Chepalam & another v Republic (Criminal Appeal 159 of 2019)
[2023] KECA 800 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KECA 800 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 159 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JUNE 30, 2023

BETWEEN

PATRICK CHEMININGWA CHEPALAM ..... 1ST APPELLANT

ANDREW MASAI MALI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence (Chemitei J) dated 18th December, 2018 In Kitale HCCC No.8 of 2009)

JUDGMENT

1. This is the first appeal of Patrick Cheminingwa Chepalam and Andrew Masai Mali (the appellants), against the judgment of the High Court at Kitale, delivered onDecember 18, 2018by Chemitei. J. The appellants were jointly charged with five counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. They were found guilty as charged and were each sentenced to serve life imprisonment in all of the counts.

2. The particulars of the offences were that on the night of 2nd and 3rd March 2008 at Embakasi village, within Trans Nzoia West District, Rift Valley Province, the appellants jointly with others not before court murdered Mary Chesane Mbuya, Samuel Mbuya, Sofy Mbuya, Moses Mbuya and Kibet Mbuya.

3. The appellants denied all the charges, and the prosecution marshalled eight witnesses in a bid to prove their case. Upon the close of the prosecution case, each appellant defended himself without oath and called no witnesses.

4. The prosecution case was that Robinson Mbuya (PW1), was on his way back home from patrol at about 2 am on the material day, when he heard his wife screaming and saw his grass thatched houses on fire. His homestead was surrounded by a group of ten men who were armed with firearms and teargas.

His wife Mary Chesane, and three children; Samuel Mbuya, Sofy Mbuya and Kibet Mbuya were shot and killed in the house. Moses Mbuya, his worker was shot and killed in a different house. His other two children were able to escape with burns.

5. PW1 told the court that he was able to see and identify the assailants by the assistance of the fire from the torched houses and the moonlight. Among the assailants, he recognized the appellants who were his neighbours and were known to him prior to the incident.

6. Sarah Chepkemoi (PW4), a daughter to PW1, testified that at the material time she saw the first appellant when he entered their house and shot her mother and her three siblings. She saw and heard the second appellant whom she knew by the nickname of "House", telling the first appellant that her mother was not dead,prompting the first appellant to shoot her mother again. She testified that she knew the appellants as her neighbours and was able to see and identify them with the assistance of the light from the fire that was burning the grass nearby.

7. Joan Temko (PW5), also a daughter to PW1, told the court that a group of attackers invaded them and ordered her mother, the late Mary Chesane, to open the door. When her mother opened the door, the attackers killed her and three of PW5's siblings using a firearm, as PW5 watched from under the bed. That she was able to see the first appellant with the help of the light from the attackers' own torches and from the burning fire. Further, that the first appellant was her neighbour and was known to her.

8. Stephen Nyoka (PW2), PW1's employee, told the court that on the night of infamy he was awakened by noises outside his house to find his boss's house ablaze. He then heard gunshots before the intruders entered his house and shot him, his children and his wife. He and his wife survived but his children died. He saw six torch bearing attackers and was able to identify some of them as his neighbours, who were also relatives of the appellants. He did not however, see the appellants in his house.

9. Jostin Chemusto (PW3), the wife of PW2, was with him when they were attacked. She testified that she put off a paraffin lamp that was alight in their house when the attackers came in, but was still able to see some of the attackers with the help of the light of their own torches. She testified that she saw the first appellant, who was a neighbour and a relative and was known to her. She stated that the deceased persons were also her neighbours, but she did not know who attacked them.

10. Doctor Donald Makoi (PW8), conducted the postmortem on the bodies of the deceased persons onMarch 7, 2008, in the presence of the police. He produced photocopies of the Postmortem Reports in court which indicated that the cause of death of the deceased persons was severe burns.

11. PC David Kipchumba Kibet (PW7), the Scenes of Crime Officer, testified that they visited the scene of the crime and found many bodies out of which 12 bodies were identified. The rest of the bodies could not be identified due to their condition. PW7 observed that the bodies had gunshot wounds, cut wounds and were also burnt. He took the scenes of crime photographs which he produced in evidence.

12. When put on his defence, the first appellant stated that the police came to his house on the February 18, 2009at 5 p.m and asked him to assist them with their investigations. They took him to Kitale Police station and put him in the cells untilFebruary 28, 2009. He was then moved to Kakuma Police station in Lodwar, where he was charged with the present offence. He denied knowing anything concerning the case.

13. The second appellant told the court that on September 22, 2009he quarreled with his neighbour for trespassing on his land. The following day the neighbour came with police officers,who ordered him to accompany them to the police station to resolve the boundary issue and that is how he was arrested. He stayed in prison for 8 months before the current charges were brought against him and he continued to deny the charges.

14. Upon considering the case before him, the learned Judge found both appellants guilty as charged, for the murder of the five deceased persons. He considered their respective mitigation and sentenced each of them to suffer life imprisonment in all the counts.

15. The appellants, being aggrieved by the above judgment, filed the instant appeal. Their grievance as evinced in the appeal was that the learned Judge convicted them in reliance of dock identification, ignored patent and material inconsistencies and contradictions in the prosecution case and wrongly found that the prosecution had proved its case against the appellants beyond reasonable doubt.

16. During the oral highlighting in the plenary hearing, Mr. Ng'ania reiterated the written submissions dated March 31, 2021filed on behalf of the appellants. He urged that the circumstances prevailing at the material time, were not conducive for positive identification. He contended that PW1 was far from the scene and had in fact, dozed off, while according to the testimony of PW5, the appellants used torches, meaning that there was no sufficient light from either the burning fire, or the moon to enable identification. Further that, the witnesses did not state where the burning fire was located, to help them identify the appellants. In addition, counsel submitted that PW4 and PW5 who claimed that they were under the bed during the attack, could not have seen the faces of the appellants in the smoke that was in the house.

17. Counsel urged that the learned Judge erred in holding that the appellants had not explained to the court their whereabouts on the fateful day. He relied on *Jali Kazungu Gona v Republic* (2017) eKLR and *Republic v Danson Mgunya* (2016) eKLR, both decisions of this court, to submit that it was for the prosecution to prove that the appellants were present and killed the deceased persons and not for the appellants to tell the court where they were.

18. On inconsistencies, it was argued that the learned Judge failed to interrogate whether these attacks took place at the same time or one after the other, to enable him interrogate whether the 1st appellant had been in two places that night. That he also failed to consider whether the appellants were being accused for offenses committed by their relatives.

19. He further urged that PW4 and PW5 were in the house when the attack occurred but they gave contradictory testimonies of what transpired, with PW4 alluding to voice recognition that was not corroborated by PW5. It was his submission that if indeed, PW4 heard what the 2nd appellant told the 1st appellant about her mother not being dead, she would have recounted this evidence to the police.

20. Counsel stated that when PW4 recorded her statement with the police, she mentioned the name of "House" who, according to her, was the 2nd appellant. She did not mention the 1st appellant whom she said shot her mother and her siblings, to the police. Counsel buttressed this position with this court's decision in *Simiyu & another v Republic* (2005) 1 KLR 192, where the witnesses did not give the appellant's names to the police soon after the attack and the Court held that:

> "...though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification"

21. Counsel submitted that the investigating officer's testimony did not disclose who planned, led and executed the arson. He relied on thiscourt's decision in *Jackson Namunya Tali v Republic* (2017) eKLR, to urge that this was a case of mere suspicion and it has been held time without number that mere suspicion, however strong, can never sustain a charge in a criminal case.

22. Counsel further faulted the learned Judge for holding that the appellants had common intention to kill the deceased persons, when the prosecution did not lead any evidence to prove a common intention between the appellants and the ingredients for common intention in the circumstances of this case were not met.

23. In light of the foregoing counsel urged that the prosecution did not prove its case against the appellants beyond reasonable doubt and the appeal should therefore succeed.

24. In rebuttal, the Director of Public Prosecution filed written submissions dated January 23, 2023on behalf of the respondent. During the virtual hearing Senior Assistant Director of Public Prosecution, Ms. Kiptoo urged on behalf of the respondent that the evidence of PW1 was that of recognition and was properly corroborated by the other prosecution witnesses. That the said evidence placed the appellants at the scene of the murder.

25. Counsel also argued that the incident took time and therefore, the witnesses had ample opportunity to recognize the appellant in the circumstances. To bolster her point, she relied on this court's decision in *Anjononi and 2 others v Republic*, Criminal Appeal No. 480, 208 and 209 of 1978 where it was held that:

> "....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or other."

26. She also submitted that in *Erick Onyango Ondeng v Republic*, Criminal Appeal No 5 of 2013, this court held that:

> "...as noted by Uganda Court of Appeal in *Twehangane Alfred v Uganda*, Crim App No 139 of 2001 (2003) UGCA 6 that it is not every contradiction that warrants rejection of evidence".

27. Counsel asserted that therefore, there was no material or grave inconsistencies and contradictions in the proceedings that affect the main substance of the prosecution's case.

28. Ms. Kiptoo also submitted that the appellants had a common intention together with others, to commit the murder. She asserted that the trial court correctly observed that the appellant knew that the shooting and burning of the people would result in death, which it did.

29. It was counsel's view that the prosecution proved the elements of murder beyond reasonable doubt and the appeal should therefore, fail.

30. We have considered the record of appeal, the submissions of both parties and the law. As stated earlier, this is a first appeal and the duty placed on this court sitting on a first appeal is as was captured in *Irene Nekesa Peter v Republic* [2014] eKLR, thus:

> ".....we are under a duty to re-examine and re- evaluate the evidence on record with the aim of reaching our own conclusions, subject to the caveat, however, that we had no advantage, as the trial court did, of seeing and hearing the witnesses."

31. In the case of *Irene Nekesa supra*, this court was following the principles set out in the often-cited case of *Okeno v R* (1972) EA p 32 at p 36, where the court observed that:

> " 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 p 336) and to the appellate court's own decision on the evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* (1957) EA p 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings 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* (1958) EA p 424"

32. In our view therefore, this appeal turns on the sole question whether the prosecution proved beyond reasonable doubt that the appellants were among the arsonists who caused the death of the deceased persons.

33. The appellants were charged with murder contrary to section 203 as read together with section 204 of the *Penal Code*. Section 203 of the *Penal Code* provides that:

> " Any person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder"

34. For the offence of murder to be deemed to have occurred, this court held in *Anthony Ndegwa Ngari v Republic* [2014] eKLR, that the elements that must be proved are that:

> " (a) the death of the deceased occurred;
>
> b. the accused committed the unlawful act which caused the death of the deceased; and
>
> c. the accused had malice aforethought."

35. In the case before us, it is not in dispute that the deceased persons died as a result of being shot by armed men who also set their houses ablaze. It is also not in dispute that the persons who set their houses a blaze did so deliberately and with malice aforethought, intending to cause the death of the victims. What is in dispute is whether the appellants were among the people who committed the ignoble act.

36. The appellants cast doubt on their identification by the prosecution witnesses. It was their argument that the circumstances of the incident were such that the witnesses could not have properly identified them. In rebuttal, the respondent argued that PW1 recognized the appellants, and the other prosecution witnesses corroborated his evidence by placing the appellants at the site of the incident at the material time.

37. The learned Judge considered the evidence of identification and stated thus:

> " 24. The entire prosecution evidence against the accused persons centered on the fact that they were seen at the scene of the incident. Nearly all the key witnesses explained that by the time they were woken up, the houses had been set ablaze and it was almost a miracle to get out. Those who survived sustained gun shots or some fire burns.

25. They explained that they were able to recognize the accused persons courtesy of the light from the fire from the grass thatched houses.

31. In my view therefore the accused persons were clearly placed at the scene. The lights from the burning houses was sufficient enough to have enabled the witnesses identifying the attackers. They took time, almost 30 minutes which essentially, despite the commotion that existed, for them to be identified."

38. In *Wamunga v Republic* (1989) KLR 424, this court spoke on the evidence of identification generally, in the following terms:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

39. We therefore, analyzed the record before us to establish whether the circumstances of identification were free from possibility of error and could sustain a conviction.

40. PW1 testified that he heard the screams of his wife followed by the sound of gunshots coming from his homestead. He looked over and saw his house on fire and there were about ten men surrounding it. He identified them as the appellants, whom he knew as his neighbours. PW1 did not however, state how far he was from his house as he observed what was going on and whether the ten men remained stationery for him to observe them.

41. PW4, testified that the attackers had already set the other houses ablaze in the compound, by the time they entered her home. That, when her mother opened the door, the assailants came in and shot her mother and siblings immediately. PW4 was however, able to identify the 1st appellant as the shooter and the 2nd appellant, whom she knew by the nickname of "House" as the one who told the 1st appellant that her mother was not yet dead. She recognized the appellants as her neighbours. PW5 also testified that she recognized the 1st appellant, who was their neighbor. The witnesses stated that they were able to see, and recognize the first and second appellants with the help of the light from the blaze, from the moon and also from the torches of the attackers. PW3 also stated that she identified the 1st appellant among the people who decimated her family.

42. This was taken as a case of recognition of the assailants who were well known to the witnesses as their neighbours and (one as a relative to PW3) hence, no identification parades were conducted. In *Anjononi and others v The Republic* [1980] KLR, this court pronounced itself as follows on identification by recognition;

> " The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused.
>
> Being night time the conditions for identification of the robbers in this case were not favourable.This was, however,a case of recognition,not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. (emphasis added).

43. We analyzed the record to establish whether the circumstances prevailing at the material time, were conducive for positive identification of the appellants.

44. To begin with, the encounter occurred at night. Secondly, if the light from the inferno was sufficient, the assailants would not need to use torches and even if they did use torches, they most probably would be flashing them away from themselves and not on their faces to aid in identification. Thirdly, it is not clear how PW4 and PW5 who said they were hiding under the bed as members of their family were butchered, were able to see and identify any of the assailants. Fourthly, we note that whereas (PW3) said she recognized the 1st appellant, who was a neighbour and a relative as one of the attackers, PW2 her husband who was with her in their hut said he did not see the 1st appellant at the scene.

45. Our fifth concern was that although the witnesses testified that the assailants were neighbours who were well known to them, they did not supply their names in the first report to the police. Lastly, we observe that the offences occurred on March 3, 2008 and it was not until February 18, 2009, almost a year later that the appellants were arrested.

46. Having anxiously examined the record of appeal, we find that the foregoing circumstances do not commend themselves to the conclusion that this conviction was safe. Consequently, we find merit in this appeal and allow it. The appellants are therefore set at liberty forthwith, unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR