Abok v Republic (Criminal Appeal 197 of 2017)
[2023] KECA 1103 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1103 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 197 OF 2017

W KARANJA, F TUIYOTT & JM NGUGI, JJA

SEPTEMBER 22, 2023

BETWEEN

MUSA ABOK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J) Dated 26th July, 2017. in HCCRA No. 36 of 2014)

JUDGMENT

1. Kenneth Jared Odhiambo Abuto (the deceased) died on 27th March, 2014. It was the evidence of Joyce Pauma Omondi (PW1), a sister-in-law to the deceased that, just before his death, the deceased "told (sic) that he had been assaulted by Musa."

2. Musa Abok (the appellant) was charged and convicted for murdering the deceased on 27th March, 2014 at Kochieng village in Kisumu District, within Kisumu County, contrary to section 203 as read with section 204 of the Penal Code. In returning the conviction, the trial court (Majanja, J) believed the evidence of Rose Anyango Awino (PW2) who told court that she saw the appellant assault the deceased and that deceased had made dying declarations to Joyce Auma Omondi (PW1), Ruth Auma Omondi (PW3), Kennedy Ochiambo Omondi (PW5) and David Ojwang Okumu (PW6).

3. On that rainy night of 27th March, 2014, Rose Anyango Awino (PW2) went out to buy bananas from the appellant's home. On her way there she saw the appellant fighting with the deceased. The deceased had been locked inside a kitchen. When the door to the kitchen was opened, she saw the deceased lying on the floor, injured and unable to talk. She proceeded with her errand, went to the house of the appellant where she bought bananas. On her way back, the deceased was not where she had left him. She was later to find him dead.

4. PW4 is the sister-in-law to the deceased. On that night she was called by her mother-in-law and together visited the scene where the deceased lay. They found him with injuries on his head, forehead and neck. The deceased told her that he had been assaulted by Musa. Together with PW5 and PW6, they carried the deceased to his home but he succumbed to the fatal injuries before reaching there.

5. PW3 accompanied PW2 to the home of the deceased where they found him lying down. He had bled. The evidence of PW3 was that:

> " I asked him what happened and said (sic) Musa had killed him"

She called PW5, PW6 and one Ouko who came and carried the deceased to his house.

6. PW5 was at his house on that night when at about 9.00p.m. he heard Rose (PW2) tell his mother (PW3) that the deceased had been attacked by the appellant. As it was raining, he did not leave the house immediately. Later, when the rain had stopped, he heard someone call him. In turn he called his brother who together went to the direction of the voice. Beside a road, they found the deceased lying underneath a tree surrounded by some people. He had a cut injury to his forehead. The deceased told him,

> " Musa had(sic) killed me"

7. PW6 found PW3, Fredrick Ouko and other relatives at the place where the deceased lay. PW6 is a cousin to the deceased and when he asked him what had happened, the deceased told him "Akina Musa had assaulted him" His evidence supported that of PW5 together with PW3 they decided to carry the deceased to his house. It was his testimony that the deceased died while at the house.

8. It fell to PC Kwambai to investigate the crime. He was unable to testify as at the time of trial he was bedridden in hospital nursing injuries suffered from a road accident. In his place PC Peter Ouko (PW9) testified and gave highlights of the investigation, part of which involved the carrying out of a postmortem on the deceased's body. The postmortem which was conducted by Dr. Dickson Mchana (PW4) revealed four wounds to the scalp, a cut wound below his right knee, a stitched wound on the lower side of the leg, injury to the left elbow, three depressed skull fractures, two on the forehead and one on the back with a swollen brain. There was also a fracture to the femur bone. The doctor returned an opinion that the cause of death was:

> " raised intracranial pressure. 2nd penetrating blunt force trauma to the head (assault)"

9. In his defence the appellant stated that on the ill-fated day he was at Mamboleo Centre until about 8.00pm when it stopped raining. He then went to his home and reaching there, he heard people say that the deceased had been beaten and left under a tree. He slept and in the morning left for Embu, his place of work. He was arrested by police officers at a road block at Kenyatta University whereupon he was informed that he was involved in the death of the deceased.

10. In this appeal, the appellant raises four grounds:

    1. The learned Judge court erred in law in failing to appreciate that the prosecution failed to establish all and singular the ingredients that constitute the offence or murder.

    2. The entire evidence by the prosecution was circumstantial and did not meet the threshold required by law in order for it to be a basis of a sound conviction in a criminal trial.

3. The trial court erred both in law and fact in shifting both the burden and incidence of proof to the accused person.

4. The sentence imposed upon and handed over to the appellant was manifestly harsh and excessive in the circumstances.

11. In his address to us at plenary, Mr. Onsongo, learned counsel appearing for the appellant made highlights of his written submissions of 17th August, 2020. Counsel submitted that the trial Judge misapprehended the content, substance and elements of a dying declaration. Counsel points that a dying declaration would attach liability if it relates to a single person and not a group of people. Answering questions posed by the Court, counsel pointed out the evidence of PW6 in which the witness stated that the deceased said that he had been beaten by "Akina Musa".

Counsel argues that liability was not assigned to a specific person or any person alleged to have assaulted the deceased. He also contends that there was no evidence in support of the conclusion by the trial court that there was malice aforethought. That there being no evidence as to who delivered the fatal blow on the deceased, it is a matter of surmises to hold it against the appellant.

12. Turning to the evidence of PW2, it was submitted that it was not possible for her to see the appellant assault the deceased as the deceased was locked in the kitchen and she was on the outside. That at any rate her evidence was that the deceased and the appellant fought.

13. Counsel further pointed out to what he saw as inconsistence in the prosecution case. He contended that there was contradictory evidence as to where the deceased was found and also where he died. That the evidence of PW4 was that the deceased died on his way home, of PW3 that he died in the kitchen and of PW5 that he died in his house.

14. It was also an argument of counsel that the evidence of PW5 was that of suspicion when he stated that he suspected the Musa the deceased was referring to, to be the accused. The appellant asserts that there are many Musas in the village and no witness clearly pointed out the appellant as the Musa who the deceased was referring to.

15. Making reference to a passage in the impugned judgement, which we shall reproduce presently, counsel for the appellant argues that the learned trial Judge suggested that the appellant ought to have done something to prove his innocence or to ask certain questions to prove his innocence. Second, that the learned trial Judge placed a burden on the appellant to prove his alibi.

16. Mr. Okango represented the respondent at the hearing. It was the view of learned counsel that at no point in time did the trial court shift the burden of proof to the appellant. Counsel argues that in the passage, the learned Judge was simply examining the veracity of the dying declaration. On the alibi, the respondent urges that as it came during the giving of the defence testimony, the court was under a duty to evaluate the suggestion of alibi against the evidence on record.

17. On the dying declaration, it is submitted that upto 4 witnesses gave evidence of the appellant's statement. Further, that even if the appellant was assaulted by a mob, the doctrine of common intent put criminal liability on each and every person in the mob.

18. On the evidence of PW2, Mr. Okango observes that while it is true that she was outside the kitchen, she was later able to access it when the door was opened and she found the deceased lying down.

19. Our remit on a first appeal is as restated in the case of *Okeno V. Republic* [1972] EA 32:

> " 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 appellant court's own decision on 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."

20. The trial court regarded the evidence of PW2 as pivotal in proving that the appellant assaulted the deceased. PW2 testified:

> " On the way I met Musa, his father and mother and one Odhiambo. Musa is the accused herein. Musa was jumping jumping. He was fighting with Odhiambo. Odhiambo had been locked inside the kitchen. The door was opened by the daughter of Loice. They are Rose, Nurvin and two others. Rose opened the door to the kitchen. I went inside the kitchen. I found him lying down."

21. The evidence is that at one point the deceased and the appellant were in the kitchen and once the door to the kitchen was opened, she found the deceased lying on the floor. Even if it is taken, as proposed by counsel for the appellant, that the witness could not have seen the appellant, this evidence is significant in the context of dying declarations allegedly made by the deceased to the other witnesses.

22. The provision of section 33 (a) of the *Evidence Act* is on dying declarations and provides:

> " 33. Statement by deceased person, etc., when.
>
> Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) relating to cause of death
>
> when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question"

23. There was unshaken evidence that while seriously injured and just a few hours before he took his last breath, the deceased told PW1, PW3 and PW5 that Musa had assaulted him. That he was contemplating death was evident in what he said to PW5,

> " Musa had (sic) killed me"

While he also told PW6 that "Akina Musa" had assaulted him, the evidence of PW2 provides a strong link that the Musa referred to by the deceased was indeed the appellant as the appellant had been locked up in a room with the deceased so soon before the deceased was found injured. So that even if the dying declaration required corroboration, then it came from the evidence of PW2.

24. And even if accepted as true that a mob was responsible for assaulting the deceased, the appellant was in that mob and he cannot escape liability because of the doctrine of common intention that has statutory underpinning in section 21 of the *Penal Code* which reads;

> " 21. Joint offenders in prosecution of common purpose
>
> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

25. Indeed, the particulars of offence set out in the information is that the appellant, with others not before Court, murdered the deceased.

26. On how the alibi evidence was treated, the alibi was offered for the first time during the defence case and the prosecution did not have an opportunity of confronting it through investigation or in the course of the prosecution case. And so the approach to take is to simply test it vis-a vis the entire prosecution case (*Karanja V Republic* [1983] KLR 501). The trial court fully appreciated this approach and we are happy to endorse the following holding by the learned Judge:

> " 17. The accused was person well known in the village, nothing was suggested to the witnesses in cross –examination that the accused was not at the scene or could have been elsewhere at the time the assault took place. In any case, his defence put him in the locality of the offence.
>
> 18. The totality of the prosecution evidence proved through the direct testimony of PW2, who had seen the accused assault the deceased, and the dying decelerations implicated the accused and other people he did not name. All in all, the prosecution evidence is overwhelming and I have no option but to reject the accused defence. It therefore find and hold that the accused was amongst the persons who assaulted the deceased"

27. The suggestion that the burden of proof was shifted to the appellant is therefore unsupported and without merit.

28. On sentence, it was imposed prior to the jurisprudence in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and it is common ground that the appellant should benefit from this new position. We are, however, unable to review the sentence as no mitigation at all was offered by the appellant at trial perhaps because he thought it to be futile as the only sentence then imposed routinely by courts was the death sentence. In the circumstances, we have no option but to remit the matter to the High court for resentencing.

29. The upshot is that the appeal on conviction is dismissed and the matter is hereby remitted to the High Court at Kisumu for an expedited hearing on resentencing. So as to ensure quick disposal, we make further order that the matter be mentioned before the Deputy Registrar High Court within 14 days for directions on resentencing.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

W. KARANJA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.