Kibet alias Kipmwetich v Republic (Criminal Appeal 98 of 2019) [2023] KECA 735 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KECA 735 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 98 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JUNE 16, 2023

BETWEEN

ALEX KIPNGETICH KIBET ALIAS KIPMWETICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret, (Githinji, J.) dated 15th November, 2018 in HC.CR.A. No. 64 of 2011)

JUDGMENT

1. Alex Kipngetich Kibet alias Kipmwetich 'the appellant' was charged in the High Court at Eldoret, with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. The particulars in the information were that on the night of 16th and September 17, 2011 at an unknown time in Chebunet village of Chebiemit sub-location in Marakwet West District of the then Rift Valley Province, the appellant jointly with others not before the court murdered Joseph Kigen Banua, 'the deceased.'

3. The appellant denied the charges and his trial soon thereafter ensued. In a bid to prove its case against the appellant, the prosecution lined up a total of 8 witnesses.

4. PW1 was the doctor who conducted post mortem on the body of the deceased. His findings were that the face of the deceased was soiled with blood, not pale, had two cut wounds 2cm x 1cm at supra orbital area, a petechial on chest wall bilaterally about 3cm x 4cm, bruises on right and left upper limbs around the elbow and visible strangulation marks around the neck. There were clots on the chest wall bilaterally around the 5th -7th rib. The lung was fibrosed and there was congestion around the neck. There was a right parietal depressed skull fracture and laceration on the skull. The cerebrum was congested with blood.

5. The cause of death was found to be asphyxia due to strangulation. The head injury was not severe as to cause death.

6. PW2 was a bar attendant at Springs bar. On September 16, 2011 he saw the deceased lying on the grass outside Kokwet bar. He went and turned him and noted that he was asleep. He went back to the bar where the appellant ordered a beer. After being served the appellant went away. He then closed the bar. The following day, he was informed by one Kibet that the deceased had been killed.

7. On September 19, 2011 he and the appellant were in attendance at a Baraza that was aimed at finding a suspect. The appellant then pulled him aside and warned him not to tell anyone that he had seen him at Chebiemit on the material night.

8. PW3 was the step brother to the deceased. He was called and informed to go home as the deceased had been killed. He found the body of the deceased in a hole on the farm near the road.

9. PW4 was a bar attendant at Kokwet bar. She was asleep in the bar at around 11pm on September 16, 2011 when she was awakened by noise or screams from the deceased who was saying 'unaniua na sijakula kitu ya mtu.' She switched on the electricity lights and looked through the window. She saw the appellant beating up the deceased with a piece of wood at the front of the bar. The appellant continued to beat the deceased who was drunk as he dragged him. She had known the appellant for 2 years.

10. PW5 was at the time of the incident stationed at Chebiemit police station. On September 19, 2011 he and three of his colleagues attended a Baraza about 2 Kilometres from Chebiemit Police Post. The baraza was aimed at assisting with the investigations. They had received information from people who had been in the bar, including PW2, that the appellant was the suspect. The appellant was the last person to have been seen with the deceased. They arrested the appellant at the meeting. The appellant was later re-arrested by police officers from Kapsowar Police Station.

11. PW6 was walking home after leaving Springs bar. He was called by the appellant whom he recognized by his voice. He had known the appellant since birth as they were neighbours. The appellant informed him of a luggage he wanted help to carry. He accompanied the appellant to Kapsiliot road about 30 metres away where he found “the luggage” to be a drunk person. He was able to recognize the drunk person as the deceased; he did so with the help of moonlight. The appellant asked him to help put the deceased’s arms over his shoulders and they walked him up to the junction that led to his home about 300 metres away. The appellant then asked him to leave them there and he obliged.

12. PW7 was the investigating officer. He revisited the scene of murder after taking over investigations. He also visited Kokwet bar. He was informed that the appellant had quarrelled the deceased and started beating him up. PW4 saw the appellant beat up the deceased with a cider post while PW6 stated that the appellant asked him to help carry a 'luggage', who turned out to be a badly injured person. It was alleged that the appellant threatened them with death, if they did not comply with his orders or if they revealed what they had seen. On September 17, 2011 the body of the deceased was discovered by some herdsmen. He looked for the appellant but did not find him until September 19, 2011 when he was arrested.

13. PW8 was the in-charge at Chebiemit Police Post. Upon receiving information of a body lying somewhere, they proceeded to the location and found the body in a praying position near the river. The scenes of crime officers took photos and the body was later moved to Iten mortuary.

14. Put on his defence, the appellant in his sworn statement of defence stated that on the material night he was at home. He stayed with his father until 9pm and then went to sleep. At about 11 pm he was woken up by his father to go drive out the cows that had moved to the farm. He did so and went back

to bed. The following day, he bought 60 litres of diesel and returned home. He went to buy a tyre tube to repair his bicycle but was informed the shop owner had gone to the scene where his neighbour's body had been found. He also went to the scene. The police arrested PW6 as a suspect on September 19, 2011 and he was called to help with the investigations. He denied being Alex Kipngetich or killing the deceased.

