Ethele v Republic (Criminal Appeal 13 of 2014)
[2023] KECA 156 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 13 OF 2014

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 17, 2023

BETWEEN

SIMON LETENYO ETHELE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (M. J. Anyara Emukule & H. A. Omondi, JJ.) delivered and dated 21st February, 2014 in HC. CR.C. No. 282 of 2011)

JUDGMENT

1. The appellant is before us on a second appeal. The appellant was convicted on a charge of the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to death. His appeal to the High Court was dismissed in its entirety. He is dissatisfied with the judgment of the High Court on six grounds which we discern as follows. First, that the first appellate court erred in upholding the decision of the lower court despite the charge sheet being fatally defective. Second, that the description of the alleged stolen motor cycle failed to meet the requirements of section 137 of the *Criminal Procedure Code*. Third, that the learned judges of the High Court erred in relying on impeachable evidence under section 163(1)(c) of the *Evidence Act*. Fourth, that the learned judges failed to notice that the provisions of section 211 of the *Criminal Procedure Code* were not complied with. And fifth, that the offence was not proved beyond reasonable doubt, and sixth, that the first appellate court erred in dismissing his defence.

2. The prosecution's case against the appellant was founded on the evidence of 9 witnesses. In summary, the case was that the deceased was employed by PW2 as a motor bike rider. On the material day, he was sent by his father, PW1, at about 6 pm to go fetch him some nails. He however did not return home. After an extensive search, the deceased's body and the motorbike were recovered within a compound owned by PW6. Upon interrogation, PW6 stated that he had rented the house to the appellant and one Nganga. The appellant was later arrested after a few days while digging some trenches and charged

with the offence of robbery with violence. The appellant in his defence gave unsworn evidence. His defence was confined to the events of the day of his arrest. He alleged to have worked for the deceased's family two years prior to the incident and that there was a possibility of a grudge since he refused to work for the deceased's family.

3. This is a second appeal and our mandate is confined to matters of law. This is in line with the provisions of section 361(1)(a) and (b) of the *Criminal Procedure Code*. This position has been previously captured by this court in *David Njoroge Macharia v Republic* [2011] eKLR as follows:

> "That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611."

4. When this matter came up for hearing, both parties sought to rely on their respective written submissions. For the appellant, the submissions were filed by M/S Wangari Mwangi & Co. Advocates and are dated October 21, 2022. Counsel divided the submissions into two thematic areas. First, on circumstantial evidence, counsel submitted that this was a case of circumstantial evidence and that the learned judges of the High Court failed to consider the veracity of circumstantial evidence in this case. Counsel submitted that answers were not offered to the questions as to the relationship between the appellant and the deceased, who killed the deceased and whether any murder weapon was recovered. Counsel also submitted that the circumstantial evidence on record had a lot of gaps thereby making the chain of events incomplete and incapable of inferring guilt on the appellant. Counsel referred to the case of *Republic v Kipkering Arap Koske & another* [1949] 16 page 135 to submit that circumstantial evidence should conclusively link the appellant to the offence without leaving any room for any other hypothesis. Counsel also relied on the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR to advance this line of submission and concluded that the evidence on record was insufficient to guarantee the conviction and sentence.

5. The second theme of the appellant's submissions concerned lack of corroboration of the evidence tendered by the prosecution. Counsel submitted that the evidence on record has glaring inconsistencies and contradictions. He said that the first appellate court failed in its duty to review the proceedings. According to counsel, those discrepancies and contradictions create doubts as to whether the appellant committed the offence. In conclusion, counsel urged the Court to find that the conviction of the appellant is unsafe and proceed to quash the conviction and set aside the sentence.

6. The respondent's submissions were filed by Ms Monica Mburu, Prosecution Counsel. Ms Mburu addressed the Court on three thematic areas which we summarise below. The first issue was that the charge sheet was not fatally defective as alleged by the appellant. In addressing this issue, Ms Mburu submitted that the charge sheet complied with section 134 of the *Criminal Procedure Code* and that the appellant was charged with an offence known in law. Counsel referred the court to the decisions in *Alkano Galgalo Dida v Republic* [2021] eKLR where the learned judge cited the Court of Appeal in *Sigilani v Republic* [2004] 2KLR 480 where the court stated that the principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand.

7. The second theme of the respondent's submissions is that section 211 of the *Criminal Procedure Code* was complied with, contrary to the view raised by the appellant. Counsel submitted that the import

of section 211 is that at the close of the prosecution's case, a court will put an accused person on his defence when a case is made against him. And that in doing so, the court is to explain to the accused of his rights. Counsel submitted that in the instant case, there was sufficient evidence adduced by the prosecution to warrant a decision to have the accused put on his defence.

8. The third thematic area of the submissions is that the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel submitted that in line with the provisions of section 143 of the *Evidence Act*, the prosecution called a number of witnesses who gave evidence to prove the case against the appellant beyond reasonable doubt. Counsel reiterated that the deceased's lifeless body was recovered at the appellant's dwelling house with stab wounds and a slit throat. That PW8 who was the landlord testified that the appellant lived in the said house with Ng'ang'a. That PW 3 who knew the appellant saw him parking motor cycle registration no. KMCQ 713A at the back of his house. PW 2 confirmed ownership of the motorcycle by producing receipt from where he bought it (P Exh.3). PW 9 found the appellant's photos hanging in the house where the deceased's body was recovered being P Exh.4 (a) - (c). That PW7 retrieved the motorcycle's ignition keys from the appellant's pocket during arrest. And that the appellant failed to explain how the keys came into his possession.

9. Counsel referred to the case of *Republic v Peter Chege Wanja* [2008] eKLR where the court referred to the decision of the Court of Appeal in *Omar Mzungu Chimera v Republic*, Criminal Appeal No 56 of 1998 and submitted that the evidence on record satisfied the test established therein. In conclusion, counsel urged us to dismiss the appeal and uphold the conviction and sentence.

10. We have considered the memorandum of appeal, the record of appeal and the submissions of both parties. In our view, this appeal raises two issues for determination. First, whether the evidence on record satisfied the threshold of circumstantial evidence to sustain conviction of the appellant. And second, whether the sentence passed by the trial court was cogent.

11. The first issue that we deal with is whether the evidence on record satisfied the threshold of circumstantial evidence to sustain the conviction of the appellant. We note, that both the first appellate court and the trial court concluded that the evidence on record was circumstantial in nature. We further note that both the trial court and the first appellate court warned themselves of the test to be applied in instances where the evidence presented was circumstantial.

12. That being said, the appellant's complaints in this regard is that the evidence on record did not provide answers for the questions as to who killed the deceased, the relationship between the deceased person and the accused person and where the murder weapon was. The appellant also submits that even though the appellant lived in the house where the deceased's body was recovered, the same cannot be used to infer his guilt on him. It is also the appellant's contention that the learned judges of the first appellate court failed to question the motive of the murder or the relationship between the appellant and the deceased.

13. As we have already pointed out, the evidence on record is circumstantial. At the risk of repetition, we affirm the views of the two courts below; that when faced with circumstantial evidence, the court ought to satisfy itself that the said evidence was not only cogent but was also incompatible with the innocence of the accused person.

14. As cited by the appellant, in the case of *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR, this court defined circumstantial evidence as that evidence which enables a court to deduce a

particular fact from circumstances or facts that have been proved. The test for circumstantial evidence was well elaborated by this court in *Joan Chebichii Sawe v Republic* [2003] eKLR 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 on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

15. We remain alive to the fact that when dealing with circumstantial evidence, the prosecution is required to show that the circumstances from which the inference of guilt is to be drawn are, in the first instance, proved beyond reasonable doubt. In essence, the prosecution must prove to the required standard, the existence of such fact. Having said the foregoing, and in enabling our assessment, we remind ourselves that the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The elements of the offence of robbery as has been defined by this court was well captured in the case of *Charles Maina Wamai v Republic* [2003] eKLR as follows:

> "...an accused person commits the offence of robbery with violence, if with an intention to steal, he commits one or more of the following acts:-
>
> a. is armed with any dangerous or offensive weapon or instrument; or
>
> b. is in company with one or more persons; or
>
> c. immediately before or immediately after the time of the assault he beats, strikes or uses any personal violence to the person"

16. It therefore follows that circumstantial evidence relating to the facts which are aimed at proving the existence of any of these elements must be proved by the prosecution beyond reasonable doubt. From the evidence on record, PW6 conducted a postmortem on the deceased and based on his examination concluded that the deceased succumbed due to shock from excessive bleeding caused by multiple stab wounds with a sharp object. The evidence of PW1 and PW2 confirmed that the deceased had a motorbike registration number KMCQ 713A and according to PW1, he left his home with it on the previous day at about 6 pm and never returned.

17. The evidence of PW1, PW2, PW7 and PW8 confirmed that the deceased's body was recovered from the appellant's house. PW8 confirmed that he had rented the house to the appellant, alongside one Ng'ang'a. PW3, on his part, testified that he saw the appellant, whom he knew, park the motorcycle behind his home and he even spoke to them. His version was corroborated by the evidence of PW4 who confirmed having been informed of the incident by PW3. PW1, PW2, and PW7 all confirmed that upon arrest, the appellant was found with the ignition key to motorbike registration number KMCQ 713A. All these facts were never challenged.

18. From the facts highlighted above, we have no doubt that the evidence led by the prosecution forms a continous chain linking the appellant to both the motorbike and the deceased person. When he was placed on his defence the appellant did not offer any explanation as to how he came into contact with

the motorcycle ignition key or how the deceased's body found itself in his house. In *Mungai v Republic* (Criminal Appeal No. 49 of 2021) [2021] KECA 51 (KLR), the court held as follows:-

> "Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regarding being had to the common course of natural events and human conduct."

19. In the circumstances, the unavoidable conclusion is that the case against the appellant was proved beyond reasonable doubt. On what amounts the standard of beyond reasonable doubt, which we have satisfied ourselves that the case against the appellant met, this court in *Stephen Nguli Mulili v Republic* [2014] eKLR held:

> "The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated:
>
> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

20. The next issue for our determination is whether the sentence passed by the trial court and affirmed by the first appellate court was lawful. The appellant did not challenge the sentence passed by the trial court and affirmed by the first appellate court. We are also cognizant that under section 361(1)(b) of the *Criminal Procedure Code*, our mandate is limited to instances where a sentence has been enhanced by the High Court or where the subordinate court had no power under section 7 to pass that sentence. The case herein is not one that falls within either of the scenarios provided under section 361(1)(b) of the *Criminal Procedure Code*.

21. The trial court while sentencing the appellant to death noted that "... in any event, my hands are tied. There is no other sentence placed by law..." The first appellate court on its part while confirming the sentence noted that the sentence was legal. We cannot fault the two courts below in passing and confirming the sentence of death. This was the law back then. However, the recent judicial developments from the High Court, this court and the Supreme Court has changed the tide in as far as mandatory statutory sentences are concerned. In a recent decision of this court in the case of *Dismas Wafula Kilwake v Republic* [2019] eKLR, the Court stated that:

> "...the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

> This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence…"

22. We are of the view that criminal justice system is a field where both the accused and the complainant (or the state) seek justice. Even in instances where an accused person is found guilty, courts must remain independent referees capable of rendering a proportionate punishment for the offence. Judicial discretion still ought to be maintained and exercised by the courts as and when the situation, the facts and the circumstances of the case demand. It is a tool offered to the courts, without which a miscarriage of justice could arise.

23. Having said the foregoing, we find it prudent, judicious and in the interest of justice to vacate and set aside the sentence of death as passed by the trial court and affirmed by the first appellate court. In doing so, and based on the circumstances of this case and the mitigation put forth by the appellant, we find that a sentence of 40 years imprisonment is proportionate.

24. Consequently, and based on the foregoing, the appeal against conviction fails and is hereby dismissed. The appeal against sentence is hereby allowed. The death sentence is hereby set aside and the appellant is sentenced to 40 years imprisonment. The sentence to run from the date of the first sentence imposed by the trial court, being the 28th day of October, 2011.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR