Tengesi v Republic (Criminal Appeal 216 of 2014)
[2023] KECA 697 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KECA 697 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 216 OF 2014

F SICHALE, LA ACHODE & WK KORIR, JJA

JUNE 16, 2023

BETWEEN

JULIUS LESHO TENGESI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 25th July 2014 IN HC. CRA NO. 83 OF 2007)

JUDGMENT

1 Julius Lesho Tengesi (the appellant herein) was charged together with George Kimani Kinoti with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence were that on July 13, 2007, at Ngamini village in the then Nyandarua district within the Central Province, jointly murdered Joseph Kimani Kariuki alias Sendeu.

2 The appellant was tried and convicted of the offence and sentenced to 43 years' imprisonment while his co-accused was acquitted of the offence, the court having found no circumstances directly linking his co-accused to the offence. Being aggrieved with the conviction and sentence, the appellant filed this appeal *vide* a notice of appeal filed in court on August 14, 2014, raising 7 grounds of appeal. Subsequently, thereafter the appellant through his counsel filed supplementary grounds of appeal dated December 9, 2022},raising the following grounds of appeal:

1. The learned trial judge erred in law and fact by relying on contradictory evidence.
2. The learned trial judge erred in law and in fact by relying on retracted confession.
3. The learned trial judge erred in law and fact by concluding that the blood stains found on the appellant's clothes belonged to the deceased.

4. The learned judge erred in law and fact by holding that since the appellant was frightened was a sign of guilt.

5. The learned trial judge erred by law and fact in relying on the evidence of the appellant in convicting him instead of the evidence of the prosecutor (sic) witnesses.

6. That the sentence of 43 years was extremely harsh and excessive."

3 When the matter came up for plenary hearing on December 14, 2022, Mr Ombati, learned counsel for the appellant sought to rely on his written submissions dated December 9, 2022. Counsel submitted that the circumstantial evidence relied upon by the prosecution had other co-

4 existing circumstances which weakened the inference of guilt; that the learned judge relied on evidence of witnesses which was contradictory as while PW1 said that the Motorola cellphone and receipt was recovered from the deceased's house, PW8 said that he recovered it from the pocket of the appellant.

5 He further submitted that the learned judge erred in law and fact by holding that the blood stains on the clothes submitted for analysis belonged to the deceased in convicting the appellant, hitherto, in the absence of analysis of blood samples of the appellant; the findings thereon did not advance the prosecution's case.

6 Mr Ondimu for the state conceded the appeal.

7 We have carefully considered the record of appeal, the submissions by counsel, the authorities cited and the law. This being a first appeal, this court is mindful of its duty as a first appellate court. This duty was well articulated by this court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a 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 demeanour and so the first appellate court would give allowance for the same"
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> A brief analysis of the evidence in the trial court is however necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellant. The evidence before the trial court was as follows:
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> On July 14, 2007, PW1, Abdallah Karungo Kinyariro had returned home from a place called Shamata. Acting on information, he proceeded to the river and found one Njeri and her husband on the opposite bank of the river and Njeri showed him a white nylon sack which was inside the river and blood was oozing from the sack. He then telephoned one Joseph Karanja and told him that there appeared to be a body in a sack inside the river and asked him to proceed to the scene and if possible bring other people along with him.
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> It was his further evidence that over 30 people came and one, Njogu (PW2) opened the sack and they found a human body of a male person which they were not able to recognize immediately but on checking closely, they discovered it was that of Sendeu. He then called the police and called for the appellant as he thought he would know of the deceased's

8 whereabouts since they worked together as watchmen. On enquiry, the appellant stated that the deceased had gone to a Church in Gilgil. PW1 doubted this information as to the best of his knowledge; the two never went to church in Gilgil but attended one at a place called Magutu which was 4 kilometers from his farm.

9 He further testified that he told the appellant and his co-accused that the deceased's body had been discovered in the river but they did not express any shock but looked afraid. The police then came later and took away the body together with the appellant and his co-accused.

10 On July 14, 2007, PW2 Patrick Njogu Ngugi, also acting on information proceeded to the scene and found PW1 and one, Mama Njeri. He then got into the river and retrieved the sack which had a body inside. On checking, he confirmed that indeed the body was that of Sendeu whom he knew as he used to work together with the appellant. Later on, a group of people came to the scene with the appellant and his co-accused and when the appellant was asked whether he had seen the deceased that day, he stated that he had not seen him and that he thought that the deceased had gone to Church.

11 PW3 was Eliud Kihara Maina. It was his evidence that on July 14, 2007, at about 4:00PM, he was at a place called Ngamini trading center when he heard that something had been found in the river within PW1's farm. He proceeded to the scene and saw a sack that had a body inside which he identified to be that of the deceased (Sendeu). It was his further evidence that after identifying the body, they decided to look for the deceased's co-worker (the appellant herein) to find out from him if he knew of the deceased's whereabouts and that the appellant told them that the deceased had gone to Church in Gilgil and would not be coming back. He stated further that, as they were questioning the appellant, they noticed that he looked frightened.

12 PW4 was Mary Njoki Fundi. She testified that on July 14, 2007, she was irrigating her land when she saw a sack in the river and called PW1 who came along with many other people and they removed the sack from the river which had a body that had deep cuts on the head and they discovered that it was the body of Kimani who was also known as Sendeu. PW1 then called the police and they left the body on the river bank.

13 PW5 was Beatrice Wanjiku Masai. It was her evidence that she knew the deceased who was her employee as a farm worker on a land that she had leased from PW1. She stated further that, on July 14, 2007, she was called by PW1 and informed that the deceased had been found murdered by the river side.

14 PW6 was George Mungai. It was his evidence that on July 14, 2007, he heard people screaming that a body had been found in the river at PW1's farm. He rushed to the scene and identified the body to be that of Joseph Kimani Kariuki alias Sendeu. He noted that the deceased had serious injuries on the head.

15 PW7 was Dr Fredrick Kariuki who produced a post mortem report in respect of the deceased prepared by Dr Luire. According to the report, the deceased's head was totally deformed with multiple cuts on the skull. The jaw bone was deformed with loose teeth both on the upper and lower jaw. The respiratory chest wall was intact and the lungs were also intact. There was massive bleeding on the brain tissue. He formed the opinion that the cause of death was due to severe head injury caused by massive trauma on the head.

16 PW8 was Corporal Samuel Njoroge. It was his evidence that on July 14, 2007, he received a telephone call from PW1 who alleged that there was a body floating in Pesi river. He proceeded to the scene together with his colleagues and arrested the appellant and his co- accused who were suspected by members of the public. He then searched the appellant and recovered a mobile phone make Motorola

which allegedly belonged to the deceased. He later moved the body to Nyahururu District Hospital Mortuary for post mortem.

17 PW9 was Paul W. Kange'the who produced a report from the Government Chemist on behalf of Joseph Kagunda Kimani, his colleague who was away in China for further studies. According to the report, clothes marked exhibits "A", "B", "C" and the shoes "D" and "F" had no blood stains. The jacket marked "E" was slightly stained with human blood of group "A.

18 The appellant in his defence gave a sworn testimony and called no witness and denied having committed the offence. He further denied having ever worked or lived with either the deceased or his co-accused.

19 Having carefully gone through the record and the pleadings, we have framed the following two issues for determination:

1. Whether the learned judge erred in law and in fact in relying on circumstantial evidence? And if not

2. Whether the sentence imposed upon the appellant was harsh and excessive?

20 It is indeed not in dispute that no one witnessed the deceased being murdered. The prosecution's case was therefore entirely hinged on circumstantial evidence. According to PW1's evidence, after discovering the deceased's body, he called the police and called for the appellant as he thought he may have information on the deceased's whereabouts since they worked together for PW5. He further testified that after the police came, they proceeded to the deceased's house which was locked and upon breaking the same they found the deceased's mobile phone and a receipt.

21 PW8, the investigating officer in this case, on the other hand testified that he arrested the appellant and his co-accused as they were suspected by members of the public. He contradicted PW1's evidence when he stated that he recovered the deceased's phone upon searching the appellant from the appellant's pocket whereas PW1 in his evidence stated that the deceased's phone was discovered in his (the deceased's) house.

22 He further testified that in his investigations, he was able to establish that the deceased owed the appellant Kshs 2,000/= and that he got this information from PW1. PW1 in his evidence however made no mention of any debt as testified by PW8. As a matter of fact, he stated that he was not aware of any acrimony between the appellant and the deceased.

23 PW9, the Government Analyst in his report was of the view that the blood samples of the suspects should have been submitted for analysis.

24 From the evidence on record, it is evident that there was no evidence directly linking the appellant with the death of the deceased. From the evidence of PW1, PW2, PW3 and PW8, the appellant was merely suspected because he used to work with the deceased.

25 In the *locus classicus* case of *Rex v Kipkerring Arap Koske & 2 others* [1949] EACA 135 it was stated as follows as regards circumstantial evidence:

> "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." (emphasis ours).

26 In *Musili Tulo v Republic* Cr App No 30 of 2013 [2014] eKLR, this court laid down the test to be applied in considering whether circumstantial evidence can find a conviction by stating as follows:

> Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr App No 32 of 1990, this court set out the conditions as follows:
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> > It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 the guilt of the accused; 9iii) the circumstances taken cumulatively, should from 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.""

27 The contradiction in the testimonies of PW1 and PW8 regarding the recovery of the deceased's phone ought to have been resolved in the appellant's favour.

28 Additionally, the evidence of PW9, the Government Analyst that the clothes analyzed had human blood group "A" did not advance the prosecution's case, bearing in mind that no blood samples were taken from the appellant. As a matter of fact, PW9 opined that the blood samples of the suspects should have also been submitted for analysis. In cross examination, he reiterated that it was imperative to take samples of the appellant for comparative purposes and that further it was difficult to say whether the blood on the jacket was that of the deceased or the appellant. We dare say that the evidence of this particular witness which the learned judge partly used to convict the appellant was of no probative value and was worthless as he simply gave out the blood group found on the items submitted for analysis. We further decry the casual manner in which investigations were carried out in this matter which was extremely shoddy and substandard.

29 We think we have said enough to show that the circumstantial evidence on record does not unerringly point towards the guilt of the appellant nor, taken cumulatively, does it form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and no one else. By the same breath, we also think there was a total omission by the trial court's failure to consider the twin principle namely; whether there were any co-existing circumstances that weakened or destroyed the inference of guilt of the appellant, one such circumstance being the contradictory evidence ofPW1 and PW8 and the serious omissions contained in the report adduced by PW9, the Government Analyst.

30 From our own evaluation of the evidence on record, we are satisfied that the offence charged was not proved to the required standard beyond any reasonable doubt. Whereas it may be true that there were serious suspicions that the appellant may have indeed killed the deceased, coupled with the fact that he did not appear to be a credible witness, it has been stated severally that suspicion however strong cannot be a basis of finding a conviction and we are inclined to give the appellant the benefit of doubt. We are grateful to Mr Ondimu, the learned state counsel for conceding the appeal and hasten to add that state counsel, being officers of the court, should when circumstances call for concession, be able to concede anappeal.

31 Regarding the sentence of 43 years that was imposed upon the appellant, it would be superfluous to consider the same having found that the appellant's conviction was not safe.

32 Accordingly, we quash the conviction and set aside the sentence imposed on the appellant and order that he be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Nakuru this 16th day of June, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR