Akala v Republic (Criminal Appeal 50 of 2017)
[2024] KECA 1267 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1267 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 50 OF 2017

FA OCHIENG, JM MATIVO & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

THOMAS MOKAYA AKALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 16th March 2017 in HC.CRC. No. 4 of 2015)

JUDGMENT

1. Thomas Mokaya Akala, the appellant, was charged, tried, convicted and sentenced to suffer death for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The information stated that on 7th January 2015, at [Particulars Withheld] within Narok County, the appellant murdered Margaret Nyakoboke Mokaya.

2. The appellant was aggrieved by that decision and he is now before us on a first appeal. The appellant filed amended grounds of appeal dated 15th March 2024 seeking to upset the decision of the trial court on the grounds that:

> "i. That the learned superior court judge erred in law by failing to analyse and re-evaluate the entire evidence and find that there was no eye witness account hence there was no evidence to convict;
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> ii. That the learned superior court judge erred in law by allowing the signed confession to stand despite ignoring that undue influence and fear of the unknown caused the appellant to confess to a crime he didn't commit;
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> iii. That the learned superior court judge erred in law by failing to observe that the appellant's right to a fair trial as enshrined in Article 50 [of *the Constitution*]

was contravened thus prejudicing him when he was not given a chance to mitigate before sentencing;

iv. That the sentence imposed on the appellant was manifestly harsh and excessive."

3. At the trial, the prosecution called 9 witnesses in support of its case. This being a first appeal, it is necessary that we restate the evidence adduced at the trial. Makori Nyangweso (PW1) was the husband to Margaret Nyakoboke Mokaya (the deceased). He was also the employer of the appellant who worked at the farm he had leased in Mulot. On the material day, while at his home in Keroka, he received a call from his neighbours in Mulot informing him that his wife had been murdered. He immediately left for Mulot. Upon arrival, he found his wife's body lying on the floor with a cut on the neck. He also found the appellant having been arrested by members of the public as a suspect.

4. Monica Nyabonyi (PW2) was a neighbour to the deceased. She knew the appellant who worked for the deceased and resided in the deceased's compound. Her testimony was that on the material day at 6.30 am, she heard screams emanating from the deceased's compound. Upon arrival at the deceased's house, she found her body on the floor while the appellant was being questioned by a mob that had gathered at the venue.

5. James Nabala (PW3) was the lessor of the land that the deceased lived and worked on. He recalled that on the material day, he received a call from his brother that the deceased had been murdered. He proceeded to the farm and found the deceased's body lying on the floor with her neck slit. He also found the appellant tied up and being interrogated by members of the public.

6. Julius Ngoko (PW4) identified the body of the deceased for postmortem. He observed a cut on the deceased's neck and bruises on the head.

7. Edna Kemunto (PW5) was another neighbour of the deceased.

She lived about 200 metres away. She knew the deceased and the appellant who lived in separate houses within the deceased's compound. She recalled that on 8th January 2015 at about 6.30 am, she saw the appellant sharpening a jembe. Soon thereafter, she heard the appellant scream that the deceased was dead. The appellant admitted to the mob baying for his blood that he had killed the deceased over a debt of Kshs. 10,000/=.

8. Daudi Omata (PW6) was the village elder. He testified that on the material day, he received a call from APC Omari who informed him that the deceased had been murdered. On arriving at the scene, he found the body of the deceased lying on the floor. They detained the appellant and commenced questioning him prior to the arrival of the chief. Upon inspecting the appellant's room, they recovered a blood-stained machete and bhang. The witness also testified that the appellant's trouser had blood.

9. Dr Titus Ngulungu (PW7) conducted postmortem on the deceased. He noticed linear bruising on the right forehead while the neck and mandible also had excision wounds extending from the left mandible to the left neck. The right upper limb also had bruises. Internally, he noticed that the lungs had collapsed with major neck vessels severed. He concluded that the cause of death was massive blood loss due to sharp trauma to the neck resulting in the severing of major neck vessels. He produced the postmortem report as an exhibit.

10. Superintendent of Police Festus Kiambi (PW8) was the DCIO of Narok at the time. The confession made to him by the appellant was admitted after a trial within the trial. He testified that the appellant

admitted killing the deceased in the confession which he recorded on 13th January 2015 at about 3.30 pm. The confession was produced as an exhibit.

11. Police Constable Sammy Liu (PW9) testified that upon being assigned to investigate the case on 8th January 2015, he immediately proceeded to the scene. On arrival, he found the body lying on the floor with a slit throat. The crowd had detained the appellant. He was given a machete and a trouser, which he identified at the trial and produced as exhibits. The witness also produced photographs of the scene taken by one Corporal Kiboma as exhibits. After completing investigations PW9 charged the appellant with the murder of the deceased.

12. In his defence the appellant denied killing the deceased. He testified that when he went to pick the farm tools from the deceased's house, he found the door open while the deceased's body lay in a pool of blood. He raised alarm but when the neighbours came, they accused him of killing the deceased.

13. In finding the deceased guilty in a judgment delivered on 16th March 2016, C. Meoli J. held that the confession made to PW8 although repudiated by the appellant was corroborated by other evidence. Further, that the circumstantial evidence on record pointed to the appellant as the murderer of the deceased.

14. When the appeal came up for virtual hearing on 15th April 2024, learned counsel Ms. Cherono appeared for the appellant while learned counsel Mr. Omutelema represented the respondent. They had both filed written submissions which they sought to rely on without making any oral submissions.

15. Counsel for the appellant through the submissions dated 15th March 2024 asserted that the prosecution did not prove the charge of murder against the appellant. Counsel argued that whereas the fact of the deceased's death was proved, there was no evidence linking the appellant to the offence. It was counsel's submission that there was no DNA evidence adduced to link the appellant to the death of the deceased.

16. The appellant's counsel attacked the confession submitting that it was obtained through coercion and the appellant's ignorance. According to counsel, the appellant was forced to sign a document he did not understand. Counsel relied on the case of Sango Mohamed Sango & Another v. Republic [2015] eKLR to submit that such a confession could not be relied upon. Counsel also referred to the holding in Ogero Omurwa v. Republic [1979] eKLR to urge that a retracted confession, if uncorroborated, should not be relied upon. It was counsel's submission that because the corroboratory evidence was obtained through coercion, it could not support the retracted confession.

17. Turning to the appeal against sentence, counsel decried the fact that the appellant was not accorded an opportunity to mitigate. Counsel referred to the Supreme Court holding in Francis Karioko Muruatetu & Another v. Republic [2017] eKLR to urge that mitigation is a compulsory component of sentencing and the trial court ought to have considered the sentencing principles enunciated in that case. In conclusion, counsel urged us to allow the appeal in its entirety or in the alternative allow the appeal against sentence.

18. In opposing the appeal, counsel for the respondent relied on the submissions dated 27th February 2024. Counsel commenced by highlighting the elements of the charge of murder and submitted that the prosecution discharged its mandate by proving all the elements of the offence. To buttress this assertion, counsel rehashed the evidence on record.

19. Turning to the appellant's confession, counsel submitted that the same was properly admitted pursuant to sections 25 and 25A of the *Evidence Act* and also corroborated. According to counsel, the learned trial Judge correctly invoked section 111 of the *Evidence Act* because the appellant's defence was a mere denial.

20. Regarding the appeal against sentence, counsel conceded that the death penalty was harsh in the circumstances of the case. He, however, prayed for a severe prison term considering the aggravated circumstances of the commission of the offence.

21. As this is a first appeal, we will delve into and consider afresh the evidence as presented before the trial court before arriving at our own independent conclusion. Even as we do so, we will remain conscious of the fact that unlike the trial court, we did not have the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. We will therefore give room to that limitation. In this regard, we wish to associate ourselves with the holding of the Court in Dickson Mwangi Munene & another v. Republic [2014] eKLR that:

> " This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

22. Having reviewed the record of appeal, the submissions and the authorities relied upon by counsel, we find that the core issue arising for our determination is whether the charge of murder was proved. We can only consider the appeal against sentence if we find that the appellant was properly convicted.

23. Section 203 of the Penal Code which establishes the offence of murder states as follows:

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

24. To prove the offence of murder, the prosecution must establish the fact and cause of the death of the deceased person, that it is the accused person whose actions or omissions led to the death, and that the accused person had malice aforethought in taking away the life of the deceased. Thus, in Roba Galma Wario v. Republic [2015] eKLR it was 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..."

25. In this case, the fact of the deceased's death was never in dispute. All the prosecution witnesses save for PW8 saw the deceased's body at the scene. They testified that the deceased lay on the floor towards the door of her house. They also observed that the deceased had a slit throat. The appellant also testified and corroborated the fact of the deceased's death. PW7 who conducted postmortem on the body of the deceased concluded that the cause of death was massive blood loss due to sharp trauma to the neck with severing of major neck vessels.

26. The point of departure between the two antagonizing sides was whether the appellant was complicit in the death of the deceased. Before addressing this issue, we appreciate the fact that there were no eyewitnesses to the killing of the deceased and this matter cannot be determined based on direct evidence. When faced with a case based on circumstantial evidence, the threshold set in Abanga alias

Onyango v. Republic (CR. App NO. 32 of 1990) LLR NO. 3975 comes in handy. In that case it was held that:

> " It is settled law that when a case rests on entirely 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."

27. From the appellant's defence and the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6, the appellant was an employee of the deceased and he lived in a house next to that of the deceased. The farm upon which they lived was leased to PW1 by PW3. Further, according to PW2 and PW5, they received news of the deceased's death on 8th January 2015 at about 6.30 am when the appellant raised alarm. This evidence placed the appellant at the scene of crime.

28. There was the evidence of PW6 and PW9 that a blood-stained panga and trousers were recovered from the appellant's hut. The appellant offered no explanation regarding the blood-stained panga found hidden inside his house. His house was adjacent to the house in which the deceased had met her death as a result of a slit throat. In his defence, the appellant did not talk about what transpired to the deceased despite his house being adjacent to hers. Despite our not having the benefit of seeing the photographs of the scene of crime, the learned trial Judge vividly described the scene as could be seen from the photographs. We further note that the appellant has not challenged the learned Judge's description of the scene. In accepting such a vivid description, we further agree with the conclusion of the learned Judge at paragraph 38 of her judgment that:

> " As earlier observed, the deceased evidently met her death while awake and fully dressed. If indeed another person attacked her on the evening prior to the alleged discovery of the murder by the accused, she would have raised an alarm and being within earshot, the accused should have heard..."

29. In our view therefore, the circumstantial evidence put forth against the appellant satisfied the test established in Abanga alias Onyango v. Republic (supra). The foregoing set of evidence shifted the onus to the appellant to explain how the deceased met her death. He didn't do so and without that explanation, he stood guilty of the offence.

30. The highlighted evidence was not the only evidence against the appellant. There was the evidence of PW8 on the appellant's admission that he committed the offence. We are aware that despite the written confession, the appellant denied the confession and even objected to its production in court. As required, the trial court proceeded to conduct a trial within a trial before admitting the confession. In her judgment, the learned Judge correctly observed that although the appellant had repudiated the confession, some things in the statement could have only been known by the appellant.

31. Counsel for the appellant referred to the case of Ogero Omurwa v. Republic [1979] eKLR in an attempt to persuade us that the appellant's confession was improperly received by the trial court. We observe that the learned Judge relied on the same authority in her judgment. We have read through the

decision and of relevance is the holding that once a confession is retracted, it is important for the court to seek for corroborative evidence. In that regard, the Court held that:

> "We would re-emphasise that if a statement is retracted, it should be an unfailing practice for the Court to look for corroboration of the material particulars in the statement unless the Court is able to come to the unhesitating conclusion that the confession is true in the manner stated in the quotation from Woodroffe and Ameer Ali (supra)."

32. Earlier in the judgment, the Court summarized the law as stated by Woodroffe and Ameer Ali thus:

> " The law is concisely summarised in Woodroffe and Ameer Ali (9th Edn) at p 277, in the following words: 'It is unsafe for a Court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate its truth'.""

33. Similarly, in the case Sango Mohamed Sango & another v. Republic [2015] eKLR, which the counsel for the appellant referred to, the Court stated as follows:

> "As this Court stated in Kanini Muli V. Republic, CR. APP. NO. 238 of 2007, even after the trial court has ruled a confession admissible, the accused person is still entitled to call evidence to show that the confession cannot be acted upon. Earlier in Lakhani V. Republic, (supra) the appellant had not objected to the admission of his confession of theft made to his branch manager and as a result the confession was admitted without a trial within trial being held. Later in his defence, the appellant denied making the confession. On appeal the Court of Appeal for Eastern Africa held that the trial court ought to have asked the appellant at the time when the evidence of his confession was about to be given, whether he wished to repudiate or retract it or whether he agreed to its admission in evidence, and that as soon as the appellant repudiated his confession, a trial within trial ought to have been held.
>
> In Wambunya V. Republic [1993] KLR 133 this Court stated that a trial court should accept any confession, which has been repudiated or retracted with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. (See also Tuwamoi V. Uganda [1976) Ea 91 And Thiongo V. Republic [2004] 2 KLR 38)."

34. Section 25 of the *Evidence Act* also recognizes that a confession may be corroborated by stating that:

> " A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."
>
> (Emphasis ours)

35. We further wish to refer to the case of John Kipsesat Chepyator v. Republic [2019] eKLR where the Court simplified the process of taking a confession thus:

> " As stated therein, the Court must consider the provisions in the Evidence (Out of Court) Confession Rules, 2009 which are very clear not only on the rank and cadre officers that confessions ought to made to but also on the procedure of recording and adducing the

confession before court. From the reading of the said rules, a confession must be recorded in writing, the accused person ought to be given an opportunity to clarify the content of the said confession and it must contain a certificate at the end. This must [be] read together with the provision of section 25A of the *Evidence Act* which provides that the cadre of officers should be either a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police. We take cognizance of the fact that anything less that the foregoing, does not amount to a confession."

36. In this case, having gone through the record, we are satisfied that the learned Judge appreciated the principles enunciated in the cited authorities. As we have already pointed out, the learned Judge conducted a trial within a trial to ascertain that the appellant had indeed made the confession voluntarily. Having gone through the proceedings of the trial within trial, we are satisfied that the confession was taken in compliance with the Evidence (Out of Court Confessions) Rules, 2009. The appellant having been arrested on 8th January 2015 stayed in the cells and was presented in court on 12th January 2015. On 13th January 2015, he informed the investigating officer that he wanted to make a statement. The investigating officer referred him to PW8 who, as a superintendent of police, was qualified to record the statement. PW8 gave an account of what transpired during the session he had with the appellant while recording the confession and how he complied with the procedural requirements.

37. The appellant's main complaints about the confession are with regard to the occurrence book record, the translation and the venue of the recording. A perusal of the record shows that the trial court found that the two witnesses who testified in the trial within trial were truthful in their evidence. We find no basis for holding otherwise. We also note that the appellant never challenged the contents of the confession despite having counsel on record. Similarly, even though it would have been proper for the confession to be recorded in the appellant's own language and words, the translation done by PW8 was not fatal as the end product complied with rule 10 of the Evidence (Out of Court Confessions) Rules, 2009. As for the venue of the recording of the confession, the witnesses in the trial-within-trial were clear that the appellant was taken out of the cells and delivered to the office of PW8 and it is there where the confession was recorded.

    As we have already stated, we are satisfied that the confession recorded by PW8 complied with the Evidence (Out of Court Confessions) Rules, 2009 and was therefore admissible.

38. Despite the confession being admissible, the learned Judge correctly observed that the appellant had retracted it and in compliance with the dictum in Ogero Omurwa v. Republic (supra) and Sango Mohamed Sango & another v. Republic (supra), the learned Judge sought and found corroboration of the confession. She specifically referred to "the cause and souring of the relationship between the deceased and Accused" as not possibly having "been invented by the recording officer or even drawn from the witness statements, because most of them (PW2, 3, 5, in particular) were not close to the deceased or Accused" as they were new in the area and could not have known if the deceased and the appellant had any differences. We have reviewed the record and we are satisfied that the learned Judge properly evaluated the evidence and the confession was indeed corroborated. We therefore find no error in the analysis of the learned Judge on the issue of the confession. It is therefore our ultimate finding that the appellant confessed to the killing of the deceased.

39. The next issue relates to whether the appellant had malice aforethought. From the record, it is clear that the appellant was dissatisfied with his place as an employee of the deceased. He wanted to own a larger parcel of the land leased from PW3 and also felt unappreciated. In our view, these grievances formed the basis of the appellant's subsequent actions. It is apparent from the injuries sustained by the deceased and the parts of the body targeted that the appellant had only one intention, to end the

deceased's life. The nature of the injuries sustained and the parts of the body injured squarely falls within the ingredients of malice aforethought as was held in Republic v. Tubere s/o Ochen [1945] 12 EACA 63 that the existence of malice aforethought can be inferred from 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; and the conduct of the accused before, during, and after the incident.

40. In the end, we find that the offence of murder was proved against the appellant. The appeal against conviction is therefore without merit and is for dismissal.

41. Turning to the appeal against sentence, counsel for the appellant contended that the death penalty was passed in its mandatory nature. Further, that the appellant's mitigation was not considered resulting in the imposition of a harsh and severe sentence. From the sentencing proceedings, we note that both the learned Judge and the appellant's counsel held the view, which was the correct legal position on 16th March 2017 when the appellant was being sentenced, that the sentence under section 204 of the Penal Code was mandatory. However, on 14th December 2017, the Supreme Court rendered its judgment in *Muruatetu & another v. Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015* (Consolidated)) [2017] KESC 2 (KLR) declaring unconstitutional the mandatory nature of the death sentence under section 204 of the Penal Code. It is therefore on the basis that the death sentence was meted upon the appellant in its mandatory nature that we step in to consider the appellant's appeal against sentence.

42. In this case, the record shows that the appellant was a first offender. There was no mitigation on the part of the appellant. On the other hand, the appellant descended upon his employer causing her severe injuries and ending her life. Even if he was owed any money or felt unappreciated, this cannot be an excuse for what the appellant did to his employer. His action was an affront to the trust the deceased bestowed upon him as an employee. That the appellant was expected to be a source of security may explain why the appellant's house was erected next to that of his employer. The appellant's action therefore calls for a severe sentence. In the circumstances, we find that a sentence of 30 years' imprisonment would be appropriate punishment in the circumstances of this case.

43. In conclusion, we find the appeal against conviction to be without merit and dismiss it. However, the appeal against sentence partially succeeds to the extent that the death penalty is set aside and the appellant is instead sentenced to a term of 30 years in prison. As the appellant was held in custody throughout the trial, his sentence, shall in compliance with the proviso to section 333(2) of the Criminal Procedure Code, run from 15th January 2015 when he was first arraigned before the trial court.

44. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

F. OCHIENG

JUDGE OF APPEAL

J. MATIVO

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

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

Signed

Deputy Registrar