15. DW2 stated that they had supper at 10pm together with the appellant. At 11pm he called the appellant to remove the cows from the farm. At 8am the following morning he saw the appellant in his house. He heard of the death of the deceased at 5pm. He later heard that the appellant had been arrested in connection to that offence.

16. The Learned Judge in his judgment noted that the evidence of PW1 left no doubt that the deceased was murdered due to the visible body injuries and the cause of death being asphyxia due to strangulation.

17. On the question as to who murdered the deceased, the learned Judge considered the evidence of PW4, PW2 and PW6 who all saw the appellant and the deceased on the material night. He stated that their evidence was not shaken during cross- examination. None of them had a grudge against the appellant. Their evidence placed the appellant at the scene.

18. The court noted that PW4 saw the appellant assaulting the deceased with a stick. The decree of the assault was a reflection of the desire of the appellant to cause grievous harm to the deceased.

19. There was ample light which enabled PW4 to see him. The appellant was also very well known to PW4 and PW6. The evidence was that of recognition. The last person to be seen with the deceased alive was the appellant.

20. The court further stated that the reason why the appellant ordered PW6 to leave him alone with the deceased, was suspect; and also that the only reason he told PW2 not to state the events of Friday in the Baraza was to conceal the murder.

21. The learned Judge concluded that even though there was no witness who witnessed the deceased being strangled, the available circumstantial evidence pointed irresistibly to the appellant's guilt. The evidence was incompatible with his innocence and incapable of explanation upon any other hypothesis than that of his guilt.

22. The court held that the appellant's alibi defence was an afterthought. He did not raise his line of defence during cross-examination. It was raised for the first time when the appellant had been put to his defence.

23. Subsequently, the appellant was convicted and sentenced to serve 25 years' imprisonment.

24. Aggrieved by the conviction and sentence, the appellant filed the present appeal and raised eight grounds; to wit that the Learned Judge erred in law and in fact by failing to find and hold that: there was no direct evidence of identification pointing at the appellant; the cause of death was not clearly established by the prosecution; the prosecution evidence was full of contradictions; the weapon allegedly used to hit the deceased was not produced in evidence; there were witnesses who did not testify when the case started de novo; the evidence of PW8 vindicated the appellant; the evidence of alibi was not considered; and that the witnesses who testified de novo changed their testimonies.

25. When the appeal came up for hearing, Mr Miyienda, learned counsel appeared for the appellant; whereas Ms Githaiga, learned prosecution counsel represented the respondent. They both relied on their written submissions and opted not to highlight the same.

26. The appellant submitted that there was no direct evidence of identification pointing to him. The appellant contended that the evidence of PW2 and PW4 on identification was contradictory. That the witnesses changed their statements when the suit started de novo.

27. The appellant further contended that Alex Kipng'etich Kibet alias Kimwetich on the charge sheet was different from DW1 who was Joseph Kipng'etich Kibet. The appellant submitted that the person arrested by PW8 was PW6 and not him. That PW8 identified the appellant at the dock as PW6. The appellant further submitted that there was no light to enable anyone identify him anywhere at the scene of the alleged murder.

28. The appellant submitted that the cause of death was not clearly established by the prosecution as the post mortem report was inconclusive. He further submitted that in the absence of the murder weapon, the prosecution evidence was weakened.

29. The appellant took issue with the witnesses who failed to testify when the matter started de novo and stated that their evidence was detrimental to the prosecution case.

30. The appellant submitted that his alibi defence was not disproved by the prosecution.

    He was at home on the alleged dates when the murder occurred.

31. The respondent submitted that the offence of murder was proved beyond reasonable doubt. Counsel maintained that PW4 saw the appellant beating the deceased with a cider post/wooden stick while PW6 assisted the appellant carry the deceased towards his home. The appellant was the last person to be seen with the deceased alive. The cause of death was proved by PW1 to the satisfaction of the court.

32. Relying on the testimony of PW4, PW6, PW2 and PW1, counsel submitted that the appellant committed the unlawful act which caused the death of the deceased. That even though the deceased had an underlying medical condition, his immediate cause of death was asphyxia.

33. On identification, counsel submitted that PW4 was able to identify the appellant while he was beating the deceased 3 metres from her when she turned on the electric lights.

34. PW6 was able to identify the appellant through his voice as he had known him since he was born. He also assisted the appellant carry the deceased until the junction which was 300 metres away from the appellant's home; where he left the appellant with the deceased. Counsel maintained that all eye witnesses positively identified the appellant and that the identity of the appellant was that of recognition. To buttress the submission, counsel relied on the case of *John Muriithi Nyaga v Republic [2014] eKLR*.

35. As regards malice aforethought, counsel relied on the evidence of PW1, PW2, PW4 and PW6 in submitting that the actions by the appellant were planned and deliberately aimed at causing the death of the deceased.

36. Counsel contended that the appellant did not raise the defence of alibi during cross- examination hence it was an afterthought. Be that as it may, the evidence was watered down by the evidence of PW4 and PW6. Counsel stated that the appellant was arrested 2 days after the incident which was ample time for him to get rid of the murder weapon. That this evidence was corroborated by that of PW5, PW7 and PW8.

37. Relying on the decision in the case of *Richard Munene v Republic [2018] eKLR* and the evidence of PW2, PW4, PW6 and PW1 counsel submitted that the prosecution case was seamless and the evidence was well corroborated.

38. Counsel further submitted that it was dishonest for the appellant to state that the witnesses had changed their testimonies and some were never recalled when the provisions of Sections 200(3) and 201(2) were clear. Counsel stated that the only witness not called was PW3 in the initial case as the witness had since relocated to Uganda and could not be traced. To further buttress this submission counsel referred to the case of *Ndegwa v Republic [1985] eKLR* and *Abdi Adan Mohammed v Republic [2017] eKLR* for the proposition that -

> ' where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his evidence cannot be obtained without an amount of delay or expense, which in the circumstances of the case the court considers unreasonable, the evidence given earlier by that witness, in the proceeding, is admissible.'

39. On sentencing, counsel noted deterrence and retribution as some of the objectives of sentencing. That it was evident that the appellant clearly planned on how he was going to execute the murder and try to cover up the same. Counsel stated that the learned Judge properly exercised his discretion in sentencing the appellant to 25 years' imprisonment.

40. We have considered the appeal, submissions made by counsel and the law. The issues for our determination are whether the appellant was properly identified; and whether the prosecution case was proved beyond reasonable doubt in light of the alleged contradictions and the appellant's alibi defence.

41. This being a first appeal, the appellant has a legitimate expectation that the entire evidence adduced before the trial court would be subjected to a fresh evaluation and analysis. When undertaking the task, we would bear in mind that we neither saw nor heard any of the witnesses; and have to give due allowance for the same. It is our mandate as set out in Rule 29(1) of the *Court of Appeal Rules* to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant. We have a duty to reconsider the record in totality as laid before the trial Judge. In the case of *Issac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No 272 of 2005* this court held that:

> ' In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.'

42. As regards identification, the appellant contended that he was not the appellant in this case, as his name is Joseph and not Alex. We have failed to reconcile how the appellant lodged the present appeal in the names he claims are not his and how he was able to stand trial if at all the names in the charge sheet were not his. Did he respond to the name every time it was called out? Was he able to cross-examine witnesses in the same name? Why is the issue being raised before this court now? The appellant has not demonstrated how he went through a trial as an accused person who was different from him. If he was a person other than the accused, that ought to have been the first issue he would have raised before the trial court; and the court would have been required to make a determination of that issue at the earliest opportunity. As the appellant did not raise the issue, the trial court had no reason to determine it. In any event, the conviction was not based upon the identification of the perpetrator, by his home.

43. Section 382 of the *Criminal Procedure Code* which provides:

> ' Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision

on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.'

44. This Court in the case of *Peter Ngure Mwangi v Republic [2014] eKLR* was guided by the case of Peter Sabem Leitu v R, Cr App No 482 of 2007 (UR) where the Court held thus:

> ' The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.'

45. We therefore, find this claim by the appellant to be an afterthought. It cannot be determined on an appeal, when it was neither raised nor determined by the trial court. In any event, the arrest of the appellant was not pegged upon the name under which he was later tried and convicted. The appellant was arrested based on evidence of recognition as the person who had fatally assaulted the deceased.

46. PW4 was able to identify the appellant when she was awakened from sleep and turned on her lights. She had known the appellant for 2 years and was able to identify the clothes he was wearing on the material night. PW6 was able to recognize the appellant by his voice when he called him to assist in carrying luggage. They had known each other since childhood. He walked with the appellant to where the deceased was and assisted the appellant in carrying the deceased for a while. PW2 testified that the appellant visited Springs Bar on the material day. PW2 had no reason to think that there was any ill-motive on the appellant's visit to the bar until the appellant threatened him not to tell anyone that he was at the bar on the material night. PW2 used to work as an attendant at the said Springs Bar.

47. The source of light was the electricity light used by PW4. The witnesses were consistent in cross examination on the sequence of events on the material night including the identity of the appellant and the weapon used. PW4 saw the appellant beating the deceased with a cider/wooden stick. PW6 found the deceased had been badly injured he could not walk on his own. PW6 also stated that they did not take the deceased to his home, as the appellant demanded they leave him with the deceased. What transpired after that is unknown.

48. From the foregoing, it cannot be said that the witnesses formulated a story so consistent as to implicate the appellant who they had no grudges against. They had no reason to lie to court. The appellant was mentioned by all the prosecution witnesses by name. In the case of *Cleophas Otieno Wamunga v Republic [1989] eKLR*, this Court while dealing with the complexities of an identification of an assailant stated:

> ' It is trite law that where the only evidence against a defendant is evidence of identification of 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.'

49. Similarly, in *Lesarau v R, 1988 KLR 783*, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name.

50. In *R v Turnbull, [1976] 3 All ER 551*, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state:

> ' Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'

51. In the case of *Reuben, Taabu Anjononi & 2 Others v Republic [1980] eKLR* the Court stated thus:

> ' This, however, was 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. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported.)'

52. Having warned ourselves of the dangers of mistaken identity when it comes to recognition, it is our view that in the present circumstances, the appellant was recognized by both visual (PW4) and voice recognition (PW6). The appellant was placed at the scene of crime by three of the eight prosecution witnesses.

53. On whether the prosecution proved its case beyond reasonable doubt, the prosecution called eight witnesses in an attempt to prove its case. The learned Judge chose to believe all these witnesses. Malice aforethought had been proved by the evidence of PW7 who stated that the appellant had quarrelled with the deceased and started beating him in a fight that was one-sided as the deceased did not fight back. The fact that the appellant failed to take the deceased home or to the hospital despite being seriously injured and opted to have him dropped by the roadside was sufficient proof he intended to kill him. The appellant had knowledge that his actions would cause the death of the deceased since the deceased could not even walk on his own and he could not carry him by himself and would require assistance to do so yet he sent away the person who was assisting him. At the very least, the appellant did not care whether or not the deceased died. If he had cared, he would have helped him to get either home or to the hospital. Instead, he abandoned him after causing him to suffer serious injuries through assault.

54. We note from the medical record that the degree of head injuries inflicted on the deceased was enough to kill him without strangulation and yet the deceased was strangled to death. The appellant had resolved to beat the deceased with the intention of inflicting fatal injuries on him and when he failed to die from the beatings he was strangled to death. In the case of *Republic v Oyier [1985] KLR 553*, this court laid down this principle:

> ' The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings

or it was shown that the trial magistrate erred in his findings or that he acted on wrong principles.'

55. Guided by the above principle, we find that the trial court which had the occasion to observe the witnesses when they testified formed an impression that they were truthful and therefore credible. The appellant contended that the evidence by prosecution witnesses was contradictory. From the record, we find no contradictions in the evidence which would affect the outcome of the case. In the case of *Jackson Mwanzia Musembi v Republic [2017] eKLR* this Court quoted with approval the decision in the case of Uganda Court of Appeal in Twehangane Alfred v Uganda, [2003] UGCA, 6, where the court noted that it is not every contradiction that warrants rejection of evidence. The court stated:

> ' With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.'

56. The learned Judge acted on the evidence tendered on the record and correctly analyzed it and applied the correct principles of law, to the facts at each and every stage of the analysis. No issues were misapprehended. Accordingly, we find that the offence was proved beyond reasonable doubt.

57. The appellant alleged that the prosecution failed to call some of the witnesses who had testified before the matter began de novo and that the murder weapon was not produced in court. It is trite law that the prosecution is not required to call all possible witness under Section 143 of the *Evidence Act*. In *Keter v Republic [2007] 1 EA 135* the court held inter alia that:

> ' The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.'

58. In light of the evidence and conclusions reached, there was no need for the prosecution to call more witnesses or produce the murder weapon. The evidence on record was sufficient to link the appellant to the crime.

59. As regards the appellant's alibi defence, we find that by setting up an alibi defence the appellant did not assume the burden of proving its truth so as to create doubt in the prosecution case as in the case of *Ssentale v Uganda [1968] EA 365*.

60. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution, as was held in *Wang'ombe v Republic [1976-80) 1 KLR 1683*. It is common ground that the appellant raised what he calls his alibi defence for the first time while giving his testimony on defence. Be that as it may, given the implicit nature of an alibi defence, the appellant bore no burden to prove his alibi. He would still have been entitled to the benefit of the doubt, if his alibi cast doubt on the case presented by the prosecution.

61. In the case of *Ganzi & 2 Others v Republic [2005] 1 KLR 52* this Court stated that:

> ' Where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.'

62. We find that the alibi defence, when weighed against the evidence on the record, is completely displaced and does not hold.

63. Having considered the evidence on record and the circumstances of this case on its own merit, we are not inclined to interfere with the findings by the trial court. The upshot is that the appeal is without merit and is hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 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