



Kitsao & 2 others v Republic (Criminal Appeal 52, 55 & 57 of 2020) [2023] KECA 258 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 258 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 52, 55 & 57 OF 2020
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
MARCH 17, 2023**

BETWEEN

MOSES JUMA KITSAO 1ST APPELLANT

SAFARI KITSAO KADENGE 2ND APPELLANT

CHARO SWALEH KITSAO 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the judgment of the High Court of Kenya at Malindi delivered before NYAKUNDI, J, dated 29th October in HCR. Appeal No. 16 of 2018, 2020 at MALINDI)

JUDGMENT

1. The appellants Moses Juma Kitsao, (hereinafter the 1st appellant), Safari Kitsao Kadenge (2nd appellant) and Charo Swaleh Kitsao (the 3rd appellant) were charged with one count of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on October 4, 2018 at Mikamui Village, in Bambe Division, Ganze sub-county within Kilifi county, jointly murdered Karis Charo Hare. They pleaded not guilty to the charge before W Korir, J on October 16, 2018. R Nyakundi, J conducted the trial.
2. The prosecution called five witnesses. The accused persons gave sworn defence at the close of prosecution case. After hearing the case, the learned judge found all three appellants guilty of murder and sentenced each of them to 35 years imprisonment.
3. The appellants being aggrieved with the judgment and sentence of the trial court lodged this appeal before this court. They have raised similar grounds of appeal in their memorandum of appeal which are:



- i. The learned trial judge erred in law by failing to consider that the appellants were denied their right of information disclosure (sic) prior to taking of plea in breach of article 50(2) (a) (b) (J) and (M) of *the constitution*.
 - ii. The learned trial judge erred in law by failing to consider that there was no proper identification at the scene of crime.
 - (iii). The learned trial judge erred in law by not considering that there was massive contradictions and invariances from the witnesses.
4. The facts of the prosecution case are that on the evening of the day in question, the deceased visited the home of his nephew PW1, Karisa Charo Kombe, and reported to a family meeting that he was concerned because the appellants were ploughing his piece of land without his consent. The appellants were absent at the meeting but were also members of their family. PW1 said that the deceased left the meeting for his home at 7pm, while the rest of them left at 10pm. PW1 heard screams at 10pm and learnt the house of the deceased had been burnt down. He confirmed that report after proceeding to the home of the deceased, which was a ten minutes walk from his house.
5. PW1 said that he found the deceased at the scene. He called Chief to report the incident, before accompanying the deceased to report to the police. They returned to the scene with the police who later left, as did PW1. PW1 was woken up by screams of people who also reported that the deceased had been murdered. PW1 called police and proceeded to the house of the deceased where he found him lying on the ground with a head injury.
6. PW2 Kanzu Kistao was the deceased's younger brother and the appellants were the sons of one of his brothers. PW2 said that on October 4, 2018 he received information that the house of the deceased was burnt down. He proceeded to the deceased's home and confirmed the report. As he chatted with the deceased, who informed him that the appellants were the ones who committed the arson, the appellants emerged from a nearby path and entered his compound. The appellants went directly to where the deceased sat. PW2 described the attack, saying that the 1st appellant pushed the deceased from the chair, and he fell to the ground. The 2nd appellant picked the same chair and hit the deceased with it, while the 3rd accused hit the deceased on the head with a stone. PW2 testified that on witnessing the attack, he feared for his life and decided to run away from the scene.
7. PW3 Jackson Karuma was a neighbour and relative of the deceased, while the appellants were his cousins. He proceeded to the home of the deceased after hearing screams and wailing late on the material night, and found the deceased lying on the ground with injuries on the head. The 2nd and 3rd appellants sat nearby. He did not witness anything. He said he informed the clan – elder, PW1 about the incident.
8. PW4 PC Bonface Namukata received the arson report on October 4, 2018 from the deceased and PW1. He also visited the scene and saw the burnt house of the deceased. The deceased reported that the appellants were the arsonists. PW4 received second report the same night from PW1 to the effect that the deceased had been murdered at the scene he had visited earlier the same night. PW4 proceeded to the scene and found the deceased lying injured on the ground. The deceased was bleeding from a severe head injury. The appellants were at the scene. He carried the appellants, the deceased and a chair said to have been the weapon used, to Bamba Police Station. From there, he took the deceased to Kilifi Hospital where he was admitted.
9. PW5 was the investigating officer. He started his investigation on October 5, 2018. His investigations revealed that the deceased passed on the October 6, 2018, after an attack on the October 4, 2018. He



produced the post mortem report as exhibit 5, which indicated that the cause of death was head injury due to blunt force trauma. He recommended that the appellants be charged with the murder of the deceased after his investigations were complete.

10. The appellants in their sworn defence did not deny that they were close relatives of the deceased and of being involved in a fight with the deceased. According to the 1st appellant, the 3rd appellant started a quarrel with the deceased on the material night and a fight ensued. He said that he went to separate them but unfortunately the deceased fell. The 2nd appellant stated that the 3rd appellant took a chair and hit the deceased with it, injuring him on the head.
11. The 3rd appellant in his defence told court that he went to the home of the deceased and found that his house had been burnt. He stated that he fought with the deceased and his co- appellants overpowered him and that the deceased fell down and hit himself against a chair. He said that they all went to the police station to report but were locked up as suspects while the deceased was taken to hospital where he died a few days later.
12. We heard the appeal on the virtual platform on October 17, 2022, with learned counsel Mr Were appearing for all three appellants while Ms Vallerie Ongeti Principal Prosecution Counsel represented the State. The appellants were present appearing virtually from Malindi Prison.
13. Mr Were relied on his written submissions dated October 13, 2022 and highlighted them before us. Ms Ongeti for the State relied on her written submission dated October 14, 2022. She highlighted her submissions and urged that she was relying on them entirely.
14. This is a first appeal, our mandate is to subject the entire evidence adduced before the trial Court to a fresh analysis evaluation and scrutiny, while bearing in mind our limitation of not having had the opportunity to see or hear the witnesses and to test their demeanour, and to give due allowance for same. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 this Court espoused that mandate or duty as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
15. Gleaning from the submissions of Mr Were for the appellants, and Ms. Ongeti for the State, three issues lie for our determination. Firstly, whether the prosecution proved the murder weapon, whether it was subjected to DNA analysis and whether failure to produce it as an exhibit or have it subjected to DNA analysis was fatal to the prosecution case. Secondly, whether the prosecution proved mens rea, or malice aforethought as against the appellants. Thirdly, whether the learned trial Judge failed to appreciate that the prosecution case was riddled with contradictions and variances.
16. As regards the murder weapon, it was Mr Were’s submission that the stone PW2 saw used to hit the deceased was not produced as an exhibit, neither was the stone and the chair subjected to DNA analysis, which he urged is fatal to the prosecution case. He urged us to find that the chair exhibited in court was not broken and so there was no proof it was used in the assault. Ms. Ongeti submitted that PW2 testified that the appellants attacked the deceased using a stone and a chair, she urged that even though the stone was not recovered, it did not create doubt in the prosecution case.
17. The learned trial Judge in his analysis as he considered the issue of causation of death observed; ‘that the validity of that ingredient connoted a negligent act or wilful and voluntary act in which the death



of a human being occurs'. The learned Judge proceeded to find that the evidence of PW2 and PW3; 'establishes that the acts of assault came from the accused persons who used a stone and a chair to inflict bodily harm. Overall, the state has demonstrated the nature of injuries concentrated to the parietal-temporal and occipital region of the scalp. That alone manifests an unlawful occurrence.'

18. We are in agreement with the learned trial Judge that the prosecution was able to adduce evidence to establish that the appellants used two objects to attack the deceased, causing him such serious injuries that his relatives, PW1 and PW2 who saw him that night reported him dead. These objects were a chair and a stone. The stone was not recovered from the scene but the chair was produced an exhibit.
19. Regarding murder weapons, this Court has had occasion to deal with the question of the effect to the prosecution case where the murder weapon was not exhibited in Court. In *Ekai v Republic* (1981) KLR 569 the Court held that failure to produce the murder weapon of itself was not fatal to a conviction and that as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. Similarly, in *Karani v Republic* (2010) 1 KLR 73; the court stated that:-

'The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.'
20. In this case, the learned trial Judge was satisfied that the weapons used to cause fatal injuries were known, and one of them the chair, was as an exhibit. In addition, he was of the view that the injuries suffered by the deceased as per the post mortem were consistent with the eye-witness account. Nothing turns on this point.
21. Though Mr Were did not substantiate, he submitted that the witnesses for the prosecution were inconsistent in their testimonies. Counsel urged that there were massive contradictions and inconsistencies that rendered it impossible for the prosecution to prove the case on the required standard. Mr Were also urged that the appellants were not properly identified as the culprits who attacked and fatally injured the deceased.
22. Regarding inconsistencies in the evidence, Ms Ongeti, placing reliance on the case of *Munene v Rep* [2018] eKLR urged that not every trifling contradiction or inconsistency of witness evidence will be fatal to the prosecution case unless it is shown that the inconsistency goes to the root of the case, which was not shown in this case. Counsel urged that PW2 the identifying witness knew both the appellants and the deceased before the incident, being his relatives.
23. The learned trial Judge addressed that issue and found that the appellants were previously known to PW2 and PW3, and that both these witnesses placed the appellants at the scene of attack.
24. We have considered the evidence on record. There were two incidents on the material night. The first one was at 10pm and was an arson attack where the home of the deceased was torched and destroyed in his presence. PW1 testified that the deceased disclosed to him that the appellants, who were his nephews, were the arsonists. The second one took place at 1am same night, in the full glare of PW2. PW2 called PW1 and reported the incident. PW3, a closer neighbour to the deceased proceeded to the home and found just after the deceased had been attacked. PW1, 2 and 3 found the appellants at the scene of crime. They placed the appellants at the scene, while PW2 witnessed the attack, identifying each of the appellants as the perpetrators. He was also able to describe the role played by each of them.



25. Quite apart from the evidence of the prosecution, the appellants in their defence made on oath admitted that they were not only at the scene of incident, but also had an altercation with the deceased which degenerated, according to them, to a fight and resulted in the appellant receiving serious injuries. The learned trial Judge considered their defence and had the following to say about it:

“There is no doubt that the mere differences given by the accused persons by their defence as to who bears the greatest responsibility in the death of the deceased did not acquit them from the provisions of Section 21 of the Penal Code on common intention and malice aforethought in Section 206 of the Penal Code.”

26. We consider their defence as confessions of guilt as the appellants directly acknowledged that between the three of them they caused injury to the deceased, which eventually resulted in his death. In *Ahmad Abolfadhi Mohammed & another* Petition No 39 of 2018 [eKLR], the Supreme Court defined what constitutes a confession as against an admission thus:

“It can be surmised therefore, that a Confession is a direct acknowledgement of guilt on the part of the accused while an Admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction. These distinctions can therefore be summarised as follows:

1. A confession untainted by any legal disqualification may be accepted as conclusive in itself of the matters confessed. An admission however, pursuant to section 24 of the *Evidence Act*, is not conclusive proof of the matters admitted though it may operate as an estoppel.
2. A confession is a direct admission of guilt while an admission amounts to inference about the liability of the person making the admission in the cause...

27. In support of his submission that death was not intended, Mr Were submitted that the existence of a land dispute between the deceased and the appellants negated the presence of malice forethought on the part of the appellants, and that they ought to have been charged with the lesser charge of manslaughter under to Section 202 of the *Penal Code*. Ms Ongeti did not agree with Mr Were. She urged that the totality of the evidence adduced in the case was a clear demonstration that the appellants were acting in concert as defined under Section 21 of the Penal Code, and set out to commit the offence charged.

28. We have considered the entire evidence and subjected it to a fresh analysis and evaluation. We have no doubt that the appellants formed a joint enterprise to attack the deceased, first by destroying his house through an arson attack, and then within hours attacked his person inflicting fatal wounds which caused his death two days later. The appellants did not hide their actions, which they carried out in the full glare of their relatives. They did not deny the facts constituting the offence of murder, the role they played and the eventual result of fatality on the part of the deceased.

29. We have come to the conclusion that the case against the appellants was proved to the required standard and that their appeal against conviction has no merit.

30. As regards sentence, apart from the omnibus prayer that the conviction be quashed and the sentence set aside, there were no submissions made in to the same. We have noted that the learned Judge sentenced the appellants within the judgment, and not after the conviction and after the conduct of a sentencing



hearing. Sections 323 to 325 ad Part IXA of the *Criminal Procedure Code* and the Sentencing Policy Guidelines address this aspect of the trial. Part IXA deals with Victim Impact Statements, while Section 323 deals with the need to ask the accused convicted of an offence to address the Court as regards sentence. Failure to adhere to these provisions, though not having the power of invalidating the proceedings, is a procedural infraction, and a denial of constitutional right to fair trial.

31. On the issue of sentence, the appellants did not challenge the same and therefore we see no reason to interfere.
32. The result of this appeal is that we affirm the conviction and consequently dismiss the appeal.

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

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

