



REPUBLIC OF KENYA



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**Obiri v Republic (Criminal Appeal 95 of 2017)
[2023] KECA 341 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 341 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 95 OF 2017
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MARCH 17, 2023**

BETWEEN

SALAM OBIRI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kisii
(J. R. Karanjah, J.) dated 4th May, 2017 in HCCR No. 89 of 2014)*

JUDGMENT

- 1 The appellant was arrested and arraigned before the High Court at Kisii and charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the August 2, 2014 at Riontweke Sub-location in Nyamache Sub-county within Kisii County, he murdered Carolyne Moraa Mosesti (deceased).
- 2 The appellant denied the charge leading to a trial in which the prosecution called 3 witnesses in support of its case. PW1, a motorcyclist and an uncle to the deceased, gave testimony to the effect that on the fateful day at about 11.00 am he met the deceased while she was going to church. They exchanged greetings and parted ways. At about 1.00pm on the same day, on his way back home, he again met the deceased, but this time round she was in the company of the appellant, who was known to him. Later, at about 2.00pm, he heard that the deceased had been killed. He visited the scene of the incident and found the deceased on a bed inside the appellant's house, a fact that was corroborated by PW3, the investigating officer. PW2, an aunt to the deceased, testified to having identified the body of the deceased at Nyamache District Hospital on August 8, 2014 for purposes of a post-mortem examination.
- 3 PW3, testified that on the material day he was instructed by his superior to accompany his colleagues to the scene. They proceeded to Nyangusu area and found the father of the appellant who informed them



that the appellant was being lynched by members of the public. PW3 and his colleagues rushed to the scene. of the incident and rescued the appellant. They then left for the home of the appellant where they found the body of the deceased on the appellant's bed. They moved the body to the mortuary and on August 8, 2014 a post- mortem examination was conducted. PW3 produced a report of that post-mortem together with a mental assessment report in respect to the appellant that found him fit to stand trial. PW3 further testified that investigations revealed that the deceased was a girlfriend to the appellant.

- 4 At the close of the prosecution's case, the learned judge found the appellant had a case to answer and placed him on his defence. The appellant gave an unsworn statement and denied committing the offence. He testified that on the fateful day he was in church when two people called him outside and asked him to accompany them to his home. On the way, he was confronted by motorcyclists who claimed to have arrested him. The appellant stated that he later found himself at Nyamache hospital where he learnt that he had been hit with a hammer. Police Officers went to the hospital and took a statement from him. They later arrested and arraigned him in court for an offence he did not commit, deposed the appellant.
- 5 The learned judge (JR Karanjah, J) heard the matter, evaluated the evidence tendered and found the appellant guilty as charged. He then sentenced him to death.
- 6 Aggrieved by the judgment and sentence of the High Court, the appellant preferred the instant appeal. Through his counsel Mr Alex Mbeka, he lodged a memorandum of appeal based on 6 grounds. These are condensed in the written submissions to 2 issues namely;
 - a. Whether the prosecution proved its case beyond reasonable doubt so as to warrant a conviction and a death sentence against the appellant.
 - b. Whether the sentence meted against the appellant is unconstitutional.
- 7 During the hearing of the appeal, learned counsel Mr Mbeka appeared for the appellant while the respondent was represented by Mr Okango, the learned Senior Principal Prosecution Counsel. Both parties had filed written submissions which they highlighted orally.
- 8 Mr Mbeka contended that the appellant was not properly identified since it is only PW1 who saw him with the deceased. To counsel, the prosecution should have called more witnesses to corroborate PW1's evidence. It was further submitted that the learned judge relied on a mere suspicion since the appellant was not placed at the scene of the crime and no witness was called to prove his hand in the murder. Moreover, the trial court was faulted for relying on uncorroborated circumstantial evidence to convict the appellant. In this respect, counsel referred to the principles to be applied on in order to determine whether circumstantial evidence adduced is sufficient to sustain a conviction, as analysed in this Court's decision in *Abanga alias Onyango Vs Republic CR A No 32 of 1990(UR)*, an authority that was cited in [Republic Vs michael Muriuki Munyuri\[2014\] eKLR](#). The Court observed as follows in that decision;

'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'



9 On sentencing, it was urged that in view of the Supreme Court determination in *Francis Karioko Muruatetu & Another Vs Republic & 4 Others*[2017] eKLR, a decision that was made after the impugned judgment, this Court should remit this case back to the trial court for resentencing.

10 In opposition to the appeal, Mr Okango asserted that the appellant was positively identified through recognition by PW1. Further, the body of the deceased was found on a bed in the appellant's house shortly after the deceased was seen alive with the appellant. On the sufficiency of the circumstantial evidence, counsel submitted that the evidence in this case was just as good as direct evidence for the reason that PW1, who was found to be a credible witness, testified to seeing the appellant in the company of the deceased. The deceased's body was thereafter found in a bed inside the appellant's house, and the cause of death as relayed in the post- mortem report was found to be strangulation.

11 Concerning sentencing, Mr Okango agreed with Counsel for the appellant that the matter should be remitted to the trial court for mitigation and resentencing.

12 In determining the twin issues identified by the appellant's counsel, we are aware of our role as a first appellate Court as was stated in *Reuben Ombura Muma & Another Vs Republic* [2018] eKLR;

'This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses.'

13 The appellant challenges his identification by PW1 as the person last seen with the deceased before her death, claiming that more witnesses should have been called to corroborate that evidence. He further finds solace in the fact that he was not found at the scene of the crime, and questions the trial court's reliance on circumstantial evidence which, to him, needed further corroboration.

14 The respondent contests those claims arguing that the evidence in this case was as good as direct evidence, the body of the deceased having been found on a bed in the appellant's house shortly after the deceased had been seen alive with the deceased by PW1. The learned judge upon evaluating the evidence and the principles to be applied in considering circumstantial evidence surmised;

'Herein, the evidence by David (PW1) was clearly un rebutted and was unshaken during cross- examination. It was in the mind of this court credible and sufficient in offering strong circumstantial evidence against the accused on the basis that he was the last person to be seen with the deceased while she was alive and that her dead body was found in his house on his bed a few hours after they had been spotted together.'

15 Upon our own analysis of the evidence on the whole, we cannot but concur with the holding of the learned judge. Following the sighting of the appellant with the deceased shortly before she was found strangled to death on a bed in the appellant's house, the appellant was duty bound to explain what happened to the deceased. We need only restate what this Court stated in *Mungai Vs republic*[2021] *KECA 51 (KLR)* [Per Nambuye, Karanja & Kiage, JJA]

14. 'The presence of a dead woman half buried in a house, with a shovel, a panga and a knife with the sharp items stained with the blood of the blood group of the deceased, are facts which the law of evidence recognizes as being especially within the knowledge of the appellant as the owner of the house who was present at the material time and was obligated to explain. Falling in the same category are the bloodstains that were found on the appellant's shoes and shirt.



Only he could explain the ghoulish find of the body and the damning presence of the deceased's blood on his personal apparel.'

15. Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regard being had to the common course of natural events and human conduct.
16. The law on circumstantial evidence is quite settled that all the inculpatory facts must lead irresistibly to the conclusion of the guilt of the person accused and that there should be no co-existing facts or circumstances that weaken that inference or that are capable of explanation on any reasonable hypothesis consistent with his innocence. See *Rex Vs Kipkering Arap Koske & Anor [1949] 16 EACA, 135, Simon Musoke vs Republic and John Chebii Sawe Vs Republic*.
18. It has been stated and is worth repeating that calling evidence circumstantial does not lessen its value or lower its probative force. The co-existence of relevant facts can form a chain so strong and so complete as, to leave no doubt whatsoever as to the perpetrators guilt. With respect, this in one such case'.

16 On the strength of the foregoing authority, and the overwhelming evidence implicating the appellant, we are satisfied, as was the learned Judge, that the appellant is guilty as charged. In any case, a perusal of the proceedings before the trial court on October 23, 2014 when the appellant was taking plea indicates that, when the charge was read to him, his response was, 'I killed but not intentional'. The court however proceeded to record, 'not guilty'. We cannot without launching into the realm of speculation, tell, what exactly transpired in court on that day for an answer that may not have faithfully reflected the response to the plea to be recorded, but, going by our analysis above, we are of the view that the appellant's conviction was proper, and the appeal against it is dismissed.

17 Should the case be referred back to the trial court for re-sentencing in light of the Supreme Court decision in Francis Karioko Muruatetu (Supra)? As correctly submitted by counsel, by the time the impugned judgment was rendered, Muruatetu (supra) had not been decided. We cannot therefore fault the learned judge for following the statute law then in existence. We also note that the appellant did not mitigate at the trial court, but it cannot be held against him. He may well have considered it an exercise in futility given the then mandatory sentence.

18 In the circumstances, while the appeal on conviction fails, it succeeds on sentence. We set aside the death sentence and order that the file be remitted to the High Court at Kisii for purposes of a full resentencing hearing. The matter shall be mentioned before the presiding judge of that court within fourteen (14) days hereof for appropriate directions as to the said resentencing hearing.

Order accordingly.

Dated and delivered at Kisumu this 17th 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

