Kazungu & 6 others v Republic (Criminal Appeal 46 of 2022)
[2023] KECA 653 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 653 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 46 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

DAMA KAZUNGU ..... 1ST APPELLANT

ANDERSON MULEWA ..... 2ND APPELLANT

JIMBI JEFFA KAREMA ..... 3RD APPELLANT

AMANI NGALA ..... 4TH APPELLANT

MWALIMU KAINGU JEFFA ..... 5TH APPELLANT

RACHEL KAZUNGU ..... 6TH APPELLANT

JEFFA KAZUNGU KAREMA ..... 7TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi delivered by R. Nyakundi, J. on 20th December 2021 in Criminal Case No. 7 0F 2015)

JUDGMENT

1. The Appellants, Dama Kazungu hereinafter the 1st Appellant, Anderson Mulewa the 2nd Appellant, Jimbi Jeffa Karema, the 3rd Appellant, Amani Ngala, the 4th Appellant, Mwalimu Kaingu Jeffa the 5th Appellant, Rachel Kazungu the 6th Appellant and Jeffa Kazungu Karema the 7th Appellant were jointly charged with one count of murder contrary to section 203 as read with 204 of the *Penal Code*. It was alleged that the Appellants, on 6th February, 2015, at Roka village jointly with others not before Court murdered Kazungu Jefwa Katana.

2. The Appellants denied the charge and were therefore taken through the trial process with the prosecution calling six witnesses. The defence comprised the evidence by each of the Appellants and three other witnesses. After analyzing the evidence, the learned trial Judge, in a Judgment he rendered on 20th December 2021 found all the Appellants guilty of murder, convicted them and sentenced each of them to 26 years imprisonment. Aggrieved by the conviction and sentence, the Appellants preferred this appeal raising the same grounds of appeal in their respective memorandum of appeal. They challenge the judgment of the trial court on grounds that malice aforethought was not proven; that there was no proper identification of the Appellants at the scene of crime and that their defences were not considered. They have prayed that the conviction be quashed and the sentence set aside.

3. In a first appeal such as this one, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In *Okeno vs. Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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..."

4. And in *Jonas Akuno O'kubasu v Republic* [2000] eKLR as:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it..."

5. The appeal was heard through this Court's virtual platform on the 13th February 2023. All the Appellants were present virtually the 1st to 4th, and the 6th and 7th from Malindi Prison, while the 5th Appellant from Manyani Prison. Also present was learned counsel Mr. Gicharu Kimani for all the Appellants and learned Prosecution Counsel Mr. Mwangi Kamanu holding brief for learned Senior Prosecution Counsel Mr. Jami Yamina for the State.

6. Mr. Gicharu Kimani relied on his written submissions dated 25th July 2022 and did not wish to highlight. Mr. Mwangi Kamanu relied on the written submissions dated 25th July 2022 filed by Jami Yamina. He did not wish to highlight.

7. It is important that we give a summary of the evidence adduced before the trial court at this stage. The Prosecution marshaled six witnesses in proof of its case. PW1, Charo Kithepe, testified that he was at home on the evening of 6th February 2015 when three people in a motor bike arrived soon followed by others. The group, who were neighbours frog matched him to the deceased home. He found a crowd at the home. The deceased was lying motionless on the ground with blood oozing from his nostrils. PW1 was roughed up and asked to perform some ritual in order to heal Salama, (DW8 in the case). He was then released from the home with a warning that if Salama did not survive, they would go for him.

8. PW1was accompanied by his wife, PW3 Amina Charo. He identified those who went to his home and those he met at the home of the deceased as the 1st Appellant who was the wife of the deceased, 2nd, 5th and 7th Appellants. He said he went straight to the village elder, one Beraina. Beraina refered him to the Assistant Chief, PW4 Cackston Kithi Yaa who he went to see the next morning.

9. PW4 gave him a letter to take to the police for assistance. PW1 and PW3 took the letter to PW2, Sergeant Danile Kimeu at Motsangoni Police Post on the 7th February 2015. PW1 gave the names of those who threatened him. He also told PW2 that one Anderson Kazungu Jefwa was the one who was forcing him to confess that he was a witch in association with the deceased. PW2 summoned the Appellants through the village elder. When they went to him, he arrested all of them.

10. The evidence of PW3, was similar to that of PW1. She had accompanied PW1 to the home of the deceased. She also accompanied PW1 to report the matter to PW3 and PW2 in that order. She witnessed the Appellants slap PW1. They also accused him of bewitching Salama, when they were at the home of the deceased. PW1 and PW3 stated that they learned of the death of the deceased the same night after they had left the home.

11. PW5, Dr Zeinat Zahran, produced the post mortem report on the deceased on behalf of his colleague by Dr Bachu. The examination revealed that the deceased suffered multiple injuries to the tibia, fibula, left jaws, chest; fracture of the 1st, 2nd and 3rd rib of the left; and, fracture of the fibula bone. The doctor formed the opinion that the cause of death was hemorrhage secondary to head trauma. The post mortem form was produced as P. exh 1.

12. PW6 Andronicus Machuka was the investigating officer. He said that he received the report of assault through Motsangoni Police Post. He visited the scene with one Muemi of the Post and he reckoned it was on the same day of 6th February 2015. He said that his investigations revealed that the death of the deceased was due to a suspicion of involvement in the illness of Salama Kazungu, DW8, through sorcery. He said that the culprits were arrested together with the eye-witnesses of the murder. There statements were recorded.

13. In her defence, the 1st Appellant denied committing the offence. She testified that the deceased was ill but had no treatment card to that effect. She denied the allegations of involvement in sorcery.

14. The 2nd Appellant testified that he learnt that the deceased was beaten to death; he denied allegations of sorcery involving the deceased.

15. The 3rd, 4th 5th, 6th and 7th Appellants testified that they heard of the death of the deceased. They denied killing the deceased. The 7th appellant testified that he was not at the scene on the day of the incident but that he left the deceased at home indisposed.

16. Dw8 Salama Kazungu Jefwa was the daughter the deceased. She testified that she was ill that day and that she accompanied her mother, 1st Appellant, her brothers, 2nd and 5th Appellants to hospital. She said that she did not know how her father died.

17. Dw9 Shida Katitu and Dw11 Nelson Masha denied the offence and stated that they received information of the death of the deceased. Dw10 Masha Baya was unaware of the death of the deceased.

18. The learned judge found that the death of the deceased was proven vide the post mortem report; that the injuries on the deceased were unlawfully inflicted. The court also found that the appellants caused the death of the deceased as they believed he had a hand in the sickness of Salama. It was found that the unlawful acts that caused the death of the deceased were with malice aforethought; that the Appellants were identified by PW1, PW2, PW3 and PW4 as the perpetrators of the offence. The Appellants were

found guilty of the offence of murder and convicted. Without giving an opportunity to the Appellants to give their mitigation, the learned trial Judge sentenced each Appellant to 26 years imprisonment.

19. Counsel addressed three grounds of appeal raised by the Appellants in their appeals. With respect to the first ground, that the prosecution did not proof of malice aforethought Mr. Kimani urged that it is only PW1's evidence that is indicative that some of the Appellants had assaulted the deceased, and that none of the prosecution witnesses gave direct evidence that the Appellants harmed the deceased. That there was merely circumstantial evidence and therefore malice aforethought was not proved.

20. Mr. Yamina did not submit on this aspect of the appeal. His submissions addressed a ground that was not argued by the Appellants, neither was it ever one of the grounds raised.

21. The learned trial Judge was very clear what the issues for determination were in this case and cited them succinctly in his judgment at page 77 of the record of appeal. On the issue of malice aforethought the learned Judge delivered himself thus:

> " The Appellant was held hostage on suspicion he practiced witch craft. There was therefore a clash between them (Appellants) and the deceased...useful evidence of PW1, PW2, PW3 and PW4 pointing to deceased having suffered injuries...
>
> The Appellants were last seen with the deceased (sic) severally inflicted harm on vital organs of his body as per the post mortem. From the evidence (sic) the acts by the Appellants can be summed up as unjustifiable, inexcusable and unmitigated that endangering state of the mind'

He continued to find:

> " With malice aforethought the Appellants committed the murder that can be inferred from those surrounding circumstances. Whatever was done involved the natural and probable consequences of their unlawful acts... it is on that basis I find the death was actualized with malice aforethought."

22. Section 206 of the *Penal Code* sets down the circumstances that constitute malice aforethought as follows:

> " 206 Malice aforethought
>
> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> 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.

23. In *Morris Alouch v Rep* Cr. Appeals No 47 of 1996 (UR) the Court of Appeal while considering what can constitute malice aforethought stated as follows:-

> " If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later."

24. For the offence of murder and proof of malice aforethought in *Rex vs. Tubere s/o Ochen* {1945} 1Z EACA 63, Eastern Court of Appeal observed:

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

25. And in the case of *Hyam v DPP* {1974} A.C. the Court held *inter alia* that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

26. From the authorities cited, it is clear that malice aforethought constitutes an act or omission that caused injuries that led to the death of the deceased. There must be a nexus between the acts or omissions with the accused. The evidence can be direct or based on circumstantial evidence. In this case, even though PW6, the investigating officer testified that there were eye witnesses of the murder of the deceased, those were not availed to court at the trial.

27. As regards the evidence of PW1, PW2, PW3 and PW4 that the Judge found pointed to injuries inflicted on the deceased; PW1 and PW3 both testified to injuries inflicted on PW1. Their testimony was clear that by the time they went to the deceased's home, he was already injured and was motionless and unresponsive. They did not witness the assault on him. PW2 and PW4, these were the police officer and Assistant Chief that said they got the report of the incident from PW1 and PW3 one day later. None of these witnesses support evidence from which circumstances constituting malice aforethought can be deduced or inferred. We agree with the Appellants that malice aforethought was not proved.

28. On the second issue that the learned Judge did not consider that there was no proper identification of the Appellants at the scene of crime, Mr. Kimani, while placing reliance on the case of A*bdalla Bin Wendo & Another vs. Republic* (1953) 20 EACA 166, urged that Pw1 did not witness the Appellants murder the deceased. This issue is subsumed in the previous issue of lack of evidence to prove malice aforethought. As we have stated, there was no testimony of anyone that claimed to have witness any of the Appellants attack the deceased. In the circumstances, there was no identification of any of the Appellants as those who inflicted injuries on the deceased, or played any role towards that end.

29. On the third issue that the Appellants defences were not considered, Mr. Kimani cited the case of *Festo Androa Asenua vs. Uganda* Criminal Appeal No I of 1998 for the proposition that the prosecution did not prove their case to the required standard; that the court did not investigate the Appellants' alibi, neither did the prosecution rebut the truthfulness of the Appellants' alibi defence.

30. Mr. Yamina for the State, while relying on *DPP vs. Peter Onyango Odongo & 2 others* (2015) eKLR, urged that the learned trial Judge considered the Appellants defences, weighed it against the rest of the evidence, giving himself caution of the danger of convicting innocent persons. He urged us to dismiss the appeal as lacking merit.

31. The Appellants raised alibi defence, albeit at the defence stage of the proceedings. They even called witnesses to support their evidence. In this case, the Appellants are all related. The 1st Appellant is the wife of the deceased, and apart from the 3rd, 4th, 5th Appellants, the rest of them including the witnesses they called except for DW11were children or spouses of the children of the deceased. There was a lot of activity at the deceased home. There was also a large crowd of neighbours and on lookers. Given these circumstances, coupled with no evidence of any witness to the murder of the deceased, the Appellants defence, had it been considered would have brought a different verdict in this case. We agree that the defence was not adequately considered.

32. Having come to the conclusions we have in this appeal, we find that the appeal by all the Appellants has merit. We find that there was no evidence upon which a conviction could be founded. The conviction was not safe.

33. Accordingly, we allow the appeal, quash the convictions and set aside the sentences. We order that the Appellants be set at liberty forth with unless they are otherwise lawfully held.

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

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR