Kariuki v Republic (Criminal Appeal 196 of 2017)
[2024] KECA 1129 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KECA 1129 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 196 OF 2017

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

SEPTEMBER 6, 2024

BETWEEN

HARRISON MUTHIE KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Meru (R.K. Limo, J.) dated 13th October 2015 in HCCR No. 9 of 2012)

JUDGMENT

1. The appellant, Harrison Muthie Kariuki, is before us challenging his conviction and sentence for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 6th July 2012 at Komboini Village in Kirinyaga District within Kirinyaga County, he murdered Moses Karaba Kibutha (the deceased). He was convicted on 13th October 2015 by the learned R.K. Limo, J. of the High Court at Kerugoya, and sentenced to death.

2. The conviction and sentence have been challenged on the following grounds:-

> " 1) That the trial Judge erred in law while convicting me on inconsistent and contradicted evidence by the key prosecution witnesses.
>
> 2. That the trial Judges erred in law while convicting me on the basis of identification by the identifying witnesses which the same wasn't made under free atmospheric conditions.
>
> 3. That the trial Judges erred in law while convicting me on charges that weren't proved to point to my link to the execution of the same.

4. That the trial Judges erred in law while complying with the provisions of section 169(1) of the C.P.C. Cap 75 L.O.K."

3. The appellant filed the following supplementary grounds of appeal:-

" 1) That the learned trial Judge erred in law in finding that the charge of murder contrary to section 203 as read with section 204 of the Penal Code had been proved to the required standard of proof beyond a reasonable doubt.

2. That the learned trial Judge of the superior court erred in law in finding that the conditions obtained during the commission of the offence were conducive/ favourable for positive identification/recognition of the appellant.

3. That the trial court erred in law in convicting the appellant on evidence which was discredited and unreliable for having contradictions, discrepancies, and inconsistencies.

4. That the trial court erred in law by failing to fully comply with the mandatory provision of section 201(2) of the CPC Cap 75 Laws of Kenya.

5. That the learned trial Judge erred in law in considering extraneous evidence on the defence of drunkenness which was raised only as or in submissions. The same occasioned prejudice/injustice for submissions do not amount to evidence.

6. That the superior court erred both in law in shifting the burden of proof apropos of the defence of alibi raised by the appellant.

7. That the learned trial Judge erred in law in meting out mandatory death sentence."

4. The record shows that the prosecution called ten (10) witnesses. Millicent Wairimu Karaba (PW 1) was the deceased's widow. When she testified, she was 64 years old. The appellant was her grandson; son to her son. On 6th July 2012 she was in the kitchen preparing supper (ugali) for the deceased who was under a mango tree in the compound warming himself. She sent her granddaughter Christine Wairimu Wamweru (PW 2), aged 15, to take warm water to the deceased to wash his hands in readiness for the food. It was about 8.30 pm. Behind PW 2 was Arnold Macharia Peris (PW 3), a class eight child, who was carrying food. He was also the appellant's cousin. The appellant appeared from the path leading to the toilet and confronted the deceased asking him "How many courts have you gone to?" The deceased responded, "Why?" The appellant called him "uncircumcised" and stated "I have come to kill you." This voice attracted PW 1 to the scene. The appellant kicked the deceased on the chest. The deceased fell down. The appellant took a wooden chair and used it to hit the deceased until it broke into pieces. PW 1 was screaming. When PW 1, PW 2 and PW 3 tried to get close to where the deceased was being beaten the appellant threated to kill them. With the chair in pieces and the deceased on the ground, PW 1 ran to call the Assistant Chief. The appellant had run away. In the meantime, the appellant's father, David Kariuki Karaba (PW 4), who had left home to go and buy cigarettes, returned when he heard screams. He found his father (the deceased) on the ground while badly injured. Many people had come to the scene. He was told that the deceased had been injured by the appellant who had run away. PW 4 organised for a vehicle to take the deceased to Kerugoya District Hospital. The deceased died on the way to hospital. The incident was reported at Kerugoya Police Station and at Sagana Police Station. The appellant was arrested the same night at his house.

5. When Dr. Karomo Ndirangu (PW 9) conducted post mortem on the body of the deceased on 13th May 2012 at Kerugoya District Hospital, he found that the body was bruised on the forehead and on the lower ribs on the right side. He had broken ribs on the lower right side; ribs 8 to 12. The ribs were fractured with hemorrhage. There was rapture of liver posteriority. The cause of death was intra-abdominal hemorrhage secondary to blunt trauma.

6. The appellant gave a sworn defence in which he denied that he had murdered the deceased who was his grandfather. He stated that the deceased was his great friend and that this did not go down well with the family members. Secondly, his father (PW 4) would complain that he (the appellant) was not his biological son. He denied that he was in the incident that PW 1, PW 2, PW 3 and PW 4 had talked about, in which the deceased was murdered. He stated that after doing his work of harvesting and selling tomatoes on this day, he went to drink in a bar until 6.30pm. He changed to another bar where he bought and drunk Napoleon brandy before he walked home with what was left in the bottle. He put the bottle under the bed and slept. He was found asleep in his house by police and arrested. The police took the bottle which they testified about. He did not call witnesses.

7. This is the evidence that the trial court considered and found that the guilt of the appellant had been established beyond reasonable doubt. Our duty as the first appellate Court is to subject the whole of the evidence before the trial court to fresh and exhaustive examination and draw our own independent conclusions thereon, while being conscious of the fact that we did not have the advantage of seeing and hearing the witnesses as they testified. (See Okeno -vs- Republic [1972]EA 32).

8. The substance of the appellant's complaint on appeal was that the deceased was attacked and murdered at night in circumstances that were not favourable for positive identification and/or recognition, and that the prosecution evidence regarding such identification and/or recognition had been contradictory and inconsistent. Therefore, that his conviction was not based on conclusive evidence. The other material complaint was that the trial was by C.W. Githua, J. and subsequently taken over by R.K. Limo, J. who did not explain to him that he was entitled to recall the witnesses who had given evidence before C.W. Githua, J.

9. We can deal with this second complaint immediately. During the trial before either Judge, the appellant was represented by learned counsel M. Nduku. R.K. Limo, J. took over the case upon the transfer of C.W. Githua, J. Before R.K. Limo, J. on 27th October 2014, the learned counsel addressed the court as follows:-

> " The matter is part heard. We have no problem with directions given that the matter do proceed from where the other court reached. We only ask for proceedings."

The learned Judge then directed as follows:-

> "The matter shall proceed from where it had reached. The accused shall be supplied with the copy of the proceedings through his counsel..."

It is evident that there was no request that the witnesses who had testified be recalled, a right the appellant had but did not exercise. We do not find any merit in the complaint that the appellant's right under sections 201(2) of the Criminal Procedure Code was compromised. The appellant had the benefit of counsel who understood that the right to recall the witnesses was available but elected not to exercise it.

10. On the question of identification, we consider that the appellant was known to the witnesses. The trial court was therefore dealing with recognition. During the hearing of the appeal before us, learned

counsel Mr. Makura represented the appellant while learned counsel Mr. Naulikha represented the State. Each had filed written submissions which he was allowed to highlight. It was the submission by Mr. Makura that the incident having been at night, and even as PW 1, PW 2 and PW 3 having talked of there having been moonlight, the intensity of the moonlight was not clearly explained. It was pointed out that, according to PW 1 –

> " It was around 8.00pm. There was moonlight but it was not bright."

When PW 1 was cross-examined, she stated:-

> " It was around 8.30pm. It was dark."

PW 2 stated that –

> "That night there was moonlight. I saw the accused very clearly through moonlight assault my grandfather..... our grandfather had sat under a mango tree warming himself using firewood. The mango tree was not far from the kitchen "

According to PW 3, learned counsel submitted:-

> " There was bright moonlight. I identified the accused as the one who was beating up my father physically through the moonlight. I cannot remember the clothes he was wearing my grandfather had been seated by the fire not far from the kitchen."

11. It was the submission by learned counsel for the appellant that the evidence was not consistent on whether the night was dark or there was moonlight. The situation was made worse by the fact that the attacker caused fear to the witnesses when he threatened to kill them.

12. As far as Mr. Naulikha was concerned, the witnesses were closely related to the appellant who they recognized both physically and by voice.

13. We are enjoined to carefully reexamine the evidence of PW 1, PW 2 and PW 3 to be able to satisfy ourselves that the learned Judge properly engaged with their testimonies before he made the finding that he was satisfied beyond doubt that they positively recognized the appellant as the deceased's attacker that night. We recall that in Wamunga -vs- Republic [1989] KLR 425, this Court stated as follows:-

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

14. We are also conscious of the fact that where the prosecution has called several witnesses in support of its case, there are bound to be contradictions and discrepancies or inconsistencies in their evidence. where the contradictions, discrepancies and inconsistencies are material and substantial, they have to be resolved in favour of the accused (See Richard Munene -vs- Republic [2018]eKLR). But where contradictions, discrepancies and inconsistencies in evidence do not relate to material facts, or where they are minor, trivial or trifling and not fundamental to the questions in issue or do not create a doubt in the mind of the court, they can be ignored. (See Twegangane Alfred -vs- Uganda [2003] UGCA6).

15. In re-evaluating the prosecution evidence, we are alive to the fact that the appellant, in stating that he was not at the scene at the time when PW 1, PW 2 and PW 3 stated that he was there and he was the

one who attacked and murdered the deceased, he raised the defence of alibi. In dismissing the defence, the trial court stated as follows:-

> "I also find that the defence of alibi cannot hold as no evidence was adduced to establish it. As a matter of fact, the accused in his written submissions perhaps on reflection abandoned it altogether and put more emphasis on drunkedness....."

16. The appellant's counsel submitted that the trial court misdirected itself when it shifted the burden on the appellant by asking him to adduce evidence to prove the alibi. Then, that the trial had gone on a frolic by attributing the defence of drunkedness on the appellant when he had not raised such a defence. We agree that it was a serious misdirection for the court to demand that the appellant establishes that his alibi was true. This is because it is trite law that an accused who raises an alibi defence does not assume the burden of proving it. (See Kiarie -vs- Republic [1984] KLR 739). In a criminal case, the burden is always on the prosecution to prove the guilt of the accused beyond doubt. The burden does not shift. It is the prosecution to call evidence to prove beyond doubt that the accused was at the scene when the offence was committed, and that he was the one who committed it.

17. The misdirection notwithstanding, on our re-consideration of the evidence of PW 1, PW 2 and PW 3, we are certain that it was the appellant who attacked and murdered the deceased. The incident was at night, but in the home of the deceased. The deceased was warming himself beside a fire under a mango tree near the kitchen where PW 1 was preparing food. PW 1, PW 2 and PW 3 were all closely related to both the appellant and the deceased. There was no reason for all of the witnesses to blame the appellant if she/he did not see him attacking the deceased. According to them, the appellant did not stealthily, as it were, attack the deceased. He did this while talking and threatening to kill the deceased. He warned PW 2 and PW 3 that if they moved near him, he was going to kill them. PW 1 PW 2 and PW 3 certainly could recognize the appellant's voice, even assuming that this was a dark night. But all testified that there was moonlight. Even if it was not very bright, we find, they could recognize that it was the appellant speaking. These are the reasons why we confirm the finding by the learned Judge that the witnesses were able to positively recognize the appellant as the person who attacked and fatally wounded the deceased on the material night. The evidence was overwhelming.

18. The attack on the deceased was not provoked. The appellant came quarrelling. He kicked the deceased in the chest. The deceased fell from the chair he was seated in. He picked the chair and, using it, hit the deceased all over the body until it broke into pieces. As he did this, he was telling the deceased that he was going to kill him. Indeed, the deceased died from the injuries he sustained. He did not reach the hospital. The threats to kill coupled with the vicious attack using a chair until it broke into pieces went to show that the appellant had malice aforethought. He intended to cause the death of the deceased, and went on to actualize it. We confirm the conviction.

19. The appellant was convicted of murder. He was sentenced to death. This was the mandatory sentence under section 204 of the Penal Code. Learned counsel tried to persuade us that we have discretion to vary the sentence. We agree that following the Supreme Court decision in Francis Karioko Muruatetu & another -vs- R. [2017]eKLR the death sentence, though still lawful is no longer the only sentence available to an accused person following sentence. The Court indeed has discretion to mete out any other sentence depending on the circumstances of each case. Unfortunately, given the nature and the circumstances of the offence herein, it is our view that the appellant deserved the sentence he was given. We decline the invitation to us to interfere with the sentence imposed on the appellant. We uphold the sentence.

20. The consequence is that the appeal is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the Original.

Signed

DEPUTY REGISTRAR