Auko v Republic (Criminal Appeal 134 of 2019)
[2024] KECA 1694 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1694 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 134 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

HENRY OBISA AUKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Cherere, J) dated 26th July 2018 in HCCRC No. 18 of 2017)

JUDGMENT

1. Henry Obisa Auko, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the information duly signed on behalf of the Director of Public Prosecutions (DPP), stated that on 7th July, 2017, at Kenyamedha village in Kisumu West Sub-County within Kisumu County, he unlawfully murdered Elizabeth Auko (Deceased).

2. The appellant pleaded not guilty to the charge and a trial ensued in which eleven witnesses testified for the prosecution, and the appellant gave a sworn statement in his defence.

3. The witnesses who testified for the prosecution included: Ezina Achieng Fuko (Ezina), who is the mother to the appellant and the deceased; Simon Ochieng Ouko (Simon), who is the younger brother to the appellant and the deceased; Daniel Mwallo Adongo (Daniel), cousin to the appellant and the deceased; Rosemary Anyango (Rosemary), and Sophia Achieng Juma (Sophia), both neighbours to the deceased's family; Erick Odhiambo Deya (Erick), a boda-boda rider who on the fateful morning picked Ezina from her house to take to her business premises; Morris Adongo Ndege (Morris), an uncle to the appellant and the deceased; Dr. Robert Omollo (Dr. Omollo), who performed the postmortem examination on the body of the deceased; APC Tobias Okelo (APC Tobias), of Kagonyo AP Post,

to whom the appellant surrendered; PC Juliana Mola (PC Juliana), of DCI Kisumu West; and PC Chrispus Abola (PC Abola), of Crime Scene Support Kisumu.

4. In her judgment, the learned Judge found that the death of the deceased was proved by the evidence of Ezina, Simon, Daniel, Rosemary, Sophia and Morris, who saw the deceased's body with a deep cut on the neck, and the evidence of Dr. Omollo, who performed the postmortem. In addition, the learned Judge found that the appellant conceded having committed the unlawful act which caused the death of the deceased. The learned Judge found self defence not applicable, as the appellant was neither provoked nor was he facing any eminent danger to justify the use of force; that the injuries inflicted on the deceased were vicious and caused near amputation of the neck, leaving no doubt that the appellant must have known that the act of cutting the deceased with such a sharp instrument would cause her grievous harm or death. The learned Judge therefore found malice aforethought established; concluded that the appellant was guilty of the charge, convicted him and sentenced him to death.

5. The appellant is aggrieved by the judgment of the High Court and has lodged this appeal. In his memorandum of appeal prepared through learned counsel Ms. Winnie Anuro, the appellant has raised four grounds. He faults the learned Judge for erring in law and fact, by failing to evaluate the evidence as a whole; failing to find that the prosecution case was not proved beyond reasonable doubt; failing to find that the ingredients of the offence of murder were not established; relying on circumstantial evidence; sentencing the appellant to death without exploring other forms of punishment; and imposing a sentence on the appellant that was harsh in the circumstances.

6. In support of the appeal, the appellant has filed written submissions, in which he relied on Republic -vs- Andrew Omwenga [2009] eKLR, for the proposition that in order to establish the charge of murder against the appellant, the prosecution had to prove, first, the death of the deceased and the cause of death; secondly, that the accused committed the unlawful act which caused the death of the deceased; and that the appellant had malice aforethought.

7. The appellant did not dispute the fact of death of the deceased.

   However, the appellant maintained that the prosecution failed to prove that the appellant's act or omission was the sole cause of death, or that the act was unlawful. The appellant maintained that there was no tangible evidence before the court, that proved that it was the appellant who killed the deceased. Nor was there any evidence of malice aforethought. This was because the prosecution evidence did not place the appellant at the scene of the crime, and, therefore, neither the actus reus nor the mens rea was established. In addition, that the prosecution relied on circumstantial evidence which did not meet the threshold required as the evidence did not conclusively tie the appellant to the commission of the offence.

8. As regards the sentence, the appellant relied on a two Judge bench decision of the High Court, Sayeko -vs- Republic [1989] KLR 306, for the proposition that an appellate court can only interfere with the discretion exercised by the trial court, where it is shown that the trial court acted on some wrong principles, or the sentence is manifestly excessive, or shown to be unlawful. Counsel argue that the sentence of death is inimical to international law and customs, and is also unconstitutional as it violates the appellant's right to be free from cruel, inhuman and degrading treatment, and his right to inherent dignity under *the Constitution*, and therefore the sentence was unconstitutional.

9. The appellant also relied on the Supreme Court's decision in Francis Karioko Muruatetu & another -vs- Republic [2017] eKLR, submitting that he has spent a period of six years in custody from the time of his arrest, and has sufficiently reformed. He urged the Court to set aside his conviction and sentence in the interest of justice, and release him back to the society. He pleaded with the Court to set aside the death sentence and urged that a term sentence be substituted.

10. The respondent also filed written submissions, which were prepared by Mr. Patrick Okango, Senior Principal Prosecuting Counsel, in the Office of the Director of Public Prosecution (ODPP). The respondent submitted that the fact of death and the cause of death of the deceased were not disputed, and were in any case proved beyond reasonable doubt. The critical issue for determination was identified as whether the death was caused by an unlawful act of omission or commission, on the part of the appellant.

11. The respondent conceded that there was no single witness who saw the appellant kill the deceased, but argued that the court did not fall into any error in relying on circumstantial evidence. This was because the prosecution produced sufficient evidence which placed the appellant at the scene and pointed to him as the only person who could have committed the heinous act of cutting the deceased with a panga on the neck. That Ezina confirmed leaving the appellant at home, after the appellant had given a direct threat to her and the deceased; this was confirmed by Erick, the boda-boda rider who carried Ezina; Ezina, Simon and Daniel all placed the appellant at the scene, a few minutes before the incident; that the appellant having been seen with the deceased, and the deceased being found shortly thereafter in a pool of blood with the appellant missing, provided conclusive circumstantial evidence pointing to the appellant as the person who committed the offence.

12. In addition, the respondent added that in his sworn testimony the appellant placed himself at the scene, and confirmed that he inflicted a cut on the neck of the deceased; the evidence of the doctor confirmed that the deceased died as a result of a single neck injury that was so severe that it almost amputated the neck; that malice aforethought was proved through the threats that the appellant had made to Ezina and the deceased, that morning, and also through the horrendous attack on the deceased.

13. On sentence, while admitting that sentencing is an exercise of discretion, and an appellate court will ordinarily not interfere with the exercise of discretion unless it was exercised whimsically, the respondent submitted that in sentencing the appellant to death, the trial Judge considered the mitigation and the circumstances of the offence, in accordance with Francis Karioko Muruatetu & another -vs- Republic (supra), and exercised her discretion in imposing a deterrent sentence. The Court was therefore urged not to interfere with the sentence.

14. This being a first appeal, we are required to subject the entire evidence that was adduced in the trial court to afresh examination and evaluation in order to arrive at our own conclusion, bearing in mind that unlike the trial court, we have not had the advantage of seeing and accessing the demeanor of the witnesses. (see Okeno v Republic [1972] EA 32. Alexander Ongasia & 8 others vs Republic [1993] eKLR).

15. In accordance with that obligation, we have reconsidered and reevaluated the evidence, the contending written and oral submissions. the authorities cited, and the law. The offence of murder, which the appellant was convicted of, is explained under section 203 of the Penal Code, as follows:

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

16. Both parties have rightly identified in their submissions, the ingredients of the offence of murder, that must be established in order to secure a conviction, as the death of deceased; the fact that the deceased died as a result of an unlawful act or omission on the part of the appellant; and that the act or omission was committed with malice aforethought.

17. From the evidence that was before the High Court, and the submissions made before us, the death of the deceased is not in dispute. The cause of death is also not substantially disputed. In any case Dr.

Omollo who did the postmortem examination on the body of the deceased, testified that the deceased died out of cardiopulmonary arrest, secondary to severe bleeding, due to a cut on the neck, resulting from a sharp object that caused near amputation of the neck, and we have no reason to doubt this professional opinion, which was accepted by the trial Judge

18. The main issue for our determination is whether the prosecution proved that it was the appellant who caused the injury that resulted in the deceased's death, and if so, whether, the appellant caused the injury with malice aforethought. In this regard, there is no dispute that none of the witnesses who testified actually saw the appellant inflict any injury on the deceased. The evidence relied upon was therefore, basically circumstantial evidence, which the appellant has faulted the trial court for relying on.

19. In PON -vs- Republic [2019] eKLR, the Court facing a similar situation where there was no direct evidence, had this to say:

> " There is no such evidence hence the recourse to circumstantial evidence. Though not direct, circumstantial evidence, as this Court stated in *Musili Tulo V. Republic Criminal Appeal No. 30 of 2013*, '. is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'

20. In Republic -vs- Mohammed & another [2019] KESC 48 (KLR), the Supreme Court had this to say in regard to the application of circumstantial evidence:

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 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 CRA 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.16 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."

21. It is clear that circumstantial evidence is evidence which can be relied upon to secure a conviction, provided the evidence is carefully considered in light of the guidance given by this Court and the Supreme Court as above quoted. The questions that we must address is, whether the facts or circumstances from which the inference of the appellant's guilt was drawn, were fully established, and whether the facts are incompatible with the appellant's innocence, but incriminate him in a way that the chain is so complete, that the only conclusion that can be arrived at, is that it is the appellant who killed the deceased, and not any other person.

22. The evidence that was relied upon to implicate the appellant was, first, the evidence of Ezina, that on the morning of the material day as she was leaving her home, the appellant threatened to kill her and

the deceased. The evidence of Ezina was corroborated by Erick, a boda boda rider who had come to pick Ezina, and who confirmed that he heard the appellant utter the threats.

23. Secondly, Simon, also testified that on the fateful morning, he was helping the deceased to air her maize, when the appellant joined them. After they finished airing the maize Simon went to his house leaving the appellant with the deceased. Shortly thereafter, Simon was at his balcony brushing his shoes when he saw a crowd at his mother's house, and going there, found the deceased lying on the ground bleeding profusely, and the appellant, whom Simon had earlier left with the deceased, was nowhere to be seen.

24. Thirdly, Sophia, who was the first person to spot the deceased lying in a pool of blood, had come to visit the deceased at Ezina' house, when on arrival, she saw blood flowing near the door, and on following the blood saw the body of the deceased and screamed attracting neighbours and Simon. There was also the evidence of APC Tobias Okello that the appellant surrendered himself at Kagonyi AP Post on the evening of the material date.

25. The evidence of Ezina, Erick, Simon and Sophia, was consistent, and established that the appellant had threatened to kill the deceased; that he was the last person seen with the deceased; that shortly thereafter the deceased was found dead, in a pool of blood with a deep cut on the neck; and that the appellant was nowhere to be seen. [26] In Moingo & Another v. Republic [2022] KECA 6 (KLR) this Court had the following to say about the "last seen doctrine":

> " The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine 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 an inference that the accused killed the deceased). See also *Ngeno vs Republic (Criminal Appeal 24 of 2016)* [2024] KECA 757 (KLR)."

26. Section 111 of the *Evidence Act*, which provides for situations in which the burden of proof may shift to an accused person, states:

> " 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

27. The prosecution, having established that the appellant was the last person seen with the deceased shortly before the deceased was found dead in a pool of blood, with a deep cut on her neck, what happened to the deceased was a matter specially within the knowledge of the appellant. Under section 111 of the *Evidence Act*, the burden was upon the appellant to explain what happened to the deceased or how she met her death.

28. The explanation given by the appellant in his sworn statement in his defence, did not exonerate him, but provided further incriminating evidence against him. He conceded in the statement that he had an altercation with the deceased that morning, and had slapped the deceased with a panga. This means that the appellant admitted having been at the scene with the deceased, and having used a panga. The evidence of the pathologist confirmed that the deceased had only a deep cut wound on the neck and no other injury. The appellant's defence therefore reinforced the inference that it was the appellant who cut the deceased with a panga. The inculpatory facts against the appellant were well established, and pointed irresistibly to the appellant and no other person, as the one who had caused the fatal injury on the deceased.

29. As regards malice aforethought, the evidence of Ezina and Erick confirm that the appellant's actions were premeditated. Moreover, the manner in which the appellant viciously cut the deceased's neck with a panga, nearly amputating the neck, leaves no doubt that the appellant intended to kill or cause grievous injury to the deceased.

Malice aforethought can therefore be inferred under section 206(a) & of the Penal Code.

30. Consequently, the appellant's conviction was well founded as the inculpatory facts underpinning the circumstantial evidence, which was relied on, were established and pointed unerringly to the appellant, and no other person. In addition, all the ingredients for the offence of murder were proved beyond reasonable doubt.

31. In regard to sentence, the appellant faulted the learned Judge on two grounds. First, that the learned Judge sentenced him to death without exploring other forms of punishment; and secondly, that the sentence imposed was harsh. In the written submissions the appellant introduced a new ground submitting that the sentence was not only excessive, but also illegal and unjust, and further adding that the mandatory death sentence was inimical to international law and customs and is also unconstitutional. The appellant not having included the issue of illegality and unconstitutionality in his grounds of appeal, it is not open to us to entertain these grounds.

32. In Bernard Kimani Gacheru vs Republic [2002] eKLR, this Court underscored the role of the trial court in sentencing:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist"

33. In sentencing the appellant, the learned Judge considered the victim impact assessment statement and the presentence report, and found both unfavourable to the appellant. The learned Judge then rendered herself as follows:

> " As earlier stated in the judgment, the action by accused of murdering her sister by cutting her neck to near amputation requires a deterrent sentence. As much as the accused is a first offender, and the fact that death sentence has been ruled by the Supreme Court not to

be mandatory, this case is one that requires a death sentence. I therefore sentence accused person to suffer death."

34. The trial Judge cannot be faulted in the way she exercised her discretion. She considered the circumstances of the case, and also took into account relevant reports as well as the fact that the appellant was a first offender. The learned Judge was also alive to the Supreme Court decision in Francis Kariokor Muruatetu vs Republic (supra), in regard to the unconstitutionality of the mandatory nature of the death sentence. She, nevertheless, formed the opinion that the appellant deserved the death sentence, and exercised her discretion in imposing that sentence. We find that the learned Judge properly exercised her discretion and that the sentence that was imposed on the appellant was neither harsh nor excessive, but compatible with the magnitude of the appellant's action.

35. The upshot of the above is that we uphold the appellant's conviction and sentence and dismiss the appeal in its entirety.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR