Mwambire v Republic (Criminal Appeal 7 of 2022)
[2024] KECA 865 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 865 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 7 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JULY 26, 2024

BETWEEN

THOMAS CHENGO MWAMBIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 20th December 2021 in Malindi Criminal Case No. 6 of 2017)

JUDGMENT

1. The appellant, Thomas Chengo Mwambire, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information stated that, on 21st June 2016 at Kibao Cha Ngombe village, he murdered Getrude Sidi Garama (the deceased).

2. The appellant pleaded not guilty and the matter proceeded to hearing.

3. On 21st June 2016, Francis Kenga, PW1, was at home when he received a telephone call from Kongoni from someone by the name Shaban informing him that the deceased was being assaulted. He decided to send George Kenga, PW3, and Eric Iha, PW4, to go and bring the deceased home. When the deceased arrived home, he saw that her head was swollen. The next day, she was taken to Kongoni Hospital, but was referred to Malindi Sub-County Hospital and later to the Mombasa Coast General Hospital for treatment. She was admitted at the Mombasa General Hospital for three weeks whereafter she returned home. She did not recover and passed away on 16th January 2017. PW1 testified that the deceased died from injuries she sustained as a result of the assault by the appellant, and that a postmortem was conducted to establish the cause of her death.

4. In cross examination, he confirmed that the deceased was his ex-wife and that, although she had a growth in her stomach, she died from the injuries following an assault by the appellant; and that the growth had never been an issue.

5. Shaban Francis Iha, PW2, a pupil at Kagombani Primary School, and a son to the deceased, testified that on the night of 21st June 2016 at about 10.00 pm. while asleep with his sister, he was woken up by his mother's screams. He stated that he saw the appellant beating the deceased and that, when they tried to help her, he removed them from the house; and that they screamed and neighbours came to their aid. They were taken to a neighbor's house and their mother was taken to hospital where she passed away.

6. In cross examination, he stated that he had told the police that the appellant used an iron bar to beat the deceased.

7. PW3 was asked by PW1 to go with his brother PW4 and bring home their mother, who had been beaten. They rushed to the deceased's house and found that she had been locked up in the house from where she was screaming. They banged on the door and, when they opened it, they saw the deceased on the floor crying, and that the appellant was in the room. They took their mother home, and she was taken to hospital the next day. By then, she was not talking and she later succumbed to her injuries; and that the deceased's head and leg were swollen and that she later passed away due to brain injury.

8. PW4, the brother to PW3, further added that, when they went to get the deceased, they found her in a distressful condition and she was crying. He stated: "We found Thomas beating her." They returned home with her, and the next day, because she could not walk or talk, she was taken by tuk tuk to Kongoni hospital. Later, they took her to Malindi Sub-County Hospital from where she was transferred to Mombasa Coast General Hospital. The doctors established that she had suffered injury to the brain. He stated that a scan showed that her brain had been bleeding and that, despite treatment, her condition did not improve.

9. Agnes Mwaganje, PW5, stated that the deceased was initially married to PW1 and, on separation, she befriended the appellant. She also received information on the material day that the appellant had attacked the deceased, and that she had later died from the injuries she had sustained.

10. Cpl. George Ndirangu, PW6, who was attached to Marereni Police Station, investigated the murder of the deceased. He visited the scene and, from the investigations, he told the court that the deceased who cohabited with the appellant suffered injuries inflicted by the appellant.

11. Dr. Swaleh, PW7, stated that the postmortem report was prepared by Dr. Mathias, who had since retired. During the proceedings, he had applied for and was allowed to produce the report. He reported that the deceased suffered hemorrhage to the head, and opined that the cause of death was cerebral vascular hemorrhage, and that the date of death indicated in the postmortem was 16th January 2017.

12. In a sworn statement, the appellant denied the offence. He recalled that he had attended a burial on that material day and, when he returned home, he found the deceased totally drunk. He also recalled that the deceased had a pre- existing medical condition and was not permitted to drink any alcohol. It was also his defence that, when PW3 and PW4 arrived at his home, he was in the house, but that there was no conflict between him and the deceased. According to him, the deceased fell ill and he was informed by relatives that she had left the house where they cohabited.

13. Upon considering the matter, the trial Judge, by a Judgment dated 15th September 2021, convicted the appellant of the offence of murder and sentenced him to 26 years imprisonment.

14. Aggrieved by the decision, the appellant filed an appeal to this Court on grounds that the learned judge erred in law by failing to consider that the post- mortem report was produced and admitted as an exhibit in evidence in violation of sections 77, 33 and 48 of the *Evidence Act*; by failing to consider that the investigation officer (PW5) No 81788 Cpl. George Willy Ndirangu, was not from the DCI unit to undertake investigation on such serious offences as provided under section 35 of the *National Police Service Act*; and by failing to consider that the prosecution evidence was marred with irreconcilable contradictions, whether the prosecution relied on circumstantial evidence, and that there was a break in the chain of causation as there was no direct linkage between the appellant's actions and the deceased's death.

15 The appellant filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Mr. Adalla, submitted that the evidence which was tendered by the prosecution did not meet the threshold required by law to convict the appellant with the offence of murder; that no one saw the appellant assaulting the deceased; and that, therefore, all the evidence tendered was circumstantial.

16. It was further submitted that there was a break in the chain of causation as the evidence did not directly link the appellant's actions on 21st June 2016, when the deceased left his house to her death on 16th January 2017; that, consequently, the court could not conclusively reach a finding that the appellant murdered the deceased.

17. The respondent also filed written submissions. Learned counsel for the State, Ms. Nandi, submitted that, with regard to the production of the postmortem report, PW 7 laid the basis for its production on behalf of Dr. Mathias, who had retired from service and, as such, he fully complied with the rules of evidence. Counsel submitted that all the prosecution witness evidence was consistent, and that the prosecution proved its case to the required standards; that, on the issue of causation, PW2 was asleep and was awakened by his mother's screams as she was being beaten by the appellant; that he had locked the door from the inside and had continued beating her; that he removed the children from the house, and they shouted for their neighbours to help; that the deceased was hit with an iron bar; and that the postmortem report showed that she died from brain hemorrhage. Counsel asserted that there was a clear connection between the assault and the cause of death as the deceased died from related injuries within one year of the date of the assault.

18. This being a first appeal, the mandate of this court is to re-evaluate and conduct an independent analysis of the evidence presented before the trial Judge, and to subsequently draw our own conclusions whilst also recognizing that this Court did not have the opportunity to see or hear the witnesses firsthand.

19. In the case of Pandya vs Republic [1957] EA 336, the predecessor of this Court aptly pronounced itself on this guidance thus:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

> apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

20. In view of the foregoing guidance, we consider that the issues for consideration are: i) whether the murder of the deceased was proved to the required standard; ii) whether there was a break in the chain of causation; iii) whether the prosecution relied on circumstantial evidence that pointed to the appellant's guilt; iv) whether the production of the postmortem report by PW7 violated the law; and v) whether the prosecution witnesses' evidence was inconsistent and contradictory.

21. On the first issue as to whether the elements of murder were proved beyond reasonable doubt, sections 203 and 204 of the Penal Code provide:

> 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Any person who is convicted of murder shall be sentenced to death.

22. For a court to reach a finding that the accused murdered the deceased, the prosecution is required to prove beyond reasonable doubt that: (a) the death of the deceased and the cause of that death; (b) that the accused caused the death of the deceased and (c) that the accused had malice aforethought.

23. In the case of Roba Galma Wario vs Republic [2015] eKLR, this Court held 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."

24. Similarly, in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, the Court held that:

> ...For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

25. The fact of the deceased's death is not in dispute and was clearly established by the evidence of the prosecution witnesses. The postmortem report, which was produced as evidence indicated that the deceased died due to cerebral vascular hemorrhage. Hence the deceased's death was sufficiently proved.

26. On whether the appellant committed the unlawful act which caused the death of the deceased, PW2's evidence was that he watched as the appellant assaulted the deceased on the night of the incident. When he tried to assist his mother, he was removed from the house. He further stated that, the next day, the deceased was not talking and was taken to hospital. According to PW1, the deceased was examined at the hospital and diagnosed with a brain injury. PW2's evidence was corroborated by PW4, who also saw the appellant beating the deceased. Additionally, PW7, the doctor, confirmed that the deceased death was caused by brain hemorrhage, which was consistent with the brain injury that she sustained.

27. Much as the appellant has argued that no one saw him assaulting the deceased, and that the evidence that was relied on by the prosecution was circumstantial and did not point to him as the person who caused her death, the evidence of PW2 and PW4 was that they saw him assaulting the deceased. Whereafter, she was admitted in hospital severally, but died 6 months later from the injuries she sustained. The evidence of the violent assault on her was the direct evidence of PW2 and PW4, and was not circumstantial, contrary to his assertions. This ground is unmerited and therefore fails.

28. As concerns his submissions that there was a break in the chain of causation, and that there was no direct linkage between his actions on 21st June 2016 when the deceased left his house and 16th January 2017 when she died, a consideration of the evidence points to the contrary.

29. The general rule on the issue of causation is that the burden of proof is on the prosecution to produce evidence that the conduct of the accused was the substantial factor in causing the harm the deceased suffered.

30. Section 213 of the Penal Code provides for the circumstances in which a person is deemed to have caused the death of another . It states:

> 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;
>
> c. if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
>
> d. if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;
>
> e. if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons." (emphasis ours)

31. Section 215 (1) of the Penal Code further states:

> 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.

32. The test on causation of death under section 213 of the Penal Code was succinctly outlined in Snyman on Criminal Law 6th Edition (2014) pg 88 thus:

> "According to the adequate causation theory, an act is a legal cause of a situation, if according to human experience in the criminal course of events, the act has the tendency to bring about that type of situation. The test under this provisions being the underlying principle that the death of the deceased need not be caused by the immediate act of the accused. The accused

would therefore be held responsible for another person's death although his act was not the immediate or sole cause."

33. This brings us to the question as to whether the appellant's actions were the sole cause of the deceased's death, or whether there was an intervening act or other acts referred to as "novus actus interveniens," that lead to her death.

> "Novus actus interveniens" is Latin for a "new intervening act". In the Law of Delict 6th Edition, Neethling explains that a "novus actus interveniens" is "an independent event which, after the wrongdoer's act has been concluded either caused or contributed to the consequence concerned..."

34. In the case of R vs Cheshire [1991] 1 WLR 844, the court stated:

> Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result... Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a novus actus interveniens. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English, though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."

35. In the persuasive case of Uganda vs Nyingaling (Criminal Sessions Case No. 0101 of 2015) [2018] UGHCCRD 121, it was held that:

> In offences such as this where there is a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence, where the eventual result may be the product of additional factors which are more directly connected than is the conduct of the accused, the function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused. An intervening cause will break the chain of causation if it is independent of the acts of the accused and so potent in causing death (see Gichunge v. Republic [1972] 1 EA 546 and R v. Jordan [1956] 40 Cr App Rep 152).
>
> .....

36. Attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused. The court may use either the natural consequences test, the substantial cause test, or both. An accused will be held responsible for the final outcome that constitutes the offence if it is the natural result of what the accused said or did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he or she said or did. An accused will also be held responsible for the final outcome is a substantial and operating result of what the accused said or did, but not otherwise. If the subsequent event is so overwhelming as to make the act of the accused

merely part of the history, a novus actus interveniens, the chain of causation will have been broken. Under the substantial cause test, the chain of causation is not broken unless the act of the accused is no longer a substantial and operating cause of death. That is, it is only if the subsequent event is so overwhelming as to make the initial wound "merely part of the history," that the chain of causation will be held to be broken. In other words, if the proximate cause is not independent of the accused then he or she is responsible for it, and if it is not potent in causing death, then it will not be so overwhelming as to make the original wound merely part of the history."

37. In R vs Cheshire (supra), the court held that the accused's actions need not be the sole or even the main cause of death as long as it contributed significantly to that result.

38. Turning to the facts as were laid before the trial court, the appellant severely assaulted the deceased on 21st June 2016. After the assault, PW1, PW3 and PW4 saw that her head was swollen. She was taken to hospital where medical examinations showed that she was bleeding in her brain. It was the prosecution's evidence that the deceased was in and out of hospital for treatment for about 6 months. She succumbed to the injuries and died on 16th January 2017 from cerebral vascular hemorrhage.

39. A further consideration of the evidence does not disclose that there was any intervening acts that led to her death. Instead, it is patently clear that she died from the head injuries inflicted on her by the appellant after he assaulted her. She died 6 months later, which was within the one-year period stipulated by section 215 of the Penal Code. On this account, the only conclusion that can be reached is that the appellant was responsible for the deceased's death.

40. The third element that required to be proved is malice aforethought. In the case of Hyam vs DPP [1974] A.C., the Court held, inter alia, that:

> "Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

41. Malice aforethought may be inferred from the acts of the accused person that demonstrate an intention to kill of harm as stated in Ernest Asami Bwire Abanga alias Onyango vs R (CACRA No. 32 of 1990), where the Court held:

> the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

42. In the case of Bonaya Tutut Ipu & Another vs R [2015] eKLR, this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of Chesakit vs UG, Criminal Appeal 95 of 2004 where it was held that:

> In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

43. The Court also considered a decision of the predecessor of this Court in Rex vs Tuper S/O Ocher [1945] 12 EACA 63 where it was held:

> "It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established,

and it will be obvious that ordinarily, an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

44. In the instant appeal, the vicious assault on the deceased's head leading to the injuries inflicted, indicate that the sustained attack was aimed at causing her grievous harm or death. Consequently, it cannot be doubted that the appellant's actions with malice aforethought were intended to grievously harm or maim, or even cause death. See also Katana vs Republic (Criminal Appeal 48 of 2021) [2024] KECA 463 (KLR).

45. On identification, the appellant was well known to the witnesses. He was cohabiting with the deceased and lived with PW2 in their house. PW2 witnessed the appellant assault the deceased. Therefore, his identification was not based on the identification of a stranger but, rather, a case of recognition, which is more satisfactory, reassuring and reliable because it is dependent upon personal knowledge of the appellant. See Anjononi & Others vs. Republic [1980] KLR 59.

46. In addition, save for the investigating officer and the doctor, all the prosecution witnesses knew the appellant, who was not a stranger to them. The appellant having been recognized, and the prosecution evidence having placed him at the locus in quo where he was seen in the act of violently assaulting the deceased, we are satisfied that the learned Judge was right in finding that the appellant was properly identified.

47. On whether there were contradictions and inconsistencies in the prosecution witness evidence, a consideration of the appellant's grounds and submissions does not disclose the contradictions and inconsistencies complained of. Nevertheless, an evaluation of the evidence of each of the prosecution witnesses discloses that it was clear, consistent and cogent with each testimony and, to a large extent, corroborating the other. That said, any minor flaws in the evidence were curable by section 382 of the Criminal Procedure Code. This issue is therefore unfounded and is dismissed.

48. Turning to the appellant's contention that the postmortem report was produced in violation of section 33, 73, and 48 of the *Evidence Act*, Section 33 clearly allows for the production of documents/expert evidence where the makers cannot be found or whose attendance cannot be procured without undue delay or expense which, in the circumstances, appears unreasonable. The prosecution or any party who wishes to rely on such evidence is required to get another expert witness from the same field who is familiar with the handwriting of the author of the document to tender the evidence. Section 73 of the *Evidence Act* deals with admission of execution of attested document. While section 48 deals with opinion of experts.

49. PW7, a doctor, testified that, since the doctor who performed the postmortem had retired, he sought leave to produce the report as he was from the same hospital and was aware of the document. The proceedings show that an application was made under section 33 of the *Evidence Act* to allow PW7 to produce the postmortem report. There was no objection from the appellant, whereupon the court allowed the prosecution's application. Although it was alleged that the reports were produced contrary to the stipulations of the law, the appellant had not specified in what way the law was contravened. Consequently, we are satisfied that the postmortem report was produced in accordance with the provisions of the law.

50. On the qualifications of the Investigating officer, we have considered the record and find that the issue was not raised at the hearing, and neither was it determined by the trial court. The appellant having failed to raise it at the earlier opportunity, we decline to address this issue.

51. From the foregoing, we are satisfied that all the ingredients of the offence of murder were proved to the required standard, and that they pointed indisputably to the appellant as the person responsible for the deceased's death.

52. Accordingly, the appeal is without merit and is hereby dismissed in its entirety.

It is so ordered.

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

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR