Bett v Republic (Criminal Appeal 76 of 2017) [2024] KECA 963 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 963 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 76 OF 2017

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

LEONARD KIPROP BETT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (M. A. Odero, J.) dated 12th June 2017 in HC.CR.C. No. 111 of 2013)

JUDGMENT

1. The appellant herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars in the information were that on the night of 25th and 26th November 2013, at Gathima, Kuresoi District, within Nakuru County, the appellant murdered Ian Kipkurui.

3. In a bid to prove their case against the appellant, the prosecution called six witnesses. At the end of the trial, the appellant was found guilty, convicted, and sentenced to death.

4. As this is a first appeal, we are mandated to re-evaluate and re- analyze the evidence before the trial court, bearing in mind that we did not have the occasion to see or hear the witnesses. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), this Court restated the mandate as follows;

> " 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 nor 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."

5. The brief facts of this case were that; the appellant was the biological father of the deceased, a child aged between 3 - 4 years. At the time of the incident, the appellant's wife had gone back to her parent's home, leaving the deceased in the care of the appellant.

6. According to PW1, he was a 13-year-old boy who had gone to visit and assist the appellant, (his in-law) in planting maize. He informed the court that on 25th November 2013, after having supper, he and Kiplangat, (the appellant's younger brother), went to sleep. The appellant went to sleep with the deceased. The next morning, after preparing tea, they tried to wake up the appellant and the deceased, but they did not wake up. When their efforts proved futile, they called their neighbour, PW2.

7. PW2's testimony was that on the morning of 26th November 2013, he sent his daughter to collect milk from the appellant's home. However, his daughter returned with PW1 and Kiplangat, who informed him that they were unable to get the appellant to wake up. He alerted his other neighbour, PW3, and they went to the scene where they found the deceased lying on the bed, covered with a blanket while the appellant lay unconscious on the floor foaming from the mouth.

8. When PW2 and PW3 realized that the deceased was already dead, they then forced the appellant to drink a mixture of charcoal, mud, and raw egg in an attempt to revive him. They then rushed the appellant to the hospital where he was treated and discharged. They then reported to the police who came and took the body of the deceased to the mortuary.

9. PW5 was the doctor who conducted a post-mortem examination on the body of the deceased. He observed that the body had bruises around the neck and that the neck had been fractured. She concluded that the cause of death was strangulation leading to asphyxiation.

10. When put to his defence, the appellant in his unsworn testimony denied having killed the deceased. He told the court that he went to sleep with the deceased only to wake up in hospital and he was informed that his son was dead.

11. In her determination, the learned Judge held that the fact of the death of the deceased could not be in doubt, as this was confirmed by PW2 and PW3 who found the body in bed and PW4 who saw the body at the mortuary.

12. The learned Judge held that although PW1, PW2, and PW3 did not see any visible injuries on the body of the deceased, his mother, PW4, noted certain marks around the neck of the deceased. The learned Judge held that PW4's evidence was corroborated by the evidence of PW5 whose expert medical opinion was that the deceased died as a result of strangulation. The said expert medical opinion had not been challenged by the appellant.

13. When determining the issue of whether or not it was the appellant who caused the death of the deceased, the learned Judge noted that the prosecution relied on circumstantial evidence. The learned Judge proceeded to hold that since there was no evidence that there had been an intruder during the night, and PW1 confirmed that there was no commotion during the said night, the circumstantial evidence pointed to the appellant as the person who had strangled the deceased.

14. The learned Judge found the appellant's defence to be a blanket denial. She also observed that the appellant was shifty and evasive in demeanor while giving his testimony. She concluded that the appellant was not being truthful. Therefore, the learned Judge concluded that it was the appellant who had strangled the deceased, causing his death.

15. On malice aforethought, the learned Judge held that the force applied to the neck of the deceased was sufficient to break his little neck, and the appellant being an adult should have known.

    The learned Judge held that the intention behind this act was either to kill the deceased or to cause grievous bodily harm.

16. Accordingly, the appellant was convicted of murder as charged and sentenced to death in accordance with the law.

17. Being aggrieved by his conviction and sentence, the appellant lodged this appeal in which he raised two amended grounds of appeal to wit:

    a. The trial court erred in failing to find that the post- mortem report was produced by a witness who did not perform the autopsy.

    b. The trial court erred in failing to consider the appellant's mitigation thereby sentencing the appellant to a harsh and manifestly excessive sentence.

18. When the appeal came up for hearing on 13th March 2024, Mr. Owuor, learned counsel appeared for the appellant whereas the respondent was represented by Mr. Omutelema, Assistant Deputy Director of Public Prosecutions. Counsel relied on their written submissions.

19. In his written submissions, the appellant relied on the case of Hillary Bwire Wafula v Republic [1999] eKLR in submitting that the failure to produce the doctor who filled and signed the post-mortem report was prejudicial to him as he did not get the opportunity to cross-examine the author of the document.

20. The appellant further submitted that in the circumstances of this case, his mitigation that he was a first offender and also remorseful, and in light of the decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, a term imprisonment would be more appropriate than a death sentence. The appellant also urged the court to consider the time he had spent in custody before his conviction.

21. Opposing the appeal, the respondent submitted that the medical evidence tendered was satisfactory as on 17th August 2016 the court was informed that Dr. Sammy Getutu who had performed the autopsy of the deceased could not be traced. This resulted in PW5 who had known and worked with Dr. Getutu to be called to testify in his stead. The appellant and his counsel did not object to the production of the post-mortem report.

22. The respondent conceded that the sentence of death was meted out under the law as it was applied at the material time. However, the respondent urged the court to give a severe sentence of imprisonment.

23. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issues for determination are; whether or not the failure to call the doctor who conducted the autopsy displaced the prosecution's case against the appellant, and whether or not the death sentence meted out against the appellant was lawful.

24. It is common ground that PW5 was not the maker of the post- mortem report produced in court. The court was informed that Dr. Getutu who had performed the autopsy could not be traced.

    Under Section 77(2) of the *Evidence Act*, the prosecution was obliged to lead evidence that PW5 was conversant with Dr. Getutu's handwriting. In her testimony, PW5 stated thus:

    > " I know Dr. Sammy Getutu. I have worked with him for 1 ½ years. I can recognize his writing and signature.

This post-mortem form for Ian Kipkurui was filed and signed by Dr. Getutu. I seek to produce it on his behalf."

25. Ms. Yebei, learned counsel representing the appellant before the trial court had no objection to the post-mortem report being produced by PW5. Counsel also proceeded to cross-examine PW5 on the contents of the post-mortem report which established that the cause of death was asphyxiation due to strangulation. In any event, PW4 corroborated the evidence that there were marks on the neck of the deceased.

26. In the case of Robert Onchiri Ogeto v Republic [2004] eKLR, this Court held that:

> "The postmortem on the body of the deceased was done by Dr. Ondigo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the *Evidence Act*. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible...Section 77 (1) of the *Evidence Act* allows such documents under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the *Evidence Act*, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the post- mortem report under section 77(1) of the *Evidence Act* and the Court did not see it fit to summon Dr Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view, the postmortem report was properly admitted as evidence in accordance with the law."

27. We find that the production of the post-mortem report by PW5 was in accordance with the law, and also that it was not prejudicial to the appellant's case. We are also satisfied that the appellant exercised his right, by cross-examining the witness. In the circumstances of this appeal, this ground of appeal has no merit.

28. The appellant did not contest his conviction on any other ground, other than the production of the post-mortem report. Nonetheless, as a first appellate court, we feel obliged to re- evaluate the evidence tendered before the trial court, as we do now.

29. Section 203 of the Penal Code under which the appellant was charged provides that:

30. It follows, therefore, that to sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.

31. It is not in dispute that the deceased died. The prosecution witnesses testified that the body of the deceased was found covered with a blanket on the bed. The post-mortem report showed that indeed the deceased had died as a result of strangulation.

32. Therefore, the questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellant, and was there malice aforethought?

33. It is common ground that the appellant was convicted on circumstantial evidence as none of the prosecution witnesses saw him kill the deceased. This Court in Sawe v Republic [2003] KLR 364, stated thus:

> " 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 hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

34. The evidence of PW1 was that the deceased was last seen alive with the appellant when they went to sleep, after having supper. No one saw the appellant again until the following morning when he was found unconscious on the floor near the body of the deceased which was carefully covered with a blanket. The appellant testified that he had no idea of what had happened to him during the material night and that he only woke up in the hospital and learned of his son's death. The learned Judge, who had the occasion to see the demeanor of the appellant and hear him testify made a finding that the appellant was evasive and he was also not telling the truth.

35. In the Nigerian case of Moses Jua v The State [2007] LPELR- CA/IL/42/2006, the court held that:

> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

36. Similarly, in Stephen Haruna v The Attorney-General of The Federation [2010] 1 iLAW/CA/A/86/C/2009, the court stated that:

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

37. It is our considered view that the appellant being the last person to have been seen with the deceased before his death, had the onus under Section 111(1) of the *Evidence Act* to explain how the deceased died. Section 111(1) provides that:

> " 111(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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

38. Section 119 of the *Evidence Act* provides that:

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,
>
> human conduct and public and private business, in their relation to the facts of the particular case."

39. We find that the circumstances surrounding the incident are such that they point to the guilt of the appellant and there are no other co-existing circumstances that could weaken or destroy this inference of guilt. It follows, therefore, that the circumstances in this instance 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 none else.

40. We find that, in the circumstances, the trial court properly convicted the appellant on circumstantial evidence, and we are satisfied that the circumstantial evidence on record points unerringly to the appellant, as the person who murdered the appellant.

41. As regards malice aforethought, Section 206 of the Penal Code provides:

> " 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
>
> C. An intention to commit a felony.
>
> d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony."

42. In the case Republic v Tubere s/o Ochen [1945] 12 EACA 63, the Court established the following elements of malice aforethought:

> " The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident."

43. Due to his separation from PW4, the appellant had threatened to kill himself and the deceased. This to our minds, indicates that the murder was premeditated. The appellant strangled the deceased with his hands. The deceased being a child of 3 - 4 years, was tender, and the appellant ought to have known that by strangling the deceased, the deceased would have suffered fatal injuries. After strangling the deceased,

the appellant carefully covered him with a blanket. We find the conduct of the appellant in this instance to demonstrate malice aforethought as contemplated under Section 206 of the Penal Code.

44. In the circumstances, we are satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt.

45. As regards the sentence, the appellant in his mitigation stated that he was a first offender and that he was sorry. As the death sentence was the only sentence prescribed by the law at the time of the appellant's conviction, he was sentenced to death. However, with the current jurisprudence on sentencing, as propounded by the Supreme Court in the case Francis Kariokor Muruatetu & Another v Republic [2017] eKLR that:

> " We find that section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty... It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ..."

46. Having taken into account the circumstances in which the offence was committed, together with the appellant's mitigation, we hereby set aside the sentence of death and substitute therefore a sentence of imprisonment for 30 years. The sentence shall run from 4th March 2014, which was the date when the appellant took plea. The sentence is in compliance with **Section 333(2)** of the Criminal Procedure Code, considering that the appellant was in custody during the trial. The appeal against conviction is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

F. W. NGENYE – MACHARIA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR