Oloo v Republic (Criminal Appeal 268 of 2018)
[2024] KECA 1819 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1819 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 268 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

DAVID OCHIENG OLOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (Majanja, J) delivered on 22nd May, 2017 in HCCRC. No 40 of 2015)

JUDGMENT

1. On 6th August, 2015, PW3, AAA (A), a 13-year-old boy, was at Kona Mbuta Manyatta where he was then staying with his aunt, CAO (C). He heard someone talking to C, on her mobile phone, which was on phone speaker. The person speaking to C told C to leave her son alone, because C was not of the same age as her son.

2. C was living with her boyfriend, David Ochieng Oloo (David), and it was apparently David's mother who was on the phone with C. Later that night, David came back home, and C told him to carry away his clothes and go away. David, who was upset, took his clothes and C's clothes, and went outside the house, threatening to burn the clothes. C followed David outside. A, who remained inside the house, heard C and David arguing, C persuading David not to burn the clothes. A then heard something as if someone had fallen. Immediately thereafter he heard C scream, and he rushed outside the house, where he found C had fallen face downwards next to the door step. He saw David standing holding a knife which was blood-stained. A could see clearly because there were security lights outside. David threatened A and ordered him to go back into the house. David then dragged C into the house. A could see injuries on C who remained motionless where she was lying. David then took a bag, packed his clothes and a DVD player, and left, having inserted the knife he had, around his waist.

3. After David left, A sought help from a neighbour, one, Ronald Omondi (Ronald), who escorted him to where his uncle PW1, Bernard Omondi Orege (Bernard) was staying. Bernard, who is a tuk-tuk driver carried A and Ronald back to C's house, and with the assistance of neighbours took her to Jaramogi Oginga Odinga Teaching & Referral Hospital. Unfortunately, she passed on, on 15th August, 2015.

4. PW4, Dr. Dixon Mcana Mwaludindi (Dr. Mwaludindi), a consultant pathologist, carried out an autopsy on the body of C, which body was identified to him by C's brother, PW2, Joseph Juma Owenga (Joseph), and Hilda Adhiambo. He noticed a depressed skull fracture on the left orbit, mild bleeding into the brain, with a bruise on the left forebrain. He formed an opinion that the cause of death was severe head injury due to blunt trauma, due to assault.

5. The murder was reported at Kondele Police Station and PC Kwambai who investigated the case, arrested David and caused him to be charged. He also forwarded various samples recovered from the body of C, a blood-stained red jacket, a blood-stained curtain, as well as samples from David, to the government analysist, for analysis.

6. PW5, Richard Kimutai Langat (Langat), a government analysist, having carried out an analysis of the exhibits forwarded to him, found that the jacket and the curtain had blood stains whose DNA matched the profile of C, and that the DNA profile of David did not match the DNA profiles of the blood on any of the exhibits. Later PW 6, Peter Otieno Ooyi (Peter), took over the investigations and produced the exhibits in court as PC Kwambai had been involved in an accident.

7. It is on the above evidence that David who is the appellant before us was arraigned before the High Court and charged with the murder of C. After hearing the evidence of six prosecution witnesses, David was placed on his defence, and he gave sworn evidence and called no witness.

8. David explained that on the material night, he arrived home late from work, C who was his wife, picked a quarrel with him, because he had parked his car at a petrol station instead of coming home with it. In the course of the quarrel, he tried entering the house, but C pushed him and he held on to C as he was going to fall down. Consequently, they both fell down, and C hit her head on the ground, falling face down. Later when they went inside the bedroom, C was bleeding and she told David that she was not feeling very well. David called a tuk-tuk driver and they took C to the District Hospital where she was treated and later discharged to go home. The next day, C was feeling bad, so he took her back to the hospital, where she was admitted for eight days. He was then called to the hospital, and informed that his wife had died. He explained that he had a disagreement with some members of C's family, but Joseph intervened, and he was given the go ahead to make burial arrangements. However, the next day, he was arrested, taken to Kondele Police Station, and charged with the offence of murder. He claimed that at the time he fought with C, A was asleep.

9. In his judgment, the learned Judge found David untruthful in his testimony. This was in light of the evidence of A and Bernard, that David had taken off after the incident, and that it was A, Bernard and the neighbours who took C to hospital. The learned Judge also found that David lied that C was his wife, when she was only his girlfriend. The Judge noted that the postmortem conducted by Dr. Mwaludindi revealed that C had several other injuries on her face and her body, and therefore, her injuries were not just the result of a single fall, but an assault caused by several vicious blows on the body, and finally, a blow on the head, causing C to fall down. The learned Judge found evidence of malice aforethought within the meaning of Section 206(a) of the Penal Code, from the injuries that C suffered,which in his view left no doubt that David intended to cause grievous harm to C. The Judge concluded that David was guilty of the offence charged, convicted and sentenced him to death.

10. As expected, David has lodged an appeal challenging his conviction and sentence. In his memorandum of appeal prepared by learned counsel, Anyango Ida Rayner, David has raised five grounds. She faults the learned Judge for erring in law and fact, by failing to evaluate the evidence as a whole, and observing that the prosecution never proved their case beyond reasonable doubt; by relying on evidence of identification without observing that the conditions prevailing at the scene of crime, were absolutely difficult for a witness to make any significant identification; by sentencing David to death when the mandatory nature of the death sentence has been declared unconstitutional; by shifting the burden of proof upon David, rather than the prosecution, and totally disregarding David's defence; and by failing to hold that the facts of the case as presented, meant that the charge ought to have been one of manslaughter and not murder.

11. Learned counsel, Ms. Anyango, also filed written submissions in support of the appeal, wherein she submitted that A, on whose evidence the prosecution case was hinged, admitted that he had never seen C and David fight before; that even on the material night he never saw them fighting, as he only heard a scream from C who was outside; and that A never saw David assault C, nor did he see him use the knife that he alleged he was holding.

12. Ms. Anyango, submitted that Ronald, whose evidence would have corroborated the evidence of A, was not called to testify, and no reason was given for this omission; that Bernard's evidence did not throw any light on what transpired, as he came to the scene after C had been injured; that the evidence of Dr. Mwaludindi that C died as a result of a blunt force trauma was consistent with David's defence, while it was inconsistent with the evidence of A as the pathologist did not see any stab wounds on C's body; and that the government analysist confirmed that there was no DNA match of David's profile.

13. In addition, Ms. Anyango submitted that the events transpired at night, and despite A's evidence that he was able to identify David by way of security light, the circumstances were not favourable for positive identification, and the learned Judge should, therefore, have been cautious in relying on the evidence of identification. In support of her submission, Ms. Anyango cited Wamunga -vs- Republic [1989] KLR 424, Nzaro -vs- Republic [1991] KAR 212 and David Kipyegon Ngeno -vs- Republic [2018] eKLR.

14. Ms. Anyango, pointed out, that there were gaps in the timeline regarding when A went to Bernard's house, and when C was taken to hospital, which gaps could have been easily explained by the production of C's treatment notes and discharge summary. Ms. Anyango also pointed out that contrary to the evidence of Bernard and A, that C was taken to Jaramogi Oginga Odinga Teaching & Referral Hospital where she passed on, C was, in fact, first taken to Kisumu District Hospital, where she was treated and discharged. That David is the one who took C to Kisumu District Hospital the second time, when she was admitted for eight days, and that he kept in touch with her until she died.

15. Counsel for David faulted the learned Judge for failing to consider David's defence, and holding that David's conduct was not up to the standards required of a husband. Counsel argued that the evidence given by David in his defence, clearly showed David's concern towards C. In addition, the facts presented before the learned Judge, supported a charge of manslaughter and not murder. This is because none of the prosecution witnesses were privy to what occurred between David and C, on the night in question, and David's evidence was the only evidence before the court regarding what transpired, and his evidence was supported by the postmortem report. Counsel argued that the injuries suffered by C were not intentionally inflicted by David, but were as a result of a fall when she pushed David, and David grabbed her to steady himself, and both of them fell down. Learned counsel argued that the learned Judge erred in convicting David when the prosecution did not prove the charge against David. She, therefore, urged the Court to allow the appeal against his conviction.

16. In regard to sentence, Ms. Anyango relied on the Supreme Court decision in Francis Karioko Muruatetu & others -vs- Republic; and William Okungu Kittiny -vs- Republic, for the proposition that the mandatory nature of death sentence was declared unconstitutional. She urged the Court, if inclined to dismiss the appeal against conviction, to impose a term sentence, taking into account that David has remained in custody, from the time of his arrest on 26th August, 2015.

17. The respondent filed written submissions that were prepared by Mr. Patrick Okango, Senior Principal Prosecution Counsel, in the Office of the Director of Public Prosecutions (ODPP). The respondent submitted that the prosecution discharged its duty by proving its case to the required standard; that in regard to the ingredients of the offence of murder, the death of C was not in issue as it was confirmed by all the witnesses; that Joseph identified the body for purposes of the postmortem examination; that Dr. Mwaludindi performed the postmortem examination; and that Dr Mwaludindi established the cause of death to be severe head injury secondary to blunt force trauma, following assault.

18. The respondent added that the evidence adduced by the prosecution was sufficient to show that the injuries were inflicted on C by David; that although there was no eye witness to the assault, circumstantial evidence on record implicated David; that the evidence of A was clear that after he heard C scream, he went out and saw C lying down, and David standing holding a bloody knife. Counsel argued that the evidence was clear on who was last seen with C before her assault; that C having been found assaulted, shortly thereafter, with David as the only person in her company, provided evidence that directly implicated David; and that under Section 111 of the *Evidence Act*, the evidentiary burden shifted to David to explain who assaulted C or what happened to her.

19. The respondent argued that the explanation given by David, was found wanting by the trial court, which invoked Section 119 of the *Evidence Act*, in concluding that it was David who assaulted C. Counsel added that the court was right to infer malice aforethought pursuant to section 206(a) of the Penal Code, given the detailed injuries that were observed in the postmortem report.

20. On the failure to call Ronald as a witness, the respondent submitted that he was not a crucial witness as lack of his evidence did not prejudice David, and failure to call him did not materially affect the case. In regard to the time differences, it was submitted that the alleged inconsistencies do not negate the fact that A on the material night went to wake up Bernard, and that the inconsistency is neither grave nor does it impugn the strong prosecution evidence.

21. With regard to identification, the respondent dismissed David's submissions, pointing out that David, in his own testimony placed himself at the scene, and that the evidentiary burden was correctly shifted to David who ought to have given a satisfactory answer regarding what happened, when he was outside with C. The respondent argued that the learned Judge correctly found that David was not truthful in his testimony; that the facts established before the trial court presented a clear case of murder; and that David maintained that he did not cause the injuries on C.

22. Finally, as regards sentence, the respondent conceded that the learned Judge did not exercise his sentencing discretion, and, therefore, the mandatory sentence should be set aside, and a term sentence imposed. The respondent pointed out, that the circumstances showed that the murder was a result of domestic violence, and urged the Court in accordance with its decision in Frank Turo -vs- Republic, Criminal Appeal No. 157 of 2017, to impose a severe sentence. Mr Okango, who appeared for the respondent during the hearing of the appeal, recommended twenty- five (25) years imprisonment.

23. The appeal before us being a first appeal, the guiding principles for the exercise of our appellate jurisdiction are stated in many decisions of this Court and its predecessor. The locus classicus Okeno -vs- Republic [1972] EA 32, puts it this way:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 findings and conclusions; 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, see Peters v. Sunday Post, [1958] E. A. 424."

24. In our effort to consider afresh the evidence that was before the learned Judge, in order to arrive at our own conclusion, we have carefully perused the record of appeal, the submissions made by the respective parties, and the law. As David was charged with murder contrary to section 203 as read with section 204 of the Penal Code, we take cognizance of section 203, of the Penal Code which provides that:

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

25. The pertinent question that we must, therefore, address, is whether, the evidence before the trial court established that C died as a result of an unlawful act or omission, on the part of David; and if so, whether David had malice aforethought in committing the act or omission. The fact that C died is not in dispute as there is the undisputed evidence of several prosecution witnesses in regard to this fact, and also the evidence of David, who stated in his defence that C died. Of note is the evidence of Dr. Mwaludindi, the pathologist, who examined the body of C.

26. As to the cause of C's death, the postmortem examination report reveals that Dr. Mwaludindi found injuries on several parts of the body, including a severe head injury, which led him to the conclusion that the cause of death was severe head injury due to blunt force trauma, following an assault. The learned Judge accepted the evidence of Dr. Mwaludindi, who is a professional in this area, and we have no reason to doubt his evidence.

27. As to who caused the injuries on C, the prosecution's evidence in this regard, was anchored on the evidence of A, who was clear that he did not see David assault C. However, the circumstances testified to by A, pointed an incriminating finger at David. Section 111 of the *Evidence Act* places the burden of proof on the accused person, in certain situations. Subsection (1) of that section, states as follows:

> (1) 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:
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> 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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

28. A testified that David and C were out of the house arguing, C trying to persuade David not to burn the clothes, when A heard the sound of someone/something falling and immediately C screamed. This made A go outside the house, where he found C on the ground lying face downwards and David standing with a knife. Although David claimed that A was asleep, implying that he could not have heard what was going on, it is evident that A was very alert, and that when he heard C scream, he went out, to find out what was going on. David's explanation that C fell down accidentally, was not consistent with David's defence or his conduct. The learned Judge specifically addressed David's explanation and dismissed it as follows:

> "Finally, the postmortem conducted by PW6 revealed that the deceased had several other injuries on her face and body. This was not just a single fall but an assault caused by several vicious blows on the body and finally a blow on the head causing the deceased to fall. I also reject his defence that the deceased fell after she pushed him and he held on to her. This is implausible because, if the deceased pushed, she would have to be facing him and if he held her and they fell together, she would have hit the back side of the head. The accused's defence is a litany of lies and an afterthought."

29. We are in agreement with the learned Judge that the explanation offered by David was implausible. It is evident that David was the one who had special knowledge regarding what transpired when they were outside with C, and how C suffered the injuries that led to her being admitted in hospital the same night. Once it was proved that David was the one who was outside with C at the time she suffered the injuries, Section 111 of the *Evidence Act* kicked in and placed an evidential burden on David to explain how C sustained her injuries. David, having failed to offer an appropriate explanation, we revert to Section 119 of the *Evidence Act* that provides a rebuttable presumption on how things could have happened taking into account the common cause of natural events and human conduct. That section states:

> 119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

30. Once the primary facts were established that David was the one who was outside with C and the one who had special knowledge as to what happened to her, the prosecution had discharged its burden of proof, and the evidential burden shifted to David to exonerate himself by offering a reasonable explanation regarding how C sustained the injuries. In the premises, the prosecution evidence placed upon David a burden to discharge the rebuttable presumption that arose under section 119 of the *Evidence Act*, that implicated him, from his having been the last person seen with C. David's explanation fell short of displacing the rebuttable presumption, hence the conclusion that he was the one who assaulted C

31. We note that Ronald, who was the first person to be called to the scene by A, was not called to testify. In our view nothing arises from this omission, nor can any adverse inference be drawn from the failure

to call this witness. The Court of Appeal in Julius Kalewa Mutunga v Republic [2006] eKLR stated as follows:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

32. The evidence tendered in the High Court by the prosecution witnesses was sufficient to prove that David is the person who assaulted C on the day in question. Ronald arrived after C had already suffered the injuries. His evidence would not have shed any light on the question regarding who assaulted C. Nor do we find any oblique motive on the failure to call Ronald. His evidence may have been useful in underscoring the veracity of the evidence of A, but the failure to call him was not fatal. The critical role he played was to escort A to Bernard, and this was confirmed by Bernard.

33. There was clear circumstantial evidence that David was the one who caused the fatal injury to C. In PON -vs- Republic [2019], this Court addressed circumstantial evidence as follows:

> "In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased meet her death. 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:
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> > '..... 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.'

To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex V Kipkerring (supra) the court explained that:

> 'In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.'

Simoni Musoke V R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera V. R Criminal Appeal No. 56 of 1998, the Court stated that:

> 'It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilty is 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'

These dicta find their origin from an old decision of the House of Lords in Teper V. R. [1952] AC 480."

34. Taking the principles on circumstantial evidence as elucidated in PON vs Republic (supra), we are satisfied that our evaluation of the evidence that was in the High Court, reveal, that the inculpatory facts upon which the conclusion of David's guilt is inferred, were cogently established in accordance with the law; that they pointed unerringly to David and are incompatible with the innocence of David; and that they are not capable of explanation upon any hypothesis other than that of guilt on the part of David.

35. With regard to malice aforethought, considering the injuries inflicted on C, including the head injury, there is no doubt that David knew or ought to have known that such injuries would cause death or grievous harm to C, and malice aforethought was properly inferred under section 206(a) of the Penal Code.

36. As regards the death sentence imposed by the High Court, we note that the learned Judge, in imposing the sentence stated that, that was the only sentence for the offence of murder. We appreciate that, that was the position as at the date David was sentenced. However, that position changed a few months later when the Supreme Court in Francis Karioko Muruatetu vs Republic eKLR [2017] declared the mandatory nature of the death sentence in section 204 of the Penal Code, unconstitutional, and gave trial courts the latitude to take into account the circumstances of the offence and the offender in meting out an appropriate sentence. For these reasons, the respondent has rightly conceded the appeal in regard to sentence. Nevertheless, David committed a heinous and unprovoked offence, against a defenceless woman, in the presence of young nephew. We find that in the circumstances, and taking into account the mitigating circumstances that David's counsel brought to the attention of the High Court before it imposed sentence, we find that a term sentence of 40 years' imprisonment would be appropriate.

37. The upshot of the above is that the appeal against conviction is dismissed, but the appeal against sentence is allowed, the death sentence that was imposed on David is set aside, and substituted with a term sentence of 40 years' imprisonment, with effect from 27th August 2015 when David was first arraigned in Court, as he remained in custody throughout his trial.

It is so ordered

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024 HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR