Dhadho v Republic (Criminal Appeal 78 of 2021)
[2023] KECA 280 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 280 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 78 OF 2021

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

MARCH 17, 2023

BETWEEN

SALIM ADHE DHADHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (G. Dulu, J.) delivered on 15th October, 2018 in Criminal Case No. 34 of 2012)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars were that he murdered Zamzam Shehe on September 17, 2012 at Kubuyu Village in Tana River District, within Tana River County. During trial, the prosecution called six witnesses while the appellant gave an unsworn statement and called no witnesses. At the conclusion of the trial, he was found guilty, convicted and sentenced to death.

2. As this is a first appeal, we are required in law to re-evaluate the evidence and make our own conclusions. We have to bear in mind though that, since we are not a trial court, we did not see or hear the witnesses testify and so cannot gauge their demeanor for which we must give due allowance. This was emphasized in the case of *Okeno v Republic* (1972) EA 32 at 36 thus:

> " 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] EA 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."

3. We accordingly summarize the evidence adduced before the trial court as follows: The appellant and Zamzam, the deceased herein, were husband and wife, and together they had two children. However, they had a troubled marriage, which according to deceased's family members was caused by the appellant's abusive behaviour, as he used to beat the deceased. At the time of the incident in question, the deceased had left her matrimonial home, having been taken away by her father, and was living with her parents at Hola Makaburini, while the appellant remained with their children at their home in Laza Mtoni. The evidence suggests that prior to the incident subject of this appeal, their families attempted to intervene and resolve the conflicts between them on multiple occasions, but to no avail.

4. On the material night, the deceased's brother PW3, Hiribae Badru Shehe was at his home at about 8.00pm when someone went to tell him that he had spotted the deceased bleeding profusely by the roadside. PW3 proceeded there immediately and met the deceased, who told him that the appellant had attacked and cut her with a machete. He observed that she had cuts on the head, face, waist and right side of the back. The deceased asked him to take her to the hospital. PW3 phoned their brother Hiribae Kasdn, who came with a motor vehicle that ferried the deceased to Hola District Hospital.

5. Meanwhile, back at the home of the deceased's father, screams could be heard coming from the road. The deceased's sister, PW1, Gamaloku Mwanahamisi Guyo and her daughter Zuhura rushed outside to determine the source of the screaming. Someone informed them that the deceased had been attacked and had already been rushed to the hospital. PW1 proceeded to Hola District Hospital right away. As for the deceased's mother, PW2, Khadija Chadera, she collapsed when one of her nieces, also called Khadija, arrived home with the deceased's blood-stained shawl and told her that "Major", the appellant, had cut deceased.

6. When PW1 arrived at the hospital, she saw the deceased lying in bed and their father seated on the bedside. She heard her telling their father that her husband had cut her with a machete, although she did not state the reason for the assault. PW1 observed that she had injuries on the head, neck and right side of the chest and her neck looked like it had been strangled. PW3 and one Said Awade reported the incident to Hola Police Station that night vide OB No 32/17/9/12.

7. At about 10.00pm on the same night, PW4, Yahya Issa Komora who had known the couple since childhood was at his home when he saw "Bahatisha/Major", the appellant, approaching his house while carrying a machete. The appellant called PW4 who told him to leave as it was late and there were clashes in the area at the time. The following day, PW4 learnt that the appellant had murdered his wife.

8. On September 19, 2012, the investigating officer, PW5, CI Julius Kipkemoi Langat formerly of Hola Police Station, Crime Office, visited the scene where the deceased was picked up from after being attacked. He noticed bloodstains and signs of struggle on the ground. He drew a rough sketch of the scene and later made a fair sketch.

9. The deceased was transferred to Malindi District Hospital then to Coast General Hospital in Mombasa where she was admitted in the Intensive Care Unit (ICU) but succumbed on October 3, 2012. PW6, Dr Irene Muramba, a pathologist at Coast General Hospital performed a post mortem on the body of the deceased at the facility's morgue on October 4, 2012. Externally, the body had a four-centimeter-long healed wound on the front part of the head. Internally, it had a foul-smelling fluid on the right side of the chest cavity; the lungs appeared to be smaller and attached to the exterior chest cavity; there was no skull fracture, but an accumulation of blood on the left side of the brain, making it appear

swollen. PW6 formed the opinion that the cause of death was a severe head injury and fluid buildup in the right chest cavity.

10. According to PW5, the appellant went into hiding but was apprehended by members of the public on October 13, 2012 at Kalkacha Makutano Market, about 2 kilometres from Hola Town, and taken into police custody. PW5 testified that while the appellant was in custody, he obtained a statement under inquiry in which the appellant confessed to having attacked his wife due to suspicions of infidelity. He escorted him before the Hola Magistrate, one Hon Obiero (Mr) for recording of a confession but the magistrate declined instructing him to record a statement from the appellant from the account of his story. Thereafter, he charged the appellant with the offence of murder.

11. In his defence, the appellant denied committing the offence. He stated that he and the deceased, had a good relationship. He stated that on September 15, 2012, he granted the deceased permission to visit her father who was suffering from high blood pressure but by September 17, 2012, she had not returned to him. It was his testimony that on September 17, 2012 when the incident happened, he was at his place of work at Laza Sand along the Tana River between 7.00 and 10.00pm guarding some building blocks he had made for someone on order. At around 9:30 pm, a friend of his named Mohammed Said went to the river and informed him that his wife had been hit by a motorcycle. He went straight to his father-in- law's house where the deceased's younger brother informed him that she had been stabbed at Kibuyu and had been taken to the hospital. It was also his evidence that he went to Hola Hospital, saw his wife and gave her mother PW2 Ksh 3000/= to help with treatment and PW2 told him to go back home and look after the children. He was however arrested on October 13, 2012 in Makutano when he went to pick up money owed to him by the chief whom he had supplied with blocks. Instead of paying him, the chief called the police, who arrested him for the murder of his wife. According to him, the deceased was a victim of the clashes between the Orma and Pokomo communities that were going on at the time.

12. The trial court having considered and weighed both the prosecution and appellant's case, found that the prosecution had proved its case beyond any reasonable doubt. Dissatisfied with the conviction and sentence, the appellant is now before this court on a first appeal on the grounds that: the elements of the offence were not proved beyond reasonable doubt; the investigations conducted by the police were shoddy, biased and insufficient; and, the trial judge relied upon erroneous and disjointed circumstantial evidence without appreciating that there were extenuating circumstances that weakened a guilty verdict.

13. When the appeal came up for hearing before us on a virtual platform on November 2, 2022, the appellant was represented by learned counsel, Ms Rashid while learned Prosecution Counsel, Ms Matiru represented the State. Both parties had filed written submissions, which their respective counsel briefly highlighted.

14. On ground 1, the appellant submitted that the prosecution did not prove that the death of the deceased was caused by an unlawful act or omission on his part and that he had malice aforethought. He contended that in convicting him, the trial court relied on the fabricated hearsay evidence of PW1 and PW3 regarding a dying declaration made by the deceased. He argued that the purported dying declaration constituted evidence of identification by a single witness under unfavourable circumstances as the deceased was attacked at night in the dark and going by her injuries, she is likely to have suffered shock, which was not conducive for a positive identification or recognition. Ms Rashid added that since the deceased was talking on phone when she was attacked, she was most likely distracted and therefore unable to positively identify or recognize her attacker. Further, the appellant noted that in the dying declaration, the deceased did not shed light on the identification or recognition features that she relied on to determine that the appellant was her attacker.

15. The appellant further argued that PW1, PW2 and PW3, all close relatives of the deceased, inferred guilt on his part based on fabricated allegations of marital strife between him and the deceased which was not proved by any independent evidence but only meant to paint him negatively so as to take away his land. He also faulted the evidence of PW4 stating that since there were intercommunity clashes in the area at the time, there was nothing peculiar about him carrying a machete on the material night or better still, it is possible that another person could have been the one holding the machete. In addition, the appellant contended that his alibi defence was not controverted.

16. On ground 2, the appellant submitted that the investigations conducted by the police were poor and biased for various reasons. Firstly, the scene of the alleged crime was not visited immediately. Secondly, no scene of crime expert was called to analyze any evidence at the scene. Thirdly, the investigating officer did not record the statements of the witnesses nor arrest the appellant until after the deceased died more than 15 days after the alleged incident despite the fact that the incident was reported soon after it occurred. Fourthly, no efforts were made to recover the murder weapon from the appellant and none of the members of public who allegedly arrested the appellant was procured to explain the reason for the arrest. Fifthly, the confession allegedly made by the appellant was not recorded and PW5 did not undertake any investigations to rule out provocation as the cause of the appellant's actions. Sixthly, the deceased's mobile phone records were not investigated to establish whom she was talking to on the phone at the time she left her father's home on the material night. Lastly, that the person who went to PW3's home to inform him about the incident was not revealed.

17. On ground 3, the appellant submitted that there were other probable explanations for the death of the deceased which weakened the chain of the circumstantial evidence relied on to find him guilty. He argued that, no adverse inference should have been drawn from the fact that the deceased was living with her parents at the material time since her sister, PW1, also lived there and was a married woman. He stated that the person that the deceased spoke to on phone on the material night when she was seen leaving her father's house could also be a potential suspect. Finally, he contended that it was possible that the deceased's death resulted from the intercommunity clashes which were ongoing at the time.

18. As regards the sentence, Ms Rashid submitted that the death penalty meted out on the appellant was manifestly harsh and urged us to set it aside.

19. In opposing the appeal, Ms Matiru submitted that the prosecution proved all the ingredients of the offence of murder beyond any reasonable doubt hence, the conviction of the appellant was safe. She argued that the appellant was arrested far from the scene of crime which was a pointer to a guilty mind. On sentence, counsel submitted that the appellant was brutal to his victim who was his wife and showed no sign of remorse for his heinous act. According to counsel therefore, the sentence was fair and should not be interfered with.

20. We have accordingly considered the evidence, the respective rival submissions and the law. We find that the issues before us for consideration are whether: the prosecution proved its case beyond reasonable doubt and the death sentence imposed on the appellant was manifestly harsh.

21. Section 203 of the *Penal Code* under which the appellant was charged provides that "any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

22. In *Wakesho v Republic* [2021] eKLR, this court stated that:

> " To sustain a charge under that provision, the prosecution must prove, beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased

was as a result of an unlawful act or omission on the part of the accused person; that such unlawful act or omission was committed with malice aforethought."

23. The fact and cause of the death of the deceased is not in contention in this appeal. PW1, PW2 and PW3 testified that the deceased was attacked at around 8.00pm on September 17, 2014 and sustained serious injuries on the head and chest. The deceased was taken to Hola District Hospital that night then transported to Malindi District Hospital the next day. She ended up at the Coast General Hospital, Mombasa where she was admitted in the Intensive Care Unit until her passing on, on October 3, 2014. A post mortem conducted on her body by PW6 revealed the cause of her death as a severe head injury and fluid buildup in her right chest cavity. The next question arising for us to answer is; Did the prosecution prove that the death of the deceased resulted from an unlawful act or omission on the part of the appellant?

24. From our examination of the evidence adduced in the trial court, it is clear that there was no eyewitness to the murder of the deceased. The appellant was implicated by statements that the deceased made to PW1 and PW3 on the day she was attacked claiming that the appellant had assaulted her, as well as circumstantial evidence.

25. PW3 testified that when he went to see the deceased upon being informed that she had been seen bleeding profusely by the road, the deceased confessed to him that she had been attacked by the appellant. PW1 also stated that when she went to Hola District Hospital on the evening of the incident, she heard the deceased telling her father that the appellant had assaulted her before she fell unconscious shortly thereafter. Obviously, this aspect of PW1 and PW3's testimony was hearsay evidence, which is generally inadmissible. However, under section 33(a) of the *Evidence Act*, a statement made by a deceased person to another person relating to his or her cause of death is admissible in evidence. It provides that:

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

26. In *Philip Nzaka Watu v Republic* [2016] eKLR, this court stated the following on admission and reliance on a dying declaration:

> "Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ...
>
> Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross- examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless,

the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

27. From the evidence on record, we note that the deceased remained unconscious after the second confession on the night she was attacked until she eventually succumbed to the injuries sustained in the attack, about two weeks later on October 3, 2014. We therefore find that the dying declaration which was well corroborated by PW1 and PW2 points to the guilt of the appellant.

28. Further, just like the learned trial judge observed, we find that the scenario presented by the evidence on record is that of visual identification by a single witness under unfavourable circumstances. The learned trial judge warned himself on relying on the evidence of a single identification witness for the likelihood of a mistaken identity. The judge after analyzing the evidence nonetheless concluded that the appellant was positively identified by the deceased. On our part, we find that the judge did not err in so concluding since the deceased and the appellant knew each other intimately and accordingly, this case was one of recognition rather than identification of strangers, which lessened the chances of mistaken identity. In so holding, we find solace in this court's case of *Reuben Taabu Anjononi & 2 others vs Republic* [1980] eKLR where it was stated thus:

> "...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

29. Drawing from the foregoing, we have no doubt in our minds that it would not have been difficult for the deceased to recognize the appellant who was her husband.

30. As regards the circumstantial evidence, this court has established and restated the principles applicable to cases based on such evidence in a number of instances. For instance, in *Sawe v Republic* [2003] eKLR, this court held.

> "As we have already pointed out, the evidence in this case was entirely circumstantial. 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 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 the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

31. In our considered view, the inculpatory facts that point to the appellant's guilt in this case are that: PW1, PW2 and PW3, who were well known to both the appellant and the deceased, gave consistent and corroborative evidence that the appellant was fond of physically abusing the deceased, to a point that she had to move back to her father's home. We concur with the learned trial judge's observation that the appellant's testimony that he had given the deceased permission to visit her ailing father does not make sense since by the appellant's own admission, they lived quite near. The other inculpatory fact in our view is the fact that PW4, an independent witness confirmed that he saw the appellant with a machete on the material night. Although there may have been clashes within the area, our view is that this was used as an excuse by the appellant to absolve himself from blame. Lastly, is the fact that the appellant went into hiding and was later arrested at Makutano, far from his home. The circumstantial evidence in our view irresistibly points to the appellant as the only person could have fatally injured the deceased. These, coupled with the dying declaration by the deceased discounts the appellant's alibi defence that at the time of the attack, he was at the river guarding some building blocks he had made.

We therefore find that the prosecution proved beyond reasonable doubt that it is the appellant who caused the death of the deceased.

32. As regards malice aforethought, section 206 of the *Penal Code* provides that:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

33. From the injuries indicated in the post mortem report adduced by PW6, we find that there was malice aforethought since it is evident that the appellant's intention was to do grievous harm to or cause the death of the deceased. The appellant attacked the deceased on the head which is a vital part of the body. Further, the injuries were so severe that the deceased had to be admitted in the intensive care unit until she succumbed.

34. Consequently, we find that the prosecution proved the offence of murder against the appellant to the required standard, which is beyond any reasonable doubt. The appellant's conviction was therefore safe.

35. On sentence, it is important to state that this court can only interfere with a sentence passed by the trial court if it is satisfied that the trial court erred in the exercise of its discretion. In *Ogolla s/o Owuor v Republic*, (1954) EACA 270 the then East African Court of Appeal stated as thus:

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

36. In meting out the death penalty, the learned trial judge duly considered the circumstances under which the offence was committed as well as the mitigating and aggravating factors. He indeed also considered the decision of the Supreme Court case of *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR which did not outlaw the death penalty but held that it is still applicable as a discretionary maximum penalty. From the circumstances of the case, the confrontation between the appellant and deceased was occasioned by marital problems attested by the fact that the deceased had even fled to her father's home. The appellant in mitigation was very remorseful for what transpired subsequently. On these grounds, we find it necessary to interfere with the death penalty.

37. Consequently, this appeal partially succeeds. The appellant's appeal against conviction is dismissed. The appeal against sentence succeeds only to the extent that the death penalty imposed on the appellant

is set aside and substituted with twenty-five (25) years imprisonment with effect from the date of arrest, being October 13, 2012.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR