Mwita v Republic (Criminal Appeal 145 of 2018)
[2023] KECA 570 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 570 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 145 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

ANTONY CHACHA MWITA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Migori (Mrima, J.) dated 28th February, 2018 in Criminal Case No. 113 of 2014)

JUDGMENT

1. Antony Chacha Mwita, the appellant, was arrested and arraigned at the High Court at Migori on a charge of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence were that the appellant murdered Obadiah Chacha Getang'anyi, the deceased, on November 22, 2014 at Kegonga market in Kuria East, within Migori County.

2. The events leading to the offence were that in November 22, 2014, the deceased and the appellant were at the homestead of Sofia Robi Mwita (PW2) taking a local brew known as "changaa". Unexpectedly, the deceased's wife, Catherine Gati (Catherine) arrived at the homestead and picked a quarrel with him concerning her phone. Not to disturb the rest of the customers, PW2 with the help of other revellers, led the deceased and Catherine outside her house. As the two continued quarrelling, the appellant who is her nephew, joined them. The latter was insisting that the deceased gives Catherine back her phone as she had accused him of taking it.

3. PW2 gave two versions of events of what next transpired. The first was that the three left her homestead whilst still arguing, then the appellant and deceased went in a different direction while Catherine went in different direction. PW2 then locked her house and proceeded to attend a circumcision ceremony. Upon being reminded that her testimony did not match her statement, she changed the version of events. She stated that after the appellant insisted that the deceased gives Catherine back her phone,

he took out a knife, pointed at him with it and sternly warned the deceased that if it were not for their friendship, he would have killed him.

4. Catherine then left the homestead and PW2 left the two men and proceeded back to the house. Later on, as she was leaving for the ceremony, she saw the deceased lying down in her compound, but did not bother with him. As she was leaving her homestead, she met someone who informed her that he was heading to get a motor cycle so that he could rush the deceased, who had been stabbed, to the hospital.

5. Joseph Kerario Mosama (PW1) witnessed the deceased being ferried to the hospital by other boda boda riders. He proceeded to the hospital where the deceased was treated and discharged. However, by the following day, the deceased's condition had deteriorated and PW1 took him back to the hospital where he succumbed to his injuries. PW1 testified that prior to his death, the deceased informed him that the appellant is the one who stabbed him. The deceased's brother, Peter Musama Getanginya (PW4) was informed that the deceased had been stabbed and rushed to hospital. He stated that while in hospital, the deceased disclosed to him also that it is the appellant who stabbed him.

6. The post mortem report produced by Dr Ruwa Sammy Mwatela (PW5) indicated that the deceased suffered a deep piercing stab wound measuring 4 cm just above the posterior iliac spine running from down medially, penetrating the peritoneum. The wound was 10 – 13 cm deep. The colon was also pierced. The cause of death was concluded to be hypovolemic shock due to internal haemorrhage as a result of the attack.

7. At the close of the prosecution's case, Mrima, J. found a *prima facie* case established against the appellant, and placed him on his defence.

8. The appellant gave a sworn statement and denied the charges. He stated that on the fateful day he went to PW2's homestead to take his motor cycle from the deceased. He acknowledged witnessing the deceased and Catherine argue but he did not get involved and proceeded to Kehancha. The following day while running his errands in Mabera, he was arrested by police officers. He was taken to Mabera Police station and subsequently arraigned before court on charges he knew nothing about.

9. Mrima, J. considered the evidence submitted by the prosecution and the sworn testimony of the appellant. He held that even though the prosecution had proved the guilt of the appellant beyond a reasonable doubt, it did not prove the appellant's motive to stab the deceased. In the absence of malice aforethought, the appellant was therefore not guilty of murder. Consequently, the learned Judge substituted the charge to that of manslaughter contrary to section 202 of the *Penal Code*. He convicted him accordingly and sentenced the appellant to 20 years imprisonment.

10. Aggrieved, the appellant filed the instant appeal based on 3 grounds, that the learned Judge erred by;

    a. Relying on the testimony of PW2 which was marred with contradictions and inconsistencies.

    b. Drawing inferences and reaching conclusions not based on evidence.

    c. Convicting and sentencing the appellant based on uncorroborated evidence.

11. During the hearing of the appeal learned Counsel Miss Obware appeared for the appellant while the learned Prosecution Counsel Mr Okango appeared for the respondent.

12. Miss Obware contended that the appellant's conviction was based on circumstantial evidence hinged on PW2's testimony which consisted of mere suspicion. PW2 not only gave two conflicting accounts of what transpired that day, her account had several missing links that ought to be resolved in favour of the appellant. According to Counsel, Catherine, the wife of the deceased, was the only one in a

position to testify as to whether or not the appellant murdered the deceased. Without her testimony, the inconsistencies in PW2's testimony rendered the appellant's conviction unsafe.

13. She urged this Court to quash the conviction of the appellant and set aside the sentence or, in the alternative, reduce the sentence to a 10-year term.

14. Mr. Okango in opposing the appeal argued that the prosecution intended to call Catherine as a witness, as evidenced by her statement on record. However, she fled to Tanzania hence they were unable to trace her. Be that as it may, the circumstantial evidence adduced by the prosecution was sufficient to prove that the appellant is the one who stabbed the deceased. He urged us not to disturb the sentence as it was appropriate under the circumstances.

15. We have considered the record and the submissions made by learned Counsel. Our mandate as a first appellate Court was fittingly pronounced by this Court in the often cited case of *Okeno v Republic* [1972] EA 32 as follows;

> " 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] E.A. 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] E.A. 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] E.A. 424."

16. The twin issues for consideration are whether the appellant's conviction was safe and whether his sentence ought to be reduced under the prevailing circumstances.

17. It is not in dispute that the appellant's conviction was based on circumstantial evidence as there was no eye witness account on how the deceased was murdered. It is trite that the guilt of an accused can be proved by circumstantial evidence which enables the court to deduce a particular fact from circumstances as proved by the prosecution. Such evidence can form a strong basis for proving the guilt of an accused person just like direct evidence. See *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.

18. As we embark on our re-evaluation of the evidence to arrive at our own conclusion, we recall the pronouncement of this Court *Joan Chebichii Sawe v Republic* [2003] eKLR that;

> " As we have already pointed out, the evidence in this case was entirely circumstantial. 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." (Emphasis ours)

19. The star witness was PW2, who testified of the argument that ensued between the deceased and Catherine. This is what led to the appellant's threats to the deceased, while wielding a knife, that he would have killed him were it not for their friendship. PW2 then went back to her house and later as

she was heading to a circumcision ceremony, saw the deceased sprawled on the ground. However, she did not bother to find out if anything was wrong with him. As was raised by the appellant's counsel, we are aware of the conflicting versions given by PW2. The learned judge also noted the same when he observed in his judgment;

> " The accused person denies PW2's version of what happened that morning and takes the position that he never quarrelled with the deceased at all as they were very good friends. I intently watched PW2 as she testified. PW2 was not forthright in her evidence. At first PW2 stated that after the three quarreled he (*sic*) saw the deceased and the accused person leave the homestead together as the wife of the deceased also left using another route. When PW2 was reminded that she had initially recorded a statement with the police on the events of that morning she changed her version of what happened and stated that she actually saw the accused person draw a knife and warned the deceased and that the accused person vehemently quarreled the deceased as she left the two outside her house as he (*sic*) returned inside. PW2 appeared worried and the Learned State Counsel had to severally ask her to relax and confine herself to only what she witnessed. From the way PW2 conducted herself before the Court I can only draw an inference that although PW2 witnessed what happened at her home, she for whatever reasons, did not want to tell the Court what truly transpired."

20. We defer to the learned judge's observation as he had the privilege of seeing and analysing the demeanour of PW2. He noted that she was not forthright, appeared worried and for some reason withheld some crucial information from the court. These observations cause us to believe that PW2 was not a credible witness and therefore a conviction based solely on her testimony cannot stand. We concur with the holding of this Court in *Joseph Ndungu Kimanyi v Republic* [1979] eKLR as follows;

> " The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

21. However, as each case has its unique set of circumstances, each court must analyse the corroborating evidence if any, to ensure that a conviction is safe. We acknowledge that the learned judge did not expressly denote his reliance on the evidence of PW1 and PW4. However, in our capacity as a first appellate court we do find that that their evidence was critical in the establishment of the guilt of the appellant.

22. During cross-examination, PW1, who took the deceased back to hospital once his condition deteriorated, stated;

> " I was told by the deceased that the accused had stabbed him. I knew him all along as we went to school almost the same time. I have known the accused person all along my life."

23. Similarly, PW4, who visited the deceased in hospital before he passed on, upon examination by the court stated:-

> " When the deceased was telling me how he was stabbed he was in a very bad state and he talked with a lot of difficulty. He told me that it was Antony Chacha, the accused person, who had injured him. The deceased could not talk further than that."

24. The foregoing evidence is admissible under the provision of section 33(a) of the *Evidence Act* as relating to the cause of death thus:-

> " when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

25. The testimonies of PW1 and PW4 are the dying declarations of the deceased and they point to the guilt of the appellant. Both witnesses were firm on the identity of the appellant, which removes any chance of mistaken identity. This Court has been clear that under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Statements made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death. See *Philip Nzaka Watu v Republic* [2016] eKLR.

26. Correspondingly, in *Peter Kimathi Kanga v Republic* [2015] eKLR, the Court gave guidance on how to handle dying declarations as follows:-

> " Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal requirement."

27. Whereas we believe in the credibility of the deceased's dying declaration as evidenced by PW1 and PW4's testimony, we have taken into consideration the cautionary rule of practice which, though not a legal requirement, is critical is ensuring the safe conviction of an accused person.

28. On the corroboration, we have already rehashed PW2's testimony. Even with its credibility questions, at the very least it placed the appellant at the scene of the crime right in the middle of an argument between the deceased and Catherine. Additionally, the appellant's own admission in his defence placed him at the scene of the crime when he stated;

> " [I] then went to take my motor cycle which I had given to one Obadia Chacha.....I proceeded to where Obadiah was..... I then asked Obadiah about my motor cycle and he informed me that he had packed it outside the home. I took the keys and I was about to leave a (*sic*) wife to Obadiah came there while very much drunk. The wife to Obadiah demanded a phone from Obadiah and the deferred sharply."

29. We find that the appellant's own testimony lends credence to that of PW2, in that on the day of the deceased's death, the appellant was at the scene of the crime and was present while the deceased and Catherine had a bitter argument about her phone. We accept that PW2 left the deceased and appellant outside her house as she and Catherine left the scene. This, as the learned judge stated, raised the logical conclusion that the appellant was the last person seen with the deceased prior to his death. The learned judge drew the appropriate inference that the appellant made good his threat to kill the accused and

therefore was the perpetrator of the stabbing of the deceased. The doctrine of "last seen" has been well-captured in the Nigerian case in *Stephen Haruna v The Attorney General of the Federation* (2010) 1 iLAW/CA/A/86/C/2009 as follows;

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death.
>
> Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

30. In light of the foregoing, and in consideration of the evidence of PW1, PW2, PW4 and the appellant's own admission in his defence, we find that the inculpatory facts are incompatible with the innocence of the appellant and incapable of any other hypothesis other than that of the appellant's guilt. There were no other co-existing circumstances capable of destroying the inference of guilt on the appellants' part. Therefore, from our analysis, the circumstantial evidence adduced by the prosecution satisfied the principles set out in a long line of authorities including *Musili Tulo v Republic* [2014] eKLR;

> " 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."

31. The appeal on conviction therefore fails.

32. The appellant's Counsel implored us to reduce the appellant's sentence to a 10-year term. Sentencing is an integral part of justice and this Court has a duty to dispense justice not only to the deceased but also to the accused person. To this end, we find that a 10-year sentence is a just, proportionate and commensurate sentence to the crime committed by the appellant.

33. In the end, this appeal succeeds on sentence and we set aside the 20-year sentence and substitute it with a 10-year sentence to run from the time the appellant was first sentenced.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 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