**Kuria v Republic (Criminal Appeal 117 of 2020)**
**[2023] KECA 572 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 572 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 117 OF 2020**

**MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA**

**MAY 26, 2023**

**BETWEEN**

**BONFACE KABUCHO KURIA ............................................................ APPELLANT**

**AND**

**REPUBLIC ......................................................................................... RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Nairobi (Wakiaga, J.) dated 9th July, 2019 inNairobi HC Criminal Case No. 27 of 2015)***

## JUDGMENT

1. This is a first appeal emanating from the judgment of the High Court at Nairobi dated on July 9, 2019 by Wakiaga, J. in criminal case No 27 of 2015. Before we embark on the facts of the case, we remind ourselves of our mandate as a first appellate court as was aptly set out in the case of *Okeno v Republic* [1972] EA 32, 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."

2. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on the night of December 22, 2014 at New Donholm

Estate within Nairobi county, murdered Willy Mwongeri Mbugua, hereinafter, "the deceased". The appellant denied the charges, was tried, found guilty, convicted and sentenced to 25 years imprisonment. During trial, the prosecution called 13 witnesses and the brief facts of the case as gathered through those witnesses are as below.

3. PW1, Mary Maureen Gathoni Mbugu, a sister to the deceased, on December 23, 2014 called her mother PW4, Eunice Cate Wairimu Mbugua, to enquire if she knew where the deceased was. PW4 then asked her to go and check on him. On arrival, she found the deceased's body lying on the sofa set facing upwards with stab wounds on the neck and stomach. She noticed that his bag and laptop were missing and under the chair there was a blood stained knife, the carpet was blood soaked and walls were spattered with blood. She knew the appellant as a friend of the deceased and that they were also business partners in a De-jaying business. Subsequently, police came and removed the body.

4. PW2, Stephen Ngugi Wateru, the caretaker of the apartments where the deceased lived, stated that on December 24, 2014, he went to the deceased's apartment and found the door unlocked. When he entered, he found things strewn all over. The deceased was lying down with his body wrapped in bed sheet, when he removed the bed sheet, he saw that his body had stab wounds. He called PW1 and together they went and reported the incident to the police who came, recorded statements and collected the body.

5. PW3, Eunice Njeri Ngugi, the deceased's niece, on December 24, 2014 received a called from a nephew informing her that the deceased had died. She went to the apartment and found the deceased lying on a sofa with a stab wound on his neck. Things were scattered around the room and there was blood under the sofa set and on the walls.

6. PW4, the deceased's mother on December 22, 2014 said she gave the deceased Kshs 390,000 to buy De-jaying equipment. While at home, the deceased kept receiving phone calls from a person whom he said was a friend and business associate assisting him to buy De-jaying equipment. He later travelled back to Nairobi. For the next two days, she could not get hold of him and she called PW1, PW3 and PW5 to try and find him but on the December 24, 2014, she received information that he had been found dead in his apartment. She later attended the post mortem.

7. PW5, Alex Karanja, a police officer and a brother of the deceased testified that on December 24, 2014, he received a call that the deceased was dead. He proceeded to the scene and found the deceased lying on his back on the sofa set half covered with a blanket, there was a knife next to him that had blood stains. The house had been ransacked, and his laptop, hard disk, digital camera, and earphone were missing. The deceased had been stabbed in the chest and stomach. The scene of crime personnel processed the scene and the body was subsequently taken to the mortuary. PW6, PC Nixon Ngao Mbingu stationed at Buruburu investigations office testified that he was instructed to effect an arrest of the appellant which he did. At the police station, he recorded his statement in which he said that on the material night he was in town and proceeded directly to Githurai. Asked if he was anywhere near Donholm, the appellant responded in the negative. However, according to Safaricom Limited data on the appellant's line, he was traced in the area on the day of the deceased's death.

8. PW7, PC Kupichor Kipsang a scenes of crime officer was requested by PW12, Simon Mokaya, on December 24, 2014 to accompany him to an apartment where there was a dead body. The body had several stab wounds on the left side of the abdomen and one on the neck. He took several photographs of the scene which he tendered in evidence.

9. PW8 Dr Charles Muturi a pathologist on December 25, 2014 performed the post mortem on the deceased's body whose clothes had holes, corresponding to the stabbed wounds on the chest and abdomen. He had multiple stab wounds. In total, there were 22 stab wounds all over the body.

Internally, the left lung and, heart was perforated and vessels on the neck severed. He formed opinion that the cause of death was due to multiple stab wounds to the neck, chest and abdomen. He obtained a sample of blood from his t-shirt, which he thereafter submitted to PW12.

10. PW9, Lawrence Kinyua Muthuri, a government analyst, on January 29, 2014 received a blood sample of the deceased, a knife and a t-shirt. After analysis, he concluded that the blood stain on the t-shirt matched the DNA profile of the deceased while that on the knife was of an unknown male.

11. PW10, Cpl Kennedy Cherembos, the investigating officer proceeded to Buruburu Police Station to take up a murder case. He was handed exhibits, being a kitchen knife and a blood stained t-shirt. With the assistance of Safaricom Limited and data collected, he learnt that the appellant was a friend of the deceased and were involved in the same business. The appellant had left the city centre through Mombasa road and outer-ring road to Donholm where the deceased used to reside. He arrested the appellant and charged him on the basis that he had killed the deceased for the money he had received from PW4. Further, the appellant never participated in the deceased's funeral and gave no reason for not doing so yet they were very close friends.

12. PW11, Quinto Odeke from Safaricom Security Department received from the Directorate of Criminal Investigations, Buruburu a request to produce details on certain numbers, one of them belonging to the appellant. The data showed that he was within Donholm Savana area on the material day at 22:35hrs and 23:08hrs. At 01:57hrs on December 23, 2014 he was captured at Thome phase 5. Further, the numbers belonging to the deceased and the appellant were within the same area and location at 23:43 hrs.

13. PW12, on December 24, 2014 visited the scene. On arrival, there was a dead body lying on a sofa with a lot of blood, things had been scattered and the house ransacked. He recovered a blood-stained kitchen knife and the scene was photographed and body moved to the mortuary.

14. PW13, Cpl Moses Kaburu stationed at Buruburu police station testified that December 24, 2014, he received a report from PW2 of a dead body in an apartment. He visited the scene and found the body lying on the sofa set with multiple stab wounds, the house had been ransacked and besides the body was a bloodstained knife. He informed the Officer Commanding Police Station, Buruburu, who sent over, scene of crime officers and investigators. He interrogated some family members and learnt that the deceased had been given some money by his mother for purposes of buying a De-jaying mixing machine jointly with the appellant.

15. The trial court placed the appellant on his defence and he gave sworn testimony and called two witnesses. He stated that the deceased was his student as he taught De- jaying and music. They were also business partners. That on the material day, he left his home in Githurai at 2.00pm, went to town to run errands and left town at 9pm arriving in Githurai at 10pm. He met his neighbour and the caretaker and they roasted and ate maize until 11.30pm. He thereafter washed his clothes until 1.00am and never left his house until he was informed that the deceased had passed on. He never attended the funeral of the deceased because he had received threatening messages from the deceased's brother and cousin.

16. DW2, Erastus Mwangi Njehi testified that he sells ladies wear and knew the appellant as a customer. The appellant bought clothes from his shop situated downtown between 8.00pm and 9.00pm on the material day.

17. DW3, Irene Njeri Kamau testified that the appellant was her neighbour and on the material night she met him at 10.00pm in the plot, while fetching water and they were together till 12.00am when she retired to her house.

18. The trial court held that the prosecution case was solely based on circumstantial evidence, and the evidence adduced met the threshold. Accordingly, it convicted the appellant and sentenced him as already stated.

19. Dissatisfied with the said judgment, the appellant has now preferred this appeal on grounds that the trial court erred: by relying on call data of questionable provenance and evidentiary value; when it relied on conjecture and suspicion; when it relied on circumstantial evidence of questionable evidentiary value; when it summarily dismissed the appellant's cogent defence; and finally, when it convicted the appellant yet the prosecution had failed to discharge its burden of proof.

20. The appeal was canvassed through the go-to-meeting video platform, by way of written submissions with limited oral highlights. Mr Michuki, appeared for the appellant while the prosecution was represented by Miss Ngalyuka.

21. Mr Michuki submitted that the testimony of some witnesses was contrary to the call data captured as at 22:35hrs and 23:08hrs. It appears that the appellant was at a blank location which was not in Donholm between those hours. The only time that the appellant was captured in Donholm was at 22:59hrs and the mast number indicated at this time was different from the previous mast numbers. Further, the evidence adduced was that the appellant and deceased communicated at the same location at 23:45hrs, but from the records, the appellant at 23:43hrs was at Wabu Plaza which again was captured by a different mast number. That PW11's testimony should not have been relied upon as it was plucked from the air and was not supported by data. There was no direct evidence pointing to the appellant as the perpetrator of the offence. Further, the evidence, was nothing more than conjecture and suspicion since there was no chain linking the appellant to the offence. It was finally submitted that the offence was not proved beyond reasonable doubt. We were therefore urged to allow the appeal.

22. Miss Ngalyuka on the other hand submitted that the offence of murder was proved beyond reasonable doubt against the appellant. That the evidence placed the appellant by virtue of his mobile telephone location at the scene of crime at the time the deceased was last seen alive by PW2. That the alibi defence of the appellant on the material day did not connect what he testified, to the location of his mobile phone at Donholm as per the evidence of PW11. That PW11 was emphatic that the general mast on the appellant's location was at Donholm Savanna area in the neighbourhood of the deceased.

23. We have carefully reconsidered and evaluated the evidence presented by the prosecution in support of the charge against the appellant. In reconsidering the evidence, we note that the appellant having been charged with the offence of murder, the prosecution had to prove each and every element of the offence beyond reasonable doubt. Thus, the prosecution had to prove that the deceased died and the cause thereof, that his death arose through an act or omission of the appellant either directly or indirectly; and, that the appellant had malice aforethought in committing the act.

24. As to whether there was death and the cause thereof, we agree wholly with the finding of the trial court when it stated thus:

> " The death and the cause thereof is not in dispute. The deceased became "mteja" between the last time he spoke to his loving mother on December 22, 2014 and when she called him next on 24th December which made the family send PW2 Stephen Ngugi Mutero to check on him. PW2 confirmed that he last saw the deceased alive on December 22, 2014 at 11.00 pm and lo and behold found him dead with multiple stab wounds all over his body. The body was then moved to Kenyatta University mortuary after PW7 had taken photographs thereof where PW8 Dr Charles K. Muturi conducted a post-mortem examination thereon and formed an opinion that the cause of death was multiple stab wounds to the neck chest

and abdomen. It therefore follows that the fact and cause of death was proved beyond any reasonable doubt.

25. The main issue and as rightly pointed out by the trial court is the reliance on circumstantial evidence given that there was no one who saw the person who killed the deceased. Did the prosecution make out a case of circumstantial evidence that was so cogent as to sustain a conviction against the appellant? At the onset, we must state that the trial court properly analyzed and applied the principles that underlie the reliance on circumstantial evidence.

26. To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that the guilt of the suspect should not only be a rational inference but it should also be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with the innocence of an accused, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are *Rex v Kipkerring Arap Koske & 2 others* [1949] EACA 135 and *Simoni Musoke v R* [1958] EA 71. In *Rex v Kipkerring* [supra] the court explained that:

> "In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

27. *Simoni Musoke v R* [supra] introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years, these strictures have been developed further by way of explanation. For example, in the case of *Omar Mzungu Chimera v R* criminal appeal No 56 of 1998, the court stated that:

> "It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilty is 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"

28. This dicta find its origin from an old decision of the *House of Lords in Teper v R* [1952] AC 480. What the prosecution presented as forming circumstantial evidence with which the trial court agreed can be summarized as follows: that the appellant and the deceased were good friends who used to be together most of the time and were in the same business. That the appellant had variously communicated with the deceased, while he was with PW4. Further, that the communication captured from Safaricom data pointed to the fact that the appellant's phone was on the material day in the neighbourhood of the deceased. That the conduct of the appellant, in not participating in the funeral arrangements and the burial of the deceased pointed to a guilty mind. Lastly, the appellant was aware that the deceased had

been given Kshs 390,0000.00 by his mother in order to purchase music equipment, which could have been the catalysis for the death of the deceased. The trial court on this aspect stated thus:

> " I am therefore satisfied that the hypothesis of the prosecution case that the accused with the knowledge that the deceased had the money which was to be his seed money for the purchase of DJ mixture, having confirmed the same through their communication, went for the same and killed him in the process taking not only the said money but also the other DJ equipment which the deceased had in his house has been established through the qualitative reliable and probable circumstances presented herein above which completed the chain connecting the accused and nobody else with the offence charged."

29. With respect, we think that the trial court applied the wrong yardstick. The evidence, was in our view inconclusive. To us, there were many co-existing circumstances or factors which, in our estimation, weakened any inference or suggestion of the appellant's guilt. We say so because the mere fact that there was communication on phone between the appellant and the deceased was not in itself sufficient to point to the appellant as the one who committed the crime. The contents of the communication were not made known. The only thing that PW1 attributed to the appellant was that the deceased was being called, and when she inquired, she was told by the deceased that it was a friend who was helping him buy the De-jaying equipment. He never mentioned the name of the appellant in this conversation.

30. Secondly, there was no evidence pointing to the appellant as having been at the residence of the deceased. The times lines given by PW9 regarding the movement of the appellant were of a doubtful authenticity. There were so many errors in the data as sometimes the codes, the mast and time could not match. Further, it appears that the appellant was in an empty space between some of those hours.

31. The trial court was of the opinion that the things that were stolen from the house were tools of trade commonly used by the deceased, hence the possibility that the same were taken by the appellant was high, given that they were in the same trade. Equally, we find this as being too speculative as there was no evidence lending credence to such an assertion. None of the items were recovered from the appellant. The fact that the door was not forced open cannot be the hypothesis that it was the appellant alone who could have accessed the deceased's house. There was no evidence that was led to the effect that it was only the appellant who would visit the deceased.

32. The issue of the existence of money was equally not substantiated as to whether the appellant knew the deceased had money. Mere telephone conversation between the deceased and the appellant did not bridge the gap of the knowledge of the deceased having the money. There was no direct evidence or any evidence whatsoever that the deceased shared the information with the appellant regarding the money. Lastly, the evidence of PW9 suggested that the blood stains on the knife belonged to unknown male and not the appellant. This then eliminates the appellant as a suspect.

33. We are of the view that the instances of what was presented as circumstantial evidence, were below the threshold enunciated in the leading cases we have cited in this judgment, namely, *Rex v Kipkerring* [supra], *Simoni Musoke v R* [supra] and *Omar Mzungu v R* [supra]. The evidence does not amount to a compelling rational inference of the appellant's guilt. The facts do not lead to one irresistible conclusion that the appellant and no one else could have committed the crime, taking into consideration the natural course of human conduct. The evidence was neither compelling, credible nor cogent.

34. The appellant raised the defence of an *alibi*. The trial court considered the same against the prosecution evidence and was of the view that the same ought to have been raised earlier, and that raising it that late, prejudiced the prosecution case. We agree with the principles set by the decisions cited by the trial

court on such defence. However, it is settled law that the prosecution bears the burden of proving the charge against an accused beyond reasonable doubt.

35. Nevertheless, in relying on an *alibi* defence, the entirety of the prosecution evidence, direct or circumstantial must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an *alibi* defence during the defence hearing stage of the proceedings should not escape scrutiny of the court. However, having arrived at the decision that the appellant was not placed at the scene of the crime, it is apparent that any further discussion on the issue would be an academic exercise.

36. It follows that the prosecution failed to prove its case. All that there was against the appellant, was mere suspicion which could not be a basis for his conviction. See *Sawe v Republic* [2003] KLR 364.

37. In the result, the appeal has merit and is hereby allowed. We quash the appellant's conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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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**