Oganga & another v Republic (Criminal Appeal 156 of 2017)
[2024] KECA 1215 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1215 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 156 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

JOHN OUMA OGANGA ..... 1ST APPELLANT

NEHEMIAH AYUGI ODERA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal the judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 21st September, 2017 in HCCRA No. 67 of 2014)

JUDGMENT

1. John Ouma Oganga (the 1st appellant) and Nehemiah Ayugi Odera (the 2nd appellant) were convicted of the murder of Paul Obiero (the deceased) on November 30, 2013 at Kisumu town, Kisumu East District within Kisumu County. Murder is a crime contrary to section 203 as read with section 204 of the *Penal Code*.

2. The linchpin to the prosecution case, believed by the trial court (Majanja, J), was the evidence of Stacy Akinyi (PW4). She is a daughter of the deceased and aged 18 years old at the time she testified. On April 27, 2017, the day of the assault on her father, she would be about 15 years old. On that day, at about 8.00pm, she was sent by her mother Roseline Ngoya Owino (PW1) to buy paraffin and she proceeded to Wells Point Petrol Station. After she had purchased the paraffin, she saw a crowd just behind the petrol station. In the crowd were the appellants assaulting her father, using stones, with others pleading with them to stop. She knew the two as neighbours at home. She told the trial court that she was able to see what was happening because the area was illuminated by security lights at the petrol station. As the assault continued, she went home and reported the incident to her mother, PW1.

3. PW1 rushed to the scene to find her husband bleeding and in distress and crying out for help. The deceased told her that he had been beaten by the two appellants on an allegation that he had stolen a

goat. She got means to take her husband to Kisumu General Hospital where his condition took a turn for the worse eventually succumbing to the injuries on October 11, 2014. To be noted for now about her evidence is that her account of what her husband told her about the two was rejected by the trial court which found it as falling short of a dying declaration.

4. PW1 was present at Kisumu East District Hospital Mortuary on December 16, 2013 where she identified her husband's body before Dr. Masawa carried out an autopsy on it. The results of the postmortem were reduced into a report produced on behalf of the doctor by his colleague Dr. Patrick Omondi (PW3). The findings were that: he worked on a body of a male adult whose apparent age was 35 years with a height of 5ft, 7 inches; he had minor cuts on the left side of the head, a fracture to his right distal radio-ulnar joint; a fracture which exposed the ankle joint; a complete collapse of the right lung; and a blood clot on the upper side of the abdomen. The doctor concluded that the cause of death was cardio-respiratory arrest secondary to severe head injury with poly-trauma secondary to multiple fractures.

5. PC Peter Ooyi (PW2) was asked by Inspector Sang, the Deputy OCS of Kondele Police station, to accompany him to Nyamasaria Police Station Base to investigate a murder. There, he found PW1 who recorded a statement. His evidence was an account of how he carried out the investigations.

6. When, on May 11, 2017, the trial court found that a *prima facie case* against the two had been made out and put them on their defence, both appellants made sworn statements and one George Ouma Ochoch (PW3) gave evidence for the 2nd appellant.

7. The 1st appellant plies two trades: a mason by day and a watchman by night. He resides behind Wells Point Petrol Station at Mama Moraa area. He does not know the deceased and he denied the offence. He told the court that it was only on November 21, 2014, after he was arrested, that he learnt that he was accused of killing the deceased and then disappearing. He later learnt that the deceased was beaten on allegation that he had stolen a goat.

8. The 2nd appellant is a farmer and a resident of Nyamasaria. On December 10, 2017, he left home and returned in the evening at 5.00pm. He denied assaulting the deceased. He also told court that he was arrested on November 26, 2014. George Ouma Ochoche (PW3) gave evidence exonerating the 2nd appellant. That on November 3, 2013 while on his way from work he passed by Wells Point Petrol Station to buy petrol and whilst there he heard shouts of "thief thief" and saw a person who was accused of stealing a goat being assaulted by more than 10 people. He told court that he had known the 2nd appellant for over 10 years as they live together in Nyamasaria. He was emphatic that he did not see the 2nd appellant on that night.

9. In a crisp judgment, the trial court found the two guilty after observing:

> "(14) Although the evidence against the accused is that they both beat the deceased with canes, the prosecution did not establish who hit the fatal blow. In such circumstances it was necessary to establish that the accused acted with a common intention. Common intention may be inferred from the acts of the perpetrators and the surrounding circumstances. In the case of Njugu v Republic [2007] 2KLR 123, it was held that:
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> > "Under section 21 of the *Penal Code* (Cap 63), when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its

commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

(15) The key witness, PW4, testified that when she arrived at the scene, there was a crowd of about 20 people although when she went close, it was only the two accused who were beating the accused while accusing him of having stolen a goat. She left as they continued to beat the deceased causing him to suffer multiple injuries. On the other hand, DW3, testified that more than 10 people, who he did not know, were assaulting the deceased while accusing him of stealing a goat. For the reasons, I stated earlier I am inclined to accept the testimony of PW4. Both accused took it upon themselves to assault the accused on suspicion that he had stolen a goat. They acted jointly hence the prosecution established that they acted with common intention to beat up the deceased."

10. The appellants filed separate appeals but which raise common grievances. They are that:

    a. The trial court erred in law and fact in finding that PW4 positively identified the two appellants as the persons who assaulted the deceased.

    b. The trial Court erred in law and fact in finding that PW4 recognized the two.

    c. The evidence of PW4 was inconsistent in material particulars.

    d. The death sentenced imposed was harsh.

11. Ms. Odhong, learned counsel representing the 1st appellant, submitted that on the issue of identification, there were two eye witnesses who testified that the incident occurred at 8pm and that it was dark; however, they did not talk about the lighting conditions. Even PW1 told the court that she did not see her husband, the deceased, being beaten and did not also see the appellants at the scene. The only witness, PW4, who identified the appellants and who testified on the conditions of the light at the petrol station, gave sketchy evidence. Counsel submitted that the lighting within the petrol station may have been good, however, the incident happened outside the station and therefore it was a misdirection to rely on this as evidence of light without delving into the question of actual distance of that source of light from the scene. Counsel contended that the evidence of PW4 was further unreliable as she gave the impression of a cool, calm and collected person who chanced upon a scene in which her father was being assaulted and that she calmly watched and identified the assailants and their weapons and listened to their discussion as other people urged the assailants to stop; this was inconceivable.

12. On the issue of recognition, counsel submitted that the learned judge did not inquire into the circumstances of identification because he accepted, without question, that PW4 recognized the appellants. PW4 gave evidence that she knew the 1st appellant as a neighbour in the area they lived. However, PW1, her mother, testified that she did not know him prior to the incident. The learned judge was faulted for accepting the evidence of recognition by PW4 without questioning it.

13. On the issue of evidence of a single witness, counsel argued that the evidence of PW4 needed to be impeccably flawless and consistent yet that was not the case. There was material inconsistency with her evidence in that in her examination in chief, she testified that the people beating her father were using stones while in her cross examination she testified that they were carrying canes. Thus, she was unsure about which weapon was used. She further submitted that the post mortem report revealed that the deceased suffered terrible injuries including fractures which could more likely have been caused by heavy objects like stones. The inconsistency in PW4's evidence also lends credence to the theory that

the deceased suffered a beating by several people such as "mob justice" and not necessarily an assault by the appellants herein. In relying on the case of *John Mutua Munyoki -vs- Republic* [2017] eKLR, counsel took a view that the contradictions and inconsistencies in PW4's evidence should have led to the inescapable finding that the witness did not actually observe the on goings during the incident or that she was totally unable to remember.

14. Counsel further submitted that from the evidence of PW1 and PW4 it is clear that there was a mob present at the scene. That despite this, the prosecution offered no other evidence to support its case against the appellants. Even though a conviction is possible on the basis of the evidence of a single witness, the said evidence was not credible in this case. That PW2, the Investigating Officer did not elaborate on whether he attempted to obtain other witnesses and the failure to call those witnesses resulted in lack of corroboration on key issues. If indeed the evidence of PW4 was taken to be truth, then how did over 20 people fail to stop 2 people from assaulting the deceased? Posed counsel! It was posited that it provides answers why none of those people agreed to be a witness against the appellants as they were part of the mob that killed the deceased. In relying on the case of *Karanja & another -vs- Republic* [1990] KLR on the importance of corroboration, counsel notes that there were no independent witnesses to corroborate the evidence of PW1 and PW4 yet there was an abundance of witnesses at the scene of the incident.

15. Lastly, counsel submits that the allegation made by PW2 that the appellants disappeared from their homes after the assault and only reappeared in time to be arrested on November 26, 2014, was an attempt to justify the delay in arresting them for almost one year. There was no evidence adduced by any of the witnesses to support this fact. Further, no evidence was adduced to show the number of times the investigating officer attempted to trace and arrest them. She submits that the learned judge therefore erred in relying on this fact in rejecting their defence.

16. On sentencing, counsel urges this court to review the death sentence to a lesser sentence based on the current judicial thinking in *Francis Karioko Muruatetu & another -vs- Republic* [2017] eKLR.

17. Learned Counsel Mr. Oguso submitted orally on behalf of the 2nd appellant. We need not rehash those submissions as they echo the submissions made on behalf of the 1st appellant.

18. Representing the State, learned Prosecution Counsel Mr. Okango in opposing the appeal, submitted orally as well. He submits that the prosecution tendered sufficient evidence upon which a conviction against the appellants could be safely founded. He submits that the evidence of PW4 was credible and admissible, firstly because she was at the scene as her mother PW1 had sent her and the brother to buy paraffin at the petrol station. Secondly, there were security lights at the petrol station and her testimony was that the incident happened just outside the petrol station and she could see the appellants assaulting her father, both carrying stones. This testimony spoke to the question of lighting and identification. Further, because of the lighting, PW4 was able to positively identify the appellants through recognition as they were both known to her as neighbours in the area they resided. Learned counsel further submits that PW4's testimony was not contradictory, and the only contradiction alluded to was with regards to weapon used. He submits that taken at the face of her testimony, the act of assault that PW4 witnessed was being perpetuated by stones. The fact that they were also carrying canes does not mean to say that they were using the canes to beat the deceased. With regard to the issue raised that PW4 may have not been at the scene otherwise she would have mentioned seeing the appellants at the earliest opportunity, counsel submits that she did mention these people at the earliest opportunity possible and this was supported by the evidence of PW1 and PW2, the investigating officer. Lastly, he submits that the evidence of PW4 was properly accepted by the trial court as a testimony of a single identifying witness and it placed the appellants as the scene having committed

the offence. As for sentence, counsel proposed the mandatory term be set aside and substituted with a sentence of 25 years' imprisonment for each appellant.

19. As a first appeal court our remit is to re-evaluate the evidence and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify and due allowance must be given for that handicap. See *Okeno -vs- Republic* [1972] EA 32:

> " 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] EA 336) and to the appellant court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] EA 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] EA 424."

20. The only eye witness account of how the two appellants assaulted the deceased was that of PW4. The incident happened at night and we are urged by the appellants to find that the trial court did not consider or discuss the intensity of the light, the actual distance of the place of incident from the source of light and the effect of the shadows of several people at the scene. While we agree that there was no detailed discussion on those aspects by the trial court, we are satisfied that the light was bright enough for PW4 to see both the victim and the assailants. PW4 was emphatic and unshaken that the appellants, people she knew as neighbours, assaulted her father. Although it was 8.00pm in the night, the light from the Petrol Station was sufficient enough for her to see the incident unfold. In her own words, "the petrol station light was bright". If there was doubt as to the intensity of the light that would be removed by the evidence of DW3, a defence witness, who was at the scene and was able to see the people who assaulted the deceased.

21. We are also asked to find that it is unlikely that PW4 was able to recognize the 1st appellant as a neighbour because it would not be possible that PW4 would know the 1st appellant when her own mother did not know him. We do not think much needs to be made of this because PW4 was at the time of the incident 15 years old. She would be old enough to know her neighbours. This is how she explained her knowledge of the two:

> " I know Nehemiah. He was a neighbour and I would pass by his house on the way to school. I know John as he is a neighbour and I would pass by on my way to school. (*sic*)"

22. Looking at the cross-examination of PW4, no questions was put to the witnesses as to how she knew the two and so her testimony was unshaken. While cognizant of the dangers inherent in identification by a single witness in difficult circumstances, we are nevertheless satisfied that PW4 made no error in recognising the appellants as her father's assailants.

23. Yes, there was apparent inconsistency in the evidence of PW4 as to the weapons used by the appellants. At one point, she said they were stones and at another, canes. This inconsistency would, in our view, have been defining had it not been for some other aspects of the prosecution case which supported the theory that the two were the assailants. First, the injuries sustained by the deceased, which included fractures on his right distal radio-ulnar joint ankle and complete collapse of the right lung, was consistent with the use of stones. Second, the behavior of the two appellants after the incident was inconsistent with that of innocent people. PW2, the investigating officer, told court that the two and a

third suspect went into hiding after the incident and only resurfaced back to their homes about a year later upon which they were arrested. That evidence was not debunked at all. We are satisfied, just like the trial court, that it was the two who, in a joint enterprise, assaulted and killed the deceased.

24. In sentencing the two to death the trial court Judge lamented,

> "Though I have sympathy for their personal situation, the law provided (sic) only one sentence and it is death."

25. This was the law then but changed with *Francis Karioko Muruatetu –Vs- Republic* (2017) eKLR (Muruatetu 1), where the mandatory death sentence was declared unconstitutional.

26. In mitigation, the 1st appellant was remorseful, sought leniency and an opportunity for redemption. He was a first offender with a young family. The 2nd appellant too was remorseful. He was of advanced age although the exact age was not given. He was a sole breadwinner and sought leniency.

27. We have considered the plea by the appellants against the gravity of the offence. It does not help to take the law into one's hands. There can never be any justification to kill a person suspected of stealing a goat. We have no doubt that a stiff sentence is deserved. The two shall each serve a prison term of 20 (twenty years) to be computed from the date of sentence at the High Court. Any period spent in custody during trial shall be discounted as prescribed by section 333 (2) of the *Criminal Procedure Act*.

28. Save for this limited success, the appeal is dismissed.

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

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR