Yaa v Republic (Criminal Appeal 13 of 2022)
[2024] KECA 1570 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1570 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 13 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

KAINGU BAYA YAA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 30th September 2021 in HCCR No. 8 of 2019)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 30th September 2021 in HC Criminal Case No. 8 of 2019 in which the appellant, Kaingu Baya Yaa, was charged with murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the charge were that, on 6th April 2019 at Mukondoni Area, Malindi Sub-County in Kilifi County within the coastal region, the appellant murdered Mrimi Bacho (the deceased). The appellant denied the charge and stood trial, culminating in the impugned judgment.

3. At the trial, the prosecution called six (6) witnesses. Mweli Jeffa Mweri (PW1), a relative of the deceased, testified that, on 29th March 2019, he received a telephone call informing him of a male person lying in the open naked; that he visited the scene, only to find that the victim was his relative; that the victim lay unconscious with multiple injuries to the back and head; and that, together with Hamisi Mrima (PW4), they took him to Malindi Sub-County Hospital where he died one week later.

4. PW2, Jumwa Kazungu, a farmer, testified that the deceased was her friend with whom they had a romantic relationship. According to PW2, on 28th March 2019 at 9pm while in the company of the deceased at her home, the appellant, who was well known to her, and who was her neighbour, appeared and demanded payment by the deceased of some money; that the appellant and deceased had a bitter

exchanged, but did not fight in her presence; that, soon thereafter, the appellant started chasing the deceased out of the compound; that, shortly thereafter, the appellant came back armed with a piece of wood and threatened PW2 not to mention anything about the incident to anyone and that, if she did, she would "pay for it; that, following the threat, she left and went into hiding as she feared for her life; that the deceased did not return to her house; that, the next day, people gathered around her compound in connection with the incident involving the deceased, who had suffered physical injuries; and that she had not related the previous night's incident involving the appellant and the deceased to anyone.

5. Ephantus Chengo (PW3), a resident of Makongeni, testified that on 29th March 2019, he received information that the deceased had been assaulted; that he immediately visited the deceased at his home; that he found the deceased in critical condition with multiple injuries to his neck and head; and that he was taken to hospital where he passed away while receiving treatment.

6. PW4, Hamisi Mrima, a son of the deceased's, testified that on 29th March 2019 at 9am, he arrived at the scene and found his father (the deceased) lying down naked, unconscious and unable to talk; that he had injuries; and that he took the deceased to hospital where he was admitted for one week before he died; and that PW4 did not know who assaulted the deceased.

7. Stephen Charo (PW5), testified that, on his way from work on the morning of 29th March 2019, he met people on the way discussing the assault on the deceased, but that he did not know what had happened.

8. PW6 , PC Thomas Simiyu (No. 74589), the investigating officer then stationed at Malindi Police Station, testified that, on 3rd April 2019 he was manning the report office when PW4 reported the assault incident; that he visited the victim in hospital and found him unconscious; that, unfortunately, the victim passed away; that the deceased's postmortem report (Exhibit 1) revealed that he sustained injuries to the neck; that the Assistant Chief of the area informed PW6 of the appellant's involvement in the assault; and that, after visiting the crime scene and carrying out investigations, he charged the appellant with the deceased's murder.

9. When found to have a case to answer, the appellant gave a sworn statement in his defence, but did not call any witnesses. He told the court that, on 21st March 2019, PW2, a neighbour whom he had known for a long time, borrowed Kshs 5000 from him and left her identity card behind as security, but never came back to repay; that he was at home and alone on the night of the assault; that he only learnt about the victim's death the next day from a shopkeeper; that he knew the deceased; that he did not know who assaulted the deceased; that the deceased was PW2's boyfriend; that the appellant shared a common fence with PW2; and that the case facing him was instigated because of the money he lent PW2.

10. In his judgment dated 25th June 2020, R. Nyakundi, J. found the appellant guilty as charged, convicted him of murder and sentenced him to imprisonment for a term of thirty (30) years. According to the learned Judge, the appellant was positively identified as the perpetrator of the crime against the deceased.

11. Aggrieved by the trial court's decision, the appellant moved to this Court on appeal on the grounds set out in his undated memorandum of appeal, faulting the trial court for not considering: that malice aforethought was not established and that, therefore, the offence of murder was not proved beyond reasonable doubt; that there was no proper identification at the scene of the crime; and that the appellant's defence evidence was disregarded.

12. In support of the appeal, learned counsel for the appellant, M/s. Bennette Nzamba & Company, filed written submissions dated 10th June 2024 citing the cases of Anthony Ndegwa Ngari vs. Republic [2014] eKLR, highlighting the elements of the offence of murder that the prosecution is tasked to prove beyond reasonable doubt; and Kipkering Arap Kosekey & Another vs. Republic [1949]

EACA 135; Teper vs. Republic [1952] All ER 480; Musoke vs. Republic [1958] EA 715; Neema Mwandoro Ndurya vs. Republic [2008]eKLR; PON vs. Republic [2019] eKLR; and Sawe vs. Republic [2003]KLR 364, highlighting the three tests that must be satisfied before a court can accept circumstantial evidence, and submitting that the prosecution's evidence was merely circumstantial, of less probative value "against the scales of justice", and not sufficient to warrant the appellant's conviction.

13. In her response, learned State Counsel, Ms. Nyawinda, told the Court that she filed her written submissions, which have never been availed to us to this day. It is also noteworthy that counsel made no effort to make oral submissions on the prosecution's case.

14. We have considered the record of appeal, the submissions on record and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see Ogaro vs. Republic [1981] eKLR).

15. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it.

    The Court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that.

16. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno vs. Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

17. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59.

    4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

18. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises four main issues, namely: whether the prosecution proved the offence of murder beyond reasonable doubt; whether the appellant was placed at the scene of the crime with which he was charged; whether the appellant's defence of alibi was considered; and what orders we ought to make in final determination of the appeal.

19. While we take to mind the numerous grounds of appeal from the impugned judgment as advanced by the appellant, we nonetheless form the view that the 1st and 2nd issues, which are closely linked, stand out and commend themselves to us for determination, namely whether the appellant was recognised or positively identified as the person who assaulted the deceased thereby inflicting fatal neck and head injuries; and whether the appellant was placed at the scene of crime. Our finding on these decisive issues will determine whether or not to proceed and pronounce ourselves on the other issues.

20. On the 1st and 2nd issues, we call to mind PW2's direct evidence of the appellant's altercation with the deceased; the appellant's act of forcibly driving the deceased out of PW2s compound; and his return soon thereafter armed with a piece of wood, and his threat to harm PW2 in the event that she disclosed the incident to any other person. It is also instructive that the deceased was found lying down unconscious with severe head and neck injuries; that he was found within the vicinity of PW2's compound; and that he succumbed to the injuries and died a week later while undergoing treatment.

21. The post-mortem report produced by PW6 established that the cause of the deceased's death was intracerebral hemorrhage due to blunt trauma to the head.

22. The appellant's recognition by PW2, who is his neighbour, remains uncontested, the two being well known to each other. On the other hand, his placement at the scene of the offence draws from the circumstances of the appellant's altercation with the deceased, the assault and the subsequent fatal injuries inflicted on the deceased. On the issue of recognition, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR had this to say:

> "…. This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. This Court in Peter Musau Mwanza vs. Republic [2008]eKLR expressed itself as follows:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative , a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

24. The High Court of Kenya at Voi in AHM vs. Republic [2022]KEHC 12773 (KLR) observed that:

> " ... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

25. It is evident that the appellant was not a stranger to PW2. He was her neighbour, who was well known to her. Accordingly, the learned Judge was not at fault in concluding that the appellant was positively identified/recognised as the person responsible for the fatal injuries inflicted on the deceased. In the words of the learned Judge:

> " .... I find no difficulty to find that (PW2) knew the accused very well prior to the attack. His [her] evidence was never shaken by the defence...
>
> Subsequently, the accused was positively identified as the perpetrator of the crime against the deceased."

26. Be that as it may, learned counsel for the appellant submitted that none of the prosecution witnesses saw the appellant assaulting the deceased. We take to mind the fact that the appellant was the last person seen by PW2 with the deceased.

27. On the doctrine of Last Seen, the court in the Indian case of Deepack Sauna v State of Delhi CRL. A .174 /2004 had this to say:

> " In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt."

28. On account of the fact that the deceased was last seen in the hands and restraint of the appellant, a prima facie case was established that required the appellant 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 the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006).

29. In Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR, this Court had this to say on circumstantial evidence:

> " 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.'"

30. Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) in which this court held 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 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."

31. In the same vein, this Court expressed itself thus in Sawe vs. R [2003] KLR 364:

> "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."

32. Likewise, weighing circumstantial evidence on the scales of criminal justice, the court in R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 had this to say:

> "Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

33. The prosecution having established the identity of the appellant as the person responsible for the fatal injuries inflicted on the deceased in view of the fact that he was the one last seen with him; and the appellant having been recognised by PW2 as the one responsible for the unlawful act resulting in the fatal injuries aforesaid; and the post-mortem report having established those injuries as the cause of death, the only ingredient of murder that remained to be proved to sustain the appellant's conviction was malice aforethought.

34. Malice aforethought is defined in Section 206 of the Penal Code in the following terms:

    a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.

c. An intent to commit a felony.

d. An intention to facilitate the escape from custody of a person who has committed a felony.

35. In Hyam vs. DPP (1975) AC 55, the Court held, inter alia, that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm."

36. No doubt, the appellant's apparent pre-meditated assault on the deceased was with intent to cause bodily harm, and with full knowledge of the probability that the assault would result in death or serious bodily harm. Accordingly, the trial court was not at fault in convicting the appellant with the offence of murder.

37. Finally, on the 3rd and last issue as to whether the trial court disregarded the appellant's defence, we hasten to observe that nothing turns thereon. The issue appears to have been merely raised presumably as a gap filler in the memorandum of appeal without any submissions to elaborate his contention. Accordingly, nothing more needs to be said save that, for the avoidance of doubt, the learned Judge considered the appellant's defence as is evident from the impugned judgment and observed:

> " The accused elected to give a sworn statement of defence denying any of the elements of the offence, the pertinent evidence for the prosecution and discharge of the burden of proof and standard of proof ....
>
> The accused was in a better position to produce some form of evidence that is within his reach to determine the issue of the deceased dying without his involvement. In absence of that tactical evidence the accused lost the case with regard to the degree of persuasion to cast a doubt in his favour."

38. Having considered the record as put to us, the appellant's submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails in its entirety and is hereby dismissed. Consequently, the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on September 30, 2021 is hereby upheld. 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.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR