Dzimba & another v Republic (Criminal Appeal 87 & 89 of 2022 (Consolidated)) [2024] KECA 1571 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1571 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 87 & 89 OF 2022 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

GOHU NDUNGI DZIMBA ..... 1ST APPELLANT

SAMSON KAMBI YAA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) dated 31st March 2022 in Criminal Appeal HCCR No. 7 of 2017)

JUDGMENT

1. The appellants, Gohu Ndungi Dzimba, and Samson Kambi Yaa, the 1st and 2nd appellants, were jointly charged with murder contrary to section 203 as readwith section 204 of the Penal Code. The particulars of the offence were that, on 4th March 2017 at Mrima Wa Ndege area in Vitengeni Division, Ganze, they jointly with others not before court murdered Kazungu Kambi Mure (the deceased).

2. They each underwent a mental assessment after which they took plea and pleaded not guilty. The case proceeded to hearing with the prosecution calling 7 witnesses.

3. In her unsworn evidence, ZK - PW1, the deceased's daughter aged ten years old, was at home on the material day. After serving the deceased with a meal he went to sleep. Shortly thereafter, she saw a motor bike carrying three passengers namely Kiasi PW3, Gohu, the 1st appellant and Murungaru, enter the compound. She heard the three men conversing, and the deceased asked whether someone could give him a phone so that he could inform other family members that he was being taken away. She also witnessed money about Kshs.5,500 change hands between the deceased and her grandmother. Then, one Murungaru demanded that the deceased hand over his mobile phone which he vehemently refused. Thereafter, the three men took the deceased, and PW1 later learned that he was attacked

and that the assailants were in the process of using petrol to burn him. She did not witness these last moments of the deceased with the three persons.

4. According to the deceased's mother Changawa Mure - PW2, on the material day, the deceased was visiting his children at her home, when the appellants rode in on a motorcycle. The 1st appellant spoke with the deceased, and, shortly thereafter, the three left with the deceased on the motorcycle. She was to learn from her grandchildren that the deceased was killed, although she did not witness the incident.

5. On the same day at about 2.00 p.m, Rua Kitsao Karisa alias Kiazi (PW3) went to the bus stage to look for a vehicle, but as he was unable to find one, he hired a motor bike driven by one, Murungaru who at the time was holding a conversation with the 1st appellant. Thereafter, the 1st appellant and PW3 boarded the motorcycle to PW2's home where the deceased had gone to visit his children. According to PW3, they picked up the deceased and then drove towards a certain school where the 1st appellant and the deceased disembarked. The motor cycle rider by the name, Murungaru then dropped PW3 off at his work place. At about 8.00 p.m. he heard that the deceased was murdered. He thereafter proceeded to the 1st appellant's home to find out under what circumstances the deceased had passed on. PW3 stated that in the school where the 1st appellant and the deceased alighted, there were other people whom he positively identified as the 2nd and 3rd appellants. They were people known to him prior to this fateful day of the death of the deceased.

6. Christopher Charo, PW4 is a businessman at Mrima Wa Ndege where he owns a kiosk that sells petrol and other household goods. While at his shop on 4th March 2017, he recalled that one Rama purchased one litre of petrol, with which he filled the motor bike and left the shop. Soon after that, he heard that the deceased was killed.

7. Kahindi Mwalimu, PW5, also a businessman at Mrima Wa Ndege, hired out his motor cycle to one Rama after they negotiated and agreed on the hiring fees. The details of the journey remained scanty and were not necessarily part of their agreement. Later Rama informed PW5 of the death of the deceased.

8. Dr. Valde Ndalo, PW6, testified on the post-mortem examination report on behalf of her colleague Dr. Khadija who conducted the post-mortem. The examination revealed a charred whole body that was extensively burnt. The circumferential burns involving the head, neck, plus upper and lower limbs were measured at 100% and assessed as 3rd degree burns of the entire human anatomy system. Dr. Ndalo concluded that the report showed that the deceased death was due to the complications of burns that led to an organ damage.

9. At about 5.30 pm that day, Sgt. Stephen Owuor PW7 was informed of a murder at Gwandani, Mrima wa Ndege sub-location. On reaching the scene, there was a group of women standing near a body of a human being which had been burnt. His investigations revealed that the deceased was suspected to have caused the disappearance of one Mule, and that one, Suleiman Baya, the 2nd appellant, known locally as a police officer had sent Mbobu Muli to bring the deceased to Gwandali. After the deceased was brought, he was interrogated and, when he stated that he did not know the whereabouts of Mule, he was tortured by the 2nd appellant and others not in court and set ablaze. PW7 recorded the witness statements of six other witnesses whose statements contributed substantially in finding the appellant persons culpable for the crime. On that evidence, the appellants were charged with the offence of murder.

10. The 1st appellant gave sworn evidence and denied killing the deceased. He claimed that being a clan elder he was involved in peace building in the village and assisted the Chief of the location; that he came

to know of the killing while at the scene where a conflict arose between the deceased and other people and that, although he tried to intervene, he was overwhelmed.

11. Suleiman Baya Mwar, DW2, the 2nd appellant gave a sworn statement and denied any participation in the death of the deceased. He stated that at about 4.00 p.m. there was a scuffle involving the deceased and other members of the public. On arrival at the scene, he attempted to separate them, but his efforts were not successful.

12. Samson Kambi Yaa, DW3, also testified on oath and denied the allegations implicating him with the offence.

13. The trial Judge upon considering the evidence, found the appellants guilty of the offence of murder and sentenced each of them to serve 35 years' imprisonment.

14. Aggrieved by the Judgment, the appellants have now filed appeals to this Court. In their appeals, the 1st and 2nd appellants' grounds are that the learned judge was in error in law: in failing to consider that the prosecution case did not establish or prove the alleged offence of murder prior to preferring the charge against the appellants; in failing to appreciate that in the alleged offence of murder, that the prosecution did not advance any evidential burden of proof or evidence to the required standard of law to identify the appellants as the killers of the deceased; in failing to reanalyze and re-evaluate the entire evidence exhaustively; in failing to find that the alleged offence of murder against the appellant was maliciously organized, coordinated and orchestrated in an effort to undermine the appellants' lives, and that no scientific methodology or dusting advanced or applied or weapon caused the injuries specifically by post-mortem report for the purpose of forensic analyses this could have established who killed the deceased.

15. The grounds on the face of the amended memorandum of appeal are that the learned trial judge: failed to appreciate that the prosecution did not proved its case beyond reasonable doubt; in failing to appreciate that the requirements of sections 70, 76(i) and 77 of the *Evidence Act* were not adhered to; in failing to appreciate that mens rea and actus reus were not established; in failing to consider that the circumstantial evidence did not meet the threshold to exculpable point to the appellants as the persons who killed the deceased and that their plausible defences were not taken into account.

16. On 24th April 2024, the Court directed that the appeals filed by the 1st and 2nd appellants being Mombasa Criminal Appeal No. 87 of 2022 and No. E008 of 2024 should proceed to the exclusion of the 3rd appellant's appeal as he remains at large.

17. When the appeal came up for hearing on a virtual platform, learned counsel Ms. Mwangi holding brief for Ms. Oluoch Wambi appeared for the 1st and 2nd appellants while learned prosecution counsel Ms. Ongeti appeared for the State. In their submissions, the appellants submitted that, according to the post mortem examination report, the deceased died as a result of being attacked by a mob which later burnt him to death; that, according to PW1, the 1st appellant was the only last person seen with the deceased, and that PW3 stated that the deceased was in company of the 1st appellant when they went to the school; that there was a crowd of about 50 people, but PW3 did not provide any evidence on the mob justice or specify each of the appellant's roles in the murdering the deceased; that there was nothing to show the appellants' were responsible for killing of the deceased; and that, therefore, the, prosecution failed to prove its case.

18. The appellants further submitted that the post-mortem report was filled by Dr. Khadija on 16th March 2027, but was presented to court by Dr. Velda Ndato PW6 who never told the court if she had experience and knew the signature and handwriting of her colleague; that the prosecution did not

comply with the law in adducing the postmortem report. It was further submitted that mens rea and actus reus were not established, and that the trial Judge did not consider their defence.

19. On their part, the respondent submitted that the prosecution proved the offence of murder to the required standard; that the death of the deceased was proved by PW2, who saw the deceased lying down dead. Further, the post- mortem report confirmed that the body of the deceased had burns on the chest, back and all ligaments, the whole face, upper and lower lungs. According to the doctor, the deceased was burnt to death; that given the nature of injuries, it can safely be concluded that death was unlawful, as such injuries cannot have been authorized by law or accidental; that malice aforethought was established owing to the nature of the injuries sustained and the cause of death of the deceased who it was established was burnt by the appellants.

20. On sentence, counsel submitted that, in meting out the sentence, the trial court took into consideration the Supreme Court's pronouncements on the constitutionality of the death penalty in Francis Karioko Muruatetu & another vs Republic [2017] eKLR; that the trial judge also considered the appellants' mitigation and aggravating factors; and that, therefore, this Court should not interfere with the sentence.

21. As this is a first appeal, this Court is mandated to re-evaluate and re- analyze the evidence before the trial court, while bearing in mind that it did not have the occasion to see or hear the witnesses.

22. In the case of Chiragu & another vs 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."

23. Having carefully considered the record, submissions by counsel, the authorities cited and the law. The issues for determination are: i) whether the prosecution case was proved beyond reasonable doubt; ii) whether the postmortem report was admissible; iii) whether the appellants' defence was considered and iv) whether the sentence meted out against the appellants was lawful.

24. Section 203 of the Penal Code under which the appellants were charged provides that:

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

25. Bearing in mind the above provision, in order to sustain a charge, the prosecution is required 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. See Kathenya vs Republic [2024] KECA 1374 (KLR).

26. The ingredients of murder were reiterated by this Court in the case of Roba Galma Wario vs Republic [2015] eKLR where the Court observed:

> "For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

27. The death of the deceased was not disputed as the same was established by the evidence of all the prosecution witnesses and that of the postmortem examination report prepared by Dr. Khadija and adduced in evidence by Dr. Valde Ndalo, PW6.

28. Needless to say, with regard to the post mortem report, the appellants have contended that it was not produced by the maker and that, as a result of this omission, it was inadmissible. From a consideration of the proceedings, it is indeed true that the report was not produced by the maker.

29. Section 77 of the *Evidence Act* provides:

> "
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> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

Under Section 33 (b) of the *Evidence Act*:

> "Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

30. In the case of Sibo Makovo vs R [1997] eKLR, this Court held that:

> "It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant."

31. The proceedings show that when Dr. Velde Ndato took to the witness stand, she introduced herself and stated that she was a qualified medical doctor. She also stated that she knew the maker of the document Dr. Khadija who could not attend court as she was performing a surgery. On producing the report, it is worthy of note that the appellants did not object to its production and when given an opportunity to cross examine, they chose not to. The forgoing is clear that the prosecution adhered to the law on the production of the post mortem report and we find that this ground has no merit.

32. The second ingredient of the offence of murder was whether the appellants committed the unlawful acts thereby causing the death of the deceased. As observed by the learned Judge, none of the witnesses who testified actually saw either the 1st or the 2nd appellant kill the deceased; that since there was no direct evidence that showed who murdered the deceased, the prosecution relied on circumstantial evidence to prove its case.

33. In addressing the question of whether the appellant's unlawful actions were responsible for the deceased's death, the learned Judge had this to say:

> "...it is worth referring to the striking evidence of (PW1 and (PW2) in the respect of recognition of the accused person. The classical assertion comes from the recognition evidence of (PW3). The witness stated at length the that the point where the motor cycle rider, the 1st accused and the deceased alighted in the large number of people he managed to positively identify the 2nd and 3rd accused. On this issue (PW3) description of the accused persons coupled with prior knowledge of familiarity. With them left no doubt as to their identity and being placed at the scene of the murder..."

34. The Judge then concluded:

> "The evidence of (PW3) taken within the context of Section 20 and 21 of the Penal Code, the last person to be seen with the deceased alive included the three accused persons before the Court. The genesis of this crime is traceable from the time the motor rider in the company of the 1st accused went for the deceased as he was visiting his children."

35. What comes out from the above excerpt is that, the learned Judge did not find as of fact that the appellants' unlawful acts caused the deceased's death. The Judge reached the conclusion that since the 1st appellant was the last person to be seen with the deceased, and was placed at the scene, he was responsible for the deceased's death.

36. It is not disputed that the evidence adduced by PW1 and PW2 was that the 1st appellant went to the deceased's mother's home and took him away on a motor cycle ridden by Murungaro and accompanied by PW3. According to PW3 after he boarded the motorcycle with the 1st appellant and the rider, they went to the deceased mother's home and picked up the deceased; that thereafter, the motor cycle rider dropped the 1st appellant and the deceased, at a school where he saw about 50 people had gathered, and among them was the 2nd appellant. PW3 rode away with the rider who subsequently dropped him at his place of work. Of importance to note in PW3's testimony, is that it ends, when they dropped off the 1st appellant and the deceased at the school, and he rode off with Murungaro.

37. What happens next is that news began to circulate that the deceased was beaten by a mob and was thereafter burnt to death. Whereupon, it is the evidence of the investigating officer PW7 that attempts to explain that the deceased was a victim of a mob justice instigated by the 1st appellant who had brought him to the scene to be interrogated and that it was there that he met his death.

38. But it is of significance that besides this testimony, there is no eye witness account as to what transpired after the deceased and the 1st appellant arrived at the school and the death of the deceased. It begs the question as to whether the circumstantial evidence from the time the deceased was picked from his mother's house until his untimely death unerringly pointed towards the appellants' guilt.

39. In the case of Abanga alias Onyango vs Republic CR. App NO. 32 of 1990 (UR) in which this Court held:

40. 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 circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

41. In the case of Sawe vs. Republic [2003] KLR 364, this Court amplified the above 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."

42. The Supreme Court of India in the case of Padala Veera Reddy vs State of A.P. and Ors. (AIR 1990 SC 79), held that when the evidence relied upon by the prosecution involves circumstantial evidence, such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

43. In the instant case, the facts that were before the trial court do not disclose that after they arrived at the school, the appellants interrogated the deceased in a manner that incited the people who were present to retaliate against him. Additionally, the evidence does not show that the appellants descended on the deceased with kicks and blows, or that they were responsible for dousing him with petrol and setting

him alight. In point of fact, in so far as the appellants' actions were concerned, the circumstantial evidence chain came to an end when the deceased and the 1st appellant were dropped at the school gate, and PW3 rode off with the motor cycle rider. As there is no evidence defining or pointing to any unlawful actions on the part of the appellants' that resulted in the deceased's death, the only conclusion that we can reach is that the chain of evidence against the appellants was broken, and nothing connected them to the deceased's death. It was not enough for the prosecution to allege that the 1st appellant took the deceased from his mother's home and dropped him off at a school where there were many people. Or merely because the 2nd appellant was seen at the school by PW3, he killed the deceased. These actions were not, in and of themselves, unlawful. What the prosecution was required to adduce was evidence that demonstrated that the appellants committed unlawful acts which led to the death of the deceased. Yet, the prosecution did not adduce any evidence showing that the appellants acted unlawfully. In the result, it cannot be concluded beyond reasonable doubt that the appellants murdered the deceased.

44. Instead, the learned judge went on to find that the appellants' common intention resulted in the deceased's death.

45. As to whether there was a common intention that led to the deceased's death, in the case of Ali Salim Bahati & another vs Republic [2019] eKLR a common intention was explained thus:

> "...it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim's death. It is in such circumstances that the provisions of Section 21 of the Penal Code come into play. The section stipulates:
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> > "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."

46. Further, the case of Rex vs Tabula Yenka S/o Kirya & 3 others [1943] 10EACA 51 is applicable to the circumstances of this case:

> To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief.
>
> Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault." (emphasis ours)

47. Our reanalysis of the evidence does not disclose the presence of a common illegal intention to kill the deceased on the part of the appellants, or that they contrived a scheme to murder the deceased. We say this because, the evidence does not also show that their actions or failure to act is what resulted in the deceased's death. Notwithstanding that they were placed at the scene of the crime, the only evidence on the record that accused them of instigation is the hearsay evidence of the investigating officer, PW7 who was not an eye witness to the events as they unfolded on the fateful day.

48. In effect, there was no evidence adduced either direct or circumstantial that was supportive of the appellants' having committed the unlawful acts against the deceased that pointed unerringly to their guilt. Our reevaluation of the evidence leads us to the inescapable conclusion that the learned Judge's finding that the appellants were responsible for the deceased's death was based on no evidence given the undeniable break in the chain of the circumstantial evidence. As such, the prosecution failed to

established its case and prove the offence of murder against the 1st and 2nd appellant to the required standards and we therefore find that the appellants' conviction by the trial court was unsafe.

49. Consequently, the 1st and 2nd appellants' appeals succeed, and are allowed. Accordingly, the convictions are quashed, the sentences are set aside and the 1st and 2nd appellants are set at liberty forthwith unless otherwise lawfully held.

50. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR