Masikini & 2 others v Republic (Criminal Appeal 176 of 2018)
[2023] KECA 166 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 166 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 176 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

FEBRUARY 17, 2023

BETWEEN

NELSON WAFULA MASIKINI ..... 1ST APPELLANT

STEPHEN NYONGESA MASIKINI ..... 2ND APPELLANT

FRANK SIMUYU MASIKINI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against a conviction/sentence of the High Court at Bungoma (Aroni J.) dated 29th March, 2018 In Cr. Case No. 03 of 2011)

JUDGMENT

1. On the morning of January 25, 2011, the people of Munyofwe village in Miendo sub-location of Miendo location within Bungoma county, woke up to a murder most foul. One of their own, Gideon Masikini Wamoto had been murdered on the night of January 24, 2011. Police investigations led to the arrest of three sons of the slain man, Nelson Wafula Masikini, Stephen Masikini and Frank Simiyu Masikini the appellants herein. They were jointly charged in the High Court for the murder, under section 203 as read with section 204 of the *Penal Code*.

2. In order to prove its case against the three young men, the prosecution called a total of 13 witnesses, drawn mostly from the relatives of the family. To understand why the finger of blame was directed at the three Appellants, it is necessary to set out in brief the evidence that was presented to the trial Court.

3. The deceased was a polygamous man and Irene Nakhumicha Chebolo (PW1) was his third wife. She testified that there was a long-standing land dispute between the deceased and the Appellants, who were his sons from his first wife. The Appellants were said to have been dissatisfied with the portion of

land that the deceased gave them and had thwarted attempts by the deceased to settle the dispute and subdivide the land to all his children on two occasions on 10th and January 17, 2011.

4. PW1 recalled that on the January 17, 2011 when the deceased brought surveyors to the land, the 1st and 2nd Appellants showed up armed with machetes and disrupted the process, threatening that they would kill someone. It was her testimony that the deceased was afraid that the Appellants would kill him, since the 1st and 2nd Appellants had beaten him before.

5. PW1 went to check on the deceased early on the morning of the January 25, 2011, in the house of his late 2nd wife where he had spent the night and found him dead. She did not see any visible injuries on the deceased's body. It was her screams that rent the air and woke up the sleepy village of Munyofwe.

6. Dan Khakina Masikini (PW2), a son to the deceased and elder sibling to the Appellants was present at the meeting held on January 17, 2011 and corroborated the evidence of PW1 on the events of that day. He stated that there were about 15 people present at the gathering when the Appellants arrived and threatened to kill the deceased. He and the deceased then decided that they would escalate the matter to the District Officer in Webuye on January 25, 2011. That was the day he learnt of the unfortunate death of his father the night before. He found the deceased's body lying on the floor naked, with no visible injuries, when he went to the scene.

7. Peter Sundwa Namutare (PW3), the area Chief testified that the deceased and his family were known to him. He recalled that in July 2010, the deceased had come to his office with a letter from the DO Bokoli Division, instructing the Chief to tell the children of the deceased to contribute funds to facilitate the survey and titling of their parcels of land. He passed the information to the Appellants, their brother (PW2) and their sister Lydia, but they all responded that they did not have money for the survey fees at the time.

8. He later received another letter from the DO. instructing him to provide security for a surveyor who was scheduled to visit the deceased's land. He did as he was instructed, but the Appellants became violent and stopped the survey arguing that no other survey could be undertaken because other surveys had been carried out on the land. On January 25, 2011 he was called at about 6.20a.m. by a member of the community and informed that the deceased had been found dead. He went to the scene.

9. Lazaro Khaemba Namusamu (PW4), the deceased's uncle recalled that sometime in mid-2010, the 1st Appellant complained to him that the deceased had subdivided his land and had allocated them 3 acres each, which he now intended to reduce to 2 acres each. PW4 spoke to the deceased, who confirmed that he wanted to reduce their acreage so as to get enough land to distribute to his other children and the people he had already sold some plots to.

10. He also confirmed that on January 17, 2011, the deceased brought a surveyor to the land to survey and subdivide it. The surveyor surveyed 2 plots but chaos erupted when she came to the 3rd parcel because the 1st and 2nd Appellants arrived with machetes and iron bars and threatened to attack the deceased. They insisted that the survey process be halted or somebody would die. PW4 told the surveyor to stop the exercise. On January 25, 2011 he learnt of the deceased's demise.

11. Ham Mukhwana Wamoto (PW5), a brother to the deceased testified to the sour relationship between the Appellants and the deceased arising from a land dispute. On several occasions he heard the Appellants threatening the deceased before the morning of January 25, 2011 when he heard screams from the direction of the deceased's homestead, which was some 500m from his. He went to the scene and saw the deceased's body. He did not see any visible injuries on the body but there was blood oozing from the nose.

12. David Wekesa Wamoto (PW6), another brother to the deceased, was also present on the January 17, 2011 when the Appellants disrupted the survey process armed with machetes and iron bars. They threatened to kill someone if they continued with the survey. PW6 and others protected the deceased whom the Appellants threatened to beat. The Appellants then promised the deceased that they would kill him before the month ended.

13. He recalled that on January 23, 2011 the deceased had confided in him that he feared for his life as the Appellants were trailing him everywhere he went. The deceased was subsequently found dead on the January 25, 2011. The witness observed that the body of the deceased had blood oozing from the nose and his neck looked tender. Further, that the window to the bedroom where the deceased slept was broken and was hanging to the inside of the house.

14. Philip Wamoto (PW7), a nephew to the deceased was also aware of the frosty relationship between the deceased and the Appellants which had subsisted for many years, and would erupt in to quarrels over land now and then. On January 25, 2011 before 7 am one Masika Khaemba informed him that the deceased had been found dead. He proceeded to the deceased's home where a crowd had formed. The body of the deceased was lying on the bed. He and the area Chief went and reported the incident at Webuye police station. The police accompanied them back to the scene and interviewed the Appellants and many other people in the crowd. They subsequently took the Appellants to the police station and removed the body to Webuye District Mortuary.

15. PW7 further testified that on January 26, 2011, one Benson Waswa who is a neighbour to the 1st and 3rd Appellants, told him in the presence of David Wamoto (PW6), that on the night of 24th and January 25, 2011, he had been attracted out of his house by the barking of his dogs. While outside, he saw two people running from the direction of the deceased's homestead. By his torchlight he was able to identify the two as the 1st and 3rd Appellants. He was however, afraid to report to the police, lest the two should beat him.

16. Morris Khisa Wamoto (PW8), testified that on the fateful morning when he heard the screams, he called the third Appellant, Francis Simiyu Masikini, whose home is located between the homes of PW(8) and the deceased where the screams were coming from, to enquire what had happened. Francis told him that he did not know what had happened as he was not at home. He went to the deceased's home and found the deceased dead. Blood was coming out of his mouth and nose, the neck was tender and the stomach had a nail injury.

17. He accompanied the body to Webuye District Mortuary and later attended the postmortem. He too was aware of the deceased's strained relationship with the Appellants because of a land dispute and had attended the survey that was disrupted by the machete wielding Appellants, who chased everybody away.

18. Dr Dickson Mchana Mwaludindi (PW10), the pathologist in charge of Western Region, performed the second postmortem on the body of the deceased. The first postmortem was done by Dr Munyendo Alex and the repeat was directed by the Chief Government Pathologist Dr Moses Njue, on the basis that the initial postmortem results were found to be questionable.

19. Dr. Mwaludindi stated that he carried out the second postmortem in the presence of Dr. Munyendo who was his junior. He produced both postmortem reports in court. In his findings there were: superficial bruises on the left collar bone, left shoulder and right shoulder, a left side front wound on abdomen, skin abrasion on the face and chest, enlarged heart, 3 injuries on the right side on the abdomen. The first report opined that the cause of death was poison, while the second report attributed

the cause of death to external trauma. The doctor also stated that the report of the Government Chemist on the samples submitted for analysis, found alcohol and not poison.

20. David Nzioko Mbevi (PW11), a Deputy County Commissioner in Londiani of Kericho County stated that sometime in January 2011, he received a complaint between the deceased and his sons concerning distribution of land. He called the family and tried to resolve it. The sons complained that the deceased had failed to give them each 3 acres of land as expected. PW11 instructed the chief and the clan elders to attempt to settle the issue on the January 8, 2011. Later on, one of the sons brought a letter from the clan chairman confirming that they would resolve the issue. Later still, he learnt that the deceased had died.

21. Christine Wawire Hasan, (PW12) was the Surveyor who went on the ground with her staff in January 2011, following a request by the deceased for a survey to be done on his farm because he had sold some parcels thereof to other people. He produced a letter of consent to the subdivision issued by the Land Control Board. Present at the site were many people whom the deceased introduced as his clan members.

22. Half way through the survey and subdivision exercise, two young men whom she later learnt were the deceased's sons, came and started exchanging words with the deceased. The chairman of the clan intervened and restored peace. They continued with their work but stopped presently when a third son came and insisted that they stop and the deceased and clan chairman advised her to stop. After a week the purchasers reported to her that the deceased had been found dead.

23. At the close of the prosecution case, the Appellants were placed on their defence and they all opted to give unsworn testimonies and call no witnesses.

24. The 1st Appellant Nelson Wafula Masikini's defence was that on the material day he rose early in his home with his family and left for work on his motor bike since he is a "boda boda" rider. That he lives 1 km away from his father's home and he only learnt from his colleagues at work of the demise of his father. He did not meet the other Appellants, as he was busy working. He denied that the dispute with the deceased was the cause of his death, or that he killed him, and asserted that he had no hatred towards the deceased.

25. The 2nd Appellant Stephen Nyongesa Masikini in his defence, stated that on the morning of January 25, 2011 he was getting ready to go to work when he heard the screams of a woman coming from the house of his father's late 2nd wife, about 200M from his house. He was the 2nd person to arrive at the scene of death where he found PW1 and she told him that his father was dead. He refuted the claims that the disagreement they had with the deceased over land was the cause of his death, or that he killed him or had any hatred towards him.

26. The 3rd Appellant Francis Simuyu Wamoto's defence was that on January 25, 2011, he was working on a farm at Oriko's at about 7.30 am, when he received a call from his uncle Morris Wamoto (PW8), asking whether he was at home. PW8 told him he could hear screams coming from their home and he wanted to know what had transpired. PW8's phone went off and when the 3rd Appellant called him back he told him that his father was dead. He immediately returned his cattle home and went to his father's home. He did not see his father's body as the police had removed it. The police took him, the two other Appellants, their elder brother and the clan elder to the police station to write statements. He was subsequently put in the cells. He conceded that they had a disagreement with the deceased, but denied having killed him.

27. That then was the sum total of the evidence that was before the learned Judge and upon considering it, she was convinced that the three Appellants were the authors of their father's death. The Judge

found them guilty of the offence of murder contrary to section 203 as read 204 of the *Penal Code*. She convicted them and sentenced each to life imprisonment.

28. The Appellants were aggrieved by the above decision and immediately filed the instant appeal advancing six grounds. In a nutshell, they fault the Superior Court:

    i. For failing to appreciate that the evidence was fabricated and failing to independently, re-evaluate and analyze the evidence on record, to arrive at its own findings and see that the Appellants had no burden to prove their innocence, and the circumstances leading to the incident are shrouded in unconfirmed reports and events.

    ii. For failing to find that the trial was a nullity and or, void since the Court failed to appreciate the background of the matter as to who stands to benefit from the confinement of the Appellants in custody.

    iii. For failing to find that the evidence on record was not sufficient to attract the conviction and sentence given that the incident purportedly occurred at night, and the issue of the occurrence of the offence was not established beyond reasonable doubt.

    iv. Failing to find that the circumstantial evidence relied upon by the prosecution fell below the legal threshold of such evidence and thus could not have been the basis of a sound conviction in the circumstances.

    v. For failing to comply with section 169 of the Criminal Code in writing the judgment; and

    vi. For imposing a manifestly high, harsh and excessive sentence in the circumstances.

29. This appeal was disposed of by way of written submissions that were orally highlighted in the virtual Court. The Appellants were represented by Learned Counsel, Mr Gilbert Oguso. Their written submissions are undated. The State was represented by Learned Counsel, Ms Limo, who filed written submissions dated October 13, 2022.

30. During the plenary hearing Mr Oguso submitted that the land dispute between the Appellants and their deceased father is not disputed and that the bad blood between them had persisted for 20 years, but no witness placed any of them at the scene of the crime.

31. Counsel argued that if conspiracy is alleged, the actus reus of each must be demonstrated. As such, it was upon the prosecution to demonstrate to the court through evidence, the role that each Appellant played in the commission of the offence with which they were charged. Further, that the prosecution failed to prove or demonstrate, any communication or activity carried out between the Appellants with the knowledge or acquiescence of the others.

32. Counsel faulted the evidence of PW6 in which he stated that the Appellants told the deceased "Tutakunyonga na huwezi maliza mwezi huu" (we will strangle you and you will not finish this month!), as purely a figment of imagination by the witness, since all three Appellants could not have uttered the said words in unison

33. Counsel also criticized the production of two postmortem reports which have contradictory information on the deceased's cause of death and that in circumstances such as this, where there are conflicting reports, the benefit should go to the Appellants. He urged that the prosecution did not discharge the burden of proof to the required standard and therefore, this Court should set aside the conviction and sentence by the High Court, and set the Appellants free.

34. In opposition, Ms Limo in her submissions contends that the elements of murder as provided in section 203 of the Penal Code were proved. That it is not disputed that the deceased died and although there was no eye witness to the commission of the crime, there is sufficient circumstantial evidence tendered by PW1 to PW13, that the Appellants had a hand in the death of deceased and that there was malice afterthought.

35. Counsel relied on this Court's decision in *Mwangiswa v Republic* (Criminal Appeal no 2 of 2020) (2022) KECA 422 (KLR), where the Court upheld a conviction for murder against the Appellant, because in as much as there was no direct evidence pointing at the Appellant as the murderer, the circumstantial evidence was so strong and pointed to him as the person behind the deceased's murder.

36. She further submits that although nobody saw the deceased being killed, the circumstantial evidence is so strong that it leaves no doubt that the Appellants had a hand in the murder of the deceased. That the Appellants had a common intention to eliminate their father because of the land. In her view, the trial Judge analyzed the evidence in totality and thus found the three Appellants guilty as charged.

37. On the sentence, it is submitted that the maximum sentence for murder is death. However, in this case, considering the Appellants mitigation, they were sentenced to life imprisonment. That the sentence meted out was therefore commensurate to the offence and should be upheld.

38. We have looked at the record of appeal, the parties' written submissions, the authorities cited and the law. This being the first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial afresh and draw our own conclusion. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, consider that fact.

39. As stated by the East Africa Court of Appeal in the often-cited case of *Okeno v R* (1972) EA p32 at p36:

> " 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) EA p336) and to the appellate court's own decision on the evidence and draw its own conclusion. (Shantilal M Ruwala v R (1957) EA p570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings 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 (1958) EA p424."

40. The undisputed facts in the appeal before us are that: the deceased died; that there was bad blood between the deceased and the Appellants stemming from a land dispute; that no witness placed any of the Appellants at the scene of the crime and that there was no direct evidence pointing to the Appellants as the murderers.

41. Bearing the foregoing in mind, and having considered the grounds of appeal, the rival submissions as argued before us and the law, it is our view that the case rests entirely on circumstantial evidence. This appeal therefore turns on one main issue, whether the circumstantial evidence tendered can pass muster, to sustain a conviction for the offence of murder under Section 203 of the Penal Code against each Appellant. If we find in the affirmative on the above, then we will proceed to determine the second issue whether the sentence imposed upon the Appellants was excessive, or it was commensurate with the offence for which they were convicted.

42. Section 203 of the *Penal Code* provides that:

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

The ingredients of murder were aptly explained in this Court's decision in *Roba Galma Wario v Republic* 2015 eKLR, where the Court held that:

> " for the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice afterthought. Without malice afterthought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional"

43. The fact of the death of the deceased is not disputed. We must however, assess the evidence to establish whether the prosecution proved that the deceased met his death as a result of an unlawful act or omission on the part of the Appellants, or any of them – which constitutes the 'actus reus' for the offence of murder. It is only if we can answer the first question in the affirmative that we can go on to establish whether the said unlawful act or omission was committed with malice aforethought- which forms the "mens rea" for the offence.

44. In their grounds of appeal the Appellants state that the circumstantial evidence relied upon by the prosecution fell below the legal threshold of such evidence and thus could not have been the basis of a sound conviction. Learned Counsel Mr Oguso submits that none of the witnesses placed any of the Appellants at the scene of the crime and there is no direct evidence pointing at the Appellants as the murderers.

45. On her part, Ms Limo contends that the elements of murder as provided in section 203 of the *Penal Code* were proved. That although there was no eye witness to the commission of the crime, there is sufficient circumstantial evidence tendered by PW1 to PW13, to prove that the Appellants had a hand in the death of deceased and there was malice aforethought and that therefore, the circumstantial evidence strongly points to the fact that the Appellants caused the death of the deceased.

46. The learned trial Judge agreed with the Respondent's line of argument when she assessed the evidence before her and made a finding that:

> " .... Circumstantial evidence available unerringly points to the accused persons and circumstances of the past events chained together leave no other inference neither were their co-existing facts that would weaken this inference."

47. In the case of *Eric Odhiambo Okumu v Republic* No 84 of 2014, this Court cited the decision in *Abanga Alias Onyango v Republic* Cr App No 32 of 1990, where the test that circumstantial evidence must be subjected to, to establish whether it was sufficient to sustain a conviction, was set out as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly be established (ii) those circumstances should be of a definite tendency unerringly pointing towards the 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 human probability the crime was committed by the accused and none else"

And in *Sawe v. Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

48. The inculpatory facts in the present case are the pre-existing land dispute between the deceased and the Appellants, the altercation on the January 17, 2011, a week before the demise of the deceased, when the Appellants disrupted the survey process and were heard threatening to dispatch the deceased to his maker before the end of that month. This is the reason why witnesses pointed accusing fingers at the Appellants as the killers.

49. The evidence before us indicates that the deceased and the Appellants had co-existed together for two decades, despite the land dispute between them, each of the Appellants denied harboring any hatred towards the deceased and insisted that the land dispute was not the cause of his death.

50. There is also the question of the two postmortem reports produced in evidence, containing contradictory findings on the cause of the death of the deceased. The cause of death is a very important component in a murder trial. If the cause of death cannot be ascertained it may be difficult to apportion blame on the accused person. In the instant case the first report indicates the cause of death as poison, while the second report assigns the cause of death to external trauma. Both reports are professional opinions of how the life of the deceased ended. The only reason the court was invited to accept the second and discard the first was that the record was authored by a more senior Doctor.

51. After a careful analysis of the record of appeal, we find no evidence to place any of the Appellants at the scene of the murder on the night of infamy and neither have we found any evidence that we can equate to a smoking gun in the hands of the Appellants. In our view, the evidence does not satisfy the legal threshold required of circumstantial evidence to warrant, or justify the inference of guilt being drawn in relation to any of the Appellants.

52. The standard required to justify the inference of guilt from inculpatory facts was also stated: In *R v Kipkering arap Koske & Another* 16 EACA 135 where it was held, inter alia, that:

> " The evidence against the appellants was purely circumstantial. There was no eyewitness to the circumstances in which the deceased received his fatal injury. A considerable quantity of property had been stolen from the house of Andrea Lugando, but none of it had been recovered – and still less, traced to the possession of either of the appellants, and there is no evidence of any blood stains on the weapons which it is alleged that the appellant must have used.
>
> As said in Willis on "circumstantial Evidence" 6th edition p.311 "in order to justify the inference of guilty, 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". 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 on the prosecution, and always remain with the prosecution. It is burden that never shifts to the party accused"

53. The evidence on record amounts to no more than mere suspicion. As was held in *Mary Wanjiku Gichira v Republic*, Criminal Appeal No 17 of 1998, this Court Held that:

> " suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.

A similar view was expressed by the Tanzania Court of Appeal in *R v Ally* (Criminal Appeal No 73 of 2002 (2006) TZCA 71 where it was held by the Tanzania Court of Appeal that:

> " Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."

54. From the foregoing we find that the evidence furnished by the prosecution has not provided a nexus between the actus reus and any of the Appellants to the required standard. On that basis alone, the prosecution case must collapse. In the premise we see no reason to move on to discuss the evidence pertaining to the presence or absence of mens rea, which is a step predicated on the presence of the evidence on actus reus. We will also not proceed to the second issue to establish whether the sentence imposed upon the Appellants was excessive, or it was commensurate with the offence for which they were convicted, that reason.

55. Consequently, we allow this appeal, in respect of each Appellant, quash the convictions and set each sentence aside. Each Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 17th day of February, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR