Setek v Republic (Criminal Appeal 115 of 2017)
[2024] KECA 1263 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1263 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 115 OF 2017

M NGUGI, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

MOROMBI SANKARE SETEK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 5th October 2017inHC.CR.C. No. 59 of 2015)

JUDGMENT

1. The appellant herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars in the information were that on 14th December 2013 at Mt. Longonot Forest, Suswa in Naivasha Sub-County within Nakuru County, the appellant murdered Lesingo Tanim Kilusu.

3. In a bid to prove their case against the appellant, the prosecution called five witnesses. At the end of the trial, the appellant was found guilty, convicted, and sentenced to death.

4. As this is a first appeal, we are mandated to re-evaluate and re- analyze the evidence before the trial court, bearing in mind that we did not have the occasion to see or hear the witnesses. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), this Court stated that:

> " However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno v R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we

neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun v Republic [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary."

5. The brief facts of this case were that PW3, the deceased's father, employed the appellant as a herd's boy to look after his goats. In November 2013, the deceased was instructed to accompany the appellant to drive the family herds to feed at Longonot and stay there for a while. However, on or about 14th December 2013, when PW2, the deceased's brother, visited Longonot, he found no trace of the appellant or the deceased. The herds had been abandoned.

6. Upon searching the area, PW2 found some of the deceased's clothes in a dam. He went back home and after that, a search for the two missing persons was conducted.

7. When PW3 called the appellant on the phone, the appellant told him that they had been captured and taken to Mombasa by some unknown people. The appellant also told PW3 that he had managed to escape and needed fare to go back home. PW3 also told the court that he had visited the duo in Longonot on the night of 12th and 13th December 2013 and took some lambs with him back home.

8. According to PW5, they traced the appellant at Mai Mahiu in January 2014. The appellant then led the police to a gorge in Longonot where more of the deceased's clothes were retrieved. The police also retrieved human bones near the said gorge.

9. PW1, a Government Analyst, examined the human bones sent to their laboratory and compared them to the DNA of the parents of the deceased and confirmed that they were the parents of the deceased.

10. Put to his defence, the appellant, in his unsworn testimony, confirmed that he was employed by PW3 as a herd's boy in 2013. He told the court that he moved to Longonot with one Peter Muruan and that on 9th December 2013, he informed PW2 that he would be attending a funeral at his home. When PW2 called him on 13th December 2013 asking him to return to Longonot, he refused. However, when he decided to return on 4th January 2014, he got lost on the way.

11. The appellant told the court that he was later called by PW2 who requested that they meet in Mai Mahiu. When he went there, PW2 asked him about the whereabouts of the deceased, which he did not know. He was then arrested by the police who led him to Longonot to the site where he had herded cattle last. He informed the court that when he expressed his innocence, he was tortured. The following day, he was taken back to Longonot for a second search.

12. The learned Judge held that there was no reason why PW2, PW3 and PW4, who admittedly knew the appellant, would out of the blue search for and question the appellant about the deceased if indeed he had not gone to herd with the deceased. The learned Judge also found that the evidence of PW2 and PW3 was corroborated by the evidence of PW4 and that the evidence of the three witnesses was further corroborated when the clothes and bones of the deceased were recovered at Longonot, at the gorge where the appellant had led the police to.

13. From the foregoing, the learned Judge made a finding that not only did the appellant know the deceased, but that he had been with the deceased at the gorge at the material time.

14. The learned Judge further held that even though the cause of death of the deceased was unknown, the appellant was the last person to be seen with the deceased at Longonot. The learned Judge found the evidence of PW2 and PW3 to be truthful while the appellant's alibi defence did not displace the prosecution's case as the issues raised in the appellant's defence were not put to the witnesses on cross-examination. The learned Judge also found the appellant's defence to be inconsistent.

15. As the prosecution case was based on circumstantial evidence, the learned Judge held that this was a proper case to draw an inference of guilt because, by his conduct, the appellant had disappeared from Longonot at a time that coincided with the death of the deceased, and he made up stories to cover up his tracks.

16. Consequently, the appellant was found guilty of murder, convicted, and sentenced to death.

17. Being aggrieved by his conviction and sentence, the appellant lodged this appeal in which he raised the following supplementary grounds of appeal, to wit:

    a. The appellant pleaded not guilty at the trial.

    b. The learned Judge erred in failing to hold that the prosecution case was not proved beyond reasonable doubt, and further that the appellant was guilty of attempted murder.

    c. The learned Judge erred by taking into consideration matters that ought not have been taken into consideration.

    d. The learned Judge erred in convicting the appellant on circumstantial evidence.

    e. The learned Judge erred in failing to analyze and evaluate the entire evidence.

18. When the appeal came up for hearing on 19th March 2024, Mr.Bhansali, learned counsel, appeared for the appellant whereas the respondent was represented by Mr. Omutelema, Assistant Deputy Director of Public Prosecutions. Counsel relied on their written submissions.

19. In his written submissions, the appellant submitted that even though there is no doubt that the deceased was murdered, he (the appellant), was a survivor of a tragic and traumatizing situation. He called upon us to look at the evidence of PW2 to the effect that the appellant used to go herding with the deceased during school holidays without any complaints as a testament to the appellant's character. In this regard, the appellant submitted that he could not have had any intentions to kill or cause any harm to the deceased. To buttress this submission, the appellant relied on the case of Stephen Nguli Mulili v Republic [2014] eKLR.

20. The appellant submitted that his right to a fair trial was infringed when the court denied him bail and also failed to consider that there was a possibility that the appellant and the deceased were indeed abducted and that the appellant was lucky to have escaped. In support of this submission, the appellant relied on the case of Clement Kiptarus Kipkurui v Republic [2013] eKLR.

21. While relying on the case of Ahamad Abolfadhi Mohammed & Another v Republic [2018] eKLR, the appellant submitted that he was convicted on circumstantial evidence without proper caution, and therefore the conviction was unsafe.

22. Finally, the appellant submitted that the imposition of the death sentence without the necessary inquest report was a violation of the law under section 387 of the Criminal Procedure Code and therefore a miscarriage of justice. Mr. Bhansali prayed that if the conviction is upheld, the sentence should be revised.

23. Opposing the appeal, Mr. Omutelema highlighted that the appellant was the last person to be seen with the deceased when the deceased was alive and that he alleged that he had been kidnapped with the deceased and taken to Mombasa. However, the appellant was the one who led the police to where the bones of the deceased were recovered.

24. The respondent submitted that the appellant was convicted on circumstantial evidence which was properly evaluated and pointed to the appellant as the person who was last seen with the deceased, when the latter was alive. The respondent relied on the cases of Ahamad Abolfadhi Mohammed & Another v Republic, (supra), Sawe v Republic [2003] KLR 364, and Moses Jua v The State [2007] LPELR-CA/IL/42/2006 to buttress his submissions.

25. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issues for determination are; whether or not the prosecution case was proved beyond reasonable doubt, and whether or not the death sentence meted out against the appellant was lawful.

26. Section 203 of the Penal Code under which the appellant was charged provides that:

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

27. It follows, therefore, that to sustain a charge under the said provision, the prosecution had to prove, beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.

28. It is not in dispute that the deceased died. The human bones that were recovered from the gorge at Longonot, when compared to the DNA of the deceased's parents, matched 99.9%. This was satisfactory proof that the bones belonged to the deceased.

29. Therefore, the questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellant, and was there malice aforethought?

30. It is common ground that the appellant was convicted on circumstantial evidence as none of the prosecution witnesses saw him kill the deceased. This Court in Sawe v Republic, (supra) stated thus:

> " In order to justify on circumstantial evidence, the inference of guilt, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

31. Similarly, in Ahamad Abolfathi Mohammed and Another v Republic, (supra), this Court stated that:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
>
> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition

with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

32. The evidence of PW3 was that the deceased was last seen alive with the appellant when he left them there after he had visited the night before they went missing in December 2013. The appellant, when called on the phone, told both PW2 and PW3 that they had been abducted and taken to Mombasa, but that he had managed to escape. The next time the appellant was seen again was in January 2014 at Mai Mahiu when he went to meet up with PW2 and he was later arrested. At some point, the appellant told the court that he got lost on his way back to his place of work.

33. There is no doubt in our minds that the appellant's narration of the events leading to the death of the deceased was inconsistent. The appellant was fishing for explanations on what might have happened from abduction to wild animals, to not knowing the deceased, hoping that one of these would exonerate him from guilt. In the Nigerian case of Moses Jua v The State, (supra), the Court held that:

> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory 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 the inference that the accused killed the deceased."

34. Similarly, in Stephen Haruna v The Attorney General of The Federation [2010] 1 iLAW/CA/A/86/C/2009, the court stated that:

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstances. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

35. It is our considered view that the appellant, being the last person to have been seen with the deceased before his death, had the onus under Section 111(1) of the *Evidence Act* to explain how the deceased died. Section 111(1) provides that:

> " 111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

36. Section 119 of the *Evidence Act* provides that:

> " "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

37. In the circumstances, we find that the appellant's defence did not cast any shadow of doubt on the prosecution evidence. The circumstances surrounding the incident are such that they point to the guilt of the appellant and there are no other co-existing circumstances that could weaken or destroy this inference of guilt. It follows, therefore, that the circumstances in this case, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.

38. We find that, in the circumstances, the trial court properly convicted the appellant on circumstantial evidence, and we are satisfied that the circumstantial evidence on record points unerringly to the appellant, as the person who murdered the appellant.

39. As regards malice aforethought, Section 206 of the Penal Code provides:

> " "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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
>
> c. An intention to commit a felony.
>
> d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony."

40. In the case of Republic v Tubere s/o Ochen [1945] 12 EACA 63, the Court established the following elements of malice aforethought:

> " 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 either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident."

41. It is common ground that the deceased was a minor who was left in the custody of the appellant. By failing to inform the deceased's relatives of the whereabouts of the deceased immediately he thought the deceased had gone missing, and the fact that the appellant ran away and disappeared and until he was traced through his phone in January 2014, we find the appellant's actions to that of a guilty conscience. In the circumstances, we hold that the conduct of the appellant in this instance to demonstrated malice aforethought as contemplated under Section 206 of the Penal Code.

42. In the circumstances, we are satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt.

43. As regards the sentence, the appellant in his mitigation stated that he was a first offender. As the death sentence was the only sentence prescribed by the law at the time of the appellant's conviction, he

was sentenced to death. However, with the current jurisprudence on sentencing in the case of Francis Kariokor Muruatetu & Another v Republic [2017] eKLR that:

> "Consequently, we find that section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty...It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ..."

44. We set aside the sentence of death and substitute therefor a sentence of imprisonment for 35 years. The sentence shall run from 12th March 2014, which was the date when the appellant took plea, and in compliance with Section 333(2) of the Criminal Procedure Code. The appeal against conviction is dismissed in its entirety.

Orders accordingly.

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

MUMBI NGUGI

JUDGE OF APPEAL

.....

F. OCHIENG

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.