Otieno v Republic (Criminal Appeal 007 of 2018)
[2024] KECA 1832 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1832 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 007 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

KEVIN OUMA OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 24th April, 2017 in HCCRC No. 26 of 2014))

JUDGMENT

1. The appellant, Kevin Ouma Otieno, was the accused person in the trial before the High Court in Kisumu High Court, Criminal Case No. 26 of 2014. He was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on the night of 21st and 22nd March, 2014, at Nyan'ungu Village, Ramunde Sub Location in Ugenya District, within Siaya County, murdered Lilian Auma Owuor (deceased).

2. The appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellant and sentenced him to death.

3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, the appellant raised five (5) grounds of appeal, which are that:

    1. The Learned Judge of the High Court erred in law and fact by relying on the uncorroborated and contradictory evidence of the prosecution witnesses to convict the appellant.

    2. The Learned Judge of the High Court erred in fact and in law in finding malice aforethought when no such evidence was available on record.

3. The findings, decision and judgment of the High Court is against the weight of the evidence on record.

4. The circumstantial evidence set out by the prosecution was insufficient to the required standards and find the appellant guilty of murder.

5. The sentence imposed upon the appellant is manifestly harsh and excessive taking into account the mitigation on record as well as the circumstance of the offence.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. This duty has been stated in numerous times by this Court. For instance, in *Alexander Ogasia & 8 others vs Republic* (1993) eKLR, the Court stated:

> " It is now trite law that "it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld" - see for example Okeno v Republic [1972] EA 32

5. At the trial court, the prosecution called a total of six (6) witnesses. The evidence that emerged from the trial was as follows.

6. The deceased and the appellant were cohabiting after the death of her husband. Everlyn Awuor, an aunt to the appellant, testified as PW1 at the trial. She told the court that on 22nd March, 2014, she was woken up at 5.00am by commotion and cries of children which emanated from the deceased's house. PW1 and the deceased lived in the same compound. She went to the deceased's house and found the appellant holding a rungu but he stopped her from getting inside the house. She said that there was somebody in the house being beaten and the person was naked. Brian (deceased's son), told her that the appellant had been beating him and the deceased. She immediately went and called her mother-in-law, Christine Akoth Awino (PW3), and told her what had happened. They both went to the deceased's house but found that the appellant had already left for work. The deceased was lying on a mattress unresponsive; and had bruises on her face, ear and right side. They took her to St. Mary's Hospital where she was given painkillers and referred to Busia Hospital. Unfortunately, they did not have money to take her to Busia and so they took her back home where she later succumbed to her injuries. PW1 reported the incident to the police on the same day and the deceased's body was collected from her house and taken to the mortuary.

7. PW3, Christine Akoth Awino, sister-in-law to the deceased, corroborated in material particulars PW1's narrative about what they found when they went to the deceased's home on that fateful morning.

8. William Tago, a village elder, told the court that on the material day, PW1 went to his home and informed him that the appellant had assaulted the deceased. He went to the deceased's house and found the deceased's body lying on a mattress. He testified as PW4.

9. John Okelo Mboto, the area chief, was called by PW4 on the material day about a murder incident. He then called the officer-in-charge of the patrol base and together, they went to the appellant's house. They found the deceased's body lying on the floor; and a rungu was next to her body. He told the court that they were informed that the deceased's daughter was also injured and had been taken to hospital. They searched for the appellant, who was arrested on the material day at 2.00pm, while at a bar.

10. Dr. Jane Ambuchi testified on behalf of Dr. Patson Ukuta, who conducted the postmortem on the deceased. Dr. Patson observed that the deceased had multiple lacerations on the forearm, multiple

bruises on the thigh and right abdomen, extensive injury on the left eye, extensive blood clot underneath the scalp and head, and there was also damage on the brain. He concluded that the cause of the deceased's death was severe head injury due to assault. She was the fifth witness.

11. The final witness, PW6, was the investigating officer who gave formal evidence about how the investigations unfolded. He informed the court that the appellant was arrested on 23rd March, 2014. The same day, he went to the deceased's house and found the deceased's body lying on a mattress with a rungu next to it. Her body was half naked and she had multiple injuries all over. He took possession of the rungu and produced it in court as an exhibit. He testified that PW1 told him that the union of the deceased and appellant was marred with quarrels especially after they both got intoxicated with alcohol. He also told the court that he took witness statements and organized for the postmortem examination of the deceased.

12. When he was placed on his defence, the appellant gave sworn testimony. He testified that he knew the deceased as she was running and staying in a chang'aa den which he used to visit. He denied being at the deceased's house on the night of 21st and 22nd March, 2014. He testified that during that week, he was plastering a house at Sega and was there the whole week. However, on 23rd March, 2014, he was arrested while he was out for lunch. Later, he was told that he had murdered the deceased.

13. DW2, Kizito Aluoyo Odhiambo, told the court that on 23rd March, 2014, he was working with the appellant at Sega Market, together with two others. At 1.00pm, they broke for lunch but the appellant did not return. Upon inquiry, they were told that he had been arrested in connection with the death of a certain woman. He testified that they started working with the appellant on 18th March, 2014, till 23rd March, 2015, and would meet at 8.00am and leave at 5.00pm or 6.00pm.

14. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr. Mbeka appeared for the appellant, whereas learned counsel, Mr. Okango, appeared for the respondent. Both parties relied on their submissions.

15. Counsel for the appellant condensed the issues of determination into three as follows:

    a. Whether the prosecution availed sufficient evidence to support the charge of murder.

    b. Whether the evidence produced by the prosecution met the standard of proof to convict the appellant.

    c. Whether the trial court had legitimate jurisdiction to impose death sentence.

16. On the first issue, the appellant impugned PW1's cross examination evidence. He submitted that she contradicted herself by vacillating on the question whether there was sufficient light in the house or not. Further, the appellant argued that PW1 testified that the deceased and the appellant used to fight at times after they got intoxicated. To him, this was proof that the appellant had no intention whatsoever of killing the deceased as this was, supposedly, their modality for settling disputes. At the very worst, the appellant argued, he should have been charged with manslaughter, not murder.

17. The appellant further submitted that the prosecution utterly failed to call any witness to give direct evidence implicating the appellant with the offence of murder. He contended that during trial, PW1 talked about a child by the name Brian Otieno, who was not called as a witness but who was, apparently, present during the incident. The failure to call him, the appellant argued, was prejudicial, and a negative inference should be made against the prosecution.

18. To a large extent, the appellant's arguments on the second issue mirror his arguments on the first issue. In essence he laments that the evidence adduced in the case did not reach the very high threshold

required in a murder charge because there was no malice aforethought proved and due to the failure to call a crucial witness, Brian Otieno.

19. The appellant argued that these two failures makes the case inappropriate for the application of circumstantial evidence to sustain the conviction. He relies on the celebrated decision in *Abanga Alias Onyango vs. Republic*, Criminal Appeal No. 32 of 1990 (UR), which sets out the principles to be applied to determine whether circumstantial evidence adduced in a case are sufficient to sustain a conviction. The appellant argued that the entire evidence tendered by the prosecution witnesses did not cogently lead to the conclusion that it is only the appellant who committed the offence of murder. He also argued that it was imperative to note that no forensic tests were conducted on the rungu to ascertain that it was the murder weapon allegedly used by the appellant to commit the alleged crime.

20. On the third issue, the appellant urged that at the time of passing the sentence, the learned judge stated that the law recognized only one sentence where a person was convicted of murder which was death penalty. He relied on the now famous Supreme Court decision in *Francis Muruatetu & Another vs. Republic* [2017] eKLR for the proposition that death penalty is no longer mandatory. In the circumstances, the appellant urged this Court to refer the matter back to the High Court for resentencing, or in the alternative, for this Court to re-consider the sentence, set it aside and impose an appropriate sentence based on the circumstances of the case and the appellant's mitigation.

21. Opposing the appeal, as regards the first issue, Mr. Okango argued that the appellant's argument that he should have been convicted with manslaughter amounts to an admission that he caused the death of the deceased; and that the circumstances yielded a conclusion that the homicide was murder not manslaughter because malice aforethought was present as defined in section 206 of the Penal Code.

22. Counsel further contended that Brian Otieno was not called due to his tender age (3 years); and that this matter was considered by the High Court which concluded that his testimony would not have been useful to the proceedings.

23. The respondent was insistent that there was sufficient circumstantial evidence to inculpate the appellant as the person who caused the death of the deceased. The respondent relied on the case of *Mwita vs. Republic* [2004] 2KLR and *Mwangi & Another vs. Republic* [2004] 2KLR, wherein in it was held that the key consideration when dealing with circumstantial evidence is that the "inculpatory facts must be incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt".

24. Lastly, as regards the issue of sentence, counsel conceded to the setting aside of the mandatory death sentence in light of the Supreme Court's pronouncement in the Muruatetu case. He urged that this matter be remitted back to the High Court for re-sentencing hearing as prayed for by the appellant. However, counsel pointed out that if this Court were to set aside the mandatory death sentence, the appellant's mitigation should be considered vis a vis the fact that he left a young child of 3 years without a parent as shown in the record as he had inherited the deceased who was survived by a son. For these reasons, counsel prayed that the mitigation be weighed against the rights of the deceased's child; and proposed a sentence of thirty (30) years imprisonment.

25. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

26. This appeal, as framed and argued, raises three questions for determination:

    a. First, whether the prosecution proved its case beyond reasonable doubt as is required.

b. Second, whether failure to call one, Brian, as a prosecution witness was fatal to the prosecution case; and also, whether failure to conduct forensic test on the rungu undermined the prosecution case.

c. Third, whether the sentence imposed was lawful.

27. As regards the first question, we have set out above the evidence as it emerged at the trial. It is trite that the standard of proof in criminal cases is beyond reasonable doubt. In this case, the prosecution had to prove all the three ingredients of murder in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) proof that the accused committed the unlawful act which caused the death of the deceased and (c) proof that the accused had malice aforethought.

28. As regards the first ingredient, the appellant conceded to the death of the deceased and the cause of her death. There is common ground on this.

29. The appellant also appears to concede – though through alternative prevarication and vacillation – whether he caused the death of the deceased. On the one hand, he concedes that he used to fight with the deceased and that, therefore, any death that resulted on that fateful day could only be manslaughter not murder. On the other hand, he challenges the conclusion that he was responsible for the death in the first place.

30. This unusual strategy is unhelpful at the appellate level where the factual contestation phase is over. The facts are already established on the record. They are, incontrovertibly, that two witnesses (PW1 and PW3) found the deceased unresponsive in her house shortly after PW1 had gone to the same house and found evidence tending to show that violence by the appellant on the deceased. The deceased had been badly assaulted and had visible injuries. The appellant was the only other adult who was in the house at the time; and did not deny, through cross-examination of the evidence of PW1, that he was present. It is, therefore, rather late, at the appellate level, to propose a different theory. The trial court was entitled, on the evidence presented uncontrovertibly, to conclude that the appellant was, indeed, in the deceased's house as testified by PW1. The appellant did not, either, controvert the narrative of PW1 and PW3 that when they returned they found the deceased lying on a mattress unresponsive, and with grievous injuries.

31. On the record, therefore, the trial court was entitled to conclude that the appellant was the only adult present in the decease's house when the assault on the deceased happened; that PW1 saw signs of violence towards the deceased; and that a few moments later, when PW1 and PW3 returned, they found the deceased badly injured. In the same vein, the trial court was entitled to deduce that it could only have been the appellant who caused those injuries on the deceased. In so doing, the trial court adhered to the principles laid down by our decisional law on the application of circumstantial evidence.

32. This is what the learned Judge said in his perceptive analysis:

> "It is true that PW1 did not see the accused assault the deceased but that alone does not mean that he did not assault the deceased. The case against him is grounded on circumstantial evidence, it is also important to recall that the principle that has been restated by our court on many occasions that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt. that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see Rex v Kepkering Arap Koske & Another [1949] 16 EACA 135 and *Mwangi & Another v R* [2004] 2KLR 32)

On the material morning, PW1 saw the accused standing with a rungu at the deceased's house after being alerted by commotion that morning. PW2 also told the court that she also heard commotion that morning. After the accused left, the accused was found with severe head injuries. The evidence is that the accused was living with the deceased in the house with two children. Since he was seen at the deceased's house in such circumstances, only he could explain what could have happened to the deceased while he was there.

The accused's alibi, when considered alongside the prosecution evidence, is like a house built on quicksand. The accused does not deny that he knew the deceased or that he went to the house from time to time albeit to drink chang'aa. His alibi does not negate the positive proof that PW1 saw him armed at the deceased's house early morning prior to the deceased's death. Likewise, the fact that he was working at Sega does not diminish the fact that after assaulting the deceased, he left to go to work that morning....."

33. We have reproduced the analysis by the learned Judge in extenso because it is readily obvious from that analysis that the learned Judge properly applied the principles applicable to circumstantial evidence to reach the conclusion that the appellant was the person who caused the death of the deceased. Unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one may infer the existence of material elements.

34. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in *Republic vs Ahmad Abdolfadhi Mohammed & Anor* 2019 eKLR as follows:

> "(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is
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> "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence...."
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> [.....
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> 59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "...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, ..."
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> 60. As was further stated in the case of *Musili v. Republic* CR A No.30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances

> weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

35. The principles to be gleaned from this decision, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.

36. The question in the present appeal is whether this threshold has been met in linking the appellant with the death of the deceased. We have concluded that it has for the same reasons the learned Judge did. The appellant was, incontrovertibly, last seen at the deceased's house menacingly armed with a rungu; at least one witness heard commotion coming from the home; and the deceased was, shortly thereafter, found dead at the scene. In our view, the circumstances "taken cumulatively... form a chain so complete that there is no escape from the conclusion that within all human probability ....the [appellant]" was the person who committed the heinous crime." See Joan Chebichi Sawe versus Republic [2003] eKLR.

37. The final question on conviction is whether the appellant had malice aforethought. In this regard, the learned judge held as follows:

> "17. Hitting the deceased on the head with a rungu cannot be expected to draw harmless results. The intent is clear, and it is to inflict maximum injury which would ordinarily result in severe head injuries as those described by Dr Kubuta in the post mortem form. I have no doubt that the intent was to inflict grievous harm or kill the deceased. In this respect, I find and hold that the prosecution proved malice aforethought beyond reasonable doubt within the meaning of section 206(a) of the *Penal Code*."

38. We agree with the learned Judge that the evidence shows that the injuries inflicted on the deceased were so severe that it was a permissible inference by dint of section 206 of the Penal Code for the learned Judge to conclude that malice aforethought had been established. The fact that the deceased's body had multiple lacerations on the forearm, multiple bruises on the right abdomen, extensive injury on the left eye, extensive blood clot underneath the scalp and head, and there was also damage on the brain, caused by assault; was proof that her death was not only unlawful, but was caused with malice aforethought because at the very least there was an intention to cause grievous harm. There is no doubt that that the appellant knew that the act of assaulting the deceased with a rungu would cause her grievous harm or death. This settles the third ingredient.

39. As regards the second question – whether there was a reversible error in the learned Judge's holding that it was not fatal that Brian Otieno was not called as a witness - the learned judge held as follows:

> "15. The law does not require the prosecution to call all or any witnesses but where if fails to call a specific witness the court may draw adverse an inference against the prosecution (see *Bukenya and Others v Uganda* [1972] EA 549). In this case, I do not think the failure to call Brian Otieno would undermine the prosecution case. He was the deceased's son and one of the two children living with the accused and deceased. According to PW 6, he was aged 3 years old and at that age, I doubt very much that he would add value to the proceedings. I also do not think that failure to do forensic tests on the rungu undermined the prosecution

case. PW 1 saw the accused carry it in the house where the deceased was assaulted. He is the only one who could have used it to assault the deceased."

40. In short, we agree with the holding and reasoning of the learned Judge. Brian was a 3-year old son of the deceased and, seemingly, an adopted son to the appellant. It would have been not only traumatic but meaningless to call him as a witness.

41. Turning to the question of sentence, the Supreme Court, in the Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (supra), held that the mandatory nature of the death sentence under section 204 of the Penal, as was imposed here, was unconstitutional because it stripped the sentencing court of discretion. The Supreme Court held that:

> "[66] It is not in dispute that Article 26 (3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

42. As the State concedes, the appellant here should have the benefit of Muruatetu (supra). We have looked at the record and the mitigation of the appellant at the trial court and have considered the same including the fact that there is a child aged only 3 years old left behind whom the appellant had apparently adopted as a son. We have also considered that the appellant was a first offender. There is no evidence that he explicitly intended to cause the death of the deceased – although, by law, the requirements for malice aforethought have been met. Even then, we have considered that the appellant's action was a reprehensible one borne of domestic violence. All in all, we think that a sentence of twenty-five (25) years is the proper and just sentence for the murder perpetrated by the appellant in this case.

43. The final orders are that the appeal on conviction fails, and is hereby dismissed. The appeal on sentence is allowed to the extent that the death sentence is set aside. Instead, we hereby impose a sentence of twenty-five (25) years imprisonment on the appellant. By dint of section 333(2) of the *Criminal Procedure Code*, the sentence will be computed to begin on 23rd March, 2014, since that is when the appellant was placed in police custody as he remained in remand during the pendency of the trial.

44. Orders accordingly.

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

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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