



REPUBLIC OF KENYA



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**Sirya & 3 others v Republic (Criminal Appeal 25, 24, 26 & 22 of 2020
(Consolidated)) [2023] KECA 10 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KECA 10 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 25, 24, 26 & 22 OF 2020 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 20, 2023**

BETWEEN

**SIRYA KALALE 1ST APPELLANT
KITSAO SIRYA 2ND APPELLANT
KAHINDI KENGA 3RD APPELLANT
KATANA KENGA 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 27th February 2020 in High Court Criminal Case No. 8 of 2014)

JUDGMENT

1. Sirya Kalale, Kitsao Sirya, Kahindi Kenga and Katana Kenga, the 1st to 4th appellants respectively, were convicted for the offence of murder by the High Court at Malindi (R. Nyakundi, J.) in a judgment delivered on 27th February 2020. They were each sentenced to imprisonment for a term of thirty (30) years. The particulars of the offence for which they were convicted were that on the night of March 16, 2014 and March 17, 2014 at unknown time at Ziwa La Frunzi Village in Malindi District within Kilifi County jointly with others not before court murdered Kenga Karisa Kalale (Deceased).
2. The facts are as follows: On the morning of March 17, 2014, the deceased was found dead at Ziwa La Frunzi Village within Malindi. The previous day, on 16th March 2014, the deceased had attended the funeral of his son, a boy named Sinaraha (Sinaraha), who according to some of the witnesses had died from malaria. Stephen Kahindi Mwadzana (PW3), a resident of Msabaha, Malindi and a younger brother of the deceased was at the funeral in the afternoon of 16th March 2014. He testified that as the body of Sinaraha was being taken to the grave, the 3rd and 4th appellants, who are sons of the deceased, in



- accordance with their culture, “wanted to talk to the deceased child-Sinaraha” allegedly to find out if he died “through natural death or witchcraft”; that the elders at the funeral declined that request and the burial proceeded; that thereafter, there was a quarrel between the 3rd and 4th appellants and their father, the deceased; that he took the 3rd and 4th appellants aside and urged them not to create disturbance and impressing upon them that any family issues could be resolved amicably. He stated that there were claims that the deceased was a witch. Thereafter, PW3 went home. The following morning, he learnt that the deceased had been killed.
3. Francis Kazungu Katana (PW4), a Kaya elder, was also at the funeral of Sinaraha in the afternoon of 16th March 2014. He testified that the 3rd and 4th appellants suspected that the deceased (their father) was a witch; that in accordance with custom, the 3rd and 4th appellants “wanted to talk to [Sinaraha] by holding his ear” to establish if he died naturally or he had been bewitched; that he calmed them down; that after the burial, the deceased, left the venue as he was worried that he would be accused of causing the death of his son, Sinaraha; that he (PW4) asked some youth to look for the deceased whom, he gathered, had gone to report at the police station. PW4 stated that he slept at the burial place and later, the following morning at about 6.00 a.m. he got a call that the deceased had been killed and his body taken to Malindi Hospital. PW4 stated that he was among those who were arrested alongside the 3rd and 4th appellants on suspicion of having killed the deceased.
 4. PW4 testified further that the 1st appellant, Sirya Kalale, informed him that he (the 1st appellant) had escorted the deceased to the home of Fredrick Mwatsuma Mwarabu (PW6) a village elder; that the village elder had called the police who failed to respond in time; that PW6 then requested the 1st appellant to take the deceased to his house; that on the way to the 1st appellant’s house, the deceased excused himself to go for a short call and the 1st appellant proceeded on to his home to wait for the deceased; that the deceased did not show up and the 1st appellant learnt the following day that the deceased had been killed.
 5. Francis Charo Mrahai alias Chigo (PW5), a priest and village elder also attended the funeral of Sinaraha in the afternoon of 16th March 2014. He stated that he declined a request by Sinaraha’s step brother, the 3rd appellant, to “talk to the deceased” which, he said, is “allowed under Giriama customs”; that after his request was declined, the 3rd appellant left; that after the body of Sinaraha was placed in the tomb, he took the deceased aside to console him and in the process the 4th appellant “came while furious” and “wanted to kick his father” and referred to him “as a witch”; that PW 5 called the Chief who informed him that he would call the police; that he then got a call from the police requesting him to ask the deceased to go to the police station; that he offered the deceased refuge at his house but the deceased declined and indicated that he would go to the police station. The following day, PW5 learnt that the deceased had been killed. He went to the mortuary where he saw the body of the deceased.
 6. Village elder Fredrick Mwatsuma Mwarabu (PW6) testified that he was at his home in Frunzi on 16th March 2014 at about 9.45 p.m. when the deceased, the 1st appellant, and two other persons, namely Rama Chuma and Hamadi Hussein, visited him; that Hamadi Hussein informed him that he had rescued the deceased who was being assaulted by the 2nd appellant. PW6 stated further that the deceased informed him that at the burial of his son, Sinaraha, he had been accused him of being a witch; that he had gone to the police station to report but was asked to return the following morning; that he decided to go to his uncle, the 1st appellant, as he waited to go back to the police station in the morning. PW6 went on to say that he advised them that since they were family members, they should go home and report to the police the following morning. His visitors then left. The following morning, he heard that the deceased had been killed and his body was in the bush. He went there, saw the body of the deceased, called the police who took the body. Cross examined, PW6, stated that his homestead has



light; that he did not see other people at his homestead but “it is possible other people remained away from [his] house”; that the 2nd appellant was not among the four people who visited him that evening but the 1st appellant was among the four.

7. Dr. Chirega of Malindi District Hospital performed the post mortem in respect of the deceased. His report was produced before the trial court by his colleague, Dr. Yegon Erick (PW1) in which it was reported that the body of the deceased had a deep cut on the neck from the mandible to the right ear, the bones were visible, the jugular veins were cut, the right thigh had deep cut, the penis and scrotum were removed and there was a small cut on the left thigh. The cause of death was indicated as cardiopulmonary arrest due to bleeding.
8. The investigating officer was Sergeant George Matika of Malindi Police Station who did not testify. His sworn statement was produced before the trial court by Inspector Charles Gitende (PW7).
9. The trial court found that the prosecution had made out a case for the appellants to be put on their defence. The 1st appellant, Sirya Kalale, in his sworn statement in defence stated that the deceased was his nephew. He denied killing him. He stated that on 16th March 2014 he was at Malindi Sub-County Hospital seeking treatment for his strained legs; that at the hospital he was sent away as he had no money and an X-ray, which he produced, was done on March 18, 2014; that on returning home on March 16, 2014, he found the deceased who informed him that he had come from making a report at the police station; that the deceased appeared shaken. He stated that there was trouble at his home as people were baying for the deceased’s blood “saying that he is a witch” and; and that fearing for the life of the deceased, he decided to take him to the village elder (Fredrick Mwatsuma Mwarabu (PW6)); and that his son, “Kitsao was present”. In words of the 1st appellant:

“There were many people. I took him to the police with Kitsao (court-points at accused 2). There were other people. I did not see PW2 Hamadi at home. I even did not see him at the village elder’s place. The people who were following us left after we reached the home of the village elder. The people were many. The village elder told us to leave as he had called the police so that they could come to take him. I left the deceased at the home of the village elder. I never looked back. The deceased did not reach home. On the way he went to answer a call of nature. I now say that the village elder told us to take the deceased away. He said he would come with the police officers to take away the deceased once police officers arrived. Before we reached him the deceased said he wanted to go and answer a call of nature. I proceeded home. The deceased did not come home. I was in much pain. I never enquired why he had not come.”

10. The 1st appellant stated that the following morning, he learnt that the deceased had been killed. He went on to say that he was very close to the deceased and had no differences with him and that he had not attended the funeral of Sinaraha as he was very sick. He reiterated that “I took the deceased to the village elder. I was with Kitsao. He is the son of my brother. The village elder handed over the deceased to me.”
11. Kitsao Sirya, the 2nd appellant, stated in his unsworn statement in defence that on 16th March 2014, he was at home with the 1st appellant; that at 8.00 p.m. they suddenly saw the deceased and were surprised to see him as there was a burial for his son; that the deceased said he had come from the police as he had been threatened by his children; that:

“We proceeded to the home of the village elder Fredrick Kazungu Mwarabu. We went with Sirya Kalale, Hamadi Hussein and the deceased Kenga Karisa.”



12. He stated that at the elder's home, the deceased explained that he had come from making a report to the police as he had been threatened by his children; that the elder telephoned the police to come for the deceased but the police did not come; that the elder asked them to go with the deceased. The 2nd appellant narrated that:

“We left for home. I was with Mzee Sirya and the deceased. When we arrived home the deceased said he was going for a call of nature in the bush. I went to my house and Mzee Sirya went to his house. I slept and in the morning I heard people say there was an old man who had been killed at the sea.”

Later the 2nd appellant was arrested.

13. The 3rd appellant, Kahindi Kenga, in his sworn statement stated that the deceased “is my father” and that Sinaraha was his younger brother; that it is true that at the funeral of Sinaraha at Msabaha situated along Malindi Mombasa, he requested for the coffin to be opened so that ‘he could talk’ to Sinaraha but permission was declined; that after the burial ended at 5.00 p.m., he did not see the deceased; that he kept vigil with the family and slept there in Msabaha until 6.45 a.m.; that he then learnt from women who had gone to collect water that the deceased had been killed at Frunzi, which is far from Msabaha. He denied that he had threatened the deceased, whom he said he loved very much. He maintained that he did not kill his father and was at home at Msabaha when he learnt that his father had died at Frunzi.
14. The 4th appellant, Katana Kenga, also a son of the deceased stated in his sworn testimony that he knew nothing about the death of his father. He stated that after the burial of Sinaraha at 5.00 p.m., he slept at the house in Msabaha; that his father, the deceased attended the funeral but he did not see him after the burial and learnt of his death the following morning from women who had gone to collect water. He stated that Frunzi, where the deceased died, is far from where he was in Msabaha.
15. Christine Ntonya (DW5) and Edward Kazungu Kenga (DW6) testified on behalf of their siblings, the 3rd and 4th appellants. In their sworn testimonies, they stated that they attended the burial of Sinaraha; that the 3rd and 4th appellants as well as the deceased also attended the burial but the 1st and 2nd appellants were not there; that after the burial, the 3rd and 4th appellants remained at home in Msabaha and slept there until the following morning; that Msabaha is far from Frunzi where they heard the deceased was killed. DW6 had this to say:

“I was with accused three and four on the same mat that night. The burial was concluded at 5.00p. m. We talked until morning. Accused three and four were there until morning.”

Cross examined, DW6 stated that he had also been suspected of involvement in the death of the deceased and had been arrested.

16. The trial had commenced before Chitembwe J who heard the prosecution witnesses and thereafter W. Korir, J. (as he then was) heard the defence witnesses. In the impugned judgment delivered on February 27, 2020, Nyakundi, J., having reviewed the evidence and having considered the closing submissions found the appellants guilty as charged, convicted them and sentenced each one of them to imprisonment for a term of 30 years. Aggrieved, the appellants lodged this appeal
17. During the virtual hearing of the appeal before us on September 28, 2022, learned counsel Mr. Wamotsa appeared for the 1st and 2nd appellants. Mr. Odera, learned counsel, appeared for the 3rd and 4th appellants. Mr. Kirui, learned Prosecution counsel, appeared for the respondent. Mr. Wamotsa and Mr. Kirui relied entirely on their respective written submissions. Mr. Odera briefly orally highlighted his written submissions.



18. Mr. Wamotsa submitted that the trial court did not properly apply the law on circumstantial evidence; that although the 1st and 2nd appellants were last seen with the deceased, there were other factors that negated the presumption of guilt on their part. It was pointed out that the deceased appeared shaken on the material day and the 1st and 2nd appellants accompanied him to the village elder; that there was no grudge between the said appellants and the deceased and that the actions of the said appellants were not consistent with those who wanted to harm the deceased. Counsel also took issue with the medical report, urging that PW1 was not the maker; that the handwriting of the maker was not identified and that the qualification of the witness and of the maker of the report was not given in court and it is therefore in doubt whether the post mortem was conducted by a qualified person. In that regard, it was submitted that sections 48(1), 72 and 77(2) of the Evidence Act were not complied with.
19. Mr. Odera for the 3rd and 4th appellants submitted that: the prosecution evidence did not prove that the 3rd and 4th appellants caused the death of the deceased or that they were at the scene of crime on the fateful day; that the trial court erred in failing to make a finding on the 3rd and 4th appellants' alibi defence; that it was established that the 3rd and 4th appellants spent the entire night at Msabaha while the deceased died at Frunzi Village which are miles apart; and that the 3rd and 4th appellants could not have been in two different places at the same time. In support, counsel referred to decisions in the cases of Erick Otieno vs. R (2019) eKLR and Karura vs. R (1988) eKLR. Citing the case of Simon Musoke vs. R (1958) EA counsel submitted that there were co-existing circumstances that weakened the inference of guilt on the part of the 3rd and 4th appellants as there was no evidence placing them at the scene of crime, and furthermore, they did not go into hiding when the death of the deceased occurred.
20. In opposing the appeal, Mr. Kirui submitted that the conviction was well founded; that the prosecution established all the ingredients of the offence as set out in Anthony Ndegwa Ngari vs. Republic [2014] eKLR; that there was evidence that the appellants threatened and assaulted the deceased and accused him of being a witch; that the trial court properly applied the doctrine of last seen as the 1st and 2nd appellants were the last persons with the deceased. In that regard counsel referred to the case of R vs. DWK (2020) eKLR. It was submitted that all the ingredients of the offence were established to the required standard; and that the threats on the life of the deceased by the appellants was proof of mens rea. Counsel urged that any contradictions in the prosecution evidence were immaterial. Reference was made to the case of Philip Nzaka Watu vs R (2016).
21. We have considered the appeal and the submissions. The appellants have challenged the conviction and sentence on grounds that the offence was not proved to the required standard; that the High Court failed to consider that there were sharp contradictions in the prosecution evidence; that there was no cogent or credible evidence linking the appellants to the commission of the offence; and that the High Court failed to consider their alibi defence which was not challenged.
22. The critical question therefore is whether all elements of the offence of murder were established to the required standard. In that regard, it was incumbent upon the prosecution to prove that the death of the deceased occurred; that the appellants, with malice aforethought, committed unlawful act that caused the death of the deceased; and that the appellants were positively identified as the perpetrators of the offence. As this Court stated in Anthony Ndegwa Ngari vs. Republic (above):

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See Nyambura & Others vs. Republic, [2001] KLR 355).”



23. There is no dispute that the death of the deceased occurred. The prosecution and the defence are in agreement in that regard. The post mortem report confirmed that the deceased died as a result of cardiopulmonary arrest secondary to severe anemia as a result of deep cut wound in the neck, genital area and right thigh. There was no objection raised during the trial regarding the production of the post mortem report by PW1 on behalf of the maker. PW1 laid a basis for doing so indicating that he was familiar with the handwriting of the maker. The complaint regarding the post mortem report is an afterthought.
24. There is then the important question whether the prosecution established that the appellants committed the unlawful act which caused the death of the deceased.
25. In relation to the 1st and 2nd appellants, the evidence as set out above is that after the burial of Sinaraha, the son of the deceased, in the afternoon of 16th March 2014, the deceased appeared at the home of the 1st appellant shaken, ostensibly to seek refuge, having made a report at the police station. As already noted, the 1st appellant stated in his evidence that there was trouble at his home concerning the deceased as people were saying he was a witch and were “baying for his blood at [his] home”; that fearing for the life of the deceased, the 1st and 2nd appellants then escorted the deceased to the village elder (PW6) with other people following. It was his testimony that PW6 then called the police to come and collect the deceased and that when the police failed to do so, PW6 requested the 1st and 2nd appellants to go home with the deceased and report the matter to the police the following morning.
26. According to PW6, the deceased readily agreed to go with the 1st and 2nd appellants. The deceased left the home of PW6 in the company of the 1st and 2nd appellants. Somewhere along the way, the deceased went to answer a call of nature. That was the last time the deceased was seen alive. The learned Judge was satisfied, and held that the doctrine of last seen, which presumes that the person last seen with the deceased bears responsibility for the death applied. In that regard, the Judge expressed:
- “As pointed out by the 1st and 2nd accused in their evidence, the deceased excused himself to answer the call of nature, but they did not see the need of waiting for him to come back. DW1 and DW2 are categorical in their testimony that they parted ways without knowing the whereabouts of the deceased. In a proper case, this was an old monger 75 years; he had excused himself at around 10.00 p.m. in the night to answer a call of nature, and yet nobody cared to find out why it had taken longer than usual to turn up and proceed with the journey home. In my view, there is, but a common intention to be inferred from the circumstances of this case between the two accused persons giving rise to a conclusive inference of a joint enterprise to prosecute the offence of murder against the deceased.”
27. However, a closer look at the testimonies of the 1st and 2nd appellants shows that it is not clear at what point the deceased excused himself to answer a call of nature. The 1st appellant had initially stated that he left the deceased at the home of PW6. He then changed that statement to say that he left the home of PW6 with the deceased. The 1st appellant stated further that while “on the way”, the deceased went to answer the call of nature. However, according to the 2nd appellant, they had already reached home when the deceased excused himself to answer the call of nature in the bush. In the words of the 2nd appellant, “when we arrived home the deceased said he was going for a call of nature in the bush. I went to my house and Mzee Sirya went to his house.” The discrepancy in those two versions of events was not reconciled. For if indeed they had already reached home, the question of the 1st and 2nd appellants waiting for the deceased to relieve himself and continue with the journey would not have arisen.



28. There is another concern. The evidence shows that, like the deceased, the 1st and 2nd appellants apprehended that the deceased was in danger. The deceased appears to have hurriedly left the burial of his son, Sinaraha, and proceeded to a police station before going to seek refuge at the home of the 1st appellant. The threat to his life appears to have followed him to the home of the 1st appellant where it is said people were baying for his blood. Ostensibly to remove him and protect him from that danger, the 1st and 2nd appellants took him away to the home of PW6, the village elder and they were followed there by people. As PW6 stated “it is possible other people remained away from” his house who may thereafter have accosted the deceased. As submitted by counsel for the 1st and 2nd appellants, the conduct of the 1st and 2nd appellants in taking the deceased away to the village elder, PW6, to protect him from the people who were baying for his blood appears to be inconsistent with the idea that they plotted his death. Furthermore, the testimony of PW6 was that when he asked the 1st and 2nd appellants to go home with the deceased, the deceased readily agreed to do so. Further, the fact that the deceased sought refuge in the 1st appellants home after the burial of his son, give credence to the testimony of the 1st appellant that they “were very close” and had no difference.
29. Had the learned trial Judge taken the foregoing matters into account, we think he would have concluded, as we do, that there were co-existing circumstances that weakened the inference of guilt on the part of the 1st and 2nd appellants (See *R vs. Kipkering Arap Koske & 2 others* [1949] EACA 135) and would have granted the 1st and 2nd appellants the benefit of doubt.
30. As regards the 3rd and 4th appellants, the learned Judge found that they confronted the deceased at the burial of the son, Sinaraha, and that they were “an affiliate with their co- conspirators” the 1st and 2nd appellants. The learned Judge does not however appear to have considered the evidence of the 3rd and 4th appellants and that of DW5 and DW6 that throughout the night of 16th/17th March 2014, the 3rd and 4th appellants spent the night at the home of Sinaraha in Msabaha whereas the deceased was killed some considerable distance away in Frunzi. In our view, the alibi defence put forward by the 3rd and 4th appellants raises a reasonable doubt as to their guilt. The prosecution made no effort at all, either in the cross examination of the 3rd and 4th appellants or of their witnesses DW5 and DW6 who testified on oath, to demonstrate falsity of the defence of alibi. The prosecution had the burden to do so but did not discharge it. (See *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR).
31. All in all, the evidence does not unerringly point to the appellants, to the exclusion of all others, as the persons who killed the deceased. They are entitled to the benefit of doubt.

We accordingly quash the conviction and set aside the sentence in respect of each of the appellants. They shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

