Opisa & another v Republic (Criminal Appeal 326 of 2018) [2024] KECA 1419 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1419 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 326 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 11, 2024

BETWEEN

GILBERT SWAYI OPISA .... 1ST APPELLANT

OSCAR ONDIEK OGUTU .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

((Being an appeal from the Judgment of the High Court of Kenya at Kakamega (R.N. Sitati, J.) dated 21st February 2017 in HCRC No. 16 of 2013)

JUDGMENT

1. Gilbert Swayi Opisa (the 1st appellant herein) was charged alongside Oscar Ondiek Ogutu (the 2nd appellant herein), for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 6th March 2013 at Miyekhe Village, Ebusakami location within the County of Vihiga jointly with others not before the court murdered Stallone Echenje Nelson. They denied the charges.

2. The appellants were tried and convicted of the offence and sentenced to death. Being dissatisfied and aggrieved with both the conviction and sentence, the appellants have now appealed to this Court. This being a first appeal, this Court is mindful of its duty as 1st appellate court as well articulated in Erick Otieno Arum vs. Republic [2006] eKLR that:

   "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its

own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

3. The background to this matter begun in the mid-morning of 6th March, 2013, when Peter Echenje, PW1, who was working at Mr. Kenneth Marende's farm, was attracted by screams emanating from the appellants house within the neighbourhood. He rushed to the house where he found the appellants' mother, who told him that the deceased had stolen from the 1st appellant, and was being beaten. He realized that it was the deceased who was screaming.

4. Shortly the 1st appellant came out of the house and threatened to beat PW1. Two other people, namely Oscar, and another brother to the 1st appellant, came out of the 1st appellant's house dragging the deceased who was naked - the deceased was PW1's cousin. Upon seeing PW1, they dragged the deceased back into the house, and locked the door. Sensing danger, PW1 then ran to the shopping centre and called other people; and together they went to the 1st appellant's house, and demanded that he opens the door or else they would use force. The 1st appellant then asked PW1 to have the crowd dispersed, before he could open the door to let the deceased out. The crowd dispersed, the 1st appellant opened the door, and the deceased came out naked, and PW1 asked the 1st appellant to give the deceased clothes; and he gave out a pair of shorts.

5. PW1 testified that he saw the deceased who had a swollen head and bruises on his back. PW1 then walked with the deceased to the shopping centre from where the deceased could get home. PW1 left the deceased at the shopping centre, and went back to work. The following day, PW1 went to the deceased's house and deceased told him he was in pain. PW1 asked the deceased's parents to take him to hospital but by evening they had not taken him; and on 8th March 2013, the deceased breathed his last.

6. On cross examination PW1 reiterated his testimony in chief, adding that the 1st appellant was drunk at the time; and that he did not hear any chants of 'thief, thief'; that the only people within the compound at the time were, the appellants and a young girl. PW1 conceded that he did not witness the deceased's assault but witnessed the dragging of the deceased; rejecting suggestions by defence counsel that the deceased was assaulted by other people.

7. PW1 further stated that as he walked with the deceased to the shopping centre after the incident, the deceased told him that he was with the 1st appellant at the shopping centre where they were drinking the previous night; that in the morning the 1st appellant went to the deceased's house and told him that he had lost something that night and that he wanted to check if the deceased had seen it.

8. Joash Muganda Were, PW2, was among those who responded to PW1's request for help, that the 1st appellant and his brother Oscar, were beating up the deceased. When he got to the appellants home, he found the latter and other people within the compound. He also noticed the that the deceased was seated on a mattress within the appellant's home; and the 1st appellant claimed that the deceased had stolen from him. PW2 checked on the deceased who told him that he had severely been beaten. PW2 also demanded to know why the 1st appellant did not report the theft to the police; he also learnt that the appellants mother asked for Kshs.10,000/= so that the deceased could be released. PW2 maintained that the deceased was attacked by the 1st appellant and his relatives; and was categorical that the deceased had internal injuries and his back was swollen.

9. PW3, the deceased's father, testified that on 7th March, 2013 he received information of the assault of the deceased, and that when he asked the deceased whether he should be taken to hospital, the deceased declined. The deceased died the following day and PW3 identified the body.

10. Kevin Joseck Echenje, PW6, the deceased's brother testified that he went home on 6th March 2013, and found the deceased crying that he had been assaulted; and he mentioned the 1st appellant's name and his co-accused Oscar as the persons who had assaulted him. On cross examination, PW6 reiterated that the deceased sustained injuries on his neck and back; and that it was the 1st appellant and his co-appellant who assaulted the deceased.

11. PW7, Dr. Phillip Athero, performed the post mortem examination on the deceased and found bruises on the head and shoulder of the deceased, bruises on the back, fracture dislocation of the neck. He concluded that the cause of death was cardiopulmonary arrest secondary to the injuries due to assault and produced the report as Exhibit No.1 on cross examination, he stated that the blunt injuries were probably inflicted using blows or rungus.

12. PW8, Inspector Frederick Koech, of Luanda Police Station visited the deceased's home accompanied by a colleague and PW1; they found the deceased's body lying on the bed, and noted that he had bruises on the back and stomach. On cross-examination PW8 stated that his investigations did not reveal that the deceased had gone to steal from the appellants house, or that members of the public descended on the deceased; and that the deceased was released to the public after being assaulted by the appellants.

13. The 1st appellant, in his defence, opted to give a sworn statement. He testified that on 6th March 2013, he went to the trading centre to buy some items. When he got back to his home, he saw a boy next to the window of his house and when the boy saw him, he ran away. On reaching the door he found the same unlocked and on entering he found someone in his bedroom. On seeing the 1st appellant, the said person took a club and attempted to hit him but the 1st appellant evaded, ran outside, locked the door and raised an alarm prompting people to come to the scene.

14. The 1st appellant then instructed some of these people to guard the house as he rushed to the AP at Mabango to report, but he did not find any officers as they had gone for assignment so he decided to go back home. When he got home, he found a large crowd gathered and that the thief had been removed from the house and was lying outside on the ground, naked and had been badly beaten. The 1st appellant further stated that PW1 requested for the deceased's release and promised to pay damages; he explained he had lost Kshs.10,000/= and a belt; he requested PW1 to ask the crowd to disperse before he released the deceased fearing that he would be lynched. He then gave the deceased clothes and allowed him to go.

15. The 1st appellant further testified that the next day the Administration Policer officers went to his house enquiring what had happened, and he gave them the letter of undertaking to pay Kshs.10,000/-, written by PW1, and the officers went away claiming that they would investigate the matter. On 8th March 2013 he was arrested by a vigilante group and taken to the police, where he was released on free bond until 18th March 2016 when he was arrested and charged with the offence.

16. On cross examination the 1st appellant maintained that at the time the deceased was being beaten he was not present as he had gone to report the matter; and that he restrained the crowd from further beating the deceased.

17. The 2nd appellant in own his defence maintained that on the material date he was at his place of work and did not participate in the assault; that he was eventually arrested at a drinking den and because he could not pay for his freedom these charges were planted on him.

18. Mildred Ambasa Opisa, DW2, the appellants' mother testified that on 6th March 2013 she was at home when she heard the 1st appellant shouting loudly from his house calling, 'thief, thief, thief.' She then rushed outside and saw the 1st appellant struggling to close the door to his house. People had responded

to the calls and were gathered in the compound. The 1st appellant then left to go to Molongo police post; that the crowd opened the house and started beating the deceased and when she tried to restrain them, they overpowered her and threatened to lynch her as well. DW2 further stated that when the 1st appellant returned, he pleaded with the crowd not to kill the deceased; and that PW1 committed by a letter to pay compensation of Kshs.10,000/= for release of the deceased. DW2 stated that she was in the house when the beating took place.

19. On cross-examination, DW2 maintained that the 1st appellant was not home at the time of the assault, and further that she was seated outside her house when she saw him rushing into his house; and later come out struggling with two people as their houses were next to each other and that one person ran away with the 1st appellant's money.

20. The trial court, having considered the prosecution case, was satisfied that the ingredients of the offence of murder had been satisfactorily met. The court noted that the fact and cause of death was not in dispute as these facts were confirmed by both prosecution and defence witnesses. It was also not in dispute that the deceased succumbed to injuries inflicted by the assault as PW1, PW2 & PW7 all observed multiple injuries on the deceased's body. The said injuries were also confirmed by the postmortem performed by PW7. The trial court was also satisfied that the testimony of PW1 and PW2 placed the appellants at the locus in quo at the time the act was committed; that it was clear that the appellants committed the unlawful act that caused the deceased's death, as the incident occurred in broad daylight; and PW1 was able to identify the 1st appellant, and his co-appellant as they dragged the deceased out of the house, and when they saw PW1, they returned the deceased back into the house.

21. As regards the 2nd appellant the learned judge noted that the evidence of PW1 and PW2 clearly placed him at the scene of the incident and he was properly identified by these two witnesses at different times; further he was not a stranger to the two witnesses.

22. The learned judge doubted the 1st appellant's defence that he found the deceased in his house stealing, pointing out that if the deceased was caught in the act of stealing the money and/or any items, then the recovered items ought to have been there and then, in the appellants compound. According to the trial court the reason for the assault was evident as the 1st appellant had alleged having lost some money and having been drinking with the deceased the previous night, went to ask the deceased for the same and during the interrogation in an effort to get this money back, the 1st appellant accompanied by his co-appellant assaulted the deceased and inflicted him with injuries, which caused the deceased's death.

23. The trial court also noted that the evidence against the appellants was circumstantial as no one saw the appellants assaulting the deceased, and no one saw the mob beating the deceased; that the appellants having been properly placed at the scene inflicted the injuries that led to the death of the deceased; and these injuries were inflicted with an intention to cause grievous harm and/or death within the meaning of section 206(a) of the Penal Code.

24. Having considered all the evidence in its totality, the trial court found that the prosecution evidence was overwhelming, and effectively dislodged the appellants defence; and therefore, found them both guilty of the offence as charged, and sentenced them to death.

25. The appellants have raised the following grounds in the memorandum of appeal namely that:

    a. The learned trial judge misapprehended the concept of a dying declaration.

    b. The learned judge failed to consider the constitutional provisions on the right to protect property.

c. The leaned judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt, particularly on the question of malice afore-thought.

d. The trial judge erred in law and in fact by sentencing the appellants to death since its mandatory nature was declared unconstitutional as per the Law.

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

26. On the first ground, the appellant submits that the dying declaration of the deceased was not corroborated; and was only made to PW1. From the record we take note that the deceased told PW1, PW2, and PW6 that they were the appellants who had assaulted him. The trial court weighed this evidence against the alibi defence, in finding that the evidence properly placed the appellants at the scene; and that there is no other plausible version of the appellants whereabouts.

27. On malice aforethought, the trial court noted that the 1st appellant, after drinking with the deceased the night before the incident, alleged that he had lost some money and asked the deceased whether he had seen the same. That in this Court's view would explain why the deceased was in the 1st appellant's house, and why the house was not broken into; and the appellants in the process of interrogating proceeded to have an altercation with the deceased after which the deceased emerged with injuries.

28. The appellants submit that PW1 and PW2 gave conflicting accounts of the happenings on the night in question. These two witnesses were consistent in the material particulars, and their testimonies were never shaken; and in any event the purported discrepancies (if at all) were not substantial, as it is a fact that the deceased was in the appellants house badly beaten. It is also on record that the deceased was seen leaving the appellants house, having been badly beaten; being injured and naked; and that it was the 1st appellant who gave him a pair of shorts.

29. The respondent, in opposing the appeal submits that, the prosecution proved its case to the required standard (beyond reasonable doubt), as the key ingredients of the offence were established, namely:

a. The death of the deceased and the cause of that death;

b. that the accused committed the unlawful act which caused the death of the deceased and

c. that the accused had the malice aforethought as defined by section 206 of the Penal Code.

30. That the presence of the deceased inside the 1st appellant's house, confirmed his (deceased) version that he had indeed gone to the appellants to be asked about the alleged missing item. This evidence is consistent with the evidence of PWI who testified that he was attracted to the 1st appellant's home by screams as he was working in a nearby shamba at around 10.00 a.m, he rushed to the scene and saw the 1st appellant coming out of his own house, from where the deceased was subsequently brought out having injuries.

31. This Court notes that the actual assault was not witnessed by any of the prosecution witnesses, thus the prosecution's case was hinged on circumstantial evidence. What this Court must then determine is whether the trial judge made a sound and proper conviction based only on circumstantial evidence. In the case of Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR, this Court state:

> "However, it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to

deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence."

Lord Heward CJ in R vs. Taylor, Weaver and Donovan [1928] Cr. App. R 21:-, stated:

> "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 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. In the case of Abanga Alias Onyango vs. Republic CR. App No. 32 of 1990 (UR) this Court set out the parameters to be met in the application of circumstantial evidence in securing a conviction as follows:

    "it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

    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 circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else."

    In Sawe vs. Republic [2003] KLR 364 this Court reiterated on circumstantial evidence 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 circumstance 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 remains with the prosecution. It is a burden which never shifts to the accused."

33. Having regard to the principles, did the prosecution evidence meet the threshold? It is not in dispute that none of the prosecution witnesses saw the appellants inflicting the injuries. However, as discussed earlier, the appellants were placed at the scene of crime, with the deceased coming out of his house naked and injured. If indeed the defence of the 1st appellant is to be believed, that he caught the deceased stealing and that the deceased tried to hit him with a rungu, there would be defensive wounds inflicted on him, yet there isn't a scintilla of evidence to even suggest that the 1st appellant encountered some form of aggression from the deceased, whatsoever. This Court is, therefore, satisfied that the parameter of conviction on circumstantial evidence was met by the High Court, and as such the conviction was sound.

34. The appellants submitted that the death sentence was severe and unconstitutional. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court.

35. In Francis Muruatetu & Another vs. Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the Court gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as:

    a. Age of the offender,

    b. Being a first offender,

    c. Whether the offender pleaded guilty,

    d. Character and record of the offender,

    e. Commission of the offence in response to gender-based violence,

    f. Remorsefulness of the offender,

    g. Any other relevant factor.

36. In the same case the court in regard to the application of mitigation by the accused before sentencing held as follows:

    "it is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect than may have been unclear during the trial process calling for pity more that censure or in the converse impose the death penalty."

37. This Court in *Chai vs. Republic (Criminal Appeal 30 of 2020)* [2022] KECA 495 (KLR) (1 April 2022) held that the two holdings of the Supreme Court in the Muruatetu case make it very clear and underscore the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide. To justify a life sentence the ruling should have spoken to it, showing in black and white what the court considered. In the absence of any demonstration of factors that could have led to such a sentence we find the same to be excessive.

38. We note that the sentencing here was done prior to the Muruatetu case (Supra) and the trial judge pointed out that there was only one punishment which was there; and in so doing the court did not use its discretion in making an informed decision with regard to sentencing. It is no longer the case that the sentence for murder is the mandatory death sentence prescribed in section 204 of the Penal Code. This position changed with the Supreme Court's decision in the Muruatetu case (Supra). We consider the circumstances under which the offence took place, on a suspicion that the deceased had stolen Kshs.10,000/- from the 1st appellant and together with the 2nd appellant they brutally attacked the deceased, inflicting injuries which ultimately snuffed the life out of him.

39. The upshot is that all factors considered in this case a sentence of thirty (30) years imprisonment is appropriate. We therefore set aside the death sentence imposed by the High Court and substitute it with a prison term of thirty (30) years imprisonment and in compliance with the provisions of section 333(2) of the Criminal Procedure Code. The sentence shall run from 18th March 2013 being the date when the appellants were arrested and taking into consideration that the appellants remained in custody throughout the trial; and to that extent the appeal on sentence succeeds.

It is so ordered.

DATED AND DELIVERED AT 11TH THIS DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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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