Kadungo v Republic (Criminal Appeal E054 of 2022)
[2024] KECA 1899 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 1899 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E054 OF 2022

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

PETER KADUNGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kapenguria (Hon. R.N. Sitati, J.) delivered and dated 29th May 2019 in HCCRC No. 11 of 2017)

JUDGMENT

1. The appellant, Peter Kadungo, is before us exercising his right of appeal for the first time. The appellant was charged in the High Court at Kapenguria with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information stated that on 28th September 2017 at Ptokou Village in West Pokot County, the appellant jointly with another person not before the Court murdered Kakuko Kirakwang. The appellant denied the charges and at the conclusion of the trial, R. N. Sitati J., in a judgment delivered on 29th May 2019 found him guilty as charged and sentenced him to 30 years' imprisonment.

2. The appellant is dissatisfied with the decision of the trial Court and has raised 8 grounds of appeal which we summarize as follows: that the learned judge erred by convicting him based on the contradictory, uncorroborated and unreliable evidence of PW1, PW2 and PW3; that the learned Judge erred in failing to consider his defence; that the case against him was shoddily investigated; that key witnesses were not called to testify; and that the learned Judge erred in failing to consider the favourable probation report while sentencing him.

3. Five witnesses testified in support of the prosecution's case. James Kariwanyang (PW1) testified that on 3rd June 2017, as he was from making a report to the police about being threatened with death by the appellant and his family for allegedly being a witch, he met the appellant alongside Jane Losike and

Kopus Losiatum. The appellant stopped him and told him to face the world for the last time. As he stood still, the appellant and his two companions attacked him with stones after which he screamed and police officers came to his rescue. On seeing the police officers, the assailants ran away. He was escorted to Sigor Sub-County Hospital for treatment from where he proceeded to the Police Station to take refuge with his brother (the deceased) and their mother. At nightfall, they boarded a motorbike for Murkujwit where they intended to seek sanctuary in the home of their other brother. Soon after they started their journey, they were accosted by the appellant and Losiatum who attacked them. PW1 stated that the appellant was the first one to attack the deceased using a club. With the help of the motorcycle rider, they repelled the duo and proceeded with their journey. Three days later, the deceased complained of head pain. Although the deceased was taken to hospital and treated, he persistently complained of headaches and was later taken to Moi Teaching and Referral Hospital in Eldoret where a CT scan revealed that blood had accumulated in the brain. The deceased was attended to but later succumbed to the injuries.

4. Dr. Jotham Mukhola (PW2) conducted postmortem on the body of the deceased on 6th October 2017 and observed a bilateral suture and bilateral craniotomy scars on the head. According to the witness, the deceased's head had earlier been drilled to drain blood. Upon opening the skull, the witness observed a bilateral asymmetry of the brain secondary to pressure effect. PW2 concluded that the cause of death was increased intracranial pressure due to chronic hemorrhage secondary to head trauma. The witness testified that even though such an injury could have been caused by a road traffic accident, the history given was that of assault.

5. Patrick Kariwonyang (PW3) testified that the deceased was his younger brother. On 3rd June 2017, the deceased's daughter informed him that the deceased alongside PW1 had been attacked. He advised them to report the matter and take refuge at the nearby police station. He later sent his car to collect the deceased, their mother and PW1 from Sigor and bring them to his home. The three were picked up and arrived at his home when the deceased had a bandaged head and was complaining of back pains. On 26th September 2017, the deceased collapsed in his house and was rushed to hospital where he was diagnosed with internal bleeding in the head and he later passed away on 28th September 2017.

6. Paul Kaspan Kariwanyang testified as PW4. He stated that on 3rd June 2017 he received a call from the deceased's neighbour informing him that the deceased's homestead had been torched and his belongings taken away. He went to the deceased's home but did not find him. He then proceeded to Kapenguria where PW3 had taken the deceased together with PW1 and their mother. He found the deceased injured. PW4 escorted the deceased to hospital and later to the police station where they recorded statements. The witness further testified that on 26th September 2017, the deceased fell ill and was rushed to Moi Teaching and Referral Hospital where he died while receiving treatment. The witness testified that the deceased had informed him that it was the appellant and one Kopus Koshadungo who had assaulted him.

7. Police Constable Boniface Wayong who testified as PW5 recalled that on 6th June 2017 while at the crime office at Kapenguria Police Station, the deceased went and reported an attack by a group of people who included the appellant. He could not immediately record his statement because the deceased was injured on the head and neck. The witness asked the relatives who had escorted the deceased to the Police Station to first take him to hospital for treatment. Later on, the deceased's family members informed him that the deceased's condition had deteriorated and he had been taken to Moi Teaching and Referral Hospital in Eldoret where he died while receiving treatment. PW5 further testified that prior to being charged with the offence of murder, the appellant had been charged with assaulting the deceased, stock theft and arson. In his investigations, he established that the appellant alongside other people had attacked the deceased and PW1 on allegation that PW1 had bewitched

the appellant's brother. PW5 produced the deceased's P3 form and the appellant's mental assessment report as exhibits.

8. In his defence, the appellant who testified as DW1 denied committing the offence and stated that on 3rd June 2017, he was at home but later left for a drink at a neighbouring homestead. He was therefore surprised when he was arrested on 13th June 2017 at the end of a political rally that he had attended at Weiwei Secondary School, escorted to Marich Police Station and charged for allegedly assaulting PW1, only to be later charged in connection with the death of the deceased.

9. The appellant called two witnesses in support of his case one of them being Pkemei Sereti Karori who testified as DW2. The witness testified that he was an elder and in 2016, there ensued a dispute between PW1 and the appellant's brother during the registration of the elderly persons. According to the witness, PW1 had demanded to know why his mother had not been registered and in the process threatened the registration clerks with undisclosed consequences. Soon thereafter, the two clerks fell ill and died. Upon their death,PW1 was suspected of causing their deaths and he escaped from the village. The witness further testified that the appellant could not have killed the deceased as the traditional ceremony known as "lapai" which is used to resolve murder cases was not carried out at the appellant's homestead.

10. Samuel Pastor Nalelio (DW3) on his part testified that he was a village elder of the village where the offence was alleged to have occurred. He vouched for the appellant's innocence stating that he was not aware and had never heard that the appellant killed the deceased. He, however, confirmed the disagreement between PW1 and the two clerks as recounted by DW2, their ultimate demise and the ensuing suspicion that PW1 was a witch. The witness denied ever receiving a report about the deceased being assaulted and reiterated the evidence of DW2 that had the appellant killed the deceased, the elders would have conducted the "lapai" ceremony against the appellant.

11. When the appeal came up for hearing before us on the Court's virtual platform on 5th February 2024, learned counsel Mr. Sonkule was present for the appellant while learned prosecution counsel Mr. Majale appeared for the respondent. Counsel for the appellant had filed written submissions dated 24th July 2023 while counsel for the respondent had filed written submissions dated 12th July 2023. They both opted to wholly rely on the filed submissions.

12. In urging the appellant's case, Mr. Sonkule reminded this Court of its duty, as a first appellate Court, to re-appraise the evidence on the record and reach its own independent decision as held in *Okeno v.Republic* [1972] EA 32. Turning to the merits of the appeal, counsel submitted that the trial Judge erred by failing to warn herself of the dangers of relying on the evidence of a single witness (PW1) to convict the appellant. Counsel relied on the case of *Abdallah Bin Wendo & Another v. R.* [1953] 20 EACA to urge that the trial Court ought to have subjected the evidence of PW1 to further scrutiny and that had it done so, it would have found that the evidence was insufficient to return a conviction.

13. In respect of the ground of appeal that key witnesses were not called to testify, counsel submitted that there was an omission in calling certain key witnesses who were in the company of PW1 when he was allegedly assaulted.

14. It was also counsel's submission that the appellant's alibi defence was not taken into consideration.

15. Finally, counsel submitted that malice aforethought was not established by the prosecution in this case. In the end, counsel urged us to allow the appeal in its entirety.

16. Learned prosecution counsel Mr. Majale on his part started off by conceding that it was the prosecution's role to establish the case against the appellant beyond reasonable doubt. In urging this

Court to uphold the appellant's conviction, counsel submitted that the evidence presented by the respondent at the trial was overwhelming as it confirmed that the appellant and the witnesses knew each other very well. In regard to the appeal against sentence, counsel submitted that sentencing was a matter of discretion of the trial Court and that in this case, the learned Judge considered the probation report before imposing the sentence. Counsel therefore urged us to dismiss the appeal in its entirety.

17. This being a first appeal, section 379(1) of the *Criminal Procedure Code* and Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 empowers us to consider both matters of law and fact, or of mixed law and fact. This position of the law has continuously been emphasized by this Court in its judgments, including the case of *Chiragu & Another v. Republic* [2021] KECA 342 (KLR), where it was held that:

> " However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the *CPC* and guidance provided in the famous case of *Okeno v. R.* [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw and observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also *Erick Otieno Arun v. Republic* [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary."

18. Upon giving due consideration to the record of appeal, the submissions by counsel for the parties and the authorities cited to us, we are of the view that this appeal will be determined upon the resolution of the question as to whether the prosecution proved the offence of murder against the appellant. We can only proceed to consider the appellant's appeal against sentence if we determine that he was properly convicted.

19. The appellant was charged with the offence of murder which is legislated by section 203 of the *Penal Code* as follows:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

20. For a trial Court to return a conviction on a charge of murder, the prosecution is under obligation to adduce evidence establishing the fact and cause of death of the deceased person, that it is the accused person's actions or omissions which led to the deceased's death, and, that the accused person had malice aforethought. In that regard, it was stated in *Roba Galma Wario v. Republic* [2015] eKLR that:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

21. In this case, the fact as to and the cause of the deceased's death is undisputed. The evidence of PW1, PW3 and PW4 was consistent that the deceased died of head injury. The body was later dissected by PW2 who formed the opinion that the deceased died due to increased intracranial pressure as a result of hemorrhage secondary to head trauma. The opinion of PW2 affirmed the evidence of PW1, PW3 and PW4 as to the part of the body of the deceased that was hit by the appellant.

22. This leads us to the question as to whether the appellant was complicit in the events leading to the deceased's death. The deceased was assaulted in early June 2017 but died nearly four months later. That the appellant could be implicated in the murder of the deceased is confirmed by section 215(1) of the *Penal Code* which states that:

> " A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death."

The deceased died in September 2017 which was within a year from the date he was assaulted by the appellant in June 2017. If the evidence adduced at the trial will show that the appellant inflicted the injuries that led to the deceased's demise, then the law allows us to sustain the conviction.

23. From the evidence on record, there is no doubt that the deceased was attacked while in the company of PW1. They were going to seek refuge in the home of PW3. The evidence of PW1, PW3 and PW4 demonstrated that from the time of the attack, the deceased's health deteriorated as he suffered difficulty in passing urine and consistently complained of headaches and pains. Further, when the deceased was taken to hospital on 26th September 2017, a CT scan of the head revealed internal bleeding of the brain. Additionally, PW2 testified that during the postmortem, he noted that the deceased's head had previously been drilled to drain blood. It was also the evidence of PW1, PW3 and PW4 that the deceased was rushed to the hospital after he collapsed. He was admitted to the intensive care unit for two days before succumbing to the injuries.

24. That the law squarely places the death of the deceased at the door of the appellant is affirmed by section 213 (a) and (b) of the *Penal Code* which states that:

> " 213. Causing death defined
>
> A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—
>
> a. if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
>
> b. if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living."

25. We therefore do not hesitate in agreeing with the trial Court that the evidence adduced by the prosecution sufficiently established that the deceased's death arose from the assault suffered in the hands of the appellant on 3rd June 2017.

26. The other pertinent issue is whether the evidence on record sufficiently links the appellant to the assault of the deceased on 3rd June 2017. In this case, the only person who witnessed the attack was PW1.

His evidence was that he knew the appellant very well prior to the incident. He met him twice on the material day. The first encounter was when he was leaving the police station where he had reported a threat to his life. At that time the appellant was with two others who threw stones at him and he was rescued by the police after raising an alarm. The second time he met the appellant was when they were leaving the police station with the deceased and their mother. They were going to seek shelter at the home of PW3. It was during this second encounter that the appellant hit the deceased before they were assisted by the motorcycle rider to repulse the attack. This vivid evidence squarely placed the appellant at the scene of the crime. In view of such evidence, no doubt can be entertained about the identification of the appellant as the person who attacked the deceased. We therefore agree with the learned Judge's conclusion that the appellant was properly identified.

27. We also observe that when the appellant testified in his defence, he did not speak to the events of 3rd June 2017 and only alleged that he had gone to partake of some brew in the neighbourhood on that day. He called two witnesses and those witnesses testified of an alleged dispute between PW1 and the appellant's deceased brother who was a clerk during the registration exercise of the elderly. DW2 and DW3 did indeed confirm PW1's testimony that it was alleged that he was a witch. If motive was required for murder, then this is it. The appellant attacked the deceased's family because they believed PW1 had caused the death of his brother through witchcraft.

28. There is also the evidence of PW4 that the deceased informed him that it was the appellant who had assaulted him. The question that we must then grapple with is whether this evidence disclosed a dying declaration. Section 33 (a) of the *Evidence Act* permits admission, as evidence, a statement made by a deceased person where:

> "...the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

29. In *Philip Nzaka Watu v. Republic* [2016] eKLR, the Court outlined the circumstances under which a dying declaration can be used to convict as follows:

> "Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

30. In this case, there was history of bad blood between the deceased's family and the appellant. As at the time the deceased made the dying declaration to PW4, it cannot be said that his perception was questionable. Further, the dying declaration made to PW4 is corroborated by the evidence of PW1 which placed the appellant at the scene of crime. This dying declaration removes any lingering doubts as to the identification of the appellant at the scene of crime by PW1.

31. Another ground upon which the appellant mounted his appeal was the contention that certain critical witnesses were not called to testify by the prosecution. According to the appellant, the deceased's

mother and the motorcycle rider who were with PW1 and the deceased at the time of the incident ought to have been called as witnesses but were never called by the prosecution. In addressing this issue, the starting point is a reference to the law as found in section 143 of the *Evidence Act* which provides that there is no specific number of witnesses required to prove a fact. This Court has consistently held that the prosecution is vested with the discretion to determine the persons it wants to call as its witnesses. For instance, in *Julius Kalewa Mutunga v. Republic* [2006] eKLR the Court stated that:

> "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 – see *Oloro s/o Daitayi & others v R*. (1950) 23 EACA 493."

32. In our view, the only value the two potential witnesses would have provided to the prosecution case was to corroborate the evidence of PW1 as to what transpired when the deceased was attacked and the identity of the deceased's assailants. However, from the preceding analysis, we find that the evidence adduced by the prosecution in this matter was sufficient to prove what transpired when the deceased and PW1 were attacked. We are also satisfied that the identity of the appellant as one of the two attackers cannot be doubted. The failure to call the witnesses referred to by the appellant did not in any way dent the prosecution's case which proved that the appellant was complicit in the killing of the deceased. We therefore find no merit in this ground of appeal.

33. The next issue is whether malice aforethought was established. On this issue, we agree with the findings of the trial Court that indeed, the appellant had malice aforethought. Section 206 of the *Penal Code* provides the ingredients of malice aforethought, among them being the intention to cause death or grievous harm or the knowledge that an act or omission might cause death or grievous harm to a person. As was held in *Republic v. Tubere s/o Ochen* [1945] 12 EACA 63, malice aforethought can be discerned from the nature of the weapon used; the manner in which the weapon was used; the part of the body targeted; the nature of the injuries inflicted; and the conduct of the accused before, during and after the incident.

34. In the instant case, the appellant had accused PW1 and his family of witchcraft. Even though the weapon used was not produced, the deceased suffered injuries to his brain. The appellant therefore knew or ought to have known that whichever weapon he used and whatever the number of times he hit the deceased, his actions were likely to cause grievous harm or death.

35. In the end, we find that the prosecution proved the offence of murder against the appellant. The appeal against conviction is therefore without merit and is dismissed.

36. Finally, with regard to the sentence, we note that the trial Court sentenced the appellant to 30 years. This was after taking into consideration the pre-sentence report, the current jurisprudence on the death sentence and the appellant's lack of remorse. In the circumstances it is clear that the learned Judge took into consideration the mitigating and aggravating factors. The appellant has therefore not provided us with the reasons for interfering with the trial Judge's discretion on sentencing. Like the appeal against conviction, we find the appeal against sentence to be without merit. We also dismiss it.

37. The upshot is that entire appeal has no merit and is dismissed.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR