Saina v Republic (Criminal Appeal E088 of 2022)
[2024] KECA 809 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 809 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E088 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 12, 2024

BETWEEN

EDWARD KIPKEMOI SAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (Hon. H.A. Omondi, J.) delivered and dated 9th May 2019 in HCCR No. 49 of 2013)

JUDGMENT

1. The appellant, Edward Kipkemboi Saina, was charged, tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information stated that on 4th April 2013 at Kabilat village in Wareng District within Uasin Gishu County, he murdered Elizabeth Chelagat Saina. At the conclusion of the trial, the appellant was found guilty and sentenced to suffer death.

2. The appellant is now before this Court dissatisfied with the judgment of the trial court. He has raised ten grounds of appeal, which we condense as follows: that the evidence adduced was inconclusive and did not link him to the offence; that the doctrine of "last seen with" was improperly invoked; that the prosecution failed to call a critical witness; and that his mitigation was not considered.

3. Lydia Cherotich (PW1) testified that the deceased was her sister and that on the morning of 4th April 2013, the deceased alongside the appellant passed her home on their way to the farm. She also proceeded to her farm and would later leave for a "chama" meeting at 1.00 pm only to return at 6.20 pm. She stated that during her stay at her farm, she had heard screams emanating from the direction of her sister's farm. Later, upon realizing that their sister had failed to return home from the farm, they started searching for her until midnight when the search was halted due to darkness and rain. She also stated that on that day, one Michael was placed under arrest as he had been communicating with the appellant

on the phone the whole day. She stated that the appellant was nowhere to be seen as the search party combed the forest. Further, that the deceased had confided in her that the appellant had threatened her life on several occasions.

4. Julius Mengich (PW2) testified that he knew the deceased as she was his sister-in-law. On the evening of the material day, he joined his neighbours in search of the deceased. They would recover her body the next day on her farm covered with plants. He observed that the deceased had cut wounds on the neck and head.

5. Dr Macharia Benson (PW3) testified and produced a postmortem report on behalf of his colleague Dr Ndiangui who had since been transferred to Kenyatta National Hospital. The pathologist observed that the body was covered in blood-stained muddy clothes with a few maize seeds in her pockets. He noted that the body had multiple cut wounds at the back of the neck with the cervical spine severed leaving the head only held by a small piece of skin. He also observed a large deep cut wound extending from the right eye to the back of the head plus severe cut wounds on the chest wall at the back. Internally, the main blood vessel carrying blood to the brain had been severed. He concluded that the deceased died as a result of bleeding due to multiple cut wounds on the neck.

6. Nelson Nyangia Samoei (PW4) testified that on 18th April 2013 at about 4.00 pm, he was informed of the citing of the murder weapons within the forest by some children. Together with Joseph Ruto (PW5), they proceeded to the scene where they recovered two blood-stained pangas. One of the pangas was covered with a sweater while the other lay on top of the sweater. They reported the recovery at Kondoo Police Station and handed over the weapons to the police.

7. Joseph Kemboy Ruto (PW5) stated that the deceased was his sister and had been separated from the appellant before their reunion on 2nd April 2013 when the appellant returned. He recalled that on 4th April 2013, the deceased borrowed his panga and another belonging to their other sister, Emily, and informed him that she was headed to her farm with the appellant. Later at around 4.00 pm, he was informed that screams had been heard emanating from the forest. They went in search of their sister without success. They called off the search and reported the matter at the nearby A.P. Camp. The following day when they resumed the search they found the deceased's body covered with shrubs. They reported the discovery to the police and 13 days later, the children recovered the two pangas with the one belonging to Emily being bloodstained.

8. Joseph Chepsiron (PW6) testified that he was a neighbour to the deceased and that on the material day, while he was returning to his home from the farm, he saw the appellant and the deceased working in the farm. That evening he learnt of the deceased's disappearance and joined the search party. When it got dark, they ended the search and resumed the next day when the body was recovered. He observed cut wounds on the neck and head of the deceased with the head held to the body by a piece of skin.

9. Wilfred Nyasare (PW7) was the investigating officer having taken over from Corporal James. He produced two pangas as exhibits.

10. In his defence, the appellant denied committing the offence and stated that on the material day, he escorted his wife (the deceased) to negotiate the wages for some casual work that one Michael Yego wanted done. After the negotiations, he left the deceased with Michael Yego as he proceeded to Eldoret town. Later that evening, he called his mother who informed him that his wife had been murdered and that he was required at home. Before heading home, he proceeded to the police station to report the death but he was instead placed in custody and later charged with his wife's murder.

11. When this appeal came for hearing on 5th March 2024, learned counsel Mr. Oyaro appeared for the appellant while learned prosecution counsel Mr. S.G. Thuo was present for the respondent. Mr. Oyaro

sought to entirely rely on the submissions dated 29th February 2024 while Mr. S.G. Thuo sought to rely on his submissions dated 28th February 2024 albeit with a brief oral highlight of the same.

12. For the appellant, counsel submitted that the prosecution failed to prove the offence of murder against his client. According to counsel, the prosecution had failed to call a critical witness and the murder weapon was not produced. Still asserting that the case was not proved, counsel submitted that the investigation was poor as no forensic examination was undertaken to link the appellant to the offence. It was counsel's argument that malice aforethought was not proved against the appellant and that the trial court erred in invoking the "last seen with" doctrine as there was a witness who led the police to the scene but was not called to testify. Regarding the sentence, counsel submitted that the death penalty violated the appellant's right to life and subjected him to inhumane treatment. Counsel urged that considering the circumstances of the commission of the offence, the appellant deserved a definite prison term. In conclusion, counsel asked us to allow the appeal in its entirety or in the alternative reduce the appellant's sentence.

13. In opposition to the appeal, Mr. S.G. Thuo submitted that the prosecution established all the elements of the offence of murder. According to counsel, malice aforethought was proved through the evidence of PW1 as well as the nature of injuries sustained by the deceased. Counsel asserted that the information was not defective. It was counsel's submission that the prosecution while exercising its discretion as to the number of witnesses to call, had called all the necessary witnesses to prove the charge. Rejecting the appellant's assertion that his defence had not been considered, counsel submitted that the alibi defence, despite not being tested by the prosecution for having been raised late in the day, was considered and dismissed. In response to the appeal against sentence, counsel submitted that the death penalty was commensurate to the circumstances of the case. Further, that the death sentence is still legal and was not meted in its mandatory nature. In conclusion, counsel urged us to dismiss the appeal in its entirety.

14. This being a first appeal, our mandate under section 379(1) of the Criminal Procedure Code is akin to a retrial and incorporates a re-consideration of the facts and the law. The only limitation we must bear in mind, is that unlike the trial court we have not had an opportunity of hearing and seeing the witnesses testify in order to gauge their demeanour. Conscious of this mandate, we have reviewed the record and memorandum of appeal as well as the submissions and authorities relied on by counsel for the parties. In our view, what arises for determination is whether the offence of murder was proved against the appellant and if so, whether the appellant has made a case for our interference with the sentence.

15. For a court to return a conviction on a charge of murder under section 203 of the Penal Code, the prosecution must prove the fact and cause of death of the deceased person, that it is the accused person's actions or omissions that led to the deceased's demise, and that the accused person had malice aforethought. For this statement of the law see Roba Galma Wario v. Republic [2015] eKLR.

16. In this case, there was no eyewitness to the killing of the deceased. It is therefore necessary that we appreciate the principles governing the use of circumstantial evidence to return a verdict of guilty. Those principles were stated in the celebrated case of Abanga v. Republic LLR No. 3975 (CAK) thus:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
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> i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
>
> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

1. In this case, the death of the deceased was never in contention.

   As to how she met her death, PW3 testified that his colleague noted that the body had multiple cut wounds at the back of the neck with the cervical spine severed leaving the head only held by a thin piece of skin. Also observed was a large deep cut wound extending from the right eye to the back of the head plus severe cut wounds on the chest wall at the back. Internally, the main blood vessel carrying blood to the brain had been severed. The conclusion was that the deceased died as a result of bleeding due to multiple cut wounds on the neck. This evidence corroborates that of PW2 and PW6 who testified that they viewed the deceased's body at the scene and observed the injuries as observed by the pathologist.

18. The point of departure between the prosecution and the defence was in relation to how the deceased met her gruesome death. Nevertheless, PW1, PW5, PW6 and the appellant himself all agreed that on the morning of 4th April 2013 the deceased was seen in the company of the appellant heading to her farm. That was the last time the deceased was seen alive. According to PW6, the two were seen working on the deceased's own farm and not on any other person's farm as claimed by the appellant. The siblings of the deceased (PW1 and PW5) also testified that the deceased informed them that she was proceeding to the farm with the appellant. From the evidence of PW1, PW2 and PW6, the appellant had just returned having previously separated from the deceased who was his wife.

19. Still, there were two pangas recovered from the forest by PW4.

    According to PW5, early that morning, he had given the deceased his panga and Emily had given her another panga. The deceased informed him that she was headed to the farm together with the appellant thus the need for the two pangas. Later that day, PW6 while on his way home saw the appellant and the deceased both clearing the deceased's farm. Upon discovery of the two pangas on 18th April 2013, PW5 identified his panga and that of Emily. There was therefore no doubt that the two pangas recovered on 18th April 2013 in a forest were the ones that were being used by the appellant and the deceased. Furthermore, one of the pangas which was wrapped with a sweater was stained with blood.

20. This evidence placed the appellant at the scene of the crime and as the last person seen with the appellant before her lifeless body was found. In the circumstances, the prosecution sufficiently discharged its burden thus shifting the burden to the appellant to explain how the deceased met her death. The "last seen with" principle and its operation was succinctly explained in Moingo & another v. Republic [2022] KECA 6 (KLR) as follows:

    > "The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine 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 an inference that the accused killed the deceased (see the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006)."

21. The appellant in his defence alluded to having left the deceased in the company of one Michael Yego with whom he had negotiated the deceased's wages for farm work. He also stated that he proceeded to Eldoret thereafter where he was working and that he got to learn of the deceased's murder later that evening through his mother. As we have already stated, PW1 and PW2 were both informed by their sister (the deceased) that she was headed to her farm in the company of the appellant. PW6 testified having seen the appellant and the deceased in the deceased's farm. In the circumstances, section 107(1) as read with section 111(1) of the *Evidence Act* placed a burden on the appellant to adduce evidence and establish that he was not involved in the death of the deceased. We indeed appreciate that the appellant was under no obligation to prove his alibi but as was appreciated by the trial court, the appellant sprang up his alibi defence way after the prosecution had closed its case and did not have a chance of rebutting that defence. The trial court was thus obligated to consider the defence in light of the entire evidence that had been placed before it. In those circumstances, the implausibility of the appellant's defence was heightened by the fact that the prosecution's three witnesses placed him at the deceased's farm and not the farm of Michael Yego as he alleged.

22. The appellant has also taken issue with the prosecution's failure to call Michael Yego to testify even though he had been arrested in connection with the deceased's disappearance and was the one who allegedly led the police to the recovery of the body of the deceased. On this issue, we start by appreciating the fact that the prosecution retains the discretion to decide which witnesses are important in their case. We also note that all that the prosecution is required to do is to call all witnesses relevant to the pursuit of justice in a specific case. As such, there is no need for the prosecution to call a superfluity of witnesses but only those that are important and sufficient to prove their case- see Bukenya & others v. Uganda [1972] EA 549 and Keter v. Republic [2007] 1 EA 135. Although we cannot speculate the trajectory the evidence of Michael Yego would have taken, the evidence placed before the trial court by the prosecution was sufficient to unerringly point to the appellant as the only person who could have killed the deceased. PW1, PW5 and PW6 all placed the appellant and the deceased in the deceased's farm. We do not know what Micahel Yego could have added or subtracted from this evidence. Indeed, it was Michael Yego who alerted PW6 that he had heard screams from the direction of the deceased's farm. Much as PW1 alluded that it was Michael Yego who led to the recovery of the body of the deceased, she conceded that she was not present when the body was found. On the other hand, PW6 who was present at the time of the discovery of the body never mentioned that Michael Yego was present at that time. We are therefore satisfied that the evidence on record implicated the appellant as a participant in the deceased's murder.

23. The next issue is whether the element of malice aforethought was established against the appellant. The elements of malice aforethought are legislated under section 206 of the Penal Code as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
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> 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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

[Emphasis ours]

24. Thus, in Paul Muigai Ndungi v. Republic [2011] eKLR, it was held that:

> "More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person."

25. In this case, the appellant had multiple cut wounds on the neck, chest and head. PW3 also testified that during postmortem, it was observed that the deceased's head was held to the body by a thin piece of skin. He also observed that the main artery taking blood to the brain had been severed. In our view, the nature of injuries inflicted on the deceased were meant to end her life if not to cause her the most grievous of harms which then fits within the ambit of section 206(a) and (b) of the Penal Code. Additionally, there is also the evidence of PW1 that on several occasions, the deceased told her that the appellant had threatened to end her life. It was the evidence of PW1 and PW5 that the deceased had just reunited with the appellant two days earlier after a long period of separation. We therefore have no doubt that the prosecution proved malice aforethought.

26. Finally, the appellant decried the death sentence meted upon him terming it unconstitutional and excessive. Ordinarily, sentencing is at the discretion of the trial court and an appellate court would not interfere with the sentence imposed by the trial court merely because it would have imposed a different sentence were it sitting in place of the trial court. In this case, we find that the learned Judge (as she then was) correctly appreciated the law before determining that the ultimate sentence of death was appropriate in the circumstances. Although we agree with the trial court that the death sentence is, as was held by the Supreme Court in Francis Karioko Muruatetu & Another v. Republic [2017] eKLR, still a legal sentence within our laws, we are of the view that it is a sentence that should be meted out with great circumspection. Much as the killing of the deceased was carried out in a cruel manner, an overview of the circumstances of the case will show that the death sentence was harsh.

27. While setting aside the death sentence, we must answer what the appropriate sentence will be. In this case, the appellant was a first offender. In his mitigation, he stated that he was the sole breadwinner of 4 children and his mother was aged. On the other hand, the appellant, despite having parted ways with the deceased lured her into accepting him back before terminating her life two days later. The appellant abused the trust bestowed upon him by the mother of his children. Additionally, it is clear that the deceased met her death in an atrocious and inhumane manner. In the circumstances, we hold that a long prison term is warranted and that, in our view, should be 30 years of incarceration.

28. In conclusion, we find the appeal against conviction unmerited and we dismiss it. The appeal against sentence partially succeeds to the extent that the death sentence is set aside and substituted with a prison term of 30 years. The prison authorities shall be guided by the proviso to section 333(2) of the Criminal Procedure Code in calculating the appellant's prison term.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY, 2024

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR