Kimathi alias Kuguru v Republic (Criminal Appeal 152 of 2017) [2023] KECA 1584 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1584 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 152 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

SEPTEMBER 22, 2023

BETWEEN

JULIUS MURIUNGI KIMATHI ALIAS KUGURU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Wendoh, J.) delivered on 26th July, 2016 in H.C.CR. Case No. 16 of 2011)

JUDGMENT

1. The appellant, Julius Muriungi Kimathi alias Kuguru, was charged alongside Gedion Kinyua, before the trial court with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 31st December 2010, at Kaubau Village Ukuu Sub-location, Imenti South District within the then Eastern Province, the appellant and the 2nd Accused before the trial court murdered Jane Kiruki (the deceased). When the appellant and the 2nd Accused were arraigned before the trial court, they both pleaded not guilty to the offence. The matter proceeded to hearing with the prosecution calling six witnesses. After close of the prosecution case, the trial court found that the 2nd Accused had no case to answer, and consequently acquitted him under Section 306 of the *Criminal Procedure Code*. The appellant was,however put on his defence. He gave sworn evidence and did not call any witnesses. He denied committing the offence that he had been charged.

2. The brief facts of the case are that the deceased was at Ukuu Market on 30th December 2010. PW1, Edward Miriti Joseph, stated that he saw the deceased that day at the market, and that she appeared drunk. PW3, Faith Mtinyari, lived at Ukuu Market. She was a neighbour to PW1. She stated that she sold alcohol at the market. She told the court that on 30th December 2010, she closed her business at 10.30 pm. On her way home, before entering her house, she saw the deceased with the appellant. PW1 and PW3 stated that they afterwards heard a lady screaming. They came out of their houses with

torches to see what was happening. They stated that it was the deceased who was screaming while in the appellant's company. They testified that the deceased and the appellant were drunk. PW1 stated that the appellant started hurling insults at him. PW1 and PW3 both went back to their houses. The following morning, they were informed that the deceased's body had been found at a nearby tea farm.

3. PW2, Peter Mwenda, is a brother to the appellant. He stated that he heard from PW1 that the appellant was with the deceased the night before she was found dead. PW4, Edward Kaaria, was also a resident of Ukuu Market. He told the court that on the night of 30th December, 2010, he was at Kimathi's bar when he saw the 2nd accused person buy two condoms at the said bar.

4. The post mortem was conducted by Dr. Kalovi. The report was produced in court by PW5, Dr. Bett, on his behalf, by consent of the parties. PW5 testified that the post mortem was conducted at Meru Level 5 Hospital on 7th January 2011, at 8.00 a.m. He told the court that the deceased had strangulation marks on her neck, bruises on her chest and bruises on her external genitalia. Her trachea cartilage was compressed and distorted. The cause of death was determined to be cardiopulmonary arrest due to respiratory failure due to airway obstruction as a result of strangulation.

5. The case was investigated by IP Makori who unfortunately died before giving his testimony before the trial court. PW6, CIP Francis Wafula, who was the OCS Kariene Police Station, produced exhibits before court being the deceased's clothes and shoes that were recovered from the crime scene. He stated that he was not able to obtain photographs that were taken by the scene of crime officer as well as the report by the Government analyst.

6. The appellant in his defence denied that he killed the deceased. He testified that he resided at Ukuu Market. He stated that on 30th December, 2010, he left Ukuu at about 11.00 am and went to Nkubu town to get some money he was owed from sale of stones. While at Nkubu, he went to a bar known as Slopes where he ordered half a kilogram of meat and alcohol. He left the bar at 8.00 pm and hailed a taxi which took him home. He denied being with the deceased on the material night. He also stated that he did not meet PW1 on his way home that night. He testified that he was arrested in March 2011 on allegations of having killed the deceased and also abusing PW1.

7. After full trial, the appellant was convicted as charged, and sentenced to suffer death. Aggrieved by his conviction and sentence, the appellant filed an appeal before this Court. He advanced a total of twelve grounds of appeal in his memorandum of appeal and a further six grounds in the supplementary grounds of appeal, filed on his behalf by his advocate. In summary, the appellant was aggrieved that he had been convicted on the evidence adduced by the prosecution that was insufficient to sustain a conviction. He stated that the prosecution failed to establish the ingredients of the offence of murder to the required standard of proof beyond any reasonable doubt.

8. The appellant faulted the trial court for convicting him on the basis of suspicion and circumstantial evidence that failed to meet the required legal threshold. He was aggrieved that the trial court failed to find that the circumstances conducive for a positive identification were not present in this case. He faulted the trial Judge for disregarding the evidence of PW4 which exonerated him and broke the chain of circumstantial evidence that was relied on by the prosecution. Lastly, he urged the Court to find that the sentence imposed on him by the trial court was harsh and excessive in the circumstances. He invited this Court to allow his appeal.

9. The appeal was heard by way of written submissions which were duly filed by learned counsel for both parties. Counsel for the appellant, Ms. Nerima, submitted that the circumstantial evidence relied on by the trial court to convict the appellant did not irresistibly point to the appellant as the person who killed the deceased. She stated that no relationship was established to have existed between the appellant

and the deceased, and therefore the appellant had no reason to kill the deceased. She asserted that the deceased was sexually assaulted, and the fact that the 2nd accused person was seen buying condoms at 10.30 pm on the material night raises doubt as to whether the appellant committed the crime. She faulted the trial Judge for finding that the appellant was seen with the deceased during the day and again in the evening, when the evidence on record from PW1 showed that he only saw the appellant standing next to the deceased once that evening. She submitted that the fact that the appellant was seen standing next to the deceased, did not infer guilt on his part, as none of the witnesses saw them leaving the particular place together. In the premises, she urged this Court to allow the appeal as prayed.

10. The appeal is opposed. Learned State Counsel, Mr. Chelule, submitted that the appellant was the last person seen with the deceased before her demise. He stated that the deceased's body was recovered about 200 meters from where she was last seen with the appellant. He pointed out that the circumstantial evidence unerringly pointed to the appellant, and no one else, as the assailant. Mr. Chelule asserted that the evidence of PW1 and PW3 was cogent and corroborative, thereby, giving credence to the application of the doctrine of 'the last seen' by the trial court, and that the witnesses positively identified the appellant on the material night. He further submitted that the appellant was unable to explain what happened after he was last seen with the deceased. He explained that the manner in which the deceased was killed showed intention to end her life. He opined that the appellant was properly convicted by the trial court. With regard to the sentence, learned State Counsel was not averse to this Court reconsidering the same in light of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

11. We have carefully considered the record of appeal, the submissions by both parties, and the law. The duty of the first appellate court was stated by this Court in *Gabriel Kamau Njoroge v Republic* [1987] eKLR as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)".

12. The issues falling for determination by this Court are: whether the circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction based on such circumstantial evidence; whether the appellant was positively identified by PW1 and PW3; whether the appellant's defence was considered and whether this Court should interfere with the sentence of death that was meted on the appellant by the trial court.

13. On the first issue, as was properly observed by the trial Judge, the prosecution's case was solely based on circumstantial evidence. The appellant urged this Court to find that the circumstantial evidence relied on by the trial court to convict him did not meet the legal threshold required for such conviction. This Court, in the case of *Omar Mzungu Chimera v R* Criminal Appeal No 56 of 1998, reiterated the legal threshold that is required to be met before circumstantial evidence can form the basis to convict an accused person:

> " It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

(See also *Sawe v Republic* [2003] eKLR)

14. In the case of *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR, this Court observed as follows on circumstantial evidence:

> "However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
>
> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial'.'"

15. The Supreme Court of India in the case of In *G. Parshwanath v State of Karnataka* [2010] 8 SCC 593 held thus:

> "In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.
>
> In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt...".

16. In the instant appeal, PW1 and PW3 stated that they saw the appellant with the deceased, the night that she was killed. The appellant contends that the evidence of identification by PW1 and PW3 was not safe, since it was dark at the time they are alleged to have seen him with the deceased. We however disagree with the appellant on this point. The appellant was known to PW1 and PW3. This fact was not challenged by the appellant. Secondly, PW1 and PW3 came out of their respective houses with torches. They told the court that they used the light from the torches to identify the appellant who was standing next to the deceased. Further, the appellant talked to PW1. Both PW1 and PW3 stated that the appellant hurled insults at PW1 after which they decided to go back to their houses, and left the appellant with the deceased. On re- evaluation of the evidence in this regard, we hold that the appellant was properly identified by PW1 and PW3 on the material night.

17. The trial court relied on the doctrine of 'the last seen' to convict the appellant. The prosecution adduced evidence to the effect that the appellant was the last person to be seen in the company of the deceased at about 10.30 pm, before her body was discovered in a nearby tea plantation the following morning.

18. This Court in the case of *Chiragu & another v Republic* [2021] eKLR cited with approval the decision of the Nigerian Court of Appeal in the case of *Moses Jua v The State* (2007) LPELR- CA/IL/42/2006 where the court held as follows while considering the doctrine of the 'last seen alive with':

> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

19. Supreme Court of India in *State of U.P. v Satish* (2005) 3 SCC 114, observed as follows:

> " The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

20. The doctrine of the last seen is a rebuttable presumption. If an accused person is established to have been the last person seen with the deceased, he is required to offer an explanation as to how and when he parted ways with the deceased. The accused is required to furnish an explanation which appears to the Court to be probable and satisfactory, after which he shall be held to have discharged his burden. If an accused person fails to offer an explanation on the basis of facts within his special knowledge, such as in the instant appeal, then the court will be justified in drawing an inference of guilt.

21. PW1's evidence that the appellant was the last person seen with the deceased on the night of her death was corroborated by PW3. The appellant, in his defence, denied that he was with the deceased on the material night. He testified that on 30th December, 2010, he was at Nkubu town during the daytime and later took a taxi and went home at about 8.00 p.m. His alibi defence was however displaced by the evidence of PW1 and PW3 who were categorical that they saw the appellant in the company of the deceased on the night of 30th December 2010. Their evidence was unshaken even upon cross-examination. As stated earlier, the appellant was known to PW1 and PW3. PW3 further described that the appellant was wearing a stripped t-shirt that night. This Court has already found that the appellant was positively identified by the two witnesses. Their evidence was consistent and corroborative.

22. The appellant failed to offer the trial court any explanation as to what happened that night, and instead denied being at the scene. The appellant was last seen with the deceased at about 10.30 p.m. on the fateful night. Her body was discovered at a tea plantation 100 meters away from where she was last seen with the appellant on the following morning. The fact that the deceased was found dead a few hours after being seen with the appellant, a few meters away from where they were last seen together, and in the absence of any explanation by the appellant of what occurred that night, the trial court was justified in drawing an inference that the appellant caused the death of the deceased person.

23. Counsel for the appellant submitted that the evidence of PW4 that the 2nd accused was seen buying condoms at a bar in the market, and the fact that the deceased was suspected to have been sexually assaulted since the post mortem indicated that she had bruises on her external genitalia, weakened the circumstantial evidence against the appellant. This Court is however of a different view since the 2nd accused was not placed at the scene of crime, and neither did any of the witnesses testify that they saw the 2nd accused with the appellant or the deceased on the material night. When PW3 was going home, she stated that she saw the appellant with the deceased. When PW1 and PW3 heard someone screaming and went out to investigate, they saw the appellant and the deceased together. Nobody else was at the scene. Therefore, PW4's evidence did not in any way weaken the circumstantial evidence adduced against the appellant.

24. The appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The prosecution was required to prove the element of malice aforethought or specific intention before the appellant could be convicted of murder. By virtue of Section 13 (4) of the *Penal Code*, the trial court was required to take into account the appellant's intoxication for purposes of determining whether he had formed malice aforethought. The said section provides that:

> "(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

25. This Court in the case of *Benson Kedisia v Republic* [2009] eKLR observed as follows regarding the application of Section 13 (4) of the *Penal Code*:

> "Evidence of drunkenness need not necessarily come from an accused person himself; such evidence can come from the prosecution witnesses and it cannot be simply ignored because it has only come from the prosecution witnesses. If the learned Judge had not wrongly discharged the assessors, it would have been her duty to direct the assessors on the issue of alleged drunkenness on the part of the appellant. In the case of *Said Karisa Kimunzu v Republic*, Criminal Appeal No 266 of 2006 (unreported) this Court dealt extensively with the question of drunkenness and its relationship to section 13(4) of the *Penal Code*. There, the Court stated as follows:
>
> > "But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the *Penal Code*. If there be evidence of drunkenness or intoxication then under section 13(4) of the *Penal Code*, a trial court is required to take that into account for the purpose of determining whether the person charged was

capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son'."

26. From the foregoing, the evidence that the appellant was drunk is critical, and the prosecution was required to prove that despite the fact that the appellant was intoxicated, he still had malice aforethought, for a conviction of murder to stand. In the instant appeal, the learned Judge did not consider the fact that the appellant was drunk when navigating the element of intent to kill.

27. From the evidence of PW1 and PW3, the appellant and the deceased were both drunk when they were last seen together that night, before the deceased body was discovered the following morning. PW1 stated that he could tell that the appellant was drunk from the way he hurled insults at him. None of the prosecution witnesses spoke of any relationship that existed between the appellant and the deceased, or any motive that the appellant may have had to kill the deceased. The circumstances of this case therefore raise doubt as to whether the appellant killed the deceased with malice aforethought. The benefit of doubt ought to have been resolved in favour of the appellant.

28. On re-evaluation of the evidence, and in light of the grounds of appeal and the submissions made before us, we allow the appeal, quash the conviction for murder and set aside the sentence of death meted by the trial court. In lieu thereof, we substitute with a conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. On sentence, the appellant strangled the deceased to death. The post mortem report indicated that her trachea cartilage was compressed and distorted. We, therefore, think the appellant deserves a sentence that will serve the justice of the case. The appellant is hereby sentenced to serve 20 years' imprisonment with effect from the date the appellant was first arraigned before the trial court, being 30th March, 2011. It is so ordered.

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

W. KARANJA

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR