Kirwa & another v Republic (Criminal Appeal 230 of 2018)
[2023] KECA 598 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 598 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 230 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 26, 2023

BETWEEN

JOSEPHAT KIPKOECH KIRWA ..... 1ST APPELLANT

SAMMY KIPTOO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (Kimondo, J.) dated and delivered on 31st May, 2016 in HC.CR.C. No. 42 of 2007)

JUDGMENT

1. The appellants herein were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on September 30, 2003, the appellants jointly with others not before Court caused the death of Hillary Kimisik Malakwen in Kabore village, Lolminingai location, Nandi North District within the then Rift Valley Province. The appellants denied the charges and after hearing of the matter, they were found guilty of the offence, and sentenced to suffer death as by law prescribed.

2. The appellants were dissatisfied with the conviction and sentence and lodged this appeal raising the following four grounds; that the charges were not proved; that the conviction was premised on unproved circumstantial evidence which lacked probative value; that the conviction was based on contradictory evidence; that the appellants' alibi evidence was not considered by the trial Court.

3. The prosecution relied on the evidence of six witnesses to build their case against the appellants. Celestine Malakwen testified as PW1 stating that she was a wife to the deceased and was a teacher by profession. That on the material day, while she was from school, she witnessed her sister in law being assaulted and while she stood there to witness that, Emily Chepkoech who was a daughter to Joseph Boit chased her away wielding a stick. Emily beat her while she ran to her house where her husband,

the deceased, was resting. After about 10 minutes, the 2nd appellant came and asked her whether she had seen her neighbor one Cheruiyot. After a few minutes, the 2nd appellant came back again in the company of the 1st appellant and Elias Kipkemboi this time asking for the whereabouts of her husband, the deceased. She feigned ignorance. Later, the appellants returned this time in the company of Elias, Joseph Boit and Philemon Kirwa and they gained entry into the house and dragged the deceased out in his inner wear. They took him away. PW1 then asked Joseph Chepkwony to take to the deceased a pair of trousers. The following day in the morning, she saw a big fire at Boit's home and later learnt that her husband had been killed.

4. Zipporah Malakwen (PW2) testified that on the material day, she set out to visit Mr Boit's wife who was ailing. At the home, she was assaulted by Boit's daughter known as Stella and another lady she did not know. Later on her sister in law informed her that she had seen people going to the deceased's home. The next day her brother, one Samuel, informed her that the deceased had been taken to Boit's home and never returned and that he had died. Wilfred Kosgey (PW3) on her part testified that on the material day while she was in her house, she heard a scream coming from the direction of Boit's home. She went to the home and upon entering Boit's house, she found a man in the sitting room, whose hands and legs were tied using a rope. Mr Boit and his 3 daughters were present. She tried to intervene while the daughters insisted that the deceased had bewitched their mother. She then left the scene when her pleas fell on deaf ears.

5. PW4, James Chepkwony, on the material day heard screams emanating from the deceased's house. He then saw six people including the 2nd appellant whisking away the deceased who was naked save for his inner pants towards the home of Mr Boit. He then met PW1 and PW5 who handed him a trouser to take to the deceased which he took and placed on the deceased's shoulders while at the gate of Mr Boit. The group was whipping the deceased whilst accusing him of bewitching Mrs Boit. The next day, he heard that the deceased had been killed and burnt. He saw fire and a human hip bone where Boit was adding firewood to the fire while the 2nd appellant looked on. Phylis Cheptoo testified as PW5 and she was a daughter to the deceased. On the material day while she was cooking, she saw the 1st appellant through the window looking at the deceased who was sleeping in his bedroom. The 1st appellant then left and later returned with the 2nd appellant and one Elias who was wielding a whip. She was asked to put on a lamp which she did and handed it over to the 2nd appellant. She left the trio in the house while she stepped out. She then saw a group of people approaching and she left for the home of PW2. The next morning, she saw smoke and later realized that her father had been killed and burnt.

6. David Ruto, SP testified as PW6 recalling that he received a call from the area Assistant Chief who informed him that the deceased had been burnt to ashes the previous night by neighbours. He went to the scene, found a glowing fire which was scattered and a body burnt beyond recognition. Upon investigations, he established that the family of Mr Boit went and collected the deceased, tortured him and burnt him to ashes. He arrested Mr Boit, two relatives and a daughter who they charged before the High Court in a different matter while two sons and a daughter disappeared. The two sons were later arrested and charged. He stated that the fire was outside Mr Boit's gate.

7. For the defence, the appellants individually gave unsown evidence. The 1st appellant testified as DW1 stating that on the material day, he proceeded to his grandmother's place at Kapkagon where he spent the night. The next day, he went to the farm at 5 am and at about 9 am, some children informed him that a person had been burnt to death in their home. He then went to their home and found out that the deceased had been burnt. The 2nd appellant testified as DW2 and on his part stated that on the material day, he had gone to seek a doctor's help at Kessess and he returned back home at about 3 pm in the company of the said doctor. Upon arriving home, he found many people who had come to see his sickling mother. When the doctor was done, he escorted him and came back. After sometime, he

saw his sisters and other people at the deceased's home and later the people frog matched the deceased to their house. The deceased had been accused of bewitching their mother and he tried shielding the deceased from being assaulted by the crowd. He also informed his father that their mother was suffering from cancer and HIV and not witchcraft. He was then chased away by his father and he spent the night out in a nearby guesthouse where he worked. He stated that the following day he returned home and found fire burning but he did not see the person who was being burnt.

8. The trial Court in finding the appellants guilty of the offence noted that the prosecution, through circumstantial evidence, had proved all the elements of murder against the appellants. The Court noted that the two appellants were among the last persons to be seen with the deceased when still alive and without any exonerating evidence, they were deemed to have participated in murdering the deceased. The Court also dismissed the alibi defence tendered by the appellants which it viewed as unbelievable and an afterthought.

9. Before us, this matter came up for hearing on February 15, 2023 where Mr Mukhabani appeared for the appellants while Ms Sakari appeared for the respondents. Both parties had filed their respective written submissions which they sought to rely on accompanied by a short oral highlight of the appellants' submissions by Mr Mukhabani.

10. On record, there are three sets of submissions filed in favour of the appellants.

    We have read through all the three sets and summarize the submissions as follows. Counsel for the appellant relied on the case of *Okeno v Republic* [1972] EA 32 to point out to the Court its duty as the first appellate court. Counsel submitted that the trial Court erred by shifting the burden of proof to the appellants when dealing with the appellant's alibi defence by considering it against the evidence of the prosecution. Counsel pointed out that whereas the appellants were under obligation to give notice of intention to raise an alibi defence, the failure to issue such a notice did not take away the prosecution's power to investigate and disprove the alibi defence.

11. Counsel further submitted that from the evidence tendered by the prosecution, it was only PW1 and PW5 who linked the appellants to the offence; and that even so, the said witnesses did not place the appellants at the scene of crime which was at Boit's home. Counsel submitted that PW4 and PW3 who visited Boit's home did not testify ever seeing any of the appellants at the scene. According to counsel, the failure to place the appellants at the exact scene of crime broke the chain of circumstantial evidence and also supported the alibi defence mounted by the appellants and therefore, a conviction cannot be sustained by the prosecution. In this regard, counsel referred us to the cases of *John Mutuma Gatobu v Republic*, CR Appeal No 78 of 2013 and *Charles Mathenge Mwangi & Another v Republic*, CR Appeal No 1997 which discussed the manner in which circumstantial evidence is appreciated in our jurisdiction. On the issue of sentence, counsel urged us to adopt the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* (2018) eKLR and set aside the death sentence issued by the trial court.

12. Ms Sakari for the respondents set off by reiterating that the evidence on record proved the charge of murder against the appellants. Counsel pointed out that the conduct of the appellants at the scene of crime and the nature of injuries suffered by the deceased led to the conclusion that the appellants intended to murder the deceased. Counsel submitted that PW1, PW4 and PW5 all testified placing the appellants at the scene of crime and also on what their contributions were in the group as they frog matched the deceased out of his home. Counsel also pointed out that the evidence on record was one of recognition and identification as PW1 and PW5 both knew the appellants prior to the occurrence of the offence. Counsel relied on the case of *Choge v Republic* (1985) eKLR to point out that the evidence of recognition was more reliable than that of identification.

13. Regarding the question of circumstantial evidence, counsel relied on the case of *Republic v Kipkering Arap Koske & Another* [1949] EACA 135 to submit that the evidence on record established a complete chain of circumstances pointing to the appellants as the perpetrators of the offence. Counsel also urged the Court to dismiss the appellants' alibi defence because it was raised late in the day without offering the prosecution an opportunity to investigate or challenge it. Counsel urged the Court not to disturb the findings of the trial Court and to find that the charge of murder was proved based on the evidence on record.

14. This is a first appeal before this Court and our mandate is within the terms of section 379(1) of the *Criminal Procedure Act* and Rule 31(1)(a) of the *Court of Appeal Rules, 2022*. As a first appellate Court, we are under obligation to delve into and consider the evidence as presented before the trial court before arriving at our own independent conclusion. This position has previously been emphasized by this Court in *Dickson Mwangi Munene & Another v Republic* [2014] eKLR where at paragraph 21 the Court stated 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. See Okeno v. Republic [1972] EA 32 and Mwangi v. Republic 2002] 2 KLR 28.

15. We have reviewed the record as well as submissions by both counsel on record, in our view, the following issues are for determination in this case; whether the offence of murder was proved against the appellant and whether the trial Court considered the appellant's alibi defence.

16. The appellant herein was charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The elements of this offence are that the death of the deceased was caused by the unlawful acts or omissions of the appellant who at the time, had the requisite malice aforethought. The fact of the deceased's death was not disputed in this case. PW6 testified that he visited the scene, where he found the deceased's body which was burnt beyond recognition. They did not conduct a postmortem on the body. The evidence of PW1, PW4 and PW5 confirmed that the deceased was killed. We have gone through the judgment of the trial Court and we are in agreement with the finding of that Court that a postmortem was not essential to prove the fact of death. The evidence on record sufficiently proves the fact of the deceased's death. From the record, the deceased died of the inferno that was set upon him.

17. The next line of inquiry is whether the evidence on record directly points to the appellants and no one else as the perpetrators of the incident that led to the deceased's death. The evidence of PW1, PW4 and PW5 is that they all witnessed the deceased being frog matched by a group of people from his home to Mr Boit's home. According to PW1, the 2nd appellant and the 1st appellant came to her house where the deceased was resting and whisked the deceased away. The appellants were in the company of a group of relatives of Mr Boit. When she tried following the group she was chased away by the daughters of Mr Boit. PW4 testified seeing the 2nd appellant among the group that whisked away the naked deceased from his home to Mr Boit's home. He followed the group up to Mr Boit's home and placed a trouser on the deceased's shoulder. The next day, he went to the scene and found the 2nd appellant was watching as Mr Boit added more firewood to the fire that had consumed the deceased's body. PW5 who was 13 years during the incident recalled seeing the two appellants who whisked away her father, the deceased.

She however did not see anything else. PW3 on her part testified that she visited Mr Boit's home and found the deceased had been tied up with a rope on his hands and legs. She heard the daughters of Mr Boit accusing the deceased of having bewitched their mother.

18. The evidence of PW1, PW4 and PW5 is corroborative and confirms that the appellants were among the group of people who whisked away the deceased. Further, that evidence also confirms that it is the appellants who scouted on the deceased's whereabouts prior to leading the group to his house where they picked him from. The two appellants conceded that they were sons of Mr Boit. For the 1st appellant, he distanced himself from ever being present in the locality on that. Instead, it was his evidence that he on the material day, he was at his grandmother's place in Kapkagon where he spent the night. For the 2nd appellant, he conceded being at the scene but left for a guesthouse in the evening where he spent the night having disagreed with his father as to the accusations labeled against the deceased.

19. Before us, counsel for the appellants also argued that even though the appellants could be placed at the scene where the deceased was picked from his house, no evidence pointed to the appellants ever being at the scene of murder or even lighting the fire. From the set of evidence available on record, there was no eye witness as to how the deceased met his death. No evidence has been adduced to establish the appellant's contribution or participation in facilitating the deceased's death beyond the fact that they whisked the deceased from his house to their father's house.

20. In this case, it is appreciated by both parties and the trial court that the evidence on record is circumstantial in nature. When faced with circumstantial evidence, this Court has developed a well-trodden path to be followed. In *Joan Chebichii Sawe vs Republic* [2003] eKLR, this Court stated as follows:

> " 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 reasonable hypothesis than that of his guilt. There must be no 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 innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

21. In order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existent facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused. In finding the appellants guilty, the trial court further invoked the doctrine of "last seen with". The trial court noted that the appellants were the ones last seen with the deceased prior to him being found dead the following morning. The doctrine obligates an accused person, where a man was last seen in their company prior to being found dead, to proffer an explanation of how the deceased died failure to which the Court can find such accused persons culpable for murdering the deceased. This Court in *Moingo & Another v Republic* (Criminal Appeal No 90 of 2018) [2022] KECA 6 addressed the application of the "last seen with" doctrine in Kenya in the following terms:

> " The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty

placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006)."

22. We find the excerpt above persuasive. It follows that prior to invoking the doctrine of "last seen", the prosecution must first establish that the deceased was last seen in the hands and restraint of the appellants. From the evidence in this case, and as we have already stated, PW1, PW4 and PW5 all testified having seen the appellants whisk the deceased away from his home and naked. This being the case, the trial court properly invoked the doctrine of last seen with. In their defence, the 1st appellant denied ever being at the scene while the 2nd appellant acceded that he was at the scene. He however denied ever being involved or even being at the scene as at the time when the deceased met his death.

23. Just like the trial court, we do not find the explanations in the form of alibi defence tendered by the appellants as sufficient explanation of what transpired on the following grounds. First, in the case of the 1st appellant, there is no way his alibi defence can dispel the cogent evidence of PW1, PW4 and PW5 who saw him among the group that whisked the deceased away. His was an afterthought and mere denial. the 2nd appellant on the other hand despite failing to explain how the death occurred, he was seen by PW4 at the scene the following morning while his father, Mr Boit, was adding more firewood into the fire. We can only reach one conclusion, that the appellants knew more on how the deceased met his death than they disclosed in their defence. The trial court therefore properly invoked and applied the doctrine of last seen with in finding that the appellants were culpable for the murder of the deceased.

24. The next issue is whether the appellants' actions were with malice aforethought.

The elements of malice aforethought are provided for under section 206 of the *Penal Code* as follows:

> " 206. Malice aforethought
>
> 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."

25. From the evidence on record, PW4 testified that he heard the deceased being accused of having bewitched the appellant's mother. This allegation is confirmed by the evidence of PW3 who went to Mr Boit's house and found the deceased tied up and being assaulted. PW3 even tried to intervene but her plea landed in deaf ears. The 2nd appellant also confirms these allegations in his defence where he

narrates how he tried to plead with his father, Mr Boit, on behalf of the deceased pointing out that their mother suffered from known deceases and not witchcraft. All these pieces of evidence linked together reveals that the deceased met his death as a result of being suspected of being a witchcraft practitioner and that his practices had visited suffering to the appellant's mother. It is the appellants who whisked the deceased away from his house based on these allegations.

26. Considering the manner in which the deceased met his death, it cannot be said that the perpetrators had a different intention other than to secure the deceased's death or to the least cause him grievous harm. That being the case, we find that the actions of the appellants and their co-conspirators was of malice aforethought and resulted into the unsanctioned death of the deceased. We therefore find no merit on the appeal against conviction and the same is hereby dismissed and the conviction upheld.

27. The final issue for our determination is whether the sentence passed by the trial court was appropriate. In the sentencing proceedings, the trial Court passed a sentence of death as by law prescribed and in its mandatory nature as provided for under section 204 of the *Penal Code*. The appellants were sentenced in 2016 and we cannot fault the trial Court in passing the sentence of death in its mandatory nature. This was the law back then. However, the recent judicial developments from this Court and the Supreme Court has changed the tides in as far as mandatory statutory sentences are concerned. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR declared the mandatory nature of death sentence unconstitutional. The appellants are entitled to benefit from this jurisprudential change in the law as their appeal has come after the law has changed. We must however remind that death sentence is still legal and in appropriate circumstances, Courts will still impose it. This is of course after considering both the mitigating and aggravating circumstances.

28. We note that the appellants were first offenders and were also remorseful. On the other hand, we note the nature of the offence and the manner in which it was executed. The appellants dragged the deceased from his house, flogged him, and tied his hands and legs with a rope while pouring what seemed like water on him. The deceased was subjected to great mental torture prior to being burnt. Even when PW3 tried to intervene, the appellants declined to let reason prevail and instead proceed with their accusations against the deceased and ultimately ensuring his death by fire. This was a heinous manner of facilitating an illegal termination of the deceased's time on earth. In our view, the aggravating factors in this case call for the maximum and deterrent sentence provided by law.

    Section 204 of the *Penal Code* provides for a maximum sentence of death. In this case, even when exercising our discretion in sentence, we do not find it judicious to vacate the death sentence. It is the appropriate sentence based on the circumstances of this case and that is what the appellants herein must face.

29. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR