Nyandoro v Republic (Criminal Appeal 75 of 2019) [2023] KECA 964 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 964 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 75 OF 2019

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

JULY 21, 2023

BETWEEN

JAMES OMOKE NYANDORO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgement and conviction of the High Court of Kenya at Kisii (D.S. Majanja, J.) dated 5th December, 2018 in HCCRC No. 19 of 2018)

JUDGMENT

1. The trial of James Omoke Nyandoro, the appellant, was short and quick. He was first arraigned in court on May 2, 2018 and seven (7) months later had been convicted for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and sentenced to a prison term of 25 years. The conviction was based on the evidence of just three (3) prosecution witnesses. In this appeal, the appellant contends that some people who would have been crucial witnesses for the prosecution were not called to testify and that the evidence of the three could never be adequate to found a safe conviction.

2. It had been alleged that on April 20, 2018 at Botabori Sub- location, Gucha South Sub-County in Kisii County, the appellant murdered NOM (the deceased).

3. At his death, the deceased was 8 years old and even at this nascent age had suffered the disgrace of been labeled a thief. At 3.30pm of that fateful day, WM (PW1) mother to deceased, met the appellant as she was leaving her shamba. The appellant told PW1 that the deceased had offended him and he asked her to accompany him to his shop. There, the appellant told PW1 that the deceased had entered the shop through a metal door, the mission to steal. The appellant opened the door for PW1 who entered and sat near the corridor. The more distressing part of afternoon was about to begin.

4. As PW1 sat there, Nyankika, the son of the appellant brought in the deceased. The appellant asked Nyankika to fetch a rope which they both used to tie the hands of the deceased. Distraught, PW1 asked the appellant what the boy had done so that they could resolve it. The appellant did not respond and instead took a panga and placed it on the table. He also brought out a carton which he put over the deceased's head as if to form a crown. The appellant then poured paraffin from a 20 litre container on the carton and set it on fire. At this stage, PW1 pushed the carton off the head of the deceased whose clothes had now caught fire. The burning child ran towards PW1 and took shelter behind her. He was still burning and no doubt in unspeakable anguish. People started to gather outside the shop and raised an alarm. They threw stones in a bid to rescue the boy. As the boy and his mother had been locked inside the shop by the appellant, the people started breaking into it. The appellant then opened the door and let PW1 and the deceased out.

5. The deceased had suffered severe burns and was rushed to Etego Hospital where he was referred to Kisii Level 6 Hospital. A day later, on April 21, 2018, the child succumbed to the injuries.

6. AM (PW2) is the mother of PW1 and grandmother to the deceased. On April 21, 2018, at about 4.00pm, she visited the shop of the appellant to buy credit for her phone. Before selling the credit card to PW2, the appellant asked his son to get a rope which he used to tie the deceased and asked PW2 to leave the shop. The rest of PW2's evidence was in sync with that of PW1 as she had witnessed the appellant's action through a window to the shop. PW2 began to scream in distress. As she did so, she saw PW1 run out of the shop with the deceased whose clothes were peeling off.

7. The last prosecution witness was No 81439 corporal Louren Ouya (PW3) who gave a narration of how he investigated the complaint. He also produced the exhibits which included a post mortem report of April 26, 2018 prepared by Dr Benjamin Ndebele.

8. In his defence, the appellant stated that on April 20, 2018 he had taken his wife to hospital at Tabaka when, at 4.00pm, he was informed that a thief had stolen from him. Upon returning, he found many motor bikes parked outside his shop. When he asked about the thief, he was informed that he had been taken to hospital. He found his property destroyed. He reported the matter to the police who appeared to have known about it. He was arrested and detained. He denied the charges.

9. In this first appeal, the appellant was represented by Mr Ochoki who invited us to determine two issues:

   i. Whether the prosecution proved the offence of murder beyond reasonable doubt.

   ii. Whether the sentence imposed ought to be set aside, varied and/or quashed.

10. It is submitted by counsel that the appellant's defence of alibi was not challenged by the prosecution nor was it considered by the trial Judge nor weighed against the evidence adduced by the prosecution to determine its truthfulness. Counsel points to section 212 of the *Criminal Procedure Code* which reads:

> "If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."

11. It is argued that the prosecution did not take advantage of this provision. Counsel further cited the decisions of this Court in *Victor Mwendwa Mulinge v Republic* [2014] eKLR and *Kimotho Kiarie v Republic* [1984] eKLR on how alibi evidence should be tested. In Mwendwa's case the Court restated:

> "It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."

12. On the prosecution evidence, the appellant contended that it was inconsistent and contradictory. We shall in due course consider what the appellant proposes to be inconsistences and contradictions.

13. On another front, the appellant's case is that the prosecution failed to call the witness who conducted the alleged postmortem and those who may have positively identified the body to be that of the deceased. Counsel's plea was that we be persuaded by the decisions of the High Court in *Republic v Erick Immbwanga Ekesa* [2017]eKLR and *Republic v Beth Wangari Kimangu* [2003]eKLR. In the latter decision, the Court held:

> "...it is vital for a police officer who has recovered a dead body, firstly, to bring the people thought to be relatives of the deceased to see whether they can identify the body he has recovered to be that of their relative, and secondly, if they identify the body, that police officer to be on hand, jointly with the aforesaid relatives of the deceased, to identify that body to the doctor requested to perform a postmortem, and thirdly, that police officer to subsequently release the body, formally, to relatives of the deceased to go and bury. All that should be in the evidence adduced before the trial court.

14. We were urged to find that the prosecution failed to prove that it was the appellant who committed the murder. Arguments are made that; the match box allegedly used to ignite the paraffin was neither recovered nor produced in court; the relevance of the white jerrican produced as Pexh1 was not demonstrated when witnesses made reference to a yellow jerrican produced as Pexh 1; photographs of the scene were not produced; it is unclear when the scene was visited; the government chemist report alluded to by PW3 was not produced; the prosecution failed to establish the connection between Pexh14 and Pexh9 being the deceased's clothes and shoes, and the accused person; and the prosecution did not lead evidence as to where, when, and how the accused was arrested.

15. On the last argument, counsel cited to us the following passage of the decision of this Court in *Edwin Wafula Keya v Republic* [2005] eKLR.;

> "In our view, failure to call all or any of the three police officers who arrested the appellant some two months after the offence left unbridgeable gap in the prosecution's case and the appellant must have the benefit of that gap."

16. On another aspect, it is submitted that as the cause of fire to the deceased was not demonstrated by way of production of the matchbox allegedly used in the crime, then it would have been prudent for the prosecution to avail an expert who would have established the cause of fire and in effect link the fire to the appellant. It was asserted that failure to do so created a gap in the prosecution case.

17. On the sentence, the appellant submitted that it is excessive in the circumstances of this case and so too, that the trial court failed to consider that the appellant was a first offender. Counsel boldly pleaded that we reduce the sentence to 3 months and/or below being the term sentence imposed in the case of *Walter Marando v Republic* [1980] eKLR which he cited.

18. What answer did the respondent have to these submissions?

Mr Okango appearing for the respondent submitted that the defence of alibi was raised by the appellant in his defence after the close of the prosecution case and so the prosecution cannot be faulted for not having controverted it. Counsel argues that because of this belated defence, the trial court properly weighed the alibi defence against the prosecution evidence and found that the alibi evidence had been destroyed by the evidence of PW1 and PW2.

19. The respondent further contends that the allegations of inconsistencies and contradictions are unfounded and gives reasons. We shall consider these alongside the submissions by the appellant.

20. Regarding the postmortem and that the deceased's body was not identified, counsel for the respondent thought it to be a dishonest argument because Mr Nyagwencha, who appeared for the appellant at trial, conceded that the facts and cause of death were not disputed whereupon the court made an order dispensing with attendance of the doctor. It is argued that the post mortem report shows Ribin Mobisa Omari and Newtone Obasa as the persons who identified the body. Counsel contended that the two cases cited are distinguishable because, in those, the bodies were never identified at all.

21. The respondent made observations on the burns on the deceased body. It was asserted that the evidence of PW1 and PW2 was sufficient proof that the appellant set the deceased on fire after pouring paraffin on a carton box he had placed on the deceased's head, which paraffin trickled down the body of the deceased. The respondent argued that the appellant knew paraffin to be highly inflammable and that setting the deceased on fire, even after the mother had requested the appellant to have the issue resolved, demonstrates malice aforethought.

22. On the criticism that the prosecution failed to call the arresting officers, the respondent seeks solace in the decision of Lesiit, J (as she then was) in *Republic v Cliff Macharia Njeri* [2017] eKLR where she stated.

> " 28. The issue for determination is whether the prosecution failed to call crucial witnesses because it is only on such basis that an adverse inference can be made against the prosecution case. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of Bukenya and Others v Uganda 1972 EA 549 Lutta Ag. Vice President held:
>
> > 'The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
> >
> > Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.'"

23. On sentence, we were reminded that it is discretionary and we cannot interfere with it unless it is shown that the discretion was exercised whimsically. Counsel Okango submitted that the trial court was lenient and considered the appellant's mitigation.

24. We sit on this matter as a first appellate Court whose role is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we have not seen or heard the witnesses testify and due allowance must be given for that handicap. See *Okeno v Republic* [1972] EA 32.

25. We think that two issues require our quick and early disposal.

The post-mortem report was produced by the investigating officer (PW3). In that event neither the doctor who performed the post-mortem nor the persons who identified the body testified. Yet the trial court record shows that at the outset of the hearing the following transpired:

> " Mr Nyagwencha: The facts and cause of death are not disputed.
>
> Court: Attendance of the Doctor who did the postmortem is dispensed with. Investigation officer may produce post mortem form."

26. It is evident that the appellant did not dispute the fact that the deceased had died and the cause of his death. Indeed, in the short arguments made by Mr Nyagwencha at trial, neither the issue of whether the deceased died or the cause of death taken up nor was it disputed that the post-mortem produced was that of the deceased. That said, the practice should be that even where the cause of death is not disputed, the prosecution ought to call the doctor who performed the examination because the trial court may require to seek explanation, clarification or amplification of the contents of the report. The court may not be familiar with the terminology used in such reports and it seems obvious to us that the attendance of the expert is helpful, sometimes indispensable. Thankfully, in this matter no such difficulty arose because the cause of death was all too clear. The doctor concluded:

> " Due to complications from 56% TBSA Burns (second Degree Burns)."

27. Turning to the arrest of the appellant, here too, the officer who arrested him did not testify. Yet this cannot possibly weaken the prosecution's case as the arrest was not disputed. How can it when the appellant's own evidence in defence was that:

> " I decided to go to the police and report the matter. I found that the police knew about the incident. I was arrested and detained. I was charged about the incident I knew nothing about."

28. The conviction of the appellant was substantially founded on the eye witness accounts of PW1 and PW2. This appeal proposes that evidence of these two key witnesses are both inconsistent and contradictory as to make it unreliable. It is submitted that the evidence of PW1 that she visited the shop alone conflicts with the evidence of PW2 that she was with PW1 and the appellant before she (PW2) was asked to leave the shop by the appellant.

29. We must say that this submission is not a faithful analysis of the evidence of PW1. In cross-examination PW1 states:

> " Alice Mongare came and sat there. Gladys Moi also came there. They saw what happened."

Even more emphatic, she responded as follows to a question by the trial court;

> " Alice Mongare was a witness. We were with her. Gladys Moi is from the village. She is an adult."

30. AM is PW2. The evidence is that she, too, was present in the appellant's shop although she went there after PW1.

31. It is further submitted, for the appellant, that PW1 stated that one James opened the closed door for her to leave but that PW2 did not state that James did so and that James was never called as a witness. To be noted at once is that counsel for the appellant misapprehends the evidence of PW1 because the James referred to by the witness is in fact the appellant and he could never be available as a prosecution

witness. Second, the evidence of PW1 is that when an alarm was raised, members of the public came to the rescue and started to throw stones at the shop and breaking into it. At this point the appellant opened the door upon which PW1 and the deceased made an escape. Yet it has to be remembered that PW2 was asked to leave the shop by the appellant before he assaulted the deceased. It is probable that she could not, from the outside, see who opened the door for PW1 and the deceased, as the appellant and the two were inside the shop.

32. Heavy weather has been made about the non-production of photographs taken of the scene and the report of the Government Chemist of analysis of the exhibits recovered from the scene. No doubt the production of these would have made the prosecution case more complete but we do not think that their absence makes the strength of the eye witness accounts of PW1 and PW2 any weaker. In the presence of PW1, the appellant tied the hands of the deceased, placed a carton box over his head, poured something on the carton box and the body of the deceased and set the box on fire with a match stick. Even though there was no expert evidence that the liquid was paraffin, it seems obvious that it was an accelerant of some kind because the carton box quickly caught fire which then spread to the clothes of the deceased. PW2, too, saw this through a window of the shop. These evidence found firm support from the post mortem result which showed that the deceased died from second degree burns.

33. On the failure to call Gladys Moi, the trial court properly dealt with it as follows:

> "Counsel for the accused while relying on the case of Bukenya & others v Uganda [1972] EA 549 submitted that failure to call crucial witnesses was fatal to the prosecution case. He pointed out that the failure by the prosecution to call Gladys Moi to testify entitled the court to draw an inference that her testimony would be adverse to the prosecution case. In this case the nature of the evidence was not established and the issue was not put to PW3 in cross-examination to confirm that nature of her evidence nor did the accused name her in his unsown statement. I am satisfied that the testimony of PW1 and PW2 was direct and it established the accused's culpability hence I am unable to draw an adverse inference as submitted."

34. In the end the evidence of PW1 and PW2 was ironclad and the appeal on conviction cannot go any further.

35. Sentence, as always, is a matter of discretion to be exercised judiciously by the sentencing court. See *Ogalo s/o Owoura v Republic* [1954] 21 EACA 270; *Sayeko v Republic* [1989] KLR 306. An appellate court will not interfere with a sentence unless it has been shown to be manifestly lenient or excessive as to be demonstrably an abuse of discretion. It will also be interfered with if illegal or is arrived at by taking into account irrelevant material or failing to take into account necessary factors which causes the sentence reached to be inappropriate.

36. Here, the appellant took the law in his own hands tied an 8- year-old child, in effect immobilizing him, and set him on fire.

    All in the full glare of a desperate mother pleading that they resolve his grievance differently. The appellant acted with chilling impunity and made the life of this child so tenuous, so worthless. We do not think that a jail term of 25 years is disproportionate punishment for this callous and totally unjustified behavior of the appellant and we decline the invitation to disturb it.

37. The appeal fails on both limbs, conviction and sentence and is accordingly dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR