Okong'o v Republic (Criminal Appeal 246 of 2018)
[2023] KECA 41 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 41 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 246 OF 2018

MSA MAKHANDIA, PO KIAGE & F TUIYOTT, JJA

FEBRUARY 3, 2023

BETWEEN

NAHASHON NYANGA OKONG'O ALIAS MREFU ALIAS JALEGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 17th September, 2018 in HCCR No. 19 of 2017)

JUDGMENT

1. The appellant, Nahashon Nyanga Okong'o alias Mrefu alias Jalego was arraigned before the High Court in Kisumu and charged with murder contrary tosection 203 as read together with section 204 of the *Penal Code*. The particulars of the offence were that on June 25, 2017 at Kaloleni in Kisumu East Sub-County, within Kisumu County, he murdered Dickson Odongo Odhiambo alias Owino.

2. The appellant denied the charge leading to a trial before Majanja, J. in which the prosecution called 9 witnesses in support of its case. PW1, PW2 and PW3 were placed under witness protection pursuant to the *Witness Protection Act*, and therefore their names have been redacted from the record in order to safeguard their identity.

3. PW1 testified that on June 25, 2017, while at the Kaloleni dumpsite he saw the appellant alias Mrefu who had on a blue pair of jeans, a grey short-sleeved shirt and dark brown sahara safari boots, holding the deceased or Buda, as he called him, by the waist. He asked what was going on but Mrefu told Buda to keep quiet. Buda then asked PW1 to keep his phone. Buda was then taken away by Mrefu in the company of other boys. A while later two boys came back with a tuk-tuk that was white and orange in colour and had a green canvas, they asked PW1 to give them Buda's phone but he declined as Buda had

not instructed him to release it. The following Monday, one of the boys who was in Mrefu's company, informed PW1 that Mrefu had taken Buda to Kachok dumpsite and killed him.

4. PW2 who also worked at the dumpsite established that the deceased used to work for Mrefu. He testified that on the fateful day at around 11am while at the dumpsite he saw an incoming tuk-tuk with four occupants, Mrefu and the deceased, among them. When the occupants alighted from the tuk-tuk, PW2 noticed that the deceased's hands had been tied and Mrefu was accusing him of stealing property worth a lot of money. In addition, Mrefu was assaulting him on his hands and head with a twisted piece of metal. Once they proceeded into the dumpsite, PW2 went on his way. He noted that Mrefu had on a pair of blue trousers and a grey shirt.

4. PW3 corroborated PW2's assertion that the deceased worked for Mrefu. However, during his initial examination in chief, he testified that he only saw people quarrelling in a tuk-tuk and went on his way hence did not witness anything. The court warned him not to lie to the court as he was departing from his statement. The matter was adjourned. When PW3 took the stand again he explained that the reason he retracted his statement earlier was that he was afraid as he had been threatened.

5. PW3 then testified that he saw Mrefu on the fateful day, together with 3 other boys at the dumpsite. Mrefu was assaulting the deceased, who was on the ground, with a metal object while asking him where he took the things he had stolen. The deceased gave Mrefu a phone number, which he called. However, it appeared that he did not come to an agreement with the person on the other end. As Mrefu continued assaulting the deceased on his hands, head and feet, PW3 and 3 others tried to intervene but their efforts were futile as Mrefu asked them to either pay him Kshs. 5,000 on behalf of Buda or leave. As they were leaving, Mrefu, the deceased and other boys were going to find the deceased's uncle who they believed would pay the Kshs. 5,000.

6. John Ochieng Orinda, PW4, asserted that the appellant deals in scrap metal. He also attested that he is the one who alerted the police concerning the deceased body being at the dumpsite pursuant to a call he received regarding the same.

7. Moses Otieno Odoch, PW5, was an Assistant Chief at Kaloleni at the time. He knew Mrefu very well as he worked within his sub- location. When he got information concerning the circumstances surrounding the death of the deceased and that Mrefu was the prime suspect, he quickly summoned him to his office. On June 27, 2017, Mrefu availed himself at his office and upon interrogation stated that the deceased had stolen copper wire worth Kshs. 100,000 and ran away. Mrefu later caught the deceased and asked him where the copper was but the deceased refused to answer. So, together with others, Mrefu took him in a tuk-tuk towards Moi Stadium when the deceased jumped out and took off. Mrefu claimed that that was the last time he ever saw the deceased. PW5 then took him to the District Officer's Office. The D.O, Willis Onyona Ochieng, testified as PW6. According to him, Mrefu was not cooperative during the interrogation and only claimed to have heard about the deceased from his boys. They then took him to Kondele Police Station and left him there.

8. Dr. Mathew Oluoch, PW7, conducted a post-mortem on the deceased and found that he had; a wound measuring 6cm by 4cm on his left parietal skull; massive bleeding within his brain; a linear fracture on the frontal-parietal area of the head; multiple bruises and puncture wounds on the upper limbs; and multiple cut wounds on the lower limbs. He concluded that the deceased died of a massive brain haemorrhage due to injury by a sharp object in the head.

9. Corporal David Walubengo, PW9, together with his colleague Joseph Korir, PW8 investigated the murder. It was PW9's testimony that the attire Mrefu was wearing on the material day as described by the witnesses, were recovered at his house; the blue jeans trouser was produced as exhibit No. 2, the grey shirt as exhibit No. 1 and the sahara safari boots as exhibit 3. In the course of the investigation,

he was introduced to several street boys who feared recording statements afraid of victimization by the appellant since they made a living by selling scrap metal to him. Only two street boys volunteered to give their testimony on condition that they would be protected. Notably, during cross-examination PW9 revealed that the appellant, during interrogation, did not mention that he had travelled for business on the material day.

10. At the close of the prosecution's case, the learned Judge found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and called two defence witnesses.

11. The appellant averred that on the material day, he was in Kakamega having arrived there at 6.30 am using a Tuffoam vehicle. He delivered goods in Kakamega and returned to Kisumu by 7.30 pm on the same day. He was then summoned to the Assistant Chief's office where he denied telling him anything to do with the murder, and was later taken to the police station on allegations that he had murdered the deceased. He claimed that he did not know the deceased, he was not at the dumpsite on the material day, and denied dealing with copper wire as he only dealt with plastic waste.

12. John Otieno, DW2, affirmed that he was with the appellant at DW3's yard in Kakamega on the material day from around 7.30am. The appellant had gone to collect plastics. They began picking plastics until around 2.00 pm and eventually parted ways at 6.30 pm.

11. Enock Ndeta Ananda, DW3, was a businessman in Kakamega and the owner of the yard. He confirmed that he was with the appellant at the yard at around 8.00 am on the material day. After negotiating the prices for the plastics, he left the appellant at 9.00 am in the company of DW2.

12. The judgment by Majanja, J. was delivered on his behalf by Ochieng, J. (as he was then) on September 17, 2018. Whilst acknowledging that the evidence was largely circumstantial, the learned judge weighed the prosecution's evidence against the alibi defence and held that; the contradictions in the prosecution's case did not detract from the substance of the case on the fact that the appellant in the company of others, assaulted the deceased on the material day; the deceased body was found dumped the following day with injuries consistent to the testimony of PW1, PW2 and PW3 as fortified by findings of PW7; PW5's testimony corroborated the narrative that the deceased had stolen copper wire from the appellant and that they were together in the tuk-tuk; and finally, in the totality of the prosecution's evidence, the appellant's alibi defence was a mere moonshine and therefore rejected it. The appellant was then sentenced to 15 years imprisonment.

13. Aggrieved by the sentence, the appellant preferred the instant appeal, raising several grounds which, condensed, are that the judge erred in law and fact by;

    a. Failing to consider the alibi defence put forward by the appellant.

    b. Failing to appreciate that the prosecution's witnesses were unreliable and untrustworthy and the testimonies they gave were full of inconsistencies.

    c. Failing to appreciate that the glaring inconsistencies should have been resolved in favour of the appellant.

    d. Relying on and convicting the appellant on the basis of unsworn evidence.

    e. Imposing a sentence that was harsh and manifestly excessive.

14. At the hearing of the appeal, learned counsel Mr. Onsongo appeared for the appellant while the State was represented by Mr. Vitsengwa, the learned Prosecution Counsel.

15. Mr. Onsongo submitted that several crucial issues remained unresolved by the prosecution, such as; whether PW1 knew the appellant as alleged; the weapon allegedly used by the appellant to assault the deceased; the trouser recovered at the scene; the clothes recovered by PW9 at the appellant's house; the statement by PW5; and the injuries on the deceased's body vis a vis the alleged stone that was used to assault him.

16. The contradictions in the prosecution's case in counsel's contention, include; PW1 claiming to know Mrefu by name then later altering his testimony and claiming that he had seen him for the first time on the material day; PW1 was not clear on what the deceased wore on the material day; PW2 retracted what he stated in his statement concerning the deceased being assaulted with stones; he also denied telling the police that he saw the appellant choke the deceased and drown him in the river; and he also conceded that some aspects of his statements were actually based on hearsay. It was Counsel's conclusion that these two witnesses were inconsistent, unreliable and therefore not worthy of belief.

17. Further, PW3 ought to have been treated as a hostile witness' during his initial testimony as he was unwilling to tell the truth. Counsel questioned why PW9 did not make an inventory of the items he recovered from the appellant's house. He also took issue with the unsworn testimony as given by PW1, PW2 and PW3. He argued that the learned Judge erred by convicting the appellant on the basis of evidence taken in breach of section 151 of the *Criminal Procedure Code*.

18. Based on the serious contradictions in the prosecution's case and bearing in mind that the appellant's alibi defence was unchallenged, those doubts ought to have been resolved in the appellant's favour. The prosecution, therefore, failed in its duty to prove the murder charge beyond a reasonable doubt. Counsel implored this Court to quash the conviction and set aside the sentence.

19. Opposing the appeal, Ms. Vitsengwa submitted that the prosecution discharged its duty and proved the essential ingredients of murder; malice aforethought and cause of death was established by the extent of the injuries inflicted on the deceased as evidenced by PW7 which corroborated the testimonies of the prosecution's witnesses; and the identity of the appellant was ascertained by PW1, PW2 and PW3. The prosecution's case was based on direct evidence that the appellant was seen assaulting the deceased on the material day at Kaloleni dumpsite.

20. The appellant raised conflicting alibi defence theories as he claimed to be in Nairobi and Kakamega on the same date. Taking into consideration the totality of the prosecution's case, the learned Judge did not err by disregarding the appellant's alibi as it did not weaken, less still disapprove the prosecution's case in any way. Even the minor inconsistencies did not water down the fact that the appellant was placed at the scene of the crime assaulting the deceased. The witnesses were reliable, and, cogent and had nothing to gain by implicating the appellant.

21. On the sentence, Counsel maintained that the same was proportionate to the crime. She urged this Court to dismiss the appeal as it is unmeritorious.

22. Having considered the record of appeal as well as submissions made by Counsel, we appreciate our role as a first appellate Court as was stated in *Reuben Ombura Muma & another vs. Republic* [2018] eKLR;

> " This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

23. The issues for our consideration are whether; the prosecution witnesses were reliable and trustworthy; the probative value of PW1, PW2 and PW3's unsworn testimonies affected the prosecution's case; the consequence of the contravention of Section 151 of the Criminal Procedure Code; the contradictions

in the prosecution's case ought to be resolved in the appellant's favour; the learned judge erred by dismissing the appellant's alibi; and whether the sentence, if the conviction is upheld, was excessive.

24. The evidence, in this case, is circumstantial as none of the prosecution's witnesses actually saw the appellant murder the deceased. That being said, we recall the holding of this court in the oft-cited case of *Joan Chebichii Sawe vs. Republic* [2003] eKLR that;

> " [I]n 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." (Our emphasis)

25. The appellant decries that the evidence tendered by the prosecution, in light of his alibi evidence, was not sufficient to warrant his conviction. He contends that the testimonies of the star witnesses PW1, PW2 and PW3 were full of contradictions and retractions. From our perusal of the record, we note that the contradictions as follows;

PW1 in his testimony stated;

> "I do not know Nahashon Nyanga Okongo. I know him by the name Mrefu"
>
> Then said;
>
> "I had not known Mrefu. That was my first time to see him."
>
> During cross-examination he said;
>
> "I did not know Mrefu before this incident. I did not give any name to the police when I recorded the statement. I did not lie to the police when I recorded the statement. I stated the truth about what I saw. I know Buda by that name. I did not know his official name. In my statement I referred to the deceased as Alias Owino. I did not this (sic) name. I did not tell the police this name. The name Buda does not appear in my statement."
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> "In the statement I said that Buda was going away and I asked him, he said Mrefu was accusing him of stealing copper wire worth Kshs.100,000/=. Buda did not tell me this. It is another boy who came to the dumpsite who told me this."
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> "I did not follow them. The statement says I followed them and saw them enter into a Tuk Tuk. I did not say this."
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> Meanwhile PW2 testified that;
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> "I saw Jalego beat the deceased with a twisted piece of metal. I only saw him use the piece of metal. I did not see him use stones."
>
> He then stated;
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> "In my statement I said that someone gave Jalego was (sic) given stones by others which he used."
>
> "I did not see that Jalego tried to choke the deceased and drown him in the water as is stated in my statement. I did not tell this to the police."

When he was questioned about whether or not he saw the appellant leaving the dumpsite, this was his response;

"It is true what is in the statement that Jalego left the dumping site looking worried and that he left in a hurry. This is what I told the police. I was told this by one of the people working at the dumpsite."

PW3 who during his initial testimony departed from his statement and was warned by the court, had this to say, during cross-examination when he took the stand for the second time;

> " What I said the last time is that I was told to write what I said by Orinda. I also stated last time in court that I did not see anything."

26. The appellant contended that the above contradictions, retractions, and hearsay evidence proves that the star witnesses in the prosecution's case were unreliable and untrustworthy and therefore the learned judge erred by basing his conviction on their testimonies.

27. As we consider the testimonies of PW1, PW2 and PW3 we must consider the vital ground raised by the appellant that the aforementioned witnesses were not sworn prior to giving their testimonies and therefore the learned Judge erred by convicting the appellant on the basis of evidence that was in contravention of Section 151 of the Criminal Procedure Code, which provides;

> " Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."

28. The significance of taking oaths or solemn affirmations has been buttressed bysection 14 and 15 of the *Oaths and Statutory Declarations Act* which state;

> "14. All courts and persons having by law or consent of the parties authority to receive evidence are authorized to administer, by themselves or by an officer empowered by them in that behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them by law."
>
> "15. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken the oath."

29. Mr. Onsongo maintained that the mere fact that the said witnesses were under witness protection did not preclude the court from complying with the law concerning the swearing of witnesses. Mr. Vitsengwa conceded that the record is not clear on whether or not the three witnesses were sworn. However, she asserted that their testimony was corroborated by the documentary evidence on record. When the Court put her to task on the probative value of the unsworn statements, she tried to minimize that mishap by stating that the court had the privilege of seeing and considering the credibility of the witnesses.

30. We have perused the record and the judges notes and they do not indicate that PW1, PW2 and PW3 were sworn prior to giving their testimonies. We also note that for the rest of the witnesses, there is a

clear indication that indeed they were sworn prior to giving their testimonies. This court in *Samwel Muriithi Mwangi vs. Republic* [2006] eKLR when faced with a similar situation, held as follows;

> In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the *Criminal Procedure Code* and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the *Criminal Procedure Code*. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence."

31. In our analysis of the record, we are persuaded that PW1, PW2 and PW3 gave unsworn evidence. This omission is a gross violation of Section 151 of the Criminal Procedure Code and as such, that evidence should not to have been the cornerstone on which the conviction rested. We think that this was not a mere procedural ship to be lightly overlooked but one that goes to the heart and substance of indicial truth-seeking. As the Supreme Court of India pronounced itself in the case of *Zahira Habibullah Sheikh & another vs. State of Gujarat & others* Air 2006 SC 1367;

> [T]he fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

32. Thus, we are satisfied that the trial court failed to observe a fundamental principle that invariably affected the probative value of the witnesses' testimony upon which the appellant was convicted. It is safe to state therefore that the trial was a nullity and must be quashed. We now must consider the propriety of an order of retrial. In *Charo Karisa Salimu vs. Republic* [2016] eKLR this court cautioned;

> Where a trial is declared a nullity, the first option usually is to order a retrial. A retrial will, however, not be resorted to where it is likely to occasion injustice, or where it will be used merely to fill up gaps in the prosecution case." (Our emphasis)

33. As indicated above, PW1, PW2 and PW3's testimonies were marred with self-contradictions, an amalgam of inconsistencies and the initial retraction by PW3. All these in effect deprived the testimonies of weight thus rendering them of little value in establishing of the appellant's guilt. Furthermore, PW5, who testified that the appellant told him about the theft by the deceased was contradicted by the testimony of PW6.

34. Moreover, the appellant had an alibi defence supported by two defence witnesses. In light of the weak circumstantial evidence, the prosecution's failure to even attempt to rebut the alibi defence, further reduce the chances of a guilty verdict if a retrial were to ordered. Consequently, we are satisfied that it will not serve the interest of justice to order a retrial. As amply demonstrated above, given the evidence on record, a conviction may be a long shot. In the circumstances an order for retrial may be tantamount to gifting the prosecution a chance to fill up gaps in their case to the detriment of the appellant. See *Mark Limo Chesire vs. Republic* [2019]eKLR.

35. Ultimately and inevitably, we find that this appeal has merit. We allow it, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith, unless he be otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR