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Nyangau v Republic (Criminal Appeal 122 of 2017) [2023] KECA 400 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 400 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 122 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 31, 2023

BETWEEN

JEREMIAH NYANGAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Nyamira (CB Nagillah J) dated and delivered on 5th August, 2016 in High Court Criminal Case No 4 of 2015)

JUDGMENT

1. The appellant, Jeremiah Nyangau, was the accused person in the trial before the High Court in Nyamira High Court, Criminal Case No 4 of 2015. He was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on September 13, 2010, at Mageri sub-location in Nyamusi Division in Nyamira District within Nyamira County, the appellant, jointly with others, murdered Evans Momanyi alias Tengenya.
2. The appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellant and sentenced him to death.
3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, the appellant raised eight (8) grounds of appeal, which are that:
    1. The Learned Trial Judge misdirected himself in law and fact in finding the appellant guilty on a dying declaration that had no basis.
    2. The Learned Trial Judge erred in law and fact by disregarding the appellant's defence.
    3. The Learned Trial Judge erred in law and fact in convicting the appellant without proof of *mens rea*.

4. The Learned Trial Judge erred in law and fact by disregarding the appellant's *alibi*.
5. The Learned Trial Judge erred in law and fact in failing to critically analyze the appellant's defence against the prosecution case to the detriment of the appellant.
6. The Learned Trial Judge erred in law and fact in finding that the prosecution proved its case against the appellant beyond reasonable doubt yet the evidence on record did not support such a finding.
7. The Learned Trial Judge erred in law and fact by sentencing the appellant to death which sentence was harsh, excessive, callous and capricious under the circumstances.
8. By the Learned Trial Judge's omissions of the issues before him for determination, the appellant has been denied justice and this court ought to cure the illegality by allowing the appeal.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See *Okeno v Republic* [1972] EA 32.

5. At the trial court, the prosecution called a total of eight (8) witnesses. The evidence that emerged from the trial was as follows.

6. On September 13, 2010, at around 9.00pm, Samuel Momanyi (Samuel), the deceased's younger brother, who testified as PW1 at the trial, was at home studying. He heard a distressed voice from the road – just about 10 metres away - saying in Ekegusii language, "What have I done?". He recognized the voice as that of the deceased and went towards the direction it came from. Once outside the house, he saw some people and torches shining from that direction. He shouted to the people: "I have seen you people". Apparently, the people fled. Samuel, then, attracted the attention of other people, including his father, who went to the scene. They found his deceased brother badly injured. He had injuries on his legs, face and head. On the witness stand, Samuel narrated that they asked the deceased what had happened and that the deceased said that "Jeremiah and his people" had attacked him. On the witness stand Samuel also said he had also recognized Jeremiah that night as one of the assailants and that knew him as a friend of his deceased brother who used to visit their home frequently. He told the court that prior to the incident, the deceased had informed them that he had quarreled with the appellant but did not state the genesis of the feud. Samuel, however, admitted that there no electricity beaming from their house as they are not connected to the grid and that although there was moonlight it was dim. Further, he admitted that the assailants, who had torches, were not shining them on their faces but in the direction of their house. Finally, he admitted that he did not record in his statement to the Police that he had recognized one of the assailants. Neither did he record that the deceased told them that it was "Jeremiah and his people" who had attacked him.

7. Samuel was clearly the star witness in the trial. The case was built around his testimony. PW2, Cosmas Momanyi, a businessman and a neighbor to the Deceased's family, testified that on the material night, he heard noises coming from the deceased home and went there. On arrival, he found the deceased lying on the ground badly injured. After unsuccessfully trying to carry him in his motor cycle, he called the area councilor who came and drove the deceased to Nyamira Maternity and Nursing Home in his vehicle. He further testified that Samuel told them the name of the two suspects who had attacked his brother and so, when the Police arrived at the scene upon being called by the area councilor, they went looking for the suspects. They were unable to find one of them - Duke Onyinkwa - who still remains at large. However, he accompanied the Police to the home of the appellant where they found

him sleeping. The appellant was arrested and taken into police custody. He also told the court that the next morning, the police returned to the appellant's home and recovered a blood-stained axe handle, a pair of blood stained gumboots, a woolen jumper and a hat.

8. The third witness to testify was Charles Maina, who owned a joint business (of charging and repairing phones) with the deceased at a place called Eronge. He told the court that he walked home together with the deceased and later parted ways, with each one going to their homes. Thirty minutes later, he was called by one, Douglas Getiro, who informed him that the deceased had been beaten and injured. He went to the scene and found the deceased laying on the ground with multiple injuries on his head. He also told the court that prior to the incident, the deceased and the appellant had a dispute over a phone that was charged at their joint business premises, but he thought that the same had been resolved.

9. Dr Maureen Kemunto testified on behalf of Dr Lilian Bosire, who conducted the postmortem on the deceased. Dr Lilian observed that the deceased had bruises on the head and linear fracture on the parietal bone. She concluded that the cause of the deceased death was cardiopulmonary arrest due to massive extradural haemorrhage that was caused by trauma. She testified as PW4.

10. PW5, Kennedy Mujumbe, a relative to the Deceased, identified the body of the deceased before the postmortem was done.

11. PW6 was the government chemist who subjected the items allegedly found at the appellant's home to DNA profiling and found that the blood on the said items matched the blood sample of the deceased.

12. PW7 was the arresting officer. He informed the court that the appellant was arrested on the night of September 13, 2010. The next morning, he and his colleagues returned to the appellant's home and recovered a blood stained axe handle, a pair of blood stained gumboots, a woolen jumper and a hat. He took possession of the said items and handed them over for DNA profiling.

13. The final witness, PW8, was the investigating officer who gave formal evidence about how the investigations unfolded.

14. When he was placed on his defence, the appellant testified that he did not know the deceased and that on the material day, he was at his home doing chores; and later in the evening, he went to sleep. However, at around 2.00am in the night, he was woken up by a knock on his door. He opened the door and saw policemen in the company of PW2. They went into the house and searched it but only found a jerry can which was smelling of chan'gaa and confiscated it. Thereafter, he was arrested and taken into police custody. He later learnt that the policemen returned to his home the following morning and claimed to have recovered various items. He insisted that the items were "planted" in his as they were not recovered the first time they searched his house, upon his arrest. He also told the court that no identification parade was conducted and PW3 did not put any evidence before the court with regard to the phone he stated they (appellant and deceased) had a dispute over. Additionally, the appellant testified that PW1's testimony that he saw him attack the deceased was not true since it was dark at night and identification would have been difficult.

15. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr Mokaya held brief for Mr Ondari for the appellant, whereas learned counsel, Mr Okango, appeared for the respondent. Both parties relied on their submissions.

16. Counsel for the appellant condensed the issues of determination into five as follows:

    a. The effect of a dying declaration and whether it can be a basis for conviction.

    b. Whether the trial court erred in convicting the appellant without proof of *mens rea*.

c. Whether the prosecution proved their case beyond reasonable doubt.

d. Whether the trial court erred in disregarding the defence of alibi by the appellant.

e. Whether the sentence against the appellant was harsh, excessive, callous and capricious under the circumstances.

17. On the first issue, counsel impugned the alleged dying declaration as reported by Samuel (PW1). In this regard, counsel relied on this court's decision in *Solomon Kachera Aluta v Republic* [1982] eKLR, wherein it was held that a trial judge should approach the evidence of a dying declaration with necessary circumspection as it is unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration. Counsel further contended that there were contradictions in the prosecution case. He argued that the testimonies of PW1 and PW2 did not corroborate each other with regard to who named the suspects to the murder of the deceased. Counsel stated that while PW2 claimed that PW1 gave the names of the suspects to the police, PW1 told the court during cross examination that he never gave the names of the suspects to the police. Additionally, counsel contended that the appellant was found asleep in his home, where after he was arrested and his home was searched but the police recovered nothing that linked him to the murder of the deceased. However, the next morning, the police returned to the appellant's home and recovered various items in his absence, which were produced before court.

18. On the second issue, counsel contended that the prosecution did not demonstrate malice aforethought before the commission of the offence, as required by law and merely stating that there was bad blood between the deceased and the appellant without any evidence, was not enough by any standard. In this regard, counsel relied on this court's decision in *Joseph Kimani Njau v Republic* [2014] eKLR, wherein it was held that the trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* must be proved to the required standard. Counsel argued that even though PW1 testified that the deceased had quarreled with the appellant, it was merely hearsay. Similarly, even though PW3 said that he knew there was a dispute between the deceased and the appellant, he also said that he thought the same had been resolved; and lastly, PW2 had no idea that there was a dispute between the deceased and the appellant.

19. On the third issue, counsel rejected PW6's testimony regarding the recovery of the items from the appellant's house. He argued that the items were planted since the same were not found in the appellant's house at the time he was arrested and taken into police custody. This assertion, counsel argued, was corroborated by the evidence of PW2 and PW3 who stated that nothing was recovered from the appellant's house during the time of his arrest. Thus, it was upon the prosecution to explain to the court, what prompted the second search the following morning and how the items found connected the appellant to the murder of the deceased. According to counsel, there was no forensic proof that indeed the appellant held the wooden axe handle that was produced before the court. Secondly, counsel argued that the prosecution never proved beyond reasonable doubt that the appellant was not at his home at the time the offence was committed since he was found at his home sleeping, before he was arrested.

20. On the fourth issue, counsel contended that the appellant testified that on the material day, he was at his home doing chores and at the time of his arrest, he was found sleeping in his house. Further, some of the prosecution witnesses indeed testified that the appellant was found sleeping in his house at the time of his arrest. In this regard, counsel relied on this court's decision in *JM v Republic* [2021] eKLR, wherein the court made reference to the case of Kiarie v Republic [1984] KLR and Victor Mulinge v Republic [2014] eKLR, for the preposition that the burden of proof does not shift to an accused person when he raises the defence of *alibi* and the prosecution ought to tender or apply to the court to

obtain evidence in reply to rebut it. He contended that the defence *alibi* was not properly considered by the court as it remained undisputed. Counsel further argued that where an accused person raises the defence of *alibi*, it is upon the prosecution to place him at the scene of crime. In this regard, he relied on the decision in V*ictor Mwendwa Mulinge v Republic* [2014] eKLR.

21. Lastly, on the fifth issue, counsel contended that the sentence of death was too harsh in the circumstances and relied on the now famous Supreme Court decision in *Francis Muruatetu & another v Republic* [2017] eKLR for the preposition that death penalty is no longer mandatory. Counsel argued that the appellant has spent seven (7) years in prison and the same has served as a lesson. Therefore, due to the progress in our jurisprudence, he urged the court to relook at the mandatory sentence imposed upon the appellant *vis a vis* the circumstances of the case, grounds of appeal and the years served, and find in favour of setting him free.

22. Opposing the appeal, as regards the first issue, Mr Okango submitted that the trial court cautioned itself before admitting the dying declaration of the deceased. He argued that the dying declaration was corroborated by the incriminating wooden axe handle that was found in the appellant's house, which had blood stains that matched the deceased blood. He insisted that the exhibits, although recovered in the absence of the appellant, were accepted in evidence and corroborated the dying declaration of the deceased. He reasoned that the fact that the items were found in the absence of the appellant after his arrest the previous night, their recovery was not irregular. He urged that what happened on the night of the incident was arrest only; and the search was independently done the following day in the morning.

23. As regards the second issue, counsel contended that PW8 corroborated the testimony of PW3 on the bad relationship between the deceased and the appellant, which proved motive, hence mens rea. He argued that PW8 stated that during his investigations, he learnt that there was bad blood between the deceased and the appellant, but said that he could not disclose the source of his information. In this regard, counsel relied on the Supreme Court decision in *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, wherein the court referred to this court's observation in *Joseph Otieno Juma v Republic* [2011] eKLR, that the use of intelligence or informers' reports is standard and common practice and held that the police are not obliged to declare their informers as that will hamper crime detection. Counsel further stated that the trial court rightly held that mens rea was proved when it satisfied itself that the appellant knew that his act of assaulting the deceased with either a jembe or an axe would cause the deceased death or grievous harm, in accordance with section 206 of the *Penal Code*.

24. As regards the third issue, counsel submitted that the prosecution proved its case to the required standard of beyond reasonable doubt as all the ingredients of murder were sufficiently proved.

25. As regards the fourth issue, counsel argued while it is true that the appellant raised the defence of *alibi* and the burden is on the prosecution to prove the guilt of the appellant, it is also notable that where defence *alibi* is raised late in the day and the prosecution has no chance to rebut the same, the court has an obligation to consider the weight of the *alibi* defence against the weight of the prosecution evidence. Counsel cited *Juma Mohamed Ganzi & 2 others v Republic* [2005] eKLR for this proposition. He submitted that the trial court considered the appellant's alibi and dismissed it; and urged that this court also has the power, as the first appellate court, to re-evaluate the appellant's defence. He further submitted that the prosecution placed the appellant at the scene of the incident and the same was not dislodged.

26. Lastly, as regards the fifth issue, counsel conceded to the setting aside of the mandatory death sentence in light of the Supreme Court pronouncement in the Muruatetu case. Counsel however pointed out that the trial court record shows that the appellant was not accorded an opportunity to mitigate and neither was the question of whether he was a first offender or not, existed in the criminal record

submitted by the State. In this regard therefore, counsel urged that it was in the interest of justice that this matter be remitted back to the High Court for re-sentencing hearing so as to record the appellant's mitigation.

27. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

28. This appeal, as framed and argued, raises four questions for determination:

  a. First, whether the dying declaration of the deceased and identification evidence presented was sufficient to support a conviction.

  b. Second, whether the evidence allegedly collected from the appellant's home the morning after his arrest, and in his absence, was admissible to support the conviction.

  c. Third, whether the learned trial judge erred in dismissing the *alibi* defence mounted by the appellant.

  d. Fourth, if the court affirms conviction, whether the sentence imposed was legal and justified in the circumstances.

29. As regards the first question, we have set out above the evidence as it emerged at the trial. From that evidence, it was rather apparent that the night was fairly dark. PW1 was straightforward in admitting that the moonlight was dim. He was also similarly candid in admitting that there were no electric lights as the area is not connected to the national grid. More tellingly, he was also frank in admitting that while the assailant had flash lights, they shone them not on themselves but towards the house. The witness did not state how close he was to the scene but from the context, it would appear he was not in the immediate vicinity, hence the need for him to shout "I have seen you people!". The upshot is that the circumstances here were not ideal for unequivocal, error-free identification of the appellant. As this court has consistently held, owing to the possibility of wrongful conviction based on mistaken eyewitness misidentification, the evidence of identification/recognition at night must be tested with the greatest care using the guidelines enunciated in *Republic v Turnbull*, (1976) 3 All ER 549 and that such evidence must be watertight to justify conviction. (See, for example, *Nzaro v Republic*, 1991 KAR 212; *Kiarie v Republic*, 1984 KLR 739) and *Maitanyi v Republic*, 1986 KLR 198.

30. In addition to the danger of misidentification we have noted, the evidence of the dying declaration adduced at trial is also substantially weakened by the fact that it was first given on the witness stand. The witness (Samuel) did not record the dying declaration in his statement to the Police. While he insisted that he failed to do so because the question was not put to him by the officer recording the statement, that does not relieve our discomfort with the fact that the first time that the evidence was raised was on the witness stand.

31. We finally turn to the evidence of the alleged murder weapons which were recovered from the appellant's house in the morning after his arrest. Both the prosecution and the defence agreed that when the appellant was arrested in the night of September 13, 2010, nothing was recovered from his house. However, the next morning, the arresting officer and his colleagues returned to the appellant's home and recovered a blood-stained axe handle, a pair of blood stained gumboots, a woolen jumper and a hat. The officer took possession of the items and handed them over for DNA profiling. The Government Analyst would later confirm that the blood found on the items matched that of the deceased and testified to this effect. However, as is readily obvious, there was what Mr Okango, prosecution counsel, termed a "procedural glitch": The officer did not explain why they did not collect the items on the night of the arrest and had to go back the following morning to do the same. Neither

did he explain why they did not ask the appellant to accompany them to the house for him to witness as they collected the items. Finally, the officer admitted that they did not obtain a search and seizure warrant to access the appellant's house; and neither did they make an inventory of the items collected as witnessed by an independent observer. In our view, these failures were costly. In view of these "glitches", to use Mr Okango's word, it is not possible to definitively displace the appellant's contention that the items were "planted" in his house in order to frame him with the murder charge. The appellant's contention – especially in view of the weak identification and dying declaration evidence – raises sufficient doubt to make the conviction unsafe. The items which were tested by the Government Analyst cannot be said to have definitively placed the appellant at the scene of the crime.

32. The conclusion we must come to, then, is that the circumstantial evidence presented in this case is not "of a conclusive nature or tendency" to sustain a conviction especially in view of the co- existing circumstances, namely, the appellant's *alibi* (see, *Mwangi v Republic* [1983] KLR 327). In his defence, the appellant testified that he was in his house the whole night when the crime was committed; and that that is where he was arrested. Considering that the circumstances were not ideal for error-free identification; that the dying declaration evidence was first offered at the witness stand; and further that items allegedly collected from the appellant's house cannot be said to definitely place the appellant at the scene of crime, we are unable to say that the inculpatory facts in this case are "incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the [appellant's] guilt." See *Republic v Kipkering Arap Koske & another* [1949] 16 EACA 135. Consequently, we find that there was reasonable doubt regarding the guilt of the appellant in this case and that he is entitled to benefit from those doubts. In view of these findings, we need not reach the fourth issue – whether the sentence imposed was harsh and excessive.

33. The upshot is that this appeal has merit. Consequently, we reverse the judgment of the High Court, quash the conviction, set aside the death sentence meted upon the appellant. Instead, we enter judgment acquitting the appellant. He shall be released from custody forthwith unless he is otherwise lawfully held.

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

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR