Chituno v Republic (Criminal Appeal 97 of 2020)
[2023] KECA 323 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 323 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 97 OF 2020

AK MURGOR, S OLE KANTAI & GWN MACHARIA, JJA

MARCH 17, 2023

BETWEEN

ALEX WENUA CHITUNO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Lagat Korir, J.) dated 30th January 2017 in HC. CR. A. No. 22 OF 2012)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that he murdered Moses Wenzusi Kibeti on December 12, 2011 within Kiambu County. The prosecution called 10 witnesses while the appellant gave an unsworn statement and called no witnesses. The appellant was convicted of the offence as charged on January 30, 2017 and sentenced to death. This being a first appeal, we are required in law to re-evaluate the evidence and make our own conclusions as was stated in the case of *Okeno v Republic* (1972) EA 32 at 36 where the East African Court of Appeal stated on the duty of this Court on first appeal:

> " 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 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and 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 Post, [1958] EA 424."

2. Let us therefore see what the record says about the case made out before the trial court.

3. PW1, Judy Jelangat (Jelangat) was wife to the deceased. She told the Court that at around 1 a.m. on December 12, 2011, they were asleep when there was a loud knock at the door. She described the home as having two rooms, a sitting room and a bedroom, while there was a kitchen outside. Her husband (the deceased) picked a torch and went to the door which he opened and a group of thugs pushed their way into the house. She said they were six in number. She told the Court that the appellant was known to her by the name Fred and she recognized his voice among the group when he spoke in Bukusu language demanding money from them. The thugs began to attack them and the appellant cut her several times while the rest attacked her husband. According to her, the appellant stabbed her husband in the stomach with a knife. The thieves then fled after taking money, mobile phones, a mattress and two blankets. The thugs locked them in as they escaped, and the door was opened by their son who had fled outside the house when the thugs came in. She identified a blood stained T-shirt in Court which she recognized as belonging to the appellant, and said that he had been wearing it on the day of the attack. She later identified him in a parade at the police station. In cross-examination, she stated that there is no electricity at their home and that they usually used a lamp which was switched off at the time of the incident. She mentioned that her husband opened the door while in possession of a torch but it was taken from him. She also said that the group stayed in the house for about 10 minutes and she did not see their faces as she was bleeding from a cut on her face, which blood blurred her vision. She told the Court that she had known the appellant for 10 years, had stayed with him before and that she exchanged words with him during the attack, thus she identified him by his voice.

4. PW2 Patrick Musoba Wanyolo (Musoba) was a watchman and a neighbor to the appellant, who said he had known the appellant since 1997.

5. He told the Court that on December 14, 2011, he heard people talking about a T-shirt and he saw the said blood stained shirt in a bush. He recognized the shirt as belonging to the appellant, as he had seen the appellant wear it several times. He said that the deceased and the appellant's families were close friends.

6. PW3, Peter Irungu Kariuki (Kariuki) was a neighbor to the deceased. He was awoken by Jelangat. He stated that Jelangat had called him in the night and told him that her husband had been killed. He advised her to report to the landlord and go to the police. The next morning, Kariuki went to the scene and saw the body of the deceased lying on his bed with his intestines protruding from his stomach. The body was covered with 2 blankets. Kariuki said that he had lived on the plot for 10 years but he did not know the appellant. The Court noted that this witness did not appear candid.

7. PW4, Mchungaji David Chege (Chege) was also a neighbor to the deceased and Jelangat called him in the night and told him that her husband had been killed by thugs. He went out to help her and saw that she had blood on her face. He went with her to her home and saw her husband lying face up with his hand on his chest and his intestines protruding from his stomach. He said he had lived on the property for years but he did not know the appellant.

8. Another witness, also named as PW4 in the record, Francis Gichuhu, the father of the deceased was called on December 12, 2011 and informed him that his son had been killed. He identified the body at City Mortuary, Nairobi, and noted a stab wound in the stomach of his deceased son.

9. PW5, Inspector Sharamo Raba of Lari Police Station, was the police officer who visited the scene and noted that the deceased was lying on his bed and that there were stab wounds on the deceased's stomach

and his intestines were protruding out of the wound. The body was covered in blankets and was in bed. He said that no one told a clear picture of the attackers, and that Jelangat was in shock and did not mention any person to them as one of the attackers.

10. PW6 was Dr Joe Mungai, a pathologist at Muranga District Hospital, who conducted post mortem on the body of the deceased at City Mortuary on December 20, 2011. He confirmed that the deceased had an incision in the stomach, an incision in the lower chest and a wound on the head. The deceased died due to hemorrhage. It would appear from the record that the body of the deceased underwent post mortem twice on the same day, December 20, 2011. Dr Njau, a pathologist, examined the body which was identified to him by named witnesses. He noted blood stains, 2 incision wounds on the chest, a cut in rib cage, deep cut on right back of the head exposing the skull and bone, and bruises and lacerations on the forearms. Internally there was a cut through the liver and the diaphragm and there was a lot of blood in the abdomen. The doctor concluded that death was due to severe bleeding consistent with assault and he filled P3 form which he produced in Court as part of the prosecution evidence.

11. PW7, Chief Inspector Ernest Maringa, was a police officer from Nakuru Scene of Crimes section. He stated that he visited the scene which featured two single rooms numbered 5 and 6, linked by removing part of the separating timber wall. The door to room 5 was locked from the inside but was accessible through room 6. The deceased was in room 5, which had two beds. The deceased lay on one of the beds, covered with blankets, but upon removing the blankets, he and his colleagues saw that the intestines were protruding from the stomach.

12. PW8, Chief Inspector David Kiprono Rop, was a police officer who conducted an ID parade. He stated that he assembled 8 persons who were of similar height, complexion and dressing to the suspect and the suspect was called from the cells and he agreed to participate in the parade. The appellant chose the position he wished to stand and was picked out by Jelangat and Musoba.

13. PW9, Corporal Rogers Samba, was the police officer who was in charge of Kagwe police post, which received the report of the murder at around 6 a.m. on December 12, 2011. Jelangat mentioned to the police officer that she recognized the voice of one of the attackers. The police officer produced the T-shirt aforementioned, which he retrieved near a river as he was told that it belonged to one of the attackers. He said that the appellant is a Ugandan who also introduced himself by the name Shitoni and had an alias, Fred Masika.

14. After the close of the prosecution case, the appellant was placed on his defence after the Court found that there was a prima facie case for him to answer. The appellant chose to give an unsworn statement where he identified himself as Alex Wenza Chituno. He said that he is a Kenyan of Bukusu origin and does not know anyone by the name Fred Masika Shitoni. He said that he was engaged in construction work in various locations at the material time and he later travelled to his home until January 5, 2012 when he travelled to Nairobi. He got offered some work in Gatundu and travelled there, only to be accosted by a Chief who demanded identifying documents from him, which he did not have. He was taken to the Chief's office where he was arrested by officers from Kagwe police post. He said he was put in a parade with drunk men and that the lady (this would be Jelangat) had already seen him come from the cells, therefore the parade was not well conducted.

15. The Court considered the evidence by the prosecution and the defence offered and convicted the appellant in the judgment delivered on 30th January, 2017.

16. The appellant is now before this Court on a first appeal arguing in the homemade "Memorandum Grounds of Appeal" that the evidence tabled before the trial Court did not meet the evidentiary threshold required in such an offence, that malice aforethought was never proved against him as required, that the evidence could not sustain a conviction and that there were contradictions and

inconsistencies in evidence. The appellant filed written submissions where he states, amongst other things, that he was not linked to the scene by direct evidence, that the evidence of identification was not sufficient, that there were issues of the appellant's name and that the trial Court should not have handed down the death penalty, which is according to him excessive and unconstitutional.

17. The respondent also filed undated submissions. They submit that the appellant was well known to Jelangat for over 10 years and she recognized his voice and also recognized his blood stained shirt. The respondent terms the appeal as unmerited and urges the Court to dismiss the same.

18. We have considered the record of appeal, the law and the submissions by the parties. This is what we think about this appeal.

19. The most pertinent issue is whether the appellant was properly identified as being one of the men who attacked the deceased and Jelangat on the material night. Notably, the evidence of identification at the scene is that of a single witness, Jelangat, and this implores us to consider that evidence with utmost care. Additionally, we must consider the circumstances of the attack which took place at night in a house where there was no form of lighting at all.

20. Jelangat told the trial Court that she was asleep in bed with her husband when there was a loud knock on the door at about 1 a.m. The deceased is said (by Jelangat), to have left the bed, picked a torch and went to the door and when he opened and there was an immediate commotion where the thugs entered the house and attacked the deceased and Jelangat. It is only Jelangat who would tell the circumstances of the attack and it is on record that she said that she was cut on the face and blood entered her eyes, blurring her vision.

21. This Court in the case of *Wamunga v Republic* [1989] KLR 426 stated as follows on the evidence of a single identifying witness:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

22. It was also held in *Nzaro v Republic* [1991] KAR 212 and *Kiarie v Republic* [1984] KLR 739 that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

23. To further compound the circumstance of the case before the trial Court, the evidence of identification by Jelangat is also that of voice recognition. This Court in *Safari Yaa Baya v Republic* [2017] eKLR stated:

> "With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble.
>
> ...It is also apparent that he was startled from his sleep and in pitch darkness. He must have been traumatized, making voice recognition doubtful considering the difficult circumstances. However, in cross- examination and as a star prosecution witness, he claimed that the appellant called him "Baba" and that he called him once. This is diametrically

opposed to what he said in examination in chief; in which he stated that he was called by name twice."

24. In *Vura Mwachirumbi v Republic* [2016] eKLR, this Court stated that:

> "Of course in testing voice recognition, in addition to considering the length of time the witness has known the person and circumstances of their acquaintance, one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice."

25. After careful consideration of this matter, we are of the view that the identification of the appellant was not free from error. There was no source of light to ascertain the identity of the appellant and the voice recognition was doubtful. We take note that during examination in chief, Jelangat said that the appellant spoke to demand money. However, during cross-examination, she added that she spoke to him further and he responded, and she also added that she had seen him and spoken to him that very morning. This is a discrepancy in important evidence as the witness should have divulged their entire exchange from the beginning if it indeed took place. She told the Court, in cross-examination, that she knew him well and had stayed with him but did not say what was the nature and extent of their interactions. It is further noted that although Jelangat testified in Court that she knew the appellant very well and had seen him that night during the attack, she did not give his name to the police when she reported the incident the next day. She did not at all say that she had recognized any of the attackers and it is surprising that she would not tell the police that she and her husband had been attacked by someone she knew. It is the duty of a reportee in such circumstances to give the name or description of the attacker to the police or to any other authority at the earliest possible opportunity, something that was not done in this case. We make reference to the case of *Maitanyi v Republic* [1986] eKLR, where this Court stated:

> "There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

26. We also make reference to the sentiments by this Court stated in *Francis Muchiri Joseph v Republic* [2014] eKLR. The Court stated:

> "In the case of George Bundi M'Rimberia v R, Criminal Appeal No 352 of 2006, it was stated that a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is our considered view that failure by A to properly mention in her statement to the police the name of the appellant weakened her evidence of identification through recognition".

27. In *Lesarau v R* [1988] KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In *R v Turnbull*, (1976) 3 All ER 551, Lord Widgery, CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence's case, the danger

of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state:

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

28. In *Simiyu & another v R* [2005] 1 KLR 192 at 195, this Court faced with facts similar to the instant case expressed itself as follows:

> "If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the appellant, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the appellant and then by the person or person to whom the description was given (See R v Kabogo s/o Wagunyu 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity."

29. Why would Jelangat not give the name of a known attacker in such a serious situation where she not only suffers serious injuries but her husband is brutally murdered? We are not satisfied that Jelangat, either through voice or other recognition properly identified the appellant at the scene.

30. We also note an evidentiary gap at the scene of crime. The evidence adduced shows that there were two doors, door number 5 and 6, as the family had taken up two single rooms which were made one housing unit through removal of part of the separating timber wall. Jelangat did not clearly paint a picture of which door the attackers came through. However, it is on record that door number 5 to the sleeping quarters was locked from the inside, which then leaves the question as to how the deceased, who was attacked at the door, presumably door number 6, ended up on his bed, in room number 5. According to Jelangat, the deceased who had a torch, opened the door and he was immediately attacked at the door where he was fatally injured. Yet evidence by other witnesses and according to the police officers who visited the scene, was that the deceased's body was found in the bed covered in blankets with intestines protruding from the stomach. Neither Jelangat nor any other witness testified on how the deceased's body was removed from the scene at the door and ended up on the bed covered in blankets. We think that it was the duty of the prosecution to tender evidence on this aspect on how the body of the deceased was removed from the murder scene at the door and covered in blankets in his bed. Jelangat, who said that she was in shock, did not say that she helped the deceased in any way and she does not say that she put the body in bed and covered it in blankets. There is a serious unexplained break in the chain of events and the appellant is entitled to benefit where his identification is in doubt, and the events of the murder scene are not properly explained.

31. Lastly, with regard to the evidence of the recovered blood stained shirt, the shirt may have been circumstantial evidence but it was not taken through forensic analysis and therefore we agree with the learned Judge that it served only to create suspicion that the appellant was at the scene but suspicion alone cannot sustain a conviction. The prosecution evidence was that a blood stained shirt allegedly belonging to the appellant was recovered from the bush. Why was this blood stained shirt not examined forensically for the source or owner of the blood to be ascertained? The prosecution did not give any explanation for this omission.

32. In view of all the foregoing, we find that the identification of the appellant was not satisfactory, that the appellant was not well placed at the scene, that the evidence did not meet the threshold of beyond reasonable doubt and that the conviction was unsafe. Consequently, this appeal succeeds and is allowed. Accordingly, the conviction is quashed, the sentence is set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

AK MURGOR

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR