathers had a long standing land dispute; culminating in a criminal case against the appellant's coaccused and appellant's late father.

10. George Otieno Ndire, PW4, a police officer who visited the scene of the killing, confirmed finding the deceased lying outside his house with deep cuts on the neck and the right side of the head. PW1 told him she suspected Mzee Olum had a hand in the incident. PW2 told them that he had seen the assailant's face, and knowing that vehicles leave Magunga area from midnight to early daybreak, in a bid to cover the possible escape routes, his search for the attackers led him to lay ambush along SoriHomabay road, where upon stopping a vehicle, the appellant was identified by PW3. A bus conductor, Charles Kiboi Masara, PW7 who worked on the Kisumu-Nyandiwa route identified the appellant's co-accused as the passenger who had boarded a minibus and who was arrested by the police on claims of killing someone, he noted that the appellant had dreadlocks and an earring.

11. Inspector Ben Kiplagat Biwott, PW5, of Mbita police station conducted the identification parade on 3rd August 2013 at around 9.00 a.m and after the appellant's dreadlocked coaccused had chosen his position No. 3 on the line, PW2 picked him out by touching him; the appellant did not object or make any comments on the process.

12. The post-mortem performed by Dr. Julius Ondigo (PW6) revealed that the deceased had a 10 cm deep cut on the front of the skull with a fracture and a blood clot, a cut extending from the right side of the mouth to the right ear which had been sliced into two; that the cut had gone through the mandible, fractured it and dislodged the right molar and pre-molar; a deep cut on the upper neck region which sliced off the carotidal artery and jugular, the cervical spine was fractured and the spinal cord was dislodged. The cause of death was massive intracerebral bleeding and massive blood loss from the severed blood vessels on the neck; and that the injuries had been caused by a sharp object.

13. Blood samples taken from the appellant, his co-accused, and the deceased; a pair of jeans trouser, lightly stained with blood of human origin, which the appellant was wearing, as well as his co-accused's clothings were submitted to the Government Chemist for examination. A government analyst Caroline Njoki (PW9), conducted a DNA analysis of all the items stained with blood, where the blood found on the pair of jeans short which the appellant wore at the time of his arrest, and the panga which was recovered from his mother's house matched that of the deceased, Elly Akida.

14. Sergeant Robert Mutai (PW12), who formed part of the investigations team, established that there had been a land dispute between the late Mzee Olum, the deceased, and one Marigot Akondo; that Olum, the appellant's father had been killed because of the dispute, and there was a pending murder case in that regard; that upon getting back to the police station at 12pm, he found the appellant already in the cells wearing the blood-stained wet pair of shorts. It was at that point that the shorts were taken away from the appellant, to be taken for examination.

15. The appellant, in his unsworn testimony, told the trial court that he was a student at Ramula Primary School. He described his activities of 30th April 2013 which basically included leaving for school early in the morning; and getting back home at 5pm. At around 7.00pm, after taking the animals to their paddock, he did his studies up to about 8.30pm; went for supper at his mother's house then slept until about 1.00am when he went outside for a short call; got back to sleep. At about 5.00am a knock by the area chief woke him up. He was arrested after being asked a few questions. On the way to the police station, just near Ramula Primary school, it started raining heavily. They found a police Land Cruiser and upon being ordered to get in, he saw a dead body soaked in blood. He was ordered to sit on the floor of the vehicle, and that is how he ended up with blood stains on his shorts. At the police station he found his co-accused who did not have any clothes, and needed to go to hospital; being his older brother, he gave his clothes to his brother, and never got them back; and his mother had to bring him other clothes.

16. The learned judge in his judgment had no doubt that the deceased's death was due to massive blood loss from injuries inflicted by a sharp object; that although the identification was not watertight since it was solely on the evidence of PW2 alone, nonetheless the circumstantial evidence showed that the deceased's blood was found on the appellant's pair of shorts; and the panga which had been recovered from their homestead connected him to the death of the deceased; and the appellant owed an evidential burden to provide a reasonable explanation of how the deceased blood was found on his clothing.

17. The appellant's explanation that his clothes got stained due to contact with the body which was carried in the same vehicle that police put him upon arrest was rejected. The learned judge thus found that there was no other explanation on how the deceased blood was present on the appellant's short, other than to draw an inference that the appellant was the person in the company of others not before the

court, who had attacked the deceased on the night of 20th April 2013. He was accordingly convicted of the offence of murder and sentenced to death.

18. Aggrieved by the decision of the learned judge, the appellant has filed this appeal before us on the grounds that the learned judge misdirected himself on matters of the law and fact; the decision was premised on purely circumstantial evidence without narrowly examining the evidence of all witnesses; that the case was decided against the weight of evidence; and the learned judge erred in holding that the death sentence was mandatory, with no discretion available to him to pass any other sentence.

19. We heard the appeal on the virtual platform. Mr. G.S Okoth counsel for the appellant was present whereas Mr. Okango was present on behalf of the State. The appellant's Counsel faulted the trial court's reliance on purely circumstantial evidence which he described as insufficient. In support of this position the appellants counsel referred to Joan Chebichii Arap Koskei & Republic [2003] eKLR, which referred to R. vs. Kipkering arap Koske & Another 16 EACA 135 where it was stated that for the justification of 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. We were called upon to evaluate the evidence of PW1 who never saw who killed her husband and against the background that Calvince never told her who the three people he had seen were since it was dark outside; he could not have identified them. Further, that there was contradictory evidence regarding how the appellant was found, PW3 had testified that he was asked to take the officers to Olum's home where they found the appellant wearing a jeans short and a T-shirt which were wet but that was contradicted by PW4 who testified that he was not with PW3 at the time of arrest of the appellant herein.

20. On the evidence collected, the appellant faults the 2nd visit by PW12, Sergent Robert Mutai, who later visited their homestead on the 1st May 2023 in his absence; and that in violation of Article 50(4) of *the Constitution* of Kenya, improperly collected a panga which was produced as evidence, an act which is contrary to article 50(4) of *the Constitution*.

21. While submitting on the mandatory nature of the death sentence, counsel urged us to find that it is unconstitutional on the strength of the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR; this Court's decisions in Chai vs. Republic (Criminal Appeal No. 30 of 2020 [2022] KECA 495 (KLR)(1APRIL 2022) and Geoffrey Ngotho Mutiso vs. Republic [2010] eKLR. He faulted the strict application of the law by the learned judge and urged us that should the circumstantial evidence be upheld then the death sentence be substituted with a sentence of 10 years.

22. The appeal was opposed on grounds that the appellant was convicted based on the strong forensic evidence which was not rebutted. The appellant had been found in his house wearing blue jeans covered in blood and DNA analysis showed the blood matched that of the deceased. The appellant failed to give any explanation and therefore the learned judge was correct when he placed him at the scene of the accident.

23. In addition to the above, counsel urged us to find that the appellant did not at any time come into contact with the deceased body in the vehicle to have his blue jeans soaked in blood. When he was arrested from his home the appellant was taken to Magunga police station whereas some police officers, the OCS, and PW3 went back to the deceased homestead and took him to St. Camilus mortuary.

24. Further, that contrary to the appellant's submission the panga was recovered at his mother's house after a search was done in the presence of his brother Philip Olum, who showed the officers around the homestead. We are urged to find that the DNA blood sample on the appellant's jeans implicated him by matching the blood of the deceased.

25. Finally, regarding the unconstitutionality of the mandatory life sentence, counsel conceded that the court failed to exercise its discretion and urged us to set aside the mandatory death sentence. However, on the number of years, we were urged to consider the appellant's mitigation, the circumstances, and the gravity of the crime; that the deceased was an old man whose death was a result of injuries inflicted on him, and therefore a sentence of 25 years would suffice.

26. We have considered the evidence, the judgment of the High Court, the memorandum of appeal by the appellant, the submissions by both parties, and the authorities cited. This is in line with the principles enunciated in the Okeno vs. R [1972] EA 32, regarding our role as a first appellate court.

27. We agree with the trial court's finding that there is no dispute on the deceased's death which was proved by the post-mortem report. The question we need to ask is whether the appellant was responsible for the death of the deceased and whether the death of deceased was caused by an unlawful act or omission by the appellant. We shall re-analyse the evidence on record. From what was tendered as evidence in court it is clear that none of the prosecution witnesses saw the appellant commit any act or omission that would connect him with the murder. Thus, there was no direct evidence linking the appellant to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence.

28. In Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR, this Court stated as follows on reliance on circumstantial evidence:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from the 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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R. Taylor, Weaver and Donvan [1928] Cr. App. R 21:- It has been said that the evidence against the applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

29. In the decision cited above, Ahamad Abofathi(supra), this Court set out the test to be applied in considering whether evidence placed before a court can support a conviction. The court stated:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the subject person, and no other person, as the perpetrator of the offence. In Abunga alias Onyango vs. R, Cri. App. No. 32 of 1990, this court set out the conditions as follows:
>
> 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 the guilt of the subject;
>
> iii. The circumstances taken cumulatively should from a chain within 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."

30. Further in Sawe vs. Republic [2003] KLR 364, this court amplified on the above as:

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

31. The appellant argued that there were co-existing circumstances that weakened the chain of circumstances relied on by the prosecution particularly with regard to identification. We take note that the trial court did not rely on identification evidence at all, in fact the conviction was based purely on circumstantial evidence and we do not find it necessary to dwell on the issue of identification.

32. Having noted that none of the witnesses saw the appellant commit the offence, then the only circumstantial evidence tending to link the appellant to the crime was that of forensic evidence adduced in court. The wet blood-stained pair of jeans shorts that the appellant was found wearing, and the panga recovered at his mother's home. PW12 had noted some white dust on the 1st accused's jacket, and that the wall of the deceased home between the kitchen and house had some white substance; he scratched some of the dust; labelled it; and forwarded it to the government chemist, but it was not tested.

33. Did the appellant rebut the forensic evidence, since he is the person who wore the clothes? We acknowledge that the burden of proof is and has always been on the prosecution, however, there are circumstances when the burden of proof shifts to the accused person as recognized under Section 111(1) of the *Evidence Act* that provides as follows:

i. 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 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 of the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence;

34. The appellant maintained that when he got into the vehicle he found a dead blood-soaked body and he got his shorts soaked since he sat on the floor. Does this statement amount to an acceptable explanation? The evidence of PW1, as corroborated by PW3 and PW4, was that the deceased was taken to the mortuary in the morning at 6.00am. The learned trial judge noted that:

> " It is clear from the evidence that DW2 was arrested while wearing wet jean shorts. He was taken to the police station by PW 8 while the body of the deceased was still at the Akida homestead awaiting Scenes of Crime Officers from Homa Bay. The deceased body was never taken back to the police station but was taken directly to St. Camilus Mortuary. I therefore reject DW2's explanation that the jeans shorts were contaminated with the deceased's blood while he was being taken to the police station in the police vehicle. At no time did DW2 come into contact with the deceased's body after the incident had taken place. By the time he was

being arrested and taken to the police station, the deceased's body was still in situ. I also find that by the time he was arrested he was still wearing the jean shorts that had the deceased's blood. I am therefore satisfied that the chain of custody of evidence established that indeed DW2's clothes were stained with blood from the deceased. The deceased blood cannot be explained in any other way other than the fact that he was present when the deceased was murdered."

35. Do the circumstances presented have a definite tendency unerringly pointing towards the guilt of the appellant; do the circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and not his co-accused who was described, and identified by a witness?

36. According to the appellant, eight police officers, the chief, and PW3 woke him up at 5 a.m, questioned him, searched the house, walked him around the compound in the rain, took him to his mother's kitchen where they found his 13-year-old cousin, before taking him to the police station. Was any evidence led at the trial to suggest that the two separate police teams ended up meeting after leaving the home? The evidence of PW1 was that the deceased was taken to the mortuary in the morning at 6.00 a.m; PW3 in his evidence stated that he took the police to the Olum's family homestead. Later they waited for the arrival of the crime officers from Homa Bay who left at 5. 00a.m and thereafter the body of the deceased was taken to St.Camilus mortuary. This was corroborated by PW4 who arrested the appellant when he confirmed to the court that after arresting the appellant herein, some officers went back to Maguga police station while he went back to the deceased home to escort the body to the mortuary.

37. PW8 confirmed to the court that he escorted the appellant to the police station upon his arrest. The evidence of these witnesses is consistent that the body was escorted in the morning and therefore there is no room to make assumption that the appellant was taken to the police station in the same vehicle that was used to transport the deceased's body.

38. This evidence was corroborated by PW12 that when the other officer went to trace and find the suspects, he was left at the scene of the crime, and in the morning, he took the body to St. Camilus mortuary accompanied by PW3, Inspector Kibet and a relative. This piece of evidence contradicts the appellant's defence that the blood on his short was a result of the deceased blood when he was asked to enter the vehicle carrying the deceased. Later when PW12 went to the station, he saw that the appellant's clothes were blood stained and it is this that prompted him to revisit the appellant's home.

39. In addition to this, the panga that was recovered was found to have blood stains, and after samples were subjected to analysis, the blood was found to match that of the deceased. There is no other explanation, other than that the appellant used the panga to cut the deceased, and washed himself while wearing the jeans short, no wonder they were wet yet he was wearing them and hid the panga which was recovered later. There being no other evidence in conflict with the expert witness's opinion we cannot see any other basis upon which to reject her conclusion. Upon analyzing and evaluating afresh this issue, we reject the appellant's explanation just as the learned trial judge did. We concur with the learned judge's finding that at no time did the appellant come into contact with the deceased blood. We find and hold that the circumstantial evidence leads to the irresistible conclusion that the appellant was not only present when the deceased was murdered, but also participated in the act or omission that caused the death of the deceased.

40. In regard to the appellant's argument that the manner in which the panga was collected violated his fundamental rights under Article 50 of *the Constitution* of Kenya, we take note of the evidence that the appellant's younger brother Phillip Olum was present when police officers visited the home, and

the unrebutted evidence was that later when the mother arrived home, she was uncooperative and after speaking in dholuo, the brother refused to cooperate with the police. In our considered view, the admission of this evidence and the manner in which it was obtained did not occasion any prejudice to the appellant. The only plausible explanation, as the trial court rightly found was that the chain of events in their totality reasonably pointed to the participation of the appellant in the deceased's demise. Consequently, we find that the conviction was safe and is upheld.

41. Turning to the ground on the sentence, counsel for the appellant argued that the position taken by the trial court that there was only one mandatory sentence for the offence of murder, thus failing to exercise his discretion, prejudiced the appellant, resulting in a harsh sentence. We were urged to be guided by the Supreme Court's decision in Muruatetu II.

42. Counsel for the State concurred with this argument stating that the learned judge failed to exercise his discretion and urged us to set aside the mandatory death sentence and substitute it with a determinate term sentence.

Section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and whilst section 204 provides a death sentence upon conviction. In the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, commonly known as Muruatetu I, the Supreme Court has given a reprieve to persons convicted of murder by giving the sentencing court discretion on the nature of penalty to mete holding that:

> " section 204 of the penal code deprives the court of the use of judicial discretion in a matter of life and death, which can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of a fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right."

We a take note that the Supreme Court in Francis Karioko Muruatetu & Another v Republic (Supra) pointed out that the mandatory nature of the death penalty prescribed in section 204 of the Penal Code for the offence of murder is unconstitutional to the extent that it takes away the discretion of a sentencing court.

43. We have already considered the severity of the offence committed by the appellant herein and based on Muruatetu jurisprudence, we agree that the death sentence is one for setting aside; which we hereby do; and substitute it with a term sentence of thirty years imprisonment. We take note that the appellant had been in custody from the date he was arrested on the 1st April, 2013 and has remained incarcerated to date. By dint of section 333(2) of the Criminal Procedure Code, the imprisonment term shall be computed to begin running from that date. The appeal thus partially succeeds on sentence alone.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR