Choker v Republic (Criminal Appeal 67 of 2020)
[2024] KECA 1858 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1858 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 67 OF 2020

MA WARSAME, FA OCHIENG & LA ACHODE, JJA

DECEMBER 20, 2024

BETWEEN

KENNETH RUTO CHOKER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Kapenguria (R. Sitati J) delivered on 2nd November 2019 in Kapenguria HCCR Case No. I of 2019)

JUDGMENT

1. A summary of the evidence tendered before the trial court in this case was that sometime in 2003 RCS (the deceased), fell ill and was diagnosed with hypomania. She received medical attention for a while but her condition got worse. In 2016 PW1 WS, husband to the deceased employed the appellant Kenneth Ruto Choker, as a farm hand and minder for the deceased.

2. On 12th January, 2019 at 11:30 am, PW2 received a call from his brother SS telling him that his wife had been taken to hospital. He went to the hospital and found the deceased who told him that the appellant had hit her with a hoe in the neck and right hip. PW2 asked the appellant who was at the hospital with him why he assaulted his wife and the appellant said it was: 'so that she would fear him'. PW2 confirmed that the deceased was a woman of ungovernable temper.

3. In the course of attending to the deceased at the hospital the appellant brought milk to her as she had requested, but she refused to take it from him saying she could not take milk from the hand of a person who had assaulted her.

4. Her condition worsened and on 13th January, 2019, she was referred to Kapenguria Referral Hospital for further treatment. Later still she was transferred to Moi Teaching and Referral Hospital where X-ray, CT scan, and MRI tests revealed that she had a broken spine. She was operated to repair the spine

but on 18th January, 2019 she succumbed to her injuries. PW2 reported the death at Kapenguria Police station. PW2 confirmed that the appellant and his wife did not get along.

5. Haron Poghisio Kiyer PW3, a telephone technician at Tamkal was at home on 12th January, 2019, at around 8:00 am, when he heard his friend the appellant, talking to someone who was inside the deceased's house. PW3 went to the said home and found the appellant standing outside holding a stick while the deceased lay on the ground. He asked the appellant what had happened and cautioned him not to beat the deceased.

6. PW3 proceeded to his farm and returned at about 11:00 am, to find the appellant holding a hoe and the deceased still lying on the ground. He inquired from the deceased what was wrong, but she told him to go away. He left and later rang the appellant to ask him what had happened. The appellant did not answer. Haron later, visited the deceased in hospital and met the appellant who told him that he could not recall how and where he hit the deceased, a statement that PW3 did not understand.

7. Delvine Chesista Aaron PW4, wife to PW3 recounted that on 12th January, 2019 at about 9:00 am, she saw PW3 run towards the deceased's house. She followed him there and found the appellant quarrelling the deceased who was lying on her back on the ground, with her head almost touching the water in a trench near her. The appellant was not holding anything in his hand at that time. The deceased told her that the appellant had assaulted her. PW4 went to a neighbor and requested her to inform the deceased's relatives of what she had found. When she returned to the deceased's home she saw the appellant and his wife drag the deceased into her house and lock her inside. Later PW6, and other people came and took the deceased to hospital where she died days later.

8. Katema Cherop Catherine PW5, a teacher from Endow Primary School, went to the deceased's house at around noon on 12th January, 2019, and found the deceased lying on the floor of her house. She made arrangements for PW6, brother-in-law to the deceased to come and take her to the dispensary. Days later she learned that the deceased had died.

9. SPS PW6, a retired teacher from Muino Endow, received a call from PW5 on 12th January, 2019, at around 1:00 pm while he was at Endow Centre, informing him of what had happened at the deceased's home. He came to the house and found the deceased lying on the floor. He tried to pull her up by the hand but she complained of too much pain in her neck and hip. He asked her what had happened and she replied that the appellant had assaulted her. With the help of PW3, they took the deceased to the health clinic and on the way the deceased kept saying that the appellant had hit her with the handle of a hoe. Stephen learnt days later that the deceased had died and the appellant had surrendered himself to the police.

10. Fredrick Muli PW7, the investigating officer (I.O.) established during his investigation that the appellant and the deceased quarreled on the morning of 12th January, 2019 and the appellant hit the deceased in the back of her neck with the handle of a hoe. He visited the deceased's home and Moi Teaching and Referral Hospital to witness the post-mortem examination conducted on 25th January 2019. He found no eye witness neither did he recover the murder weapon.

11. Dr. Kibor Kibet Keitany, a pathologist based at Moi Teaching and Referral Hospital in Eldoret testified as PW1. He performed the autopsy on the body of the deceased on 25th January 2019. The body was identified to him by the deceased's husband PW2, and one Samuel Demosia. According to the pathologist, the body was that of a female aged between 42-45 years and was 160 cm long. It had blue coloration with a 6 cm long sutured incision on the right side of the neck and another incision on the back. The lungs were swollen with pulmonary oedema. The right side of the chest had 200 ml of fluid.

There was a fracture of the spine just beneath the incision and at the level of C3 and C5 where a metal plate was inserted to fix it.

12. The pathologist attributed the cause of death to pulmonary oedema, due to cervical spine fracture and injury to the spinal cord due to blunt force trauma. In his opinion the surgery which was intended to fix the spine and spinal cord could not have contributed to the death. He produced the post-mortem report in evidence. During cross-examination, he stated that the incisions he mentioned were caused by the surgical procedure and that it was possible for the injuries to the spine to have been caused by a fall, traffic accident, or a sudden twist of the head around the neck.

13. The Appellant, Kenneth Ruto Choker was charged with murder, contrary to Section 203 as read with 204 of the Penal Code in the High Court at Kapenguria. The particulars were that on 12th January 2019 at Endow village at Ptalam Sub-location within Pokot Central Sub-County of West Pokot County, he murdered RCS. He pleaded not guilty to the charges causing the matter to be subjected to a full trial in which the evidence set out above was tendered by the prosecution's seven witnesses.

14. In his defence the appellant testified without oath on 15th May 2019 and called no witnesses. He stated that on 12th January 2019, at about 9:30 am, he left his home and went to the Farm. When he came back home he found the deceased lying on the grass. He asked her why she was in that position and she rudely told him to leave her alone. He left and went about his chores as the deceased continued to shout at him. PW3 and his wife came to the deceased's home and found her lying on the ground. The appellant called his wife to come home and attend to her as he returned to the farm. While in the farm he received a call from PW1 asking him why the deceased was still lying outside. He came back home and together with his wife they carried the deceased into her house and left her there. At that time she was complaining of pain in her left hand and the right leg.

15. At around noon the appellant accompanied those who took the deceased to the local clinic where he met PW1, his uncle who was husband to the deceased. Days later PW1 informed him that deceased had died and advised him to run away. The following morning, people came to his home and destroyed all his property. Fearing for his safety he went to Kapenguria police station to report the incident. Thereafter he was arraigned in court where he denied any involvement in the murder of the deceased.

16. In a judgment dated 5th November 2019, the learned Judge held that malice aforethought was not proved and found the appellant guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The appellant was convicted accordingly.

17. The court considered a pre-sentence report dated 25th November 2019, filed in court which painted the appellant is a threat to his community for reasons that before committing the present offence he had threatened to kill another relative. That he came from a broken home and that he was not remorseful for what he did although he pleaded for leniency. Additionally, the Victim Impact Statement showed that the property of the husband to the deceased was destroyed by the family of the deceased. The appellant was sentenced to 15 years imprisonment.

18. The appellant was aggrieved and he filed this appeal to the Court of Appeal contesting both conviction and sentence. He raised grounds which we summarize as follows: that Section 150 of the Penal Code was not adhered to: that Section 7 of Cap 260 was breached: that there were inconsistencies and contradictions in the evidence: that there was no compliance with section 153 of the *Evidence Act*: and, that the appellant was convicted without proper investigation.

19. The appellant filed written submissions through the firm of Z K Yego advocates and submitted that the appellant's conviction was based on circumstantial evidence and testimonies of witnesses who did not witness the alleged assault of the victim. That the witnesses averred to the mental incapacity of the

victim. Relying on the case of Okeno v Republic (1972) EA 32 counsel urged this Court to entertain this appeal, weigh the evidence adduced before the trial court, and come to its own findings.

20. Counsel cited the case of Republic v Danson Mgunya (2016) eKLR to argue that the burden of proof rests on the Prosecution to adduce evidence beyond reasonable doubt as to the guilt of an accused person. If any reasonable possibility consistent with innocence exists, the court must find the accused not guilty. He posited that as the Supreme Court of Nigeria held in Ozaki & another vs The State Case No. 130 of 1988, for a defence to be rejected it must be incredible and must be weighed against the Prosecution evidence. Counsel also cited the case of Uganda v Sebvala & others (1969) EA 204, to state that all the accused has to do is to create doubt as to the strength of the case for the prosecution.

21. Counsel contended that the testimonies of PW1 and the expert witness did not support the allegations of the prosecution that the deceased was assaulted, resulting in her death days later. That these two witnesses said those injuries were probably caused by a fall, traffic accident, or sudden twist of the head around the neck. Counsel suggested that the victim had sustained injuries after slipping and falling with no one to tend to her and was lying on the ground when the appellant found her. Furthermore, that PWl did not testify that he observed any markings on her body that were consistent with her having been assaulted as alleged. Doubt therefore, lingers as to the cause of the injuries which resulted in the victim's demise.

22. Counsel submitted that the evidence of PW2 was hearsay as he did not witness the assault and was only told by the deceased, who often said things that were neither here, nor there on account of her illness, that the appellant hit her with a hoe. His testimony was inconsistent as he said that while he was at home he heard the appellant talking to an unnamed person who was inside Wilson Sawil's house. However when he arrived at the scene he found the appellant outside the house holding a stick and the victim was lying on the ground. That he spoke to the deceased on the fateful morning and she assured him that she was all right and made no mention of having been assaulted.

23. Counsel urged that PW4, PW5, and PW6 did not see the appellant armed or assaulting the deceased, neither did they know the cause of death. They knew the victim as being mentally infirm and their evidence does not place the appellant at the scene of the crime as the one who assaulted the deceased. PW7 who testified that the appellant surrendered himself to the police station and confessed to having assaulted the deceased did not produce a written confession in court. Further that he alleged that the appellant confessed to having hit the deceased on the back and neck, whereas the expert witness stated that the victim was injured on the neck and hip.

24. Counsel referred to the three tests set out in the case of Judith Achieng' Ochieng' v Republic (2009) eKLR that must be satisfied when a case rests on circumstantial evidence. He also cited Kimweri v Republic (1968) EA 452, where the court held that circumstantial evidence proving death must be extremely convincing; it must rule out all other explanations, leaving no doubt that the person is dead and that only the accused could be responsible. The mere fact that the appellant admitted to having been present in the victim's compound the morning of the alleged assault, does not absolve the Prosecution of the legal burden of proving that the appellant assaulted her, a burden the Prosecution failed to discharge.

25. Counsel submitted that the appellant was convicted on evidence that had overwhelming inconsistencies and loopholes and did not directly link him to the injuries that led to the victim's death. Further that all witnesses said that the victim was mentally disturbed and regularly spoke about imaginary matters. That the court relied solely on hearsay evidence of witnesses who were only told by the victim that she had been assaulted. That the alleged assault weapon was not recovered and the pathologist did not attribute the injuries sustained by the victim to being hit by the appellant.

26. On the sentence meted upon the appellant by the trial court, counsel submitted that it was excessive in the circumstances of this case and it ought to be reviewed downwards. He cited the case of OGALO s/o OWUOR V Republic [1954] EACA at pg 270 wherein the predecessor of this Court stated the Court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James v R., (1950) 18 E.A.C.A l47, it is evident that the judge acted upon some wrong principle, or overlooked some material factors, or the sentence is manifestly excessive in view of the circumstances of the case. Counsel urged that in the rare event that this Court upholds the appellant's conviction, the sentence of 15 years meted by the trial court be set aside and substituted with a lesser sentence.

27. Mr Desmond Majale, Senior Principal Prosecution Counsel in the office of Director of Public Prosecution filed written submissions dated 19th June 2024 for the respondent opposing the appeal. He urged that the appellant did not demonstrate any contradictions in the prosecution evidence. That the witness testimonies were corroborative and substantiated. Counsel asserted that the testimony of PW2 was confirmed by the appellant's testimony with regard to the victim's statement that she could not drink milk that was brought to her by her assailant.

28. In regard to circumstantial evidence, counsel referred to the case of Republic v Kipkering Arap Koske & Another (16 EACA 135) and submitted that from the totality of the circumstantial evidence and the direct evidence adduced by PW2, it is clear that the appellant did assault the deceased, causing her unlawful death. The circumstantial evidence therefore proved the appellant's guilt beyond reasonable doubt.

29. Counsel asserted that the trial was conducted in a language that the appellant understood: that he had counsel during the trial: and, his defence was considered and found not to be meritorious. Therefore, this ground of appeal is unsubstantiated and should be dismissed.

30. On the sentence counsel relied on the decision in Bernard Kimani Gacheru v Republic (2002) eKLR, where the Court of Appeal stated that sentence is a matter that rests in the discretion of the trial court and must depend on the facts of each case. He also referred to The Sentencing Policy Guidelines, 2016 ("the Guidelines") to urge that the sentence imposed must meet the following objectives in totality; Retribution, Deterrence, Rehabilitation, Restorative justice, Community Protection, and Denunciation. According to the respondent the appellant was lucky to get 15 years in place of the maximum penalty of life imprisonment provided and the aggravating factor is that the deceased was relatively young, with a history of mental instability and her life was prematurely terminated by an unlawful act.

31. Our mandate on first appeal as provided under Rule 29(1) of the Court of Appeal Rules is to re-evaluate the evidence laid before the trial Judge and draw inferences of fact on the guilt or otherwise of the appellant. Therefore, this being a first appeal, the appellant has a legitimate expectation that the entire evidence tendered before the trial court will be subjected to a fresh evaluation and analysis. As we re-evaluate the evidence however, we bear in mind that we neither saw nor heard the witnesses testify and give due allowance therefor.

32. Explaining this mandate in Okeno v Republic (1972) EA 32, the predecessors of this Court stated that:

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rawal vs R (1957) EA 570). It is not a function of the 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 conclusion. Only then can it find whether the magistrate's findings can be supported. In

doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (Peters vs Sunday Post (1958) EA 424)".

33. Section 203 of the Penal Code under which the appellant in this appeal was charged and convicted provides that:

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

34. In his grounds of appeal the appellant contested only the conviction, while in his submissions he also contested the sentence. We will address the issues surrounding conviction concurrently. The appellant was charged with murder contrary to section 203 as read with 204 of the Penal Code. To sustain a charge under this provision the prosecution was required to provide beyond reasonable doubt, proof of death by an unlawful act or omission, proof of the appellant's involvement in the death either by omission or commission, and proof of the existence of the requisite intention (malice aforethought) to cause death or grievous harm.

35. These ingredients of the charge of murder were highlighted in the case of Roba Galma Wario v. Republic [2015] eKLR thus:

> " 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."

36. Having stated the elements of murder as set out in Section 203 of the Penal Code, we are satisfied as was the learned trial Judge, that the first element of the fact of the death of the deceased as a result of an unnatural act, was proved beyond any reasonable doubt. The pathologist confirmed the death and attributed the cause thereof to pulmonary oedema, due to cervical spine fracture and injury to the spinal cord due to blunt force trauma.

37. The point of contention is whether the fatal injuries were sustained by the deceased after slipping and falling with no one to tend to her as the appellant submitted, or they were inflicted by the appellant as stated by the prosecution. There was no eye witness who saw the appellant assault the deceased, or the deceased accidentally slip and fall. What we have to re-evaluate is circumstantial evidence to resolve the contention referred to above.

38. The conditions to be considered in the application of circumstantial evidence in order to sustain a conviction in a criminal trial have been stated in numerous authorities of this Court. In the case of Abanga alias Onyango v. Republic CR. App NO. 32 of 1990 (UR) 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."

39. In Sawe Vs. Republic [2003] KLR 364, the Court added to what had been stated earlier as follows:

> "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."

40. PW3 was the first to go to the deceased's home on the ill-fated morning of 12th January 2019, when he heard the appellant talking to someone. He did not state why that talk attracted him to the home but it appears to have been animated since, according to PW4, PW3 did not just walk but he ran to the home. At the home PW3 found the appellant standing with a stick in his hand, while the deceased lay on the ground. PW3 asked the appellant what had happened and he did not answer him. The scene before him caused him to caution the appellant not to beat the deceased. There was no one else in the home at that time.

41. PW3 went away to work on his farm and returned at about 11:00 am, to find the appellant holding a hoe and the deceased still lying on the ground where PW3 left her. There was still no one else at home besides the two. PW3 asked the deceased what had happened and she told him to go away. We keep in mind however, that the deceased was mentally unwell. Later still PW3 asked the appellant on phone what had happened and instead of responding he disconnected the call.

42. PW4's recollection was that on that ill-fated morning she saw her husband, PW3 running towards the home of the deceased and she went after him. She found the appellant quarrelling the deceased who was lying on her back on the ground, with her head almost touching the water in a trench near her. The appellant was not holding anything in his hand at that time. After a while she went to a neighbour to ask for help in contacting the deceased's relatives. She came back a while later and found the appellant's wife present and the two were dragging the deceased to her house where they left her lying on the floor.

43. The appellant's version was that he came home from working on the farm and found the deceased lying on the grass. He asked her why she was in that position and she rudely told him to leave her alone. She continued to berate him as he went about his chores. That indeed, PW3 came and later his wife came to the deceased's home and found her lying on the ground. That he later called his wife to come home and attend to the deceased and when she came the two carried the deceased into her house and left her there. She complained of pain in her left hand and the right leg.

44. The inculpatory facts in this case are the evidence of the witnesses who arrived on the scene first upon hearing an altercation placed the appellant at the scene of the crime at the material time. They did not hear the deceased berate the appellant. The appellant did all the berating and that is what attracted them to the scene. Secondly, PW3 found the appellant standing with a stick and cautioned him not to beat the deceased. If the deceased slipped and fell as the appellant said, he was not found trying to help her get up. According to his own testimony, he left her sprawled on the ground and went back to the farm.

45. More importantly, although it was stated that the deceased suffered from interludes of mental breakdown, the evidence shows that she was consistent in her statement that the source of her injuries was the appellant and that he inflicted them using a hoe. She told this to PW4 at the scene and she repeated it severally to PW6 on the way to the clinic. This ties in with the evidence of PW3, who said that when he came to the home for the second time at about 11:00 am that day, he found the appellant holding a hoe and the deceased was still lying on the ground.

46. It is also pertinent that the deceased told PW2 at the clinic that it was the appellant who assaulted her using a hoe. PW2 said that when he asked the appellant who was present, why he assaulted her, his response was: 'so that she would fear him'. The appellant did not deny the accusation on the spot, nor did he state that the deceased accidentally slipped and fell. We are therefore, satisfied that it was the appellant who delivered the fatal blow that led to the deceased's death six days later.

47. Next we consider whether these injuries were occasioned upon the deceased with malice aforethought. Section 206 of the Penal Code defines Malice aforethought as follows;

> 206. Malice aforethought Shall be deemed to be established by evidence proving any one or more of the following circumstances
>
> a. an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be caused..."

49. The trial court found that the Prosecution did not prove malice aforethought. That the available evidence showed that the deceased was difficult whenever she suffered her mental episodes and could be very quarrelsome. That the appellant assaulted her to immobilize her temporarily, but she still did not shut up.

50. The East African Court of Appeal pronounced itself on proof of malice aforethought in Rex v Tubere s/o Ochen {1945} 1Z EACA 63, as follows:

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

49. Also, in the case of Hyam v DPP {1974} A.C. 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."

49. The weapon of choice for the appellant herein was a hoe, which he aimed at the back of the neck, a very delicate body part. The force applied not only fractured the cervical spine, but also severed the spinal cord within. That cannot be termed as temporary immobilization. Whether the appellant was pushed to the end of his tether because "still she did not shut up" we have no doubt that he intended to cause, at least grievous harm to the deceased with such a blow and that death was a foreseeable outcome. However, the trial judge found that malice aforethought had not been proved and there being no cross appeal, we will leave it at that and say no more on this issue.

50. Consequently, we reach the same conclusion as did the trial court, that the evidence adduced was sufficient to sustain the appellant's conviction. Consequently, we find the appeal against conviction to be without merit and dismiss it.

51. On the sentence counsel for the appellant submitted that it was excessive in the circumstances of this case and ought to be reviewed downwards. The respondent on the other hand was of the view that the appellant was lucky to get 15 years in place of the maximum penalty of life imprisonment provided and that the deceased's relative young age and history of mental instability were aggravating factors. However, as stated elsewhere in this appeal severity of sentence was not a ground of appeal.

52. In any case, as stated in the case of OGALO s/o OWUOR V Republic [1954] EACA at pg 270 to which we were referred by the appellant:

> "The Court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily, interfere with the discretion exercised by a trial judge unless as was said in James v R., (1950) 18 E.A.C.Al47'it is evident that the Judge has acted upon some wrong principle or overlooked some material factors'. To this, we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewsky, (1912) C.C.A 28 T.L.R. 364'.

49. Upon re-evaluating and analyzing the evidence on record we are satisfied that the learned Judge did not act on any wrong principle, nor did she overlook material factors. We also do not consider the sentence excessive in the circumstances of this case. We therefore decline the invitation to interfere with it.

49. Consequently, we are satisfied that the Appellant's conviction for the offence of manslaughter was safe and the sentence was commensurate with the offence. In the end we find the appeal to have no merit and dismiss it in its entirety. We uphold both the conviction and sentence.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024

M. WARSAME

.....

. JUDGE OF APPEAL

F. OCHIENG

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.. JUDGE OF APPEAL

L. ACHODE

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.. JUDGE OF APPEAL