Owendo v Republic (Criminal Appeal 70 of 2021)
[2023] KECA 718 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 718 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 70 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JUNE 9, 2023

BETWEEN

BONIFACE LITUNYA OWENDO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Korir, J.) dated 30th January, 2017 in HC. CR.A. No. 96 of 2010)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that he murdered Mueni Syombua Munuve on 19th November, 2010 within Nairobi County. During trial, the prosecution called 10 witnesses while the appellant gave an unsworn statement and called no witnesses. At the end of the trial, the High Court Judge found the appellant guilty as charged and sentenced him to death. The appellant is now before us on first appeal.

2. Our mandate on first appeal is as stated in the case of *Josephat Manoti Omwancha vs. Republic* [2021] eKLR where this Court reiterated:

> "This being a first appeal, our mandate is as was aptly set out in the case of *Okeno v Republic* [1972] EA 32, namely:
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> > "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] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). 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 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 Post*, [1958] E.A. 424.""

3. We will revisit the record to see what case was made before the trial Court with the above mandate in mind.

4. Rose Anyanswa (PW1, hereinafter Rose) was the mother to the appellant. She told the Court that the deceased and the appellant had been living together as man and wife for about 4 months before the incident which led to the death of the deceased. Rose stated that she learned that there were constant quarrels between her son and the deceased and that they had been taken away by the police. She visited the appellant's house but found it locked and later visited the deceased at Kenyatta National Hospital, where she foundBthe deceased in a state where she could not talk. She later learnt that the deceased had died.

5. Nahashon was PW2. He stated that he was a property agent and knew the appellant as a tenant in one of the single rooms which he managed. He was informed by another tenant that the appellant had burned his wife. Nahashon went to the house and found a burnt curtain, burnt pieces of cloth and smoke. He later learned that the deceased had died.

6. Edwin Owino Obaji (PW3) was a fingerprint's officer and worked at the Ministry of Immigration and Registration of Persons at the material time. On 4th May 2011, he received a set of prints but he could not confirm that they belonged to the deceased. He returned a finding that the prints were of an unknown person.

7. Corporal Protus Mauso (PW4, hereinafter Cpl. Mauso). He told the Court that he was on patrol with two other officers on 19th November, 2010 when they were informed by a member of the public that someone had burned his wife. They proceeded to the area and met the deceased and the appellant walking on the road. The deceased was badly burned and the appellant told them that he was taking her to the hospital. Cpl. Mauso stated that both the deceased and the appellant were drunk at the time they encountered them and the appellant told them that she had taken his Kshs. 100 and used it to drink alcohol, which resulted in a quarrel and he burned her in the course of the quarrel. A taxi took the deceased to hospital and the appellant was taken into custody, and was saved from a crowd which wanted to lynch him. Cpl. Mauso told the trial Court that they were never able to trace the deceased's relatives and the appellant also said that he did not know any of her relatives.

8. Corporal Fred Githire (PW5 – Cpl. Githire) was on patrol with Cpl. Mauso (PW4) and retold the events of the particular day. Cpl. Githire told the Court that the deceased, who could talk, had told them that the appellant had burned the deceased because of money that he left in the house and which she had taken and used.

9. Lydia Chepng'etich was PW6 (hereinafter Chepng'etich). She stated that she was a neighbor to the appellant at the material time. She told the Court that she was in her house when she heard a woman screaming at around 9 p.m. She recognized the voice of the deceased who was screaming. Chepng'etich observed the appellant's house whose doors and windows were closed but the door soon opened and Chepng'etich saw the appellant push and kick the deceased out of the door while her clothes were on fire and saw him pour water on her. Chepng'etich heard the deceased screaming "nisaidieni nakufa" (help me I am dying) and other people came out of their homes, one of whom called the police. In cross-examination, she said that the appellant tried to pour water on the deceased.

10. Dr. Zephania Kamau was PW7. He examined the appellant on 9th December, 2010 and noted that the appellant had partially healed burns on his lower left thigh but was mentally fit. He produced a P3 Form for the appellant.

11. Corporal Shem Ondieki Mogaka, attached to Crime Scenes Nairobi office at the material time, was PW8. He took photographs of the deceased on 2nd March, 2011 at the Kenyatta Hospital Mortuary but he took no photographs of the scene of crime.

12. Dr. Andrew Gachie, a pathologist from Kenyatta National Hospital, was PW9. He produced the post mortem form dated 3rd January, 2011. The deceased suffered 2nd and 3rd degree burns on 37.5% of her body and died from the said burns.

13. Cpl. Joseph Ochieng was PW10. He assisted in investigations, took the appellant to hospital, visited the scene, which they found had been cleaned, and recorded various statements.

14. Upon being placed on his defence, the appellant gave an unsworn statement where he denied killing the deceased, who he said he had lived with for 7 months before her death. He said that on the particular day, they had a quarrel which initially started as she came home drunk at 9.30 p.m. but it also escalated as the deceased accused the appellant of having extra marital affairs. The appellant said that he left her in the house and went to the shops and returned to the house after he heard screams, only to find his wife on fire. He told the Court that he removed her from the house and poured water on her to extinguish the flames and was going to take her to hospital when he was arrested. He said he tried to explain to the police officers what had happened but they did not listen to him. He said he was in custody and learned that his wife had died. He asserted that he had not burned her; rather that she had initially tried to hit him with a burning stove but he caught it and hurled it back at her.

15. On 30th January, 2017, Justice Lagat-Korir delivered judgment and found that the prosecution had proved its case beyond reasonable doubt; he was convicted and sentenced to death.

16. The appellant is now before us with 6 grounds of appeal as per his Memorandum of Appeal. He contends that there was no mens rea and actus rea proved; that the Court shifted the burden of proof to the appellant; that the High Court misapprehended the facts and applied wrong principles, that the entire proceedings were a nullity on account of article 25(2) and 50(2) of the *Constitution*; that the High Court did not comply with Section 306 of the *Criminal Procedure Code* and that the Court erred in failing to consider his alibi. He prays that we quash his conviction and set aside the sentence. In his submissions, he stated that the Court relied on circumstantial evidence as to his character; that the investigations were biased; that vital witnesses were not called and that the sentence was harsh and excessive.

17. Counsel for the appellant, Mr. Ntenga Marube of Marube and Company Advocates, filed a supplementary Memorandum of Appeal dated 7th February, 2022 and supplementary submissions dated 7th February, 2023 which largely mirrors the grounds in the initial Memorandum of Appeal and the initial submissions. The appellant submits that the evidence was circumstantial; that there was no eyewitness to the events that happened in the appellant's home and that the situation creates a lot of speculation. The appellant also submit that it is possible that the deceased burned herself in her drunken state and they state that the evidence of PW6, Chepng'etich, was not corroborated. The appellant also submits that the witnesses who came to the appellant's home were crucial witnesses as they may have had crucial information and could possibly have broken the chain of evidence. The appellant also submits that mens rea was not proved and that the Court misdirected itself in assuming that this was an issue of gender based violence thus wrongly convicted the appellant. Lastly,

the appellant submits that if the conviction is upheld, he prays to be released on time served or to serve a non- custodial sentence for the remainder of the term.

18. The respondent filed submissions dated 8th February, 2023 opposing the appeal. The respondent submits that the evidence was watertight and contends that the appellant, being displeased with the behavior of the deceased, had hatched a plan to eliminate her in their house. The respondent states that the decision of the trial Court was arrived at on sound prosecution evidence. The respondent asks the Court to find the appeal unmerited and dismiss it entirely.

19. We have considered the record of appeal, the Memorandum of Appeal, the submissions by the parties and the law. We bear in mind the elements required to prove the offence of murder which were stated by this Court in *Chiragu & another vs. Republic* [2021] KECA 342 (KLR) where the Court stated:

> "The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act."

20. It is an undisputed fact that the deceased died on 23rd November, 2010 as a result of the burns she sustained on 19th November 2010. The questions that now arise are whether the burns were as a result of an unlawful act by the appellant, and if so, whether the act was committed with malice aforethought.

21. The appellant emphasizes that the evidence tendered in this matter was entirely circumstantial. Indeed, none of the prosecution witnesses saw the appellant set the deceased on fire. We therefore reiterate the position of this Court on consideration of circumstantial evidence, as laid out in the case of Josephat *Manoti Omwancha v Republic* [2021] eKLR where this Court stated:

> "On circumstantial evidence, the approach we take is that now forming a well-trodden path of this Court in numerous of its decisions. We take it from *Sawe v Republic* [2003] KLR 364 (*supra*); *Wambua & 3 Others v Republic* [2008] KLR 142; *Mwendwa v Republic* [2006] 1KLR 137, *Kipkering Arap Koskei & Kirire Arap Matetu* [1949] EACA 135), *Peter Mugambi v Republic* [2017] eKLR, and *Dorcas Jebet Ketter & another v Republic* in which the following guiding principles were crystallized, namely:
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> i. The inculpatory facts must be incompatible with the innocence of the appellant.
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> ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the appellant.
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> iii. There must be no other existing circumstances weakening or destroying the inference.
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> iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution."

22. We note that the appellant initially told the Court that he had gone to the shops when the screams of the deceased made him return to the house and he found her on fire. However, towards the end of his defence, he said that she

23. had thrown a stove at him and he had hurled it back at her. The trial Court found those two versions of events to be contradictory and did not believe them. There was direct evidence by Chepng'etich (PW6) who testified that she heard screams from the appellant's neighboring house and she recognized

the scream as that of the deceased. She came out of her house and saw the appellant push and kick the deceased out of their house and the deceased was on fire. Police who were summoned to the scene found both the appellant and the deceased; the appellant told them that he was taking the deceased to hospital but members of the public had gathered who wanted to lynch the appellant for what he had done to the deceased. The appellant was arrested and the deceased was taken to hospital from where she died of severe burns a few days later. The cause of death was established by the pathologist as death arising from the said burns. It was therefore established to the required standard that the deceased died and the cause of death was given.

24. The appellant strongly argues that the prosecution did not prove malice aforethought. Malice aforethought is defined in Section 206 of the *Penal Code* which provides:

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

25. We agree with the learned trial Judge that the actions of the appellant in setting the deceased on fire was an act where he intended to kill or cause grievous harm to the deceased. He set her on fire and Chepng'etich witnessed him throwing her out of the house and kicking her while she was ablaze. The deceased died as a result of the burns that she suffered when the appellant set her on fire. His actions were malicious and the prosecution proved that he intended to kill her.

26. The appellant further contends that his trial is null and void as it contravened Articles 25 and 50(2) of the *Constitution* and that Section 306 of the *Criminal Procedure Code* was not complied with. We are of the view that the appellant was well represented by an Advocate throughout the proceedings and that he received a fair trial. Our perusal of the record also shows that on 4th June 2015, counsel for the appellant, Mr. Anambo, informed the Court that he had explained to the appellant his rights before start of the defence case and that the appellant had elected to make an unsworn statement. Therefore, these grounds of appeal have no merit and must fail.

27. The appellant urges this Court to interfere with the sentence, terming it as harsh and excessive. The appellant was convicted and sentenced to death on 30th January, 2017. That was the sentence that was set out in Section 204 of the *Penal Code* for a person found guilty of murder. The jurisprudence in Kenya has since changed after the Judgment of the Supreme Court in *Francis Kariokor Muruatetu & another v Republic* (2017) eKLR where the Court found that the mandatory nature of the death sentence as set out in the *Penal Code* is unconstitutional.

28. We note the facts of the case where witnesses including Chepng'etich and the police testified that the appellant and the deceased were drunk on the day of the incident. There was evidence that the deceased and the appellant were drunkards and that they would quarrel often when drunk.

29. It was submitted before the trial Court that the appellant was a first offender; he was a young man deserving a second chance and was remorseful. We have considered the circumstances where the appellant and the deceased were fairly young, that they had lived together for about 7 months but the relationship was not a good one but one full of quarrels resulting from their drinking alcohol and probably associating with others to the annoyance of each other. We don't think that the sentence of death is appropriate in this case.

30. The appeal on conviction fails and is dismissed. We set aside the death sentence and substitute thereof a sentence of twenty-five (25) years imprisonment from the date when the appellant was first produced in Court for plea.

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

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR