Ondara v Republic (Criminal Appeal 108 of 2016)
[2023] KECA 901 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 901 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 108 OF 2016

PO KIAGE, M NGUGI & JM NGUGI, JJA

JULY 21, 2023

BETWEEN

HASSAN ONDARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Migori (Mrima, J.) dated 23rd February, 2016 in HCCRC NO. 25 of 2014)

JUDGMENT

1 This case is tragedy writ large. At only 22 years of age and, remarkably, already a mother twice over, Gladys Munyenye must have harboured dreams of connubial bliss when she met the appellant herein, who took her as his second wife. He lived with her at a house belonging to his mother Jane Mongare Okemwa (PW2), at Kaiburu village of Kuria West district in Migori county. This was less than a kilometre from her parents' home.

It was not a happy union and the duo were said to have had constant disagreements. Gladys told her mother, Grace Osewe Nyakabari (PW4), that they had no peace and often fought. The mother advised her to go back home if the fights persisted. Her father, Dan Peter Nyankabaria Manyange (PW1) went to the appellant's house on September 29, 2011 in the early morning. He did not find the appellant and advised Gladys to pack her bags and return home once the appellant, who was out at the time returned. As cruel fate would have it, that was the last time PW1 would see his daughter alive.

Three days later, one of Gladys' sons, a young child, came to his grand parents' home. He reported that the appellant had brought him there. Neither Gladys nor the appellant came for the child all of that day, or the next two. Moreover, PW4, who does business, selling tomatoes at the market, did not see her there, where she frequented. Alarmed, Gladys parents started making enquires about her whereabouts in the neighbourhood, as well as in the larger Isebania and its environs. PW4 then called the appellant

on the telephone. He told her that he knew where Gladys had gone but he would require money to go get and bring her in 3 days. He did not do so even after telling PW4 later that he needed 3 more days.

PW4 then decided to report the matter to the Assistant Chief of Kaburui Charles Makori (PW5), who in turn advised her to report to the police. PW5 had been aware of domestic disputes between the appellant and Gladys in their five-month old marriage and had called on and counselled them to live in peace.

2 While Gladys was being sought and the appellant was, in cynical fashion, feeding PW4 with false hope, the sordid truth about her terrible fate revealed itself. On October 18, 2011, which was just over a fortnight after Gladys was last seen alive, Joseph Okello Wangari (PW7), a village elder was on his way to his shamba at about 7.30am. As he passed outside the house of a woman called Gali, she called out to him and reported that there was a foul smell in her home emanating from a pit nearby. PW7 went into the compound and was immediately assaulted by an over powering stench. Braving the terrible smell, he went to the pit in the neighbouring plot said to belong to one Mama Pius, PW7 went to call the said Mama Pius. She did not come on that day but she did the following day and also called the owner of an adjacent plot. This was Mama Hassan, the mother of the appellant. The trio met at about 11.00am on October 19, 2011. The appellant was also present. They were, however, unable to establish what was in that pit as it was too deep. PW7, then, decided to report the matter to PW5, the area assistant chief of 12 years standing, after which he left on a journey.

It was PW5's testimony that in the evening of October 22, 2011, he received information from members of the public including Joseph Ndera, who later died, that a strong odour was emanating from a deep pit near the appellant's house. As it was night, he decided to go check for himself clearly next morning. His first stop was the appellants home. He woke the appellant up and found him in the company of another woman. He first asked the appellant to enter the stinky hole, but changed his mind and asked someone else, one Julius, whom he paid Kshs 500 to do so. Julius entered the hole whence he reported he could see a body. He requested for a hoe and a container with which to scoop water from the hole. The body was rotten and larva infested. A rope was dropped to him and he tied it to a leg. When PW5 and the people there gathered pulled, in a macabre twist, the leg and thigh got plucked from the rest of the body.

Another attempt was made to retrieve the body by tying it by the waist. They pulled it up. It was naked save for a bra and a panty. The police officers who had been reported to covered badly decomposed body into a black polythene bag and took it to the mortuary. They also placed the appellant under arrest and took him to the police station.

Dr Samuel Ochere (PW6) produced in evidence a post mortem report prepared by his colleague at Kisii Level 5 Hospital Dr Matiku, who had performed a post mortem examination on the body. It was decomposed with the skin entirely peeled off. Some bones were missing as were internal abdominal muscles. The lungs, heart and head were decomposed with the last detached. Due to the extreme decomposition, he was unable to ascertain the cause of death. He took a sample from the said bone for purposes of DNA matching with her relatives.

3. At first the matching was done with the blood of Benard Manyaga Nyagambore, a brother of the deceased, collected on the day of retrieval. This was found to be unhelpful and mouth (bucal) swabs were done nearly 4 years later on July 25, 2015 from Gladys' biological parents and E.M, her child. The samples were examined by one Dr Joseph Kagunda who then generated DNA profiles thereof. They revealed that there were more than 99.9% chances that Grace Osewe and Peter Manyaga were her biological parents. By the same probability, she was sister to Benard Manyanga and also mother to EO (a minor), thus effectively and conclusively identifying the retrieved body as belonging to Gladys. The investigating officer, Corporal Francis Kivilu (PW9) made his entry in the case when an

incident of suspected murder was reported to the CID office at Isebania. He accompanied the Officers Commanding Station (OCS) and officers to Keburi Village and found the local chief and members of the public as the body was being retrieved from the hole. Neighbours suspected that it was the body of the appellant's wife who had gone missing. He established that the appellant had, on being asked about his wife's whereabouts, given contradicting accounts. This led him to suspect that the appellant knew something about her fate, and took him into custody.

4. That was the state of the evidence at the close of the prosecution case presented before Majanja, J. in the High Court at Migori. The learned judge found that a prima facie case had been made out and placed the appellant on his defence. The appellant who was represented by counsel, elected to given sworn testimony, calling no other witness. He stated that Gladys was his wife from May 2011, but that between 17th September and October 20, 2011, he was not staying with her and his efforts to trace her were unsuccessful. He said he had gone to Kisii for a funeral between September 4, 2011 and October 8, 2011 but on his return did not find Gladys. One Ongeri, a 20-year-old with whom he had left her informed him that her father had taken her with the child while the appellant was away. He went to her in-laws' home to look for her, and asked her mother about it, but she did not tell him where she was. He was present when the body was removed from the well, which he said was within the compound where he lived, but denied ever having any dispute with Gladys. He did not kill her and did not know how she died.

   Upon considering the evidence tendered by both sides, the learned judge found the prosecution case proved. He convicted the appellant as charged and holding that the only sentence prescribed by law was death, so sentenced to him.

   We have set out the evidence that was present before the trial court in some detail, cognizant of our duty as a first appellate court to proceed by way of rehearing and to re-evaluate all the evidence on record and subject to it to a fresh and exhaustive scrutiny before making our own inferences of fact and drawing our independent conclusions thereon. This is a solemn duty and the appellant is entitled to expect, nay demand it of us. And we have discharged it.

5. In his appeal to this court, the appellant complains that the learned judge erred in law and in fact by; failing to find that the case was not proved beyond reasonable doubt as the facts could not support a murder conviction; convicting the appellant on the basis of circumstantial evidence which was unsafe; shifting the burden onto the appellant to prove his innocence and ignoring his defence altogether; failing to see that the cause of death was not established, convicting him yet there was no evidence from which malice aforethought could be inferred, and for meting out the sentence of death without a social enquiry report.

6. The appellant's advocates, M/s Atieno Odinga, filed written submissions and cited Lord Denning's judgment in *Miller v Minister of Pensions* [1947] All Er 373 to make the point that the case was not proved beyond reasonable doubt. They next assailed the prosecution evidence as not meeting the standards required of circumstantial evidence in the absence of any eye witness, when the appellant was not placed at the scene and when the cause of death was not established. They referred to the case of *Abanga Alias Onyango v Republic* criminal App No 32 of 1990 (ur) As cited in *Republic v Michael Muriuki Munyuri* [2014] Eklr on the applicable principles and added, relying on *Sawe v Republic* [2003] KR 364, that suspicion no matter how strong, cannot justify a conviction. They finally contended that the sentencing of the appellant to death was bad in law in light of *Muruatetu & Anor v Republic* [2017] eKLR.

7. At the plenary hearing of the appeal, Mr Nyanga learned counsel for the appellant reiterated those submissions. He ventured to suggest that the deceased could have met her demise from other causes

but abandoned the argument when we pointed out, and he conceded, that no such suggestion was made or put to the witnesses during the trial. When we asked him whether there was any indication of remorse and mitigation from the appellant, counsel made the rather curious submission that "by protesting that he did not do it, he [the appellant] was expressing remorse."

8. On the part of the Republic, Mr Okango, the learned Principal Prosecution Counsel, highlighted the written submissions previously filed by his colleague Ms Vitsegwa. He contended that even though there was no eye witness to the murder, the circumstantial evidence was overwhelming and formed a well-knit chain that remained unbroken. He emphasized that the appellant lied that he knew where Gladys was while knowing she was dead and dumped in a well next to where he lived. Indeed, the appellant gave 3 contradictory versions as to where she was. He argued that she could not have accidentally slipped into the well as "nobody goes to draw water [dressed only] in her panties and bra." He also pointed out the fact that there had been disagreements between the appellant and Gladys and that the post mortem revealed that she had fractured ribs.

We have given due consideration to the rival submissions made before us and have carefully studied the record. It is common ground that in the absence of any eye witness to the murder, the case was mounted entirely on the basis of circumstantial evidence. And the law on this species of evidence is well-established in our jurisdiction. In *Sawe v Republic* [2003] eKLR, this court restated it thus;

> " 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 upon. 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 remain with the prosecution. It is a burden which never shifts to the party accused."

9. See also the old case of *R v Kipkering Arap Koske & Anor* 16EACA 135.

It was and remains the prosecution's case that less than five pieces of incriminating evidence point unerringly to the appellant's guilt. These include;

i. First, that the deceased, Gladys was last seen alive at the home she shared with the appellant on September 29, 2011 whereafter several witnesses all stated she was missing;

ii. Second, that the appellant gave shifting and contradictory accounts as to Gladys' whereabouts, telling PW3 that she had gone to her parents' with her child, which was a lie, telling the mother PW4 that he knew where she was and asking for money to go get her and finally telling PW4 that she needed 3 more days to go collect Gladys;

iii. Third, that there existed a history of disagreement between Gladys and the appellant which PW5 stepped in to try and resolve and;

iv. Fourth and finally, that the body was found in a well very close to where the appellant lived and where he was found in the company of another woman on the morning of retrieval, the overpowering stench from it apparently no bother to them.

10 We have carefully examined and weighed those inculpatory circumstances against the appellant's protestations of innocence.

11 We think, with much respect to appellant's learned counsel, that the cumulative effect of the circumstantial evidence adduced leads, upon application of common sense gleaned from human

experience, to a firm persuasion that the appellant had a hand in the death of his wife. What he stated about having attended a cousin's funeral did absolutely nothing to weaken the chain of circumstantial evidence or divert the finger and stench of blame that pointed unerringly to him. A husband with a history of domestic disputes with his young, young wife, who twice lies to her mother that he knows where she is and would be going to collect her, and tells other people more, concerned than he about her disappearance, that she had gone to her parents' home, while knowing that the foul smell from the well near his house noisesomely announced her tragic end and who, when other persons are concerned about the malodorous smell still goes about his life in the embrace of yet another woman quite obliviously, must in the nature of things be required to explain what befell his wife.

12 The appellant did not offer any explanation for a fact that surely must lie, by necessary logical and legal implication, specially within his knowledge. He did not offer any plausible explanation, content to only state that he knew nothing about what befell Gladys.

13. The requirement for him to explain was not some perverse imposition by the learned judge in unfair shifting of the burden, as complained by the appellant. Rather, it is a reasonable, statute-backed burden to be discharged on a balance of probabilities given the express provisions of section 111 of the *Evidence Act*.

We do not on our part find any evidence or co-existing circumstances that would weaken the inference of the appellant's guilt. Nor do we find any other theory inconsistent with his guilt, to explain the death and eventual macabre find of the body of Gladys in the well so close to where she lived with the appellant. We therefore come to the unhesitating conclusion that the appellant's conviction was safe, being based on strong and cogent circumstantial evidence. We therefore affirm the conviction and dismiss the appeal against it.

14. Turning to sentence, the same was imposed prior to the Supreme Court's decision in *Muruatetu (1)* (supra) which held that the mandatory nature of the death sentence as was imposed herein on the basis that the trial court was devoid of discretion in the matter, was unconstitutional. It is uncontested that the appellant should have the benefit of *Muruateru* (supra). Had there been mitigation on record sufficient to inform the extent of sentence to be imposed, we would have imposed a term sentence. There being no such mitigation, we direct that the case be remitted to the High Court for a resentencing hearing.

15. Our final orders are that the appeal on conviction fails, and is dismissed.

16 The appeal on sentence is allowed to the extent that the death sentence is set aside. The file shall be remitted to the High Court in Migori forthwith for the fixing of a resentencing hearing date leading to an appropriate sentence.

17 Order accordingly.

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

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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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