Munyasia & another v Republic (Criminal Appeal 218 of 2019)
[2024] KECA 1232 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1232 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 218 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

PETER WANYAMA MUNYASIA ..... 1ST APPELLANT

DENTINE WEKESA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 5th December, 2019 in HCCRC No. 30 of 2010)

JUDGMENT

1. Originally, there were two appellants: this appeal: the 1st appellant, Peter Wanyama Munyasia, died in custody as this appeal was pending. By dint of Rule 71(1)(a) of the Court of Appeal Rules, we marked his appeal as abated during the plenary hearing on 11th March, 2024. The appeal by the 2nd appellant, Dentine Wekesa, proceeded. For ease of reference, we have retained references to both the 1st and 2nd appellant in this judgment.

2. The two appellants were arraigned, charged and convicted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. They were accused, and the High Court convicted them of the murder of Joseph Ngumi Maina (deceased) on 12th July, 2010.

3. The two appellants pleaded not guilty and a fully-fledged trial ensued. The prosecution called nine witnesses and closed its case. Placed on their defence, the two appellants gave sworn evidence. At the conclusion of the trial, the learned Trial Judge was persuaded that a case beyond reasonable doubt had been established against the two appellants and convicted them of the murder as charged. Upon receiving mitigation, the learned Judge convicted each of the two appellants to thirty (30) years imprisonment.

4. The appellants were aggrieved by the conviction and sentence and preferred the present appeal. They did so on two grounds formulated by their erstwhile counsel, Ms. Ida Anyango, thus:

    1. The learned trial Judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution failed to prove their case beyond reasonable doubt.

    2. The learned trial Judge erred in law and in fact by disregarding the appellant's defence and evidence tendered.

5. This is a first appeal. Our remit on a first appeal was well set out by the predecessor of this Court in the old case of Okeno - vs- Republic [1972] EA 32 thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

6. This is the standard of review and analysis we shall adopt in this judgment. The evidence that emerged during the trial was as follows.

7. The two appellants were employed by the father to the deceased. The 1st appellant was a mason employed at a construction site in Webuye. In the same plot, the father to the deceased kept dairy cows. The 2nd appellant was employed as a farmhand there. On the fateful day, evidence from two witnesses – PW1 (the father of the deceased, Stephen Kihara Maina) and PW8 (Khadijah Murunga, a neighbour) – testified that the deceased went to the site to milk cows. PW8 testified that she saw the deceased in the company of the two appellants on that day at the site. PW1, the father, testified that the deceased used to go to the site to milk cows, and that, indeed, on the material day, he set off to the site. He did not return home that day as was usual. This prompted PW1 to go looking for him at the site. He did not find him. The 2nd appellant, whom he found at the site, volunteered no helpful information about his whereabouts.

8. On the same day the deceased disappeared – 12th July, 2010 – the 2nd appellant borrowed an axe from PW4, a sister-in-law to the deceased. He did not return the axe until two days later. PW4 testified that the 2nd appellant did not explain what he needed the axe for. However, since she lived in close proximity to the site, four days after the disappearance of the deceased, PW4 detected some strong foul smell coming from a store at the site. She also noticed many house flies flying in and out of the store. She promptly called her father-in-law (PW1) and informed him of her finding.

9. PW1 immediately went to the site and confirmed the findings. Noting that only the deceased and the 1st appellant had the key to the store, he called the Police and also permitted that the store's door be broken down. Upon breaking down the door, they found the grim finding: the decomposing body of the deceased was in the store. It had several injuries visible but the most obvious one was the one on the head. When the Police arrived, the investigations into the death of the deceased began with the two appellants immediately becoming prime suspects.

10. The other family members who testified at the trial were PW2 – a sister to the deceased; PW3 – the mother to the deceased; and PW5 – a brother to the deceased. PW2 testified that she got messages from the deceased's phone claiming that he had gone to Busia to look for work. PW4 received similar messages. That phone was later on recovered in the 1st appellant's house. PW3 and PW5 testified about the ill-blood between the 1st appellant and the deceased. Its genesis was a tent belonging to PW1 which was lost at the construction site. The deceased suspected that the 1st appellant had stolen the tent and said so. He later led a search at the 1st appellant's house and the tent was found there. PW3 testified that the 1st appellant had threatened the deceased following that incident. PW3 also testified that when she learnt that her son was missing, she went to the construction site the day after where she found the 1st appellant. She asked him why he was there yet no construction was going on, and the 1st appellant had no satisfactory answer.

11. The final two witnesses were formal ones. The doctor who performed the autopsy, Dr. Wambani Mutoro, testified that the cause of death was a severe head injury due to fracture of the skull with epidural hemoatoma, contributory rib fracture with hemothorax. The doctor opined that both sets of injuries were caused by a blunt object.

12. Finally, the investigating officer, Dan Kigambo, whotestified as PW9, narrated about the investigations he carried out and the arrests of the two appellants. He testified that as part of his investigations, he visited the home of the 1st appellant where he recovered three items of clothes which were blood-stained: a jacket; a T-shirt; and a handkerchief. He also recovered two phones. One of the phones belonged to the deceased. The blood-stained clothes were sent to the Government Chemist for analysis. Unfortunately, the report of the Government Chemist was not produced in evidence because they were not available to give evidence on the hearing date and an adjournment was denied.

13. Put on their defence, the two appellants gave sworn evidence and denied that they had anything to do with the murder of the deceased. The 1st appellant admitted that he went to the site on 12th July, 2010 to collect his wages but that the deceased told him that the money was not ready. He also said he called PW1 and PW3 to ask for his money. The rest of his defence focused on the manner of his arrest. Similarly, the 2nd appellant admitted seeing the deceased on the date of his disappearance but said that he only opened the cow shed and left. The deceased was supposed to return in the evening to lock, but did not do so. He averred that he had nothing to do with his death; and that he had no grudge or reason to kill him.

14. The learned Judge misbelieved the accounts of the two appellants while believing that of the prosecution witnesses. Finding that the case was based on circumstantial evidence, she concluded that all the evidence pointed unerringly to the conclusion that both appellants were complicit in the murder of the deceased. Regarding the 2nd appellant, the learned judge pointed to two factors:

    a. That the 1st appellant had told the police, and testified that it was the 2nd appellant who had an axe – which turned out to be the murder weapon; and

    b. That PW4 testified uncontrovertibly that she lent her axe to the 2nd appellant on the day the deceased disappeared.

15. In his appeal before us, the 2nd appellant faults the learned Judge for the conclusion that the evidence points unerringly to him as one of those who participated in the murder of the deceased. He has framed his appeal as based on two related grounds:

16. In his submissions, as well as in the oral highlights by Ms. Anyango, the 2nd appellant focused on the evidence of the axe and the centrality the learned Judge placed on it in her finding of guilt. He faulted

the learned Judge for pivoting her finding of guilt on an item that was never produced in evidence. In short, the 2nd appellant argued that the evidence in this case did not meet the threshold required for circumstantial evidence because the axe was not produced in evidence; and no items belonging to the deceased were found in the 2nd appellant's possession. Finally, the 2nd appellant argued that the Last Seen Doctrine cannot be applied because there was no concrete evidence that the 2nd appellant was seen with the deceased on the day he died. The evidence of PW8, the 2nd appellant insisted, was that she saw the deceased after she had seen the 2nd appellant – but not both of them together.

17. The parties agree on what the prosecution needed to prove in order to prevail at the trial: the Prosecution was required to prove the three elements of the offence of murder: First, that the death of the deceased occurred, second, that the death was caused by unlawful act or omission on the part of the accused person; and third, that the accused person had malice aforethought in causing the act or omission. In Joseph Githua Njuguna v R [2016] eKLR, this Court stated the elements thus:

> " [Section 204 states that] any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are:
>
> a. The death of the deceased and the cause of the death;
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> b. That the accused committed the unlawful act which caused the death of the deceased; and
>
> c. That the appellant had harboured malice aforethought."

18. In the present case, the fact of the death of the deceased is not in question or doubt. The pathologist, Dr. Wambani, who testified as PW7 produced a post-mortem report which confirmed that the deceased died as a result of severe head injury with injuries to the abdomen as contributory factors. All the prosecution witnesses confirmed the death. The 2nd appellant does not contest both the fact and cause of death.

19. Additionally, the 2nd appellant does not seriously contest that whoever caused the death of the deceased did so with malice aforethought. This is owing to the nature of the attack and injuries suffered. The nature of the injuries are such that whoever attacked the deceased must have intended, at the minimum, to cause serious injuries to him. By dint of section 206 of the Penal Code, the element of malice aforethought is, therefore, easily met.

20. The crux of the case is whether the 2nd appellant can be said to have been one of the persons who caused the death of the deceased. As the learned Judge stated, the prosecution relied solely on circumstantial evidence to link the 2nd appellant to the death. Unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one may infer the existence of material elements.

21. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in Republic vs Ahmad Abdolfadhi Mohammed & Anor 2019 eKLR as follows:

> 55. The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding

disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non- existence of some fact in question may be inferred as a probable consequence...."

[.....

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "...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, ..."

60. As was further stated in the case of *Musili v. Republic CR A No.30 of 2013* (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

22. The principles to be gleaned from the above, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.

23. The question in the present appeal is whether these threshold is met. We have come to the conclusion that it does for two reasons. First, as the learned Judge reasoned, the 2nd appellant incontrovertibly borrowed an axe from PW4 on the date the deceased disappeared before he was found dead at the same site three days later. The 2nd appellant did not explain why he borrowed the axe and neither did he dispute that he so borrowed it. His complaints on appeal that the axe was not produced in evidence are unavailing. It would have been best practice for it to be produced, but the point in issue was whether he had, in fact, borrowed an axe from PW4. Evidence established beyond reasonable doubt that he had.

24. Second, the 2nd appellant was one of the two persons – together with the 1st appellant – who were last seen with the deceased. In his submissions before this Court, the 2nd appellant attempted to blunt this fact by impugning the recollection of PW8 – whether they were, in fact, seen together. However, surrounding evidence establishes beyond reasonable doubt that they were, in fact, so seen. In addition to the testimony of PW8, the 2nd appellant in his own testimony confirmed that he was with the deceased in the morning of 12th July, 2010 at the site where the deceased's lifeless body was later found – the day the deceased disappeared. The father of the deceased, PW1, also confirmed that he knew that the deceased had gone to the construction site to milk the cows as he always did.

25. In short, we are persuaded that applying the appropriate principles of circumstantial evidence to the present case, this Court can truly say that the "circumstances taken cumulatively... form a chain so complete that there is no escape from the conclusion that within all human probability ....the [2nd

appellant]" was one of the persons who committed the heinous crime. See Joan Chebichi Sawe versus Republic [2003] eKLR.

26. The 2nd appellant was sentenced to imprisonment for thirty (30) years. The sentence was imposed after a sentence hearing in which the 2nd appellant offered his mitigation. The learned Judge considered the mitigation and exercised her discretion in fashioning the sentence. We note that the 2nd appellant did not appeal against the sentence. It is just as well. The sentence is lawful; and cannot be said to be manifestly harsh or lenient by any rational standards.

27. The upshot is that the appeal by the 1st appellant is marked as abated while that by the 2nd appellant is dismissed in its entirety.

28. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR