Eshibukule v Republic (Criminal Appeal 33 of 2017)
[2023] KECA 731 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 731 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 33 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

JUNE 9, 2023

BETWEEN

JAMES LUKALE ESHIBUKULE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (R.N. Sitati, J.) delivered and dated 22nd December 2016 in HC CR Appeal No. 149 of 2012)

JUDGMENT

1. The appellant, James Lukale Eshibukule, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The information alleged that he unlawfully caused the death of one Veronica Akumu (hereinafter referred to as the deceased) on the December 20, 2010 which offence is said to have been committed within Emungweso Village, Kisa East Location, Khwisero District within the former Western Province. The appellant pleaded not guilty to the offence and after a trial that took close to six years, he was found guilt, convicted and sentenced to suffer death.

2. The appellant has now preferred this appeal on three grounds namely that the offence was not proved beyond reasonable doubt; that the trial court erred in rejecting his defence; and, that the learned Judge erred by shifting the burden of proof to him.

3. This is a first appeal and under Section 379(1) of the *Criminal Procedure Code* and Rule 31(1)(a) of the *Court of Appeal Rules, 2022*, we are duty-bound to conduct an independent re- appraisal and analysis of the evidence on the record and reach our own finding on the guilt or otherwise of the appellant. This

jurisdiction was spoken to by this Court in *Dickson Mwangi Munene & another v Republic* [2014] eKLR as follows:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record. See Okeno v Republic [1972] EA 32 and Mwangi v Republic [2002] 2 KLR 28."

4. In constructing its case against the appellant, the prosecution relied on the testimony of nine (9) witnesses. Joseph Wangila (PW1) testified how he identified the deceased's body for the purpose of postmortem. Patrick Mang'ula Anyango who testified as PW2 narrated how on 20th December, 2010 at about 7.30 pm, he together with others went to the appellant's home where they found the appellant who informed them that the deceased had been killed by someone. They found the deceased's body on the bed. PW2 then called one Francis Namoi Ashira who also joined them at the scene. Francis Atito (PW3) similarly testified having identified the deceased's body during postmortem alongside PW1.

   He also stated that the deceased had been married to his brother and was married by the appellant after his brother's demise.

5. Paul Nambuto testified as PW4 (though erroneously indicated as PW3) and stated that on December 20, 2010, while in the company of one Jackson Indeche, they went to the appellant's home at about 11.00 am. They found the appellant and the deceased partaking of chang'aa. They joined the duo in the pastime until about 3.00 pm when they left for their homes. Livingstone Atito (PW5) testified that he was in the company of PW2 when they went to the appellant's home and found the deceased had died. They then called one Francis Namoi Ashira and informed him of the incident. Pauline Awinja testified as PW6 stating that on 20th December 2010, she went to the appellant's home where the appellant and the deceased sold chang'aa. In the course of taking the illicit brew, the appellant left to fetch more liquor and returned at about 3.00 pm. PW6 went away at about 3.30 pm leaving behind the appellant and the deceased.

6. Chief Inspector John Ogoti testified as PW7 and stated that upon receiving the information of the deceased's death, he proceeded with other police officers to the scene at about 9.00 pm on the same day. There, they found the appellant sitting on the sofa in his house. The deceased's body was lying across the bed with the feet on the ground and blood splattered on the bed and on the floor as well as on the clothes which the deceased wore. He also noticed the deceased had an injury to the head from which blood was oozing; there was a bloodstained iron bar next to the bed; and that there were bloodstains on the appellant's body including his khaki cap. He later prepared an exhibit memo form and transmitted it to the government chemist for further analysis. In his investigations, he established that there was a dispute between the deceased and the appellant over proceeds from the chang'aa sales.

7. Dr. Francis Odera Ouko (PW8) testified that he conducted postmortem on the deceased's body on December 22, 2010 at Vihiga District Hospital. He observed that the deceased who was 36 years old had a wound on the scalp on the right parietal of the head measuring 2x3 cm. Internally, the right side of the head had a fractured skull with injury to the brain tissue. He formed the opinion that the cause of death was severe head injury secondary to blunt trauma. He produced the postmortem report in support of his testimony. Moses Muhu Mwaura (PW9) testified that he was a Senior Government Analyst and that after conducting analysis on the exhibits forwarded to him, he found that the bloodstains on the

appellant's khaki cap and the metal bar matched the deceased's blood type. He prepared a report which he produced at the trial as an exhibit.

8. In his defence, the appellant gave sworn evidence stating that the deceased was his wife but denied killing her. He stated that they jointly sold chang'aa and that on the material day, he had left home at 2.00 pm and came back at about 5.15 pm. He found all doors locked and waited until 7.15 pm when his children arrived and he asked them to access the house through a window. Once the door was opened, he found the deceased lying in bed lifeless. He lay on the same bed with his head facing the same direction.

9. The trial court in its judgment found that the evidence on record was circumstantial and that the prosecution had sufficiently linked the appellant to the deceased's murder. It also found that the appellant's defence was contradictory thereby not capable of displacing the prosecution evidence linking him to the offence. The court also noted that the nature of the injury revealed malice aforethought on the part of the appellant and that he had intended to kill the deceased.

10. This matter was canvassed mainly by way of written submissions. The appellant's submissions are dated July 13, 2022. When the matter came up for virtual hearing before us, learned counsel Ms Olonyi appeared for the appellant and submitted that the evidence adduced by the prosecution did not prove the charge against her client. In support of this argument, counsel argued that no evidence was adduced to either establish how the deceased met her death or how the appellant was linked to the murder. Counsel also urged that the prosecution failed to conduct an analysis to ascertain whether the fingerprints on the iron bar belonged to the appellant and that without that evidence, there was no link between the appellant and the murder or even the murder weapon. To buttress the submission, counsel referred to the case of *James Mwangi v Republic* [1983] eKLR as denoting the circumstances under which a conviction can ensue from circumstantial evidence. According to counsel, the evidence adduced did not unerringly link the appellant to the crime.

11. Counsel also submitted that the trial court erred by shifting the burden of proof to the appellant when it failed to appreciate that without the lifting of the fingerprints from the murder weapon, there was no link between the appellant and the offence. In her view, this failure contravened the provisions of Sections 107 and 109 of the *Evidence Act*. Counsel also submitted that the prosecution erred when it failed to conduct a mental assessment on the appellant prior to the hearing of his case. In her view, this omission is fatal to the case.

12. On the rejection of the defence evidence, counsel submitted that such a move by the trial court impliedly meant that the appellant was to establish his innocence. Counsel urged that the trial court's action shifted the burden of proof to the appellant.

13. Additionally, Ms Olonyi made oral submissions and urged us to interfere with the death sentence were we to uphold the conviction. She submitted that the sentence should be reduced to the period already served considering that the appellant has children and was 57 years old at the time of his conviction.

14. Mr. Okango the learned Prosecution Counsel for the respondent equally relied on his written submissions dated February 11, 2023. Counsel submitted that although the evidence against the appellant was circumstantial in nature, the same sufficiently linked the appellant to the offence charged. Counsel also submitted that the failure to lift fingerprints from the iron bar was not fatal to their case as the test carried on the blood samples served the same purpose of linking the appellant to the offence. Mr. Okango further submitted that contrary the to claims by the appellant that the trial court did not consider his defence, the trial court actually considered the defence case and gave reasons for dismissing it. With regard to whether the burden of proof was shifted to the appellant, counsel submitted that the prosecution discharged its onus as to the burden of proof and at no time did the burden shift to the

appellant. On sentence, counsel urged us to remit the matter to the trial court for resentencing. Mr. Okango concluded his submissions by exhorting us to dismiss the appeal.

15. As we have already stated earlier in this judgment, our duty is to independently re-appraise and analyze the evidence on record prior to arriving at our own independent conclusion on the guilt or otherwise of the appellant. We have duly considered the record of appeal as well as the submissions of both sides in this appeal. It is our discernment that the following issues require our determination: whether the appellant caused the death of the deceased; if so, whether the appellant had the requisite malice aforethought; and, if the conviction is upheld, whether the death sentence was merited in the circumstances.

16. For an offence of murder to be proved, the prosecution must establish beyond reasonable doubt that the death of the deceased was caused by the accused and that the accused had malice aforethought. Section 203 of the *Penal Code* legislates the offence of murder as follows:

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

17. In this case, the fact of the unlawful death of the deceased is not disputed. Indeed, the evidence of PW1, PW3 and PW8 speak to the fact of death and the subsequent postmortem that was conducted on the deceased's body. The cause of death as established by PW8 was severe head injury secondary to blunt trauma. The big question is whether the evidence on record pointed to the appellant and no one else as the person who inflicted the fatal injuries on the deceased.

18. As rightly pointed out by the trial court, this case is hinged on circumstantial evidence. We have reviewed the judgment of the trial court and we agree with the appreciation of the learned Judge on the principles underpinning a conviction based on circumstantial evidence. When addressing the question of circumstantial evidence in *Joan Chebichii Sawe v Republic* [2003] eKLR, this Court held that:

> " 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."

19. In this case, it is not disputed that the appellant and the deceased lived together as husband and wife. The two sold chang'aa in the house where they lived. Both PW4 and PW6 testified that they were customers of the appellant and the deceased on the date of the crime. It was the evidence of PW4 that he was the last person to leave the appellant's home and he left the deceased with the appellant in their house. PW2 and PW5 both testified that they went to the appellant's home at about 7.30 pm and found the appellant who informed them that his wife had been murdered. They also saw the deceased's body after which they called the area Councillor.

20. The appellant on his part denied murdering his wife. He testified that the last time he saw the deceased alive was at 2.00 pm on the material day. From the evidence of PW6, the appellant left his home to collect more brew at 2.00 pm and returned at about 3.00 pm. The appellant however renders two versions of his return; one at 5.00 pm and another at 7.15 pm. His version on his whereabouts cannot be true in view of the corroborated and consistent evidence of PW4 and PW6. The evidence of PW4

and PW6 indeed not only places the appellant at the scene of crime but makes the appellant the last person seen with the deceased while she was still alive.

21. The other evidence linking the appellant to the offence is that of PW9. Based on his analysis of the blood samples, he matched the bloodstains on the cap the appellant was wearing to the deceased's blood. The appellant's explanation is that his cap was stained when he lay in bed upon finding the deceased dead. This claim is not plausible on the face of the appellant's incoherent evidence. The appellant's evidence is that when he tried to wake up the deceased to no avail, he lay besides her thinking she was just drunk and that it was his child who informed him that the deceased was dead and had a swollen head. However, from the evidence of PW7 who visited the scene, he described how there was blood splattered on the bed and everywhere. It beats logic that the appellant failed to notice the blood oozing from the deceased's head and the iron bar when he entered the room. There is no evidence on record that the appellant was so drunk to the extent of not realizing that his wife had been killed. The prosecution having discharged its onus of linking the killing of the deceased to the appellant, it was upon the appellant to adduce evidence to show that someone else may have intruded into his house. He could have called his children aged between 13 and 15 years to confirm that they indeed opened the house by accessing it through the window. The appellant's account of events even become more unbelievable when he implies that the alleged intruder killed the deceased, locked the door from inside the house and escaped through a window, which by his own admission, no adult could pass.

22. In the circumstances of this case the invocation of the last seen together theory is ripe. The doctrine of "last seen with" is invoked where the evidence is circumstantial as is in this case. This doctrine requires that the person last seen with the deceased before his death is presumed to be responsible for his death and he is therefore tasked with providing an explanation as to what happened to the deceased. Although the doctrine is not a strong basis for returning a conviction, it finds support in Kenya in the provisions of Section 111 of the *Evidence Act* which state as follows:

> " 111. Burden on accused in certain cases
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> 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:
>
> 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:
>
> 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
>
> 2. Nothing in this section shall—
>
> a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary

to constitute the offence with which the person accused is charged; or

b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

23. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the appellant had a duty to give an account of how the deceased met her death. This he did not.

24. The appellant has also argued that the failure by the prosecution to conduct fingerprint analysis was fatal as there was nothing else linking him to the offence. In our view, this line of argument is futile. As we have already stated, the evidence of PW8 on the blood sample analysis linked the appellant to the deceased as bloodstains found on his khaki cap was the same with the deceased's blood type. Even though he tendered what may appear to be a plausible explanation of how he got into contact with the deceased's blood, that explanation is, for the reasons already stated not credible and is for rejection. For the same reasons we also reject the submission by counsel for the appellant that the appellant's defence was unreasonably rejected by the trial court.

25. There was the submission by the appellant's counsel that the appeal should be allowed because the appellant was not subjected to mental examination in order to determine whether he was fit to stand trial. The respondent's counsel made no comment on this point. On our part we note that the appellant never raised the defence of unsoundness of mind at the trial so that the failure to assess his mental status can become an issue in this appeal. We accordingly find no merit in this argument.

26. The next issue is whether the appellant had the requisite malice aforethought when inflicting the injuries on the deceased. Section 206 of the *Penal Code* enumerates the circumstances which should lead to the conclusion that there was malice aforethought as follows:

"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

27. The learned Judge relied on the nature and extent of the injuries inflicted on the deceased as well as the weapon used to find that malice aforethought was proved. It is not in doubt that courts within and

outside our jurisdiction have always ruled that malice aforethought can always be construed from the circumstances leading to death. In *Paul Muigai Ndungi v Republic* [2011] eKLR, it was stated that:

> "More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person."

28. In the appeal before us, the record shows that several blows were inflicted on the head of the deceased using an iron bar. According to PW8, the right side of the deceased's head had a scalp wound measuring 2x3 cm. The deceased also suffered brain tissue damage secondary to a fracture on the right parietal. Additionally, PW9 testified that he extracted blood samples from an iron bar which matched the deceased's blood. This leaves no doubt as to what weapon was used in inflicting the injuries on the deceased. In this regard, it is apparent that the appellant, when assaulting the deceased, harboured one single intention, to grievously harm and even to terminate her life. Malice aforethought can therefore be inferred from the circumstances and we therefore agree with the trial court's finding that the appellant had the requisite malice aforethought. In reaching this conclusion, we observe that there is even no evidence on record that the deceased fought back.

29. The upshot of the foregoing analysis is that the appeal against conviction is without merit and is hereby dismissed.

30. Regarding the sentence, we note that the appellant was sentenced to suffer death. The trial court in sentencing the appellant based its decision on the mandatory nature of Section 204 of the *Penal Code*. We cannot fault the trial court in this regard as in 2016 when the sentence was meted the mainstream jurisprudence held that the death sentence was mandatory for any person convicted for murder. Subsequently the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR held that for the crime of murder, courts were at liberty to exercise their judicial discretion in passing appropriate sentences other than the mandatory death sentence provided under Section 204 of the *Penal Code*. In our view, the appellant is entitled to benefit from the latest jurisprudence. It is on this basis that we are persuaded to review the sentence as passed by the trial court. The appellant has successfully persuaded us that there was an error amounting to a point of law as the death sentence was imposed in its mandatory nature.

31. Although the respondent's counsel had proposed that we remit this matter to the trial court for resentencing, we find no reason for doing so because the record shows that the appellant was sentenced on December 22, 2016 after his then counsel on record had made extensive mitigation. The appellant's mitigation was that he was aged 57 years old at the time of his arrest and he had 14 children. Five of those children lived with him at the time of the incident. The appellant also pleaded for leniency. Another mitigating factor was the disclosure by the prosecutor that the appellant was a first offender. On the other hand, the aggravating circumstances were the nature of the weapon used and the fact that the killing of the deceased falls into the basket of crimes based on the gender of the victim and such crimes must be discouraged by imposition of stiff sentences. This being the case, it our view that a sentence of 28 years in prison is proportionate in the circumstances. We therefore set aside the death sentence passed by the trial court and substitute it with a sentence of 28 years imprisonment. In passing this sentence, we have considered the period spent in remand by the appellant between December 2010 when he was arraigned in court and September 2012 when he was released on bond.

32. The upshot of the foregoing is that the appeal on conviction is without merit and is hereby dismissed. The appeal against sentence succeeds. Consequently, the appellant is sentenced to serve 28 years in prison. The sentence shall run from the date of sentencing by the trial court, being December 22, 2016.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

P. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR