Kuuma v Republic (Criminal Appeal 22 of 2021)
[2023] KECA 247 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 247 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 22 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MARCH 3, 2023

BETWEEN

MANGATI KUUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitui (L.N. Mutende, J.) delivered on 13th November, 2018 in HC Criminal Case No. 21 of 2015)

JUDGMENT

1. This appeal is lodged by Mangati Kuuma, the appellant, against the judgment of Mutende, J in Criminal Case No. 21 of 2015 in High Court of Kenya at Kitui. In the High Court, the appellant was charged with murder contrary with section 203 as read with section 204 of the *Penal Code*. The particulars of the information were that, the appellant alongside others not before the court murdered one Cosmas Kyendi Munyao on June 4, 2012 at Kikuu Sub-Location, Mwitika Division, Mutomo District in Kitui County. The appellant denied the information and after a full hearing, the trial court found him guilty of the offence. The appellant was then convicted and sentenced to 22 years imprisonment.

2. The appellant being dissatisfied with the judgment of the trial court has appealed to this Court on grounds which we summarise as follows: that the evidence of PW1, PW2 and PW3 which the learned Judge relied on in finding the appellant guilty was unreliable and uncorroborated; that the prosecution's case was marred by irregularities and inconsistencies; that the prosecution failed to discharge the burden of proof required in criminal cases; that the trial court did not consider the appellant's defence; and that the trial court erred in holding that the appellant had the prerequisite mens rea.

3. This being a first appeal, our mandate is to conduct an independent re-appraisal and analysis of the evidence on record and reach our own finding on the guilt or otherwise of the appellant. This Court has expounded on this mandate in many of its decisions. We only need to cite the case of *Dickson Mwangi Munene & another v Republic* [2014] eKLR where this Court expressed itself as follows:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

4. Before the trial court, the prosecution relied on the evidence of six witnesses to build their case against the appellant. A summary of the evidence is as follows. Kasele Munyao (PW1) who was a wife to the deceased testified that on June 4, 2012, she was at her kiosk when she heard screams emanating from her home. Without wasting time, she ran towards her home where she found the appellant and one Mwosya Nzong'a dragging the deceased out of the house. The duo alleged that the deceased had stolen a goat. The appellant and his accomplice then dragged the deceased out of the compound as she followed them. Upon reaching the scene of crime, the appellant left briefly and returned with the carcass of a goat. A crowd then gathered and the deceased was set ablaze as a result of which he succumbed to the burns.

5. Mwania Munyao (PW2), the deceased's son, testified that on the material day while he was at home, he heard screams. He then rushed towards his father's homestead where the screams were emanating from. On reaching, he found the appellant and one Mwosya Nzong'a dragging the deceased. The appellant and Mwosya Nzong'a alleged that the deceased had stolen a goat. He followed them to the riverbank where he was set ablaze. When he tried to intervene, he was threatened and he ran away. He then called his uncle who later came with the sub-chief, by which time the deceased had already been burned and died. He later identified his father's body during post-mortem.

6. Daniel Mutinda, (PW3), the Assistant Chief of Kikuu Sub- Location stated that on the material day, he received a call from Mwosya Nzong'a informing him of the deceased's death. He proceeded to the scene and could not identify the body. The caller had informed him that they were in the house of the appellant. He then proceeded to the appellant's house where he found the caller, the appellant and others celebrating the killing of the deceased while taking some local brew. He then proceeded with the crowd to the scene and thereafter called the police who came and collected the body.

7. PW4 Chief Inspector Samuel Kibyego Kogo on his part narrated how he received the information about the incident from the chief and his role in collecting the body from the scene.

8. PW5 PC Jeremiah Seme investigated the incident. During his investigations, he visited the scene and found the deceased's body which was burned beyond recognition. He recorded statements from witnesses and PW1 and PW2 identified the appellant as the perpetrator. He testified that he did not collect any exhibits from the scene during his investigations. He also attended the post- mortem on the body of the deceased.

9. Dr Patrick Mutuku (PW6) stated that he conducted the post- mortem on the deceased's body and his conclusion was that the deceased died as a result of severe burns.

10. Put on his defence, the appellant gave sworn testimony and called three other witnesses in support of his case. The appellant's evidence was that the deceased was his uncle. That the previous night, the

deceased went to his house without any invitation while drunk. He was hosting his in-laws and they stayed until 3.00am after which the deceased fell asleep. The deceased woke up at 6.30am and left for his home. The in-laws also left. The appellant then took his breakfast and retired to bed only to be woken up by DW4 Kula Kairo at 12.00 noon. Kula Kairo informed him that the deceased had been arrested by people on allegation of having stolen a goat and was wondering whether the goat belonged to him. The appellant informed Kula Kairo that he had not lost any goat but his sister had reported her goat missing. Kula Kairo left and then returned a while later. The two proceeded to the scene where they saw the deceased's burnt body and the carcass of the goat. The appellant denied having participated in the burning of the deceased as well as the allegation that he dragged the deceased out of the house or even being the one who took the carcass of the goat to the scene. He further denied hosting celebrations after the incident as claimed by PW3. He, however, conceded that the dead goat belonged to his sister.

11. The appellant's wife Anna Kasese Mangati reiterated the appellant's testimony and stressed that she was with the appellant all along up to the time Joshua Kula Kairu (DW4) came and reported the killing of the deceased to him. She also testified that the appellant was later arrested in September 2012.

12. Mwosya Nzong'a (DW3) on his part gave evidence on his whereabouts on the material day and denied having participated in the torching of the deceased.

13. DW4 testified as to how he received information concerning the incident from one Bwangwa Sammy Kisengese who also asked him to inquire from the appellant if the alleged stolen goat that had led to the killing of the deceased belonged to his family. He complied and subsequently passed by the appellant's home and together they proceeded to the scene where they found the deceased already burned.

14. In its judgment, the trial court reached the conclusion that the elements of the charge of murder were proved against the appellant. On malice aforethought, it was the court's finding that the actions leading to the death of the appellant were those which the appellant knew were bound to cause grievous harm to the deceased. It also found that the identity of the appellant as a perpetrator was proved by the evidence of PW1 and PW2. It was also the Court's finding that the failure by the police to pursue DW3 did not mean that the appellant did not participate in the killing of the deceased.

15. This appeal was canvassed by way of written submissions.Counsel for the appellant, Mr Towett, addressed the nine grounds of appeal in three thematic areas. On the sufficiency of the evidence adduced by the prosecution, counsel submitted that the evidence on record did not link the appellant to the deceased's death. He argued that no witness was able to point to the appellant as the person who set the deceased on fire. Counsel also pointed out that there was no direct evidence linking the appellant to the offence as is required under sections 62 and 63 of the *Evidence Act*. Additionally, counsel was of the view that malice aforethought was not proved against the appellant. He submitted that other than the evidence stating that the appellant dragged the deceased to the scene of crime, no other evidence was adduced to infer his intentions to murder the deceased. Reliance was placed on the case of *Nzuki v Republic*, CR Appeal No. 70 of 1991 to argue that where the evidence leaves room for more than one view as to the intent of the appellant, then the prosecution ought to prove to the satisfaction of the court the version it intends the court to believe.

16. The second thematic area of the appellant's submissions was on standard of proof. Counsel reiterated the standard of proof in criminal cases and further pointed out that the onus of achieving that standard is on the prosecution. Counsel relied on the case of *Miller v Minister of Pensions* (1947) ALL ER 372 in support of the assertion that the standard of proof in criminal cases is beyond reasonable doubt. According to counsel, the evidence on record did not meet this standard and the prosecution therefore failed to discharge its duty.

17. The third thematic area submitted upon by the appellant was on the sentence. Mr Towett referred us to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR which declared unconstitutional the mandatory nature of the death sentence provided for the offence of murder under section 204 of the *Penal Cod*e. Although counsel appreciated that the judgment in *Francis Karioko Muruatetu* (*supra*) was delivered after the judgment appealed against had been delivered, he urged that the conviction and sentence are bad in law and should be vacated. In conclusion, counsel urged us to quash the conviction and in the alternative order a re-hearing of the sentencing of the appellant by the High Court.

18. Submissions for the respondent were filed by O.J. Omondi, Senior Assistant Director of Public Prosecutions. Counsel submitted that the evidence on record proved all the elements of murder. Counsel argued that the incident took place during the day and there could not be any mistake as to the identity of the appellant as he was clearly identified alongside his accomplices. Counsel submitted that malice aforethought was established from the manner in which the appellant and his accomplices dragged the deceased from his home with the intention of going to burn him. Counsel termed the allegation that the deceased had stolen a goat speculative, asserting that the appellant and his co-conspirators took the law in their own hands. In conclusion, counsel urged us to dismiss the appeal and uphold the sentence.

19. We have perused the record of appeal, the submissions and the authorities cited by both parties and the law. We are of the considered view that this appeal raises one key issue for our determination, namely, whether the appellant committed the offence with which he was charged.

20. The appellant was charged with the offence of murder under section 203 of the *Penal Code*. The prosecution can only nail an accused person for this offence where it establishes the death of the deceased and its cause, that the accused person is the perpetrator of the act leading to the deceased's death, and that the accused person had malice aforethought when he or she committed the actions that led to the death of the deceased person.

21. In this case, the fact of death of the deceased is not disputed. PW6 conducted a post-mortem on the body of the deceased and produced a post-mortem report as an exhibit to that effect. From his examination, he concluded that the deceased died as a result of severe burns.

22. The next issue which forms the foundation of this appeal is whether the evidence adduced supported the finding that it was indeed the appellant who caused the death of the deceased. In addressing this issue, we will also delve into the other grounds of appeal as to whether the evidence of PW1 and PW2 was contradictory and whether there were any irregularities in the prosecution case which vitiated the probative value of the evidence.

23. In this case, it was the evidence of PW1 and PW2 that they saw the appellant alongside DW3 drag the deceased out of his home to the riverbank where the deceased was set ablaze. PW2, however, said that he did not witness the actual setting on fire of the deceased as he had left the scene because he feared for his life. PW1 on her part testified that once at the scene, the appellant left and returned with a dead goat which he accused the deceased of having stolen and killed it. Thereafter, a crowd gathered and the deceased was set ablaze and died as a result.

24. The trial court in its judgment noted that:

> " This is a case where the prosecution called two (2) eye- witnesses to the act who described the manner in which the deceased was lynched and gave the names of his assailants. These were competent witnesses whose evidence was not challenged materially. In the circumstances

their evidence could not be alleged to have been barely adequate. Failure by the police to pursue DW3 and cause him to be charged could not be seen as a circumstance that exonerates the Accused from what he did. In the premises, I find that the accused was one of the persons who committed the unlawful act that caused the death of the deceased."

25. Our evaluation of the evidence on record is that although the appellant may have been placed at the scene of crime by PW1 and PW2, this evidence falls short of directing us to the appellant's contribution towards the death of the deceased. We say so, bearing in mind the plausible defence of the appellant that he went to the scene after the act. Our discussion in the succeeding paragraphs will show why we have reached this conclusion.

26. In our view, the appellant's defence amounted to an *alibi* that needed further consideration. This Court addressed the issue of alibi defence in *Erick Otieno Meda v Republic* [2019] eKLR and developed a four-tier test for analyzing such a defence as follows:

(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

b. An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

c. The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the *alibi* to fail."

27. The Court proceeded to note that:

> " The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices."

28. The *alibi* defence in this case was given by the appellant on oath.The same was tested by the prosecution during cross-examination. DW2 and DW4 also gave evidence on oath supporting the account of events as narrated by the appellant in as far his whereabouts at the time of the offence was concerned. The purported partner of the appellant during the commission of the alleged offence took to the stand and gave evidence on oath of his whereabouts on the material day.

29. The evidence of PW3 is that he received a call from someone who informed him of the incident. The person also informed him that they were celebrating at the appellant's home. PW3 also testified that DW3 had been at large since the incident happened and that was the reason why he was yet to be arraigned. However, on being recalled for further cross-examination after the trial changed hands between judges, it was apparent that PW3 was not being truthful in his testimony. We say so because the appellant had engaged in a land transaction where his witness was DW3. The sale agreement was executed before the immediate supervisor of PW3. It defeats logic that a fugitive wanted for the offence of murder was roaming within the location, witnessing documents before the chief but could not be arrested. Moreover, PW3 had explicitly stated that his boss was aware of the search for DW3 and had even participated in the search. Evidence was also adduced which established that PW3 was an uncle to PW1 who was the deceased's wife. Going by his unreliable evidence, could he have been advancing a vendetta on behalf of his niece? This we cannot answer save to say that he was not truthful in his evidence.

30. The appellant also advanced a defence from the onset that there was a disagreement between PW1 and PW2 on the one hand and himself on the other that arose out of a land transaction between him and the deceased as PW1 and PW2 were opposed to the deal. The existence of this land transaction was acknowledged by PW2 who however denied opposing the land sale. There was therefore reason for PW1 and PW2 to want the appellant locked away.

31. We also find interesting the evidence of PW1 on cross-examination that:

> " Many people were at the place where the burning of my husband took place. We found four people at the burning site. The other four people were Wambua Nzong'a, Ngema Katua, and Paul Kuuma. Mateng'e is a bush where River Mateng'e passes. We found the four people I had mentioned above had already collected firewood and had lit a fire already."

She additionally testified that:

> " ... Colleague of the accused to the crime disappeared that is the one who was with the accused when they pulled my husband out of our house. The people who lit the fire are still at their homes."

32. It is apparent that even if we were to believe the evidence of PW1 and PW2 that the appellant dragged the deceased from his house, the extent of the appellant's contribution towards the circumstances of the deceased's death will still remain a mystery. Additionally, the evidence of PW3 is also disturbing in this aspect. Even though PW3 testified that he received a phone call informing him of the incident from DW3, DW3 denied this. PW1 on the other hand testified that she requested her brother to call PW3. Her evidence appears to find support in that of PW2 who stated that he informed his uncle who came with PW3. In the circumstances, the testimony of PW3 that he was called by DW3 in a celebratory mood is therefore unpersuasive. Probably, PW3 simply quoted the names of individuals who were at the scene and others who were with the appellant as at the time he approached the scene.

33. We find the pronouncement of this Court in *Benard Mutua Matheka v Republic* [2012] eKLR of relevance in the circumstances of this case. In that case, it was stated:

> " We earlier stated that certain essential witnesses were not called to testify. As a general rule the prosecution is supposed to call all witnesses whose evidence is material for the just determination of a case, whether or not it is favourable to their case. They are not obliged to call more witnesses than are necessary for the just determination of the case. (*See Bukenya & Others v Uganda [1972] EA.* The court may however draw an adverse inference that an essential witness who is not called to testify would have testified adversely against the prosecution case, unless of course reasonable cause is shown for not calling that witness. There is however an additional qualification. An adverse inference may only be drawn where the evidence in support of the prosecution case is barely sufficient to prove its case. Differently put, where the prosecution case cannot be said to have been proved beyond any reasonable doubt."

34. Similarly, in *John Waweru Njoka v Republic* [2001] eKLR, this Court held that:

> " It is settled law, that where the prosecution fails to call material witnesses, the Court may draw an adverse inference against the prosecution. That however, only applies where prosecution evidence tendered is weak and inadequate to support conviction."

35. We are alive to the legal position that the right to decide which witnesses to call in order to prove a charge is a preserve of the prosecution. However, in the event that the summoned witnesses give evidence leading to the prosecution's evidence being insufficient to prove their case, the court will then be justified to draw an adverse inference against the prosecution case. The burden to prove the case against the accused person lies with the prosecution and it is upon the prosecution to call witnesses that will establish the case it has set out to prove.

36. As we have already stated, in this case, the extent of the appellant's contribution towards the death of the deceased is uncertain. We have also pointed out that there were other eyewitnesses and suspects who were named and who, according to PW1, were available to testify. We also note that DW3 who is alleged to have made a call to PW3 implicating the appellant appeared as a defence witness and rebutted that aspect of theevidence of PW3. We also note that PW3 gave evidence that DW3 had gone underground, which evidence was proved to be incorrect. All this painted PW3 as an unreliable witness and the prosecution ought to have done more in order to satisfy the trial court that the appellant was indeed the person who killed the deceased.

37. No explanation whatsoever was put forward as to the reasons for failure or the difficulties encountered by the prosecution in availing the witnesses to the incident who were not called to testify. In the circumstances, we find it justifiable to draw adverse inference on the failure by the prosecution to call other important witnesses in this case. In this instance, perhaps for emphasis, we repeat what we have already stated that the evidence on record cannot be relied upon to sufficiently implicate the appellant in the murder of the deceased. When the defence of the appellant is weighed against the prosecution case, the defence case emerges as more believable.

38. In the end, we find that the evidence on record cannot support the appellant's conviction for the offence with which he was charged. It is only just that any doubts arising out of such insufficient evidence must be construed to the advantage of the appellant. In the circumstances, we have no option but to interfere with the conviction of the appellant. The upshot of the foregoing is that this appeal is allowed. Subsequently, the conviction against the appellant is hereby quashed and the sentence imposed set aside. The appellant is set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

G.W. NGENYE-MACHARIA

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR