Marita v Republic (Criminal Appeal 280 of 2018)
[2023] KECA 580 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 580 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 280 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

DANIEL ONDIEKI MARITA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the judgement of the High Court of Kenya at Kisii (J.R. Karanja, J.) dated 21st December, 2016 in HCCRC No. 61 of 2012)

JUDGMENT

1. The appellant, Daniel Ondieki Marita, was the accused person in the trial before the High Court in Kisii High Court, Criminal Case No. 61 of 2012. He was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on March 27, 2012, at Maili Mbili village, Busogo location in Kisii District within Kisii County, the appellant murdered Marita Ondieki ("Deceased").

2. The appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellant and sentenced him to death.

3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, the appellant raised six (6) grounds of appeal, which are that:

    1. The Learned Judge of the High Court erred in law and fact by relying on the uncorroborated and contradictory evidence of the prosecution witnesses to convict the appellant.

    2. The Learned Judge of the High Court erred in law when he went ahead to convict the appellant of murder when all ingredients of the offence were not proved.

3. The Learned Judge of the High Court erred by failing to re-evaluate the evidence on record.

4. The Learned Judge of the High Court erred in law when he went ahead to convict the appellant of murder when no formal identification was ever carried out.

5. The Learned Judge of the High Court erred in law and fact by convicting the appellant of the offence of murder yet the prosecution failed to prove its case beyond reasonable doubt.

6. The Learned Judge of the High Court erred in law in convicting the appellant of murder by failing to find that the mandatory nature of the death sentence set out in section 204 of the *Penal Code* is unconstitutional.

4. This is a first appeal. Accordingly, the role of this court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to bear in mind that we neither saw nor heard the witnesses, for which we must make allowance. See *Okeno v Republic* [1972] EA 32.

5. The Deceased was the appellant's step-son. He was two and a half years old. At the trial court, the prosecution called only two witnesses. The evidence that emerged from the trial was as follows.

6. PW1, Justus Nyabuto, the assistant chief of the area where the appellant lived, testified that on March 29, 2012, while on duty, he was informed by a clan elder that the Deceased had gone missing for two days. He referred the clan elder to the local policing unit. Later, Nyabuto was informed that the Deceased body had been discovered, buried behind the appellant's house. The discovery was made by members of the policing unit and the clan elder. Nyabuto went to the scene and, on arrival, he found the appellant in the custody of members of the public, who had apprehended him on suspicion that he had killed his step-son. He questioned the appellant about the allegations. Nyabuto told the trial court that the appellant admitted to him that he had killed the Deceased. He notified the Police who went to the scene and exhumed the body of the Deceased, which was later taken to the mortuary.

7. The second prosecution witness was PC Alfred Nyasio, the investigating officer. During his investigation, he visited the scene where he found the body of the Deceased buried near a pit latrine. He noted that the Deceased had bruises on the back of his head and neck. PC Nyasio testified that he also learnt that the appellant was the last person to be seen with the Deceased before he died. He also interviewed the appellant's wife. He ended up arresting both the appellant and his wife but the wife was released later on. He conceded that the wife told him that she did not see the appellant killing the Deceased. The wife also did not make a report to the police that the Deceased had gone missing. PC Nyasio testified that he interviewed the appellant who told him that he was angered by his wife's refusal to take the Deceased to his real father.

8. Further, PW2 told the court that the post mortem examination was conducted on April 2, 2012, but the pathologist who conducted it, by the name Dr. Asava, had since resigned from government; therefore, in his absence, and with the consent of the Defence, he produced the post mortem report. In his report, Dr. Asava concluded that the deceased died from severe head injury caused by assault.

9. When he was placed on his defence, the appellant denied killing the Deceased. He testified that on the material date, he left his home and went to work at his hotel. He said that he left work at 8.30pm and returned home, where, he said, he found the Deceased missing. He told the trial court that he started looking for the Deceased with the help of other people and ended up finding his body near the

toilet. Upon discovery of the Deceased's body, villagers screamed and reported the matter to the police. He told the court that he was arrested alongside his wife; but that she was later released. He was then charged with the murder of his step-son. He denied killing the young man.

10. The appeal was argued by way of written submissions by the appellant. The respondent did not file written submissions but was given an opportunity to make oral submissions. During the virtual hearing, learned counsel Mr. Mbeka appeared for the appellant, whereas learned counsel, Ms. Odumba, appeared for the respondent. The appellant relied on his submissions.

11. Mr. Mbeka, counsel for the appellant, condensed the issues of determination into two as follows:

    a. Whether the prosecution proved its case beyond reasonable doubt to warrant a conviction and sentence to death.

    b. If conviction is affirmed, whether the death sentence meted against the appellant is constitutional.

12. On the first issue, counsel argued that from the totality of evidence tendered by the prosecution, it was clear the learned judge relied on inadmissible confession made by the appellant to PW1 that he killed the deceased as well as the uncorroborated circumstantial testimony of PW2, to convict the appellant. Counsel argued that the "confession" was inadmissible because it did not comply with section 25 and 25A(1) of the *Evidence Act* with regard to instances where a confession can be admissible in court. He argued that no witness was called to corroborate PW2's testimony that the appellant indeed was the last person to be seen with the deceased. To buttress this assertion, counsel relied on the case of *Sawe v Republic* [2003] eKLR where the court held that suspicion, however, strong is not enough to sustain a conviction. Based on the foregoing, it was his submission that the prosecution failed to meet the standard threshold of proving a case beyond reasonable doubt.

13. On the second issue, counsel relied on the Supreme Court case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and submitted that the mandatory death sentence meted on the appellant was unconstitutional. He took cognizant of the fact that the Supreme Court case was decided after the learned judge had passed his sentence on the appellant and urged this court to remit this case back to the trial court for resentencing, in the event that it was not agreeable to the above stated submissions.

14. Ms. Odumba, the respondent's counsel, conceded the appeal terming the evidence in the case "confusing". She thought that the case ought to have been sent for an inquest to establish exactly what had happened before charging the appellant.

15. With respect, we think that the State Counsel was right to concede this appeal. We say so because the circumstantial evidence relied on by the prosecution to prove its case did not meet the forebodingly high threshold required by our jurisprudence. Additionally, we agree with the appellant's counsel that the alleged confession by the appellant was not admissible.

16. The trial court relied on circumstantial evidence to convict the appellant and reasoned as follows:

    " 14. Herein, the major inculpatory factor was that the accused was the last person to be seen with the deceased before the deceased body was found buried near a pit latrine. This evidence came from the testimony of the investigating officer (PW2) when he stated that there were allegations that the deceased was lastly seen with the accused who indicated that he was taking him (deceased) to Nairobi.

15. Although the actual persons who made the allegations against the accused were not called to testify and corroborate the fact, there was a strong suggestion from the investigating officer (PW2) and the chief (PW1) that the death of the deceased was the act or contrivance of the accused who was the last person to be seen with the deceased before he was assaulted and killed.

16. The accused on being questioned by the investigating officer (PW2) implied that he fatally assaulted the deceased after being angered by the deceased mother's refusal to take him (deceased) to his father. He also told the chief (PW1) that he killed and buried the child. All these facts lead to the inevitable conclusion that he (accused) was the person who to the exclusion of any other person murdered the deceased. his defence was therefore adequately discredited and rendered invalid.

17. It is the ultimate finding of this court that the prosecution has discharged its burden of proof in stashing that the deceased was murdered by the accused. Accordingly, the accused is found guilty as charged and convicted."

17. This court has laid out, quite stably, in a number of authoritative decisions, the governing principles in utilizing circumstantial evidence to secure a conviction. The cases include *Abanga alias Onyango v Republic*, Criminal Appeal No 31 of 1990 (UR), *Sawe v Republic* [2003] KLR 364 (*supra*), *Mwendwa vs. Republic* [2006] IKLR 137, *Wambua & 3 others v Republic* [2008] KLR 142, *Peter Mugambi v Republic* [2017] eKLR, and *Dorcas Jebet Ketter & another v Republi*c. The guiding principles crystallized in these cases are that:

i. The inculpatory facts must be incompatible with the innocence of the accused.

ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

iii. There must be no other existing circumstances weakening or destroying the inference.

iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

18. Applying these principles to the present case, we are of the view that the circumstantial evidence presented by the Prosecution and relied on by the superior court to infer the guilt of the appellant fell short of the justifiably forbiddingly high evidential threshold required. In particular, three aspects of the case effete the strength of the circumstantial evidence.

19. First, the confession evidence adduced by Mr. Nyabuto, the Area Chief, was inadmissible and it was an error to admit it and consider it as evidence in the case. This was because this was, a confession to someone in authority and in the specific circumstances of this case the alleged confession would not pass muster even if it were treated as a "private" confession under section 26 of the *Evidence Act*. This is because the circumstances here show that the confession had the hallmarks of coercion. It was given in the midst of a crowd of villagers who had apprehended the appellant and then called the Area Chief to interrogate him publicly. It is difficult to say that the confession to the Area Chief in this case was voluntary and not procured by inducement, threat or promise.

20. Second, the superior court failed to satisfy itself on an important requirement before relying on the Last Seen Doctrine in this case: it was not conclusively proved that the appellant was the person last seen with the Deceased.

21. The Last Seen Doctrine is an instantiation of circumstantial evidence and an application of section 111 of the *Evidence Act*. Section 111(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which casts the burden of proof on the accused person in certain circumstances, provides as follows:-

> 111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
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> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
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> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

22. The Last Seen Doctrine essentially provides that if a person is the last one seen with the deceased just before his death or within a reasonable period of his death and no other person could have intervened in between them, then the presumption can be taken that he (the person who was last seen with the deceased) is the author of the crime causing the deceased's death. In such a case, the burden of proof shifts to the person last seen with the deceased to negate this fact and if he is not able to give a lucid and sufficient explanation about his innocence then the presumption becomes even stronger. Ideally, for the Last Seen Doctrine to safely apply, the duration of the accused and deceased last seen together and the recovery of the dead body should be minimal. This rules out the possibility that another person intervened. In cases where there exists a significant time gap between the time the deceased was last seen with the accused person and the time when the body was recovered, the presumption is considerably weakened.

23. For the Last Seen Doctrine to apply, there must be conclusive proof that the accused person was, in fact, last seen with the deceased. In the present case, no such conclusive proof exists. Instead, both witnesses obliquely testified that they had "heard" from unnamed third parties that the appellant was last seen with the Deceased. This untested evidence from third parties is inadmissible hearsay which cannot be said to conclusively prove that the appellant was, in fact, the person last seen with the Deceased. For a secure conviction to be safely based on the Last Seen Doctrine, the third parties who ostensibly saw the appellant with the Deceased needed to testify and have their testimonies tested on cross-examination. The application of the Last Seen Doctrine is also significantly weakened in this case by the time gap between the alleged last sighting and the recovery of the body.

24. Third, the potency of the accusative evidence of the Deceased's body being found in the appellant's compound is diminished by the fact that the residence was co-owned with the appellant's wife. It is true that where a body is found in one's house or compound in circumstances in which he has no reasonable

explanation a presumption is permitted by operation of sections 111 and 119 of the *Evidence Act* that the person is responsible for causing the death of the deceased. For example, this court stated in *Mungai vs. Republic* [2021] KECA 51 (KLR) [Per Nambuye, Karanja & Kiage, JJ.A.]:

> " 14. The presence of a dead woman half buried in a house, with a shovel, a panga and a knife with the sharp items stained with the blood of the blood group of the deceased, are facts which the law of evidence recognizes as being especially within the knowledge of the appellant as the owner of the house who was present at the material time and was obligated to explain. Falling in the same category are the bloodstains that were found on the appellant's shoes and shirt. Only he could explain the ghoulish find of the body and the damning presence of the deceased's blood on his personal apparel.
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> 15. Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regard being had to the common course of natural events and human conduct.
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> 16. The law on circumstantial evidence is quite settled that all the inculpatory facts must lead irresistibly to the conclusion of the guilt of the person accused and that there should be no co-existing facts or circumstances that weaken that inference or that are capable of explanation on any reasonable hypothesis consistent with his innocence. See *Rex v Kipkering Arap Koske & anor* [1949] 16 EACA, 135, *Simon Musoke v Republic* and *John Chebii Sawe v Republic*.

25. In the present case, the reasoning in this case would have applied with force to secure a conviction if the residence where the body was found was solely owned or in possession of the appellant. However, there was extant evidence showing that the appellant lived there with his wife and other family members. Inexplicably, the wife was not jointly charged with the murder. She was, also, not called as a witness because, the record indicates, she disappeared soon after she was arrested, briefly held by the Police and then released. Needless to say is that in the circumstances of this case the wife would be a competent and compellable witness as the charge was in respect to the murder of her child(section127(3)(c)). From the record, it would appear that there were other family members living in the same compound but who were unwilling to testify. In the end, it is not possible to say, on the available evidence that the presumption has to be solely taken against the appellant. In the circumstances of this case there was at least one other person who could have been said to be responsible for the death for the death of the Deceased. Therefore, the inculpatory inference does not unerringly point to only the appellant. The possibility that another person could plausibly have been the author of the crime weakens the inculpatory inference and creates reasonable doubts which must benefit the appellant.

26. In short, the only admissible evidence presented in the trial court was one of motive and strong suspicion but no concrete evidence from which inculpatory inference could be drawn was available. We must, therefore, without relish, say of the evidence in this case what this court said in *Sawe v Republic* [2003] KLR 364:

> " The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

27. And in *Pon v Republic* [2019] eKLR:

> " Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not. The appellant may have acted strangely upon his return from Sierra Leone, for instance, walking with a metal bar and sleeping in the guest house yet he had a house. His warmth and attitude towards the deceased may have changed; he may have had little interest in the issue of the lost child; he may even have denied knowing J. But all these only amount to suspicion and not evidence upon which a conviction may be found."

28. The upshot is that the conviction in this case cannot stand. We reverse the decision of the superior court; quash the conviction and set aside the death sentence imposed. Instead, we enter judgment acquitting the appellant. He shall be released from custody forthwith unless he is otherwise lawfully held.

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