Atidong v Republic (Criminal Appeal 380 of 2019)
[2023] KECA 362 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 362 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 380 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

LONGIROI ATIDONG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kapenguria (S.M Githinji J) dated 20th March 2018 IN HCCRC NO. 18 OF 2015)

JUDGMENT

1. Longiroi Atidong (the appellant herein) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the 11th day of December 2015, at Kodich location within North Pokot Sub County, jointly with others not before court murdered Felix Amedo.

2. The appellant was tried and convicted of the offence and sentenced to 30 years' imprisonment. Being aggrieved with both the conviction and sentence, the appellant has now filed this appeal and probably the last appeal, vide a Memorandum of Appeal filed in Court on April 3, 2018, raising 5 grounds of appeal. The appellant subsequently thereafter filled supplementary Memorandum of Appeal through his advocates dated February 18, 2021, raising the following grounds of appeal:

    1. That the learned honourable judge erred in law and fact in failing to subject the entire evidence tendered in the course of the hearing to an exhaustive scrutiny and therefore arriving at a verdict that was manifestly unsafe.

    2. That the learned judge erred in law and in fact by failing to find that the identification of the appellant was not proper by relying merely on voice recognition by witness which was not subjected to scrutiny and validation on the accepted standards to warrant a conviction on the part of the appellant and relied on evidence of identification without observing the conditions

prevailing at the scene of crime were absolutely difficult for a witness to make any significant identification.

3. That the honourable judge faulted (sic) in law and fact by convicting the appellant on evidence that was very incredible as the charges against the appellant were not adequately proved to point his guilt thus rendering prejudice.

4. That the learned honourable judge erred in law and fact by failing to have regard to the fact of material contradictions of evidence during the entire court proceeding which pointed to the fact that the case was not proved to the required evidence."

3. The appeal was urged by way of written submissions. When parties appeared before us for plenary hearing on December 7, 2022, Miss Orina learned counsel appeared for the appellant whereas Miss Okok appeared for the respondent. Both parties intimated to Court that they would rely on their written submissions which they opted not to highlight.

4. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate court. This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

> It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

5. A brief analysis of the evidence in the trial court is however necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellant. The evidence before the trial court was as follows:

6. PW1 was Elizabeth Amedo and wife to the deceased, who was the assistant chief of the area where they lived. It was her evidence that on December 11, 2015, at about 8PM she was at home with the deceased and their small child when she heard noises from a neighbouring home which she recognized to be voices of Longiroi (the appellant), Luliareng, Lengole and Lodou who had all grown up in the area. That, they were saying that they would do something to their homestead as the assistant chief was strict in their business and that they were dealing with chang'aa which the assistant chief had warned them against.

7. That, she then got out together with PW3 and decided to take the small child whom she had to her grandmother's house while her husband was outside. She then heard her daughter (PW3), screaming saying "they have killed my father." She then rushed to where the deceased was and found him lying on the ground and tried to lift him up. She noted that he was dead.

8. PW2 was Emmauel Lorkino a medical nurse at Kodich dispensary. It was his evidence that on 11th December 2015 at 9: 00PM, he was at Kodich trading center when one Fred Amene came and told him that there was an emergency as Chief Amedo had been attacked. They then proceeded to the chief's house and on arrival they found other people supporting the deceased and trying to give him water but he was not breathing. They then took him to hospital. Later on, he recorded his statement.

9. PW3 was Lonah Chepkemoi and a daughter to the deceased. It was her evidence that on December 11, 2015, she was at home when she heard voices of people quarrelling which she recognized to be those of Peter Lodou, Joseph Lengole, Longiroi Atidong (the appellant) and Tuliareng Lokai who were mentioning the name of her father stating that someone would have to die in their homestead for them to know who they were.

10. The deceased then talked to one of those persons and the appellant who was armed with a stone threw it at the deceased and he fell down. She then screamed and called her mother (PW1) for help and the assailants escaped.

11. PW4 was Fred Amene Chemkendo. It was his evidence that on December 11, 2015, at 9:30PM, he was at Kodich Centre when PW1 called him telling him to go for their rescue as they had been attacked. He then proceeded to the scene together with PW2 and others and PW1 informed them they they had been attacked by their neighbours. They then took the deceased to hospital and noted that he was already dead.

12. PW5 was Krop Ibrahim Lodomo, an Assistant Chief Kiruiti Sub Location. It was his evidence that on December 11, 2015, he was at a place called Ororwo when he was called by PW2 and informed that his colleague (the deceased) had been assaulted and had been seriously injured. He proceeded to the scene and found the deceased already dead. They later took the body of the deceased to the mortuary. He noted that the deceased had an injury on the chest.

13. PW6 was Nicholas Krop, an uncle to the deceased. He identified the body of the deceased for postmortem and witnessed the post mortem.

14. PW7 was John Chirchir, a senior medical officer attached to Ortum medical hospital. He produced a post mortem in respect of the deceased who had allegedly been hit with a stone and later pronounced dead. He concluded that the cause of death was cardiopulmonary arrest due to blood collection in the chest wall and abnormal chest wall movement due to the broken ribs. He further opined that the injuries were caused by a blunt object.

15. PW8 was Chief Inspector Andrew Nyarira the investigations officer in this case. It was his evidence that on December 11, 2015, he proceeded to the scene and while there, he re-arrested the appellant who had been arrested by the villagers.

16. The appellant in his defence gave an unsworn testimony and called one witness. He denied having committed the offence. It was his evidence that on December 11, 2015 at 8PM, he was at home when he heard screams in a neighbouring home which they listened to with her mother (DW2). That, after a while, the screams died and they slept and at midnight his house door was knocked at by 3 people whom he recognized by their voices. He was told to wake up. After a short while, the area chief came and handcuffed him and handed him over to the police. DW2 gave a similar version of the evidence as DW1.

17. Turning to the first ground of appeal, the learned trial judge was faulted by failing to subject the entire evidence to exhaustive scrutiny therefore arriving at a verdict that was manifestly unsafe. It was submitted for the appellant that from the 8 witnesses called

18. by the prosecution, none of them placed the appellant at the scene of crime either by voice or visual recognition and that all they alluded to, were assumptions and hearsay evidence.

19. On the other hand, it was submitted for the respondent that PW1 and PW3 placed the appellant at the scene of crime and that PW3's evidence was direct evidence; that PW3 heard the appellant and his three brothers quarrelling near their homestead; that she identified their voices as they were cousins

and people who were well known to her; that the deceased who was her father, went to speak to the four and it was at that point that he was hit with a stone and he fell down.

20. PW1 who was at the locus in quo at the time of the commission the offence testified of having heard noises of some people in a neighbouring home who were saying that they would do something in their homestead. She recognized their voices as they had grown up in the area. She identified them as follows: Longiroi (the appellant), Leliareng, Lengole and Lodou. It was her further evidence that these people were dealing with chang'aa and the deceased, in his capacity as the assistant chief of the area, had warned them to desist from this business.

21. PW3 on the other hand while corroborating the evidence of PW1 testified that on the material day at about 8PM, she was at home when she heard 4 people quarrelling outside their home whilst mentioning the name of her father (the deceased). She was able to recognize them by their voices as they were related. Again, she gave out the names of the people who were quarrelling as follows: Peter Lodou, Joseph Lengole, Longiroi Atidong (the appellant) and Tulireng Lokai. The evidence of these two particular witnesses remained firm and unshaken even under cross- examination and the appellant in cross examination did not even rebut the fact that he was squarely placed at the scene of crime by these two witnesses.

22. The learned judge while analyzing the evidence of PW1 and PW3 stated as follows at page 5 of his judgement:

> "On the second issue the crucial evidence is that of PW-1 and PW-3. The incident took place 8;00PM of which was at night (sic). They recognized the assailants by their voices. The assailants are relatives (cousins to PW-3) and neighbours who have grown up in the place and were therefore well known by the two witnesses. The defence case also alluded to the fact they are neighbours, known to each other well as even the accused could recognize their voices. There#s therefore no doubt that the assailants, who were allegedly four in number, all brothers, inclusive of the accused herein, were properly recognized by their voices beyond reasonable doubt...."
>
> ..... The accused#s defence cannot be true. He could not have been picked together with his brothers as the culprits out of no reason. The fact that his other brothers went underground after the incident, and the accused was arrested while about to, shows they were guilty conscious. The mere denial defence is untrue and is hereby dismissed...." (Emphasis supplied).

23. From the above passage we have reproduced from the judgment of the trial judge, it is evident and contrary to the appellant's contention, that the trial judge subjected the entire evidence to scrutiny and arrived at the correct finding and we are therefore unable to find fault in the trial judge's findings on this issue.

24. The four persons were at the scene of crime that night were positively recognized by PW1 and PW3 by their voices and these two particular witnesses even mentioned them by their names as they were well known to PW 1 and PW3.

25. The trial judge was further faulted for failing to find that the identification of the appellant was not proper by relying merely on voice recognition and that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any positive identification. It is not in dispute that PW1, PW3, the appellant and the other 3 assailants were all well known to each other before commission of this offence. The appellant admitted as much in his defence. This was therefore a case of positive recognition as opposed to identification. PW1 stated in her evidence in chief that she heard

the assailants say that they would do something to their homestead as the assistant chief (the deceased) was strict in their chang'aa business.

26. PW3 on the other hand stated that she heard the assailants mentioning the name of her father and saying that someone must die in the homestead. It is at that point that the deceased got outside and asked them to wait for day break to resolve the dispute instead of coming at night. The evidence of these two particular witnesses was not challenged in cross examination. PW1 and PW3 must therefore have heard the assailants, being persons very well known to them speaking for quite some time.

27. It has been stated time and time again that voice identification is just as good as visual identification. In *Karani -vs- R* [1985] KLR 290 this Court rendered itself thus:

> "Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognised it and that there were conditions in existence favouring safe identification."

Further, in *Choge v R* [1985] KLR 1.it was stated thus:

> .....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say „break her legs#. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal...."

28. From our own assessment and re-evaluation of the evidence of voice recognition, we are of the considered opinion that the voices of the assailants (who included the appellant) were well known to PW1 and PW3. In our considered view, the identification of the appellant by way of voice recognition cannot be faulted and the same was safe, sound and proper. The contention by the appellant that the conditions prevailing at the scene of crime were difficult for a witness to make any positive identification because it was at night are clearly without basis because this was a case of recognition by voice. Consequently, this ground of appeal must fail.

29. Turning to grounds 3 and 4 of appeal, the trial judge was faulted for convicting the appellant on evidence that was not credible; that the charges against the appellant were not adequately proved and that the judge failed to have regard to the fact of material contradictions of the entire evidence.

30. It is indeed not in dispute that there were minor contradictions in the evidence of PW1 and PW3, the key prosecution witnesses. In our view, these minor contradictions were not fatal to the prosecution's case for reasons which we shall advert to shortly. PW1 in her evidence in chief stated that she heard the appellant say; "how did you hit that person and with what?". In cross examination she stated that she heard one assailant asking; "how did you manage to hit him?"

31. PW3 on the other hand in her evidence in chief stated that the appellant was armed with a stone and that he threw the same at the deceased and hit him. In cross examination she seemed to contradict herself when she stated thus; "Leng'ole is one who hit my father." "I saw accused hit my father with the stone". "In re- examination she further stated; "Leng'ole hit my father with a stone the rest were behind him"

32. From the testimonies of these two particular witnesses it is evident that it is not clear who among the 4 assailants threw/hurled the stone that inflicted the fatal blow. The trial judge while addressing this issue in his judgment stated as follows:

> "PW1#s evidence suggests there was no enough light to enable one see. Even after she got back to the scene after the incident, she used her mobile phone light in order to see. We can#t tell how good was the claimed moonlight to enable one see. The evidence by PW3 is that it is the accused person who hurled the stone which hit and killed the deceased, given the circumstances, is (sic) not safe to rely on. However, there is no doubt that the accused was among the four assailants. They had expressed by way of talking that someone had to die in the home of the deceased. There is no doubt given the circumstances that it#s one of them who hit the deceased with a stone leading to his death. The four had common intention and acted in concert in commission of the said offence. In law it doesn#t matter who inflicted the killing blow. The accused person and his 3 brothers were out to cause the death of the deceased or cause grievous harm to him or to any other member of his family. They therefore had malice aforethought in terms of Section 206 of the Penal Code."

33. We fully agree with the sentiments expressed above by the trial judge. Indeed, Section 21 of the *Penal Code* cap 63 of the Laws of Kenya provides as follows:

> "21. Joint offenders in prosecution of common purpose:
>
> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." Emphasis supplied)

34. The evidence on record shows that the assailants (the appellant included) had a common intention of harming or killing the deceased who was allegedly interfering with their chang'aa business and which he had warned them about. It matters not who inflicted the killer blow. Consequently, nothing turns on this point and these two grounds of appeal must fail.

35. From the circumstances of this case and having re-evaluated the entire evidence on record and for the reasons aforestated, it is our considered view that the appellants' conviction for the offence of murder was safe and sound and well founded and all the ingredients for the offence of murder namely; the death of the deceased, that the appellant and his cohorts committed the unlawful act that caused the death of the deceased and that there was malice aforethought were proved and we have no basis to interfere with the conviction. Consequently, the appellant's appeal on conviction fails in its entirety.

36. On sentencing, the appellant was sentenced to 30 years' imprisonment. Section 204 of the *Penal Code* cap 63 of the Laws of Kenya provides that any person convicted of murder shall be sentenced to death. From the circumstances of this case, we are of the view that the appellant was handed a very lenient sentence and which we are not inclined to disturb.

37. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR