



**Charo & another v Republic (Criminal Appeal 4 of 2021)
[2024] KECA 558 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 558 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 4 OF 2021
JW LESSIT, PM GACHOKA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

RAMADHAN KAZUNGU CHARO 1ST APPELLANT

KATANA NZAI KOMBE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 18th December 2020 in H.C.CR. Case No. 10 of 2018.)

JUDGMENT

1. Ramadhan Kazungu Charo and Katana Nzai Kombe, the appellants in this appeal were charged jointly with one count of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that the appellants, on night of 29th and 30th June 2018 at Kakoneni Village, Kakoneni sub-location, Jilore Location in Lango Baya Division, Malindi sub-county in Kilifi County jointly murdered Bidii Charo Iha.

The Prosecution Case

2. The prosecution called four witnesses. Francis Joseph Karisa PW1, the deceased's stepbrother testified that he left the deceased in his home at about 10 p.m. on the 29th June 2018, to look for food. He returned at 11 p.m. but did not find the deceased. He then returned a call from Sendeya, the clan elder who told him that the deceased had been attacked and was at his home. PW1 proceeded to Sendeya's house where he found the deceased lying on the ground holding his left hand. The two appellants were also there with the wife and mother of the 2nd appellant. He observed that the deceased had suffered serious injuries on the head, face and back. He said that the deceased told him that it was the 1st appellant who assaulted him and even showed him the injuries he inflicted on him.



3. PW1 said that he was assisted by one Pastor Henry and his other brother, Thoya Ika, PW2 whom he summoned through phone, to assist them take the deceased to the hospital. He said that they left the deceased in hospital but that no sooner had they arrived at home they were summoned back to the hospital where they were told the deceased had died. At the same time PW1 said that the deceased was treated and released to go home.
4. PW2's evidence was that on it was on 30th June 2018, when he received a phone call from one Joseph Karisa, reporting the assault on the deceased. He said that he left for the police station accompanied by his wife, Rehema. That on arrival there he found the appellants writing a statement. The deceased was on his own and had a cut on his head. He said that he and the Pastor escorted the deceased to hospital and then took him back home. PW2 also said that the deceased mentioned to him that the appellants were involved in assaulting him.
5. Kahaso Nyanje, PW3 was the father of the deceased. His evidence was that on 29th June 2018, he was with the deceased when at around 8 p.m. he stepped out and that the deceased returned in the morning hours with injuries on his body. He stated that the deceased told him that he had been assaulted by Katana and Rama, the appellants, who were their neighbours. He said that PW2 rushed the deceased to hospital with injuries all over his body. That he was returned home and continued with his treatment and died while at home. It was PW3's evidence that the deceased had been summoned by the clan elder on the issue of referring to some people as witches but he did not go.
6. PW4, Thomas Simiyu, the investigating officer, stated that on 1st May 2018 at around 4 a.m., he was summoned by the report office and told to visit the scene of a murder incident which had been reported to the police as an assault. He said he went to the home of the deceased and found his body there, which he removed to the hospital mortuary. He stated that a postmortem was conducted on the body and according to the postmortem report, the deceased had suffered head injury which was the cause of his death. He said that the appellants were identified as the perpetrators. He stated that the clan elder refused to testify.

The appellants defence

7. In his defence, the 1st appellant denied committing the offence of murder. He stated that on the 29th June 2018, they had a meeting in which the deceased called his mother and one Kadzo witches. He said he found the deceased at their home at 8 p.m. and questioned him why he called his parents witches. According to him, they wanted to arrest the deceased but the deceased resisted and instead drew a nail that he used to inflict harm on the 2nd appellant. He stated that he was with six other people and that due the deceased's resistance, there was pulling and shoving and that he suffered some injuries as a result. He stated that they left the deceased at the clan elder's home in good health, though intoxicated. He claimed that the witness testimony was a fabrication.
8. Katana Nzai Kombe, DW2, was the 2nd appellant. His testimony was that the deceased went to their home for a meeting on the night of 30th April 2018. That present at the meeting was his mother and grandmother, the Chief and the Clan Elder. That it was decided the deceased be taken to the clan elders home 100 meters away, which the 2nd appellant and others did, even though the deceased was resisting. He said that they left the deceased at the clan elder's home. That on the following day when the meeting was to take place, he learnt that the deceased had died. He said that he was arrested one month later.
9. The 1st appellant called as his witness Mwenda Mwamure, DW3. DW3 said that the 1st appellant was his son, while the 2nd appellant was his younger brother. He testified that on 30th May 2018, the deceased went to their home holding a jerry can of wine. That he called his mother a witch. That present there were the Clan Elder Sendeya, Jama, Nzai, Kadimu, Kombe and the two appellants all who decided to



arrest the deceased and take him to the Chief. That since the deceased resisted, it was decided that he be taken to the Clan Elder's house which was close by, and that is what happened. That he learnt three weeks later that the deceased died.

10. The learned judge having considered the evidence adduced in the case, and having weighed the prosecution and the appellants' submissions, found that the prosecution had proved its case against the appellants beyond reasonable doubt. He convicted both appellants and sentenced each to 30 years imprisonment.
11. Aggrieved and dissatisfied with the conviction and sentence, the appellants filed their respective appeals before this Court raising the following grounds of appeal:
 - i. That the learned judge erred in law by not considering that there was no common intention in the killing of the deceased person;
 - ii. That the learned trial judge erred in law by not considering that there were massive contradictions and invariances;
 - iii. That the learned trial judge erred in law by not considering that no post-mortem report was produced in court to ascertain the cause of the deceased death;
 - iv. That the learned trial High court judge erred in law by not considering evidence of the defence.

Hearing of the Appeal

12. The appeal was heard through this Court's virtual platform on the 19th December 2023. The appellants were present virtually from Manyani Maximum Security Prison. Learned counsel, Ms. Lilian Oluoch Wambi represented both appellants, while learned Principal Prosecution Counsel Ms. Keya Ombele represented the State. Ms. Wambi relied entirely on her written submissions dated 18th December 2023 while Ms. Keya Ombele briefly highlighted her written submissions.
13. We have considered the appeal and the submissions bearing in mind that under Section 361 of the Criminal Procedure Code, a second appeal should be restricted to matters of law we remind ourselves of our role as a first appellate court. That role was succinctly articulated as follows in *Okeno vs. Republic*, [1972] EA 32.

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [*Pandya v Republic* (1957) EA 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 conclusion [*Shantilla M. Ruwala v Republic* (1957) EA 570]. It is not the function of the 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) EA 424].”
14. We have considered the rival submissions by both counsel, and the evidence on record. Having done so, we find that what falls for our determination is whether the prosecution proved the case against the appellants on the required standards.
15. Ms. Wambi challenged the prosecution case urging that the prosecution had the singular duty to prove the case against the appellants beyond any reasonable doubt and that it had failed to do so. Counsel



pointed out contradictions in the prosecution witnesses. In particular, she urged that it was not clear when and where the deceased died. That PW4, the investigating officer testified that on 1st May 2018 at 4: 00 a.m. he was summoned by the report office to proceed to the scene, initially reported as an assault case. PW4 told the court that he visited the scene of the murder, where he found the deceased with his family. He further stated that the deceased was taken and treated at Malindi Hospital where he eventually passed on. In contrast PW1's evidence was that on 29th June, 2018 he found the deceased at the home of the clan elder. He said that with the help of others he took the deceased to Malindi General Hospital where he left him. That he was summoned back same day and told that the deceased had died. According to the learned counsel, PW2 had a different date of death of the deceased being 29th June 2018.

16. The other issue raised was failure to have the post mortem examination report on the deceased produced as an exhibit. Neither was the doctor who performed the autopsy called as a witness, hence the prosecution did not establish the cause of death of the deceased. Reliance was placed on the decision of this Court in *Ndung'u vs Republic* 1985 KLR 487 for the proposition that even in cases where there is testimony to the effect that the deceased suffered serious and grave injuries, the prosecution is still under an obligation to call evidence to prove the effect of such injuries on the mortality of the deceased.
17. The other issue raised is failure to call crucial witnesses, especially the clan elder, one Sendeya in whose home PW1 found the deceased, with serious injuries. It was urged that the prosecution failed to prove that the appellants had formed a common intention to cause the deceased's death, as the crucial witnesses who had the relevant evidence of how the injuries were caused were not called to testify.
18. Finally, Ms. Wambi submitted that the learned trial Judge relied on hearsay and suspicion to convict the appellant. Citing *Mary Wanjiku Gichira vs. Republic*, Criminal Appeal No 17 of 1998, counsel urged that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence, and that before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt.
19. Ms. Keya for the Prosecution opposed the appeal. Even though counsel had stated that she had filed submissions in this matter those filed had no relevance to this appeal. We shall therefore consider her oral submissions presented before us. Counsel urged that the post mortem form was produced as an exhibit by the investigating officer. She urged that the conviction was based on circumstantial evidence and the deceased dying declaration. Counsel urged that PW1 and PW2 did not witness the assault on the deceased. She urged that the appellants had a reason to harm the deceased.
20. The learned Judge did not directly deal with the issue of inconsistency in evidence. Instead, he considered the evidence of PW1 and PW2 and found that this evidence placed the appellants at the scene of assault, and that it took place on the night of 29th and 30th June 2018. He also found that the evidence of PW1, PW2 and PW3 established that the appellants were armed with clubs and that they set upon the deceased, and as a result the injuries he suffered caused of his death.
21. The learned Judge noted that according to the appellants' evidence, the incident took place on 29th June 2018 at midnight, and that the appellants denied injuring the deceased, stating that the deceased was left at the home of the clan elder in good health at that time. The learned judge stated that it is a felony to cause grievous harm to another person without excuse or justification. That the deceased was assaulted by the accused persons. His findings were that 'every indicator on the part of the prosecution case showed that the deceased died of the injuries he sustained in the night of 29/30.6.2018 and that it is prudent to rule that the burden of proof as it relates to this element, has been sufficiently discharged as required by law.'



22. The learned Judge observed that the medical reports produced by the investigation officer have ‘dates that indicate that the deceased was assaulted on 30th April and not 29th/30th June as shown in the information.’ It is again stated that the deceased was treated at Malindi Sub - County Hospital on 30th April 2018 and discharged.
23. In regard to massive contradictions in the prosecution evidence we note that the evidence given by the witnesses was inconsistent. PW1 said that he left the deceased in his house at 10 p.m. on the 29th June 2018, and that same night Sendeya called him to his home where he found the deceased, lying on the ground alive with severe injuries. He said the deceased even told him the one who injured him was the 1st appellant. PW1 mentioned those present at Sendeya’s home as including the appellants, the mother and wife of the 2nd appellant and the 1st appellant. While PW1 said he summoned PW2 who proceeded to the scene to help him and one Pastor Henry to take the deceased to hospital the same night, PW2 contradicted PW1 saying that he found the deceased at the police station on 30th June 2018, which was the next day. PW3 added to the inconsistencies in the evidence when he said that his son the deceased, left home on 29th June 2018, and that he returned home the next day with serious injuries. The evidence given by the investigating officer PW4 compounded the matter when he gave the date of 1st May 2018, at 4 a.m., as the date he was directed to visit the deceased’s home, where he said he found the deceased injured. He said that the deceased was taken to hospital where he died.
24. The issue is whether the inconsistencies in the prosecution case amount to contradictions and whether they are material and go to the substance of the prosecution case. In *Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993*, it was held, inter alia, that:
- “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.”
25. This Court in *Erick Onyango Odeng’ vs. Republic [2014] eKLR*, cited with approval the Uganda Court of Appeal case of *Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6* in which it was held as follows:
- “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”
26. The inconsistency in the evidence raises questions as to the actual dates and the sequence of events surrounding the assault on the deceased, as well as the people involved. Was the deceased injured after 11 p.m. on the night of 29th June 2018, as stated by PW1? Or was he injured on 1st May 2018 as stated by PW4. Secondly, when did the deceased die. Was it on the night of 29th June 2018 as stated by PW1, or was he still alive on 30th June 2018, and at the police station on morning of 30th June, as stated by PW2? Or did he die on 1st May 2018 as stated by PW4? Or did he return home on his own on 30th June as stated by PW3?
27. Connected with this issue is the issue of the post mortem. The appellants’ position was that the post mortem examination report was not produced as an exhibit, which the State contested. We examined the record and confirmed that PW4 referred to the post mortem. However, from the proceedings,



he did not produce it as an exhibit. However, he produced the treatment notes which were marked exhibit 2. There was no document marked exhibit 1. We find that it was an error on the learned Judge's part not to record the production of the post mortem, noting that it was the first document PW4 referred to. The post mortem report is dated 10th May, 2018 and indicates that the approximate date of death as seven days earlier, which places the date of death at around 3rd May 2018. The cause of death is indicated as several cut wounds to the head which were sutured. The treatment notes shows the deceased was attended to at the Malindi Hospital on 30th April 2018, for several cut wounds to the head which were sutured, and a request for CT scan recommended. This means that the deceased did not die immediately after the attack.

28. The treatment notes and the post mortem examination report give a more definite time frame, one of the date when the deceased was treated at the hospital, and secondly, of the date he died. When taken into consideration with the evidence of the prosecution, the inconsistency in the evidence becomes irreconcilable. It is in direct conflict with the evidence of PW1 and PW4 whose evidence was that the deceased died the same day he was taken to hospital, albeit each witness gives totally different dates of when this happened. The two exhibits also contradict the evidence of PW2 who suggested that the deceased went to the police station one day after the attack, which contradicts PW4 who said police visited the deceased home. The evidence of PW1 and PW2 suggests that the deceased died one month before the attack. It is difficult to reconcile the dates given of the attack and also of the death of the deceased.
29. Even if we were to find that there was no inconsistency on the date of both the attack and death, there is a more important issue. The issue of who inflicted the injuries that caused death. None of the prosecution witnesses saw the attack on the deceased. They came into the picture later. PW1, the first to find the deceased saw him having severe injuries to the head and other parts of the body, which appeared fresh to him. This was about an hour after he left his brother in his house. PW1 said the deceased was at the home of the clan elder, Sendeya. The prosecution adduced no evidence to show how the deceased found himself at that home. The appellants on their part testified that the deceased went to their home at 9 p.m. that night and abused their kin. They stated that they dragged the deceased to Sendeya's home to resolve a dispute that arose when he called their mothers witches. Noting that the 1st appellant was a nephew of the 2nd appellant, the grandmother of the 1st appellant was the mother of the 2nd appellant, one of the women branded a witch by the deceased. The 2nd appellant testified that they dragged the deceased for a distance of 100 meters from their home to the home of Sendeya, and claimed that apart from injuries sustained as they push the deceased, he had no other injuries when they left him with Sendeya. This begs the question: who then inflicted the cuts on the deceased?
30. We note that the learned Judge found that the appellants were armed with clubs with which they attacked the deceased. First, even the medical treatment notes and the post mortem form do not support that finding. Secondly, there is no evidence to show whether the appellants or anyone else in their company were armed with any weapon. His conclusion seems to be conjecture rather than based on the evidence before him.
31. This leads to the issue of the failure to call crucial witnesses to testify. The appellants' submissions were that the doctor who treated the deceased, the doctor who carried out the post mortem examination and the clan elder Sendeya, among others were not called as witnesses.
32. The Court of Appeal in *Julius Kalewa Mutunga vs. Republic* [2006] eKLR stated as follows:

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of



that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

33. In *Bukenya & Others vs. Uganda* 1972 EA the former East African Court of Appeal laid down the following important principles on the issue of witnesses:

- i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
- ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
- iii. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

34. In this case, it is not fatal that the pathologist did not testify, as the fact the deceased died is not in dispute, and the cause of death not difficult to decipher from the post mortem report. However, the doctor who treated him was crucial, and would have helped the prosecution resolve some of the inconsistencies in its case. The most important however omission was the absence of Sendeya, the clan elder in whose home the deceased was found having serious injuries. He was there from the onset of the dispute between the appellants, their kin and the deceased. He was there as the deceased was escorted to his home, and was present when PW1 went to collect the deceased to take him for treatment. He had the most crucial evidence, was an eye witness and could have helped fill the serious gaps in the case. He knew who attacked the deceased, what weapons were used and what kind of injuries were inflicted. He was a very important witness.

35. What should the Court have done where the prosecution did not avail him? Section 150 of the Criminal Procedure Code [CPC] gives an answer with a caution, thus:

“Power to summon witnesses, or examine person present

150. A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

36. The Court in *Bukenya & Others vs. Uganda*, (supra), held the court has not only the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. [Emphasis]. Section 150 of the CPC makes it clear that a [trial] court at any stage of a trial or other proceeding under this Code, summon or call any person as a witness... any such person if his evidence appears to it essential to the just decision of the case. Sendeya was one such person whose evidence was essential for the just decision of the case. The only caution being that the prosecution and the defence should be given an opportunity to cross examine a person so called by the court.



37. We find that the prosecution did not discharge its burden of proof in this case, and that the evidence adduced in its case was barely sufficient to establish the case against the appellants. The inconsistencies in the prosecution evidence that remained unresolved at the close of the prosecution case and the serious material contradictions all went to the very root of the prosecution case. The failure to call crucial witnesses to testify left a lacuna in the prosecution case that left the prosecution evidence in shambles and a complete mess. There was absolutely no evidence upon which the learned Judge could have arrived at the decision he did, had he correctly directed his mind to the critical issues in the case.
38. We have said enough. We find that there is merit in the appeal by both appellants. Accordingly, we allow the appeal, set aside the conviction of the appellants and quash their sentences. We set the appellants at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

J. LESIIT

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

