Wesonga v Republic (Criminal Appeal 179 of 2020)
[2023] KECA 1302 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1302 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 179 OF 2020

PO KIAGE, M NGUGI & JM NGUGI, JJA

OCTOBER 27, 2023

BETWEEN

SHABIR WACHIRA WESONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (R. N. Sitati, J.) dated 20th December, 2019 in Criminal (Murder) Case No. 44 of 2014)

Failure to disprove a plausible alibi undermines the prosecution's burden of proof

The appellant was convicted of murder under sections 203 and 204 of the Penal Code for the killing of Juma Okune Shiundu on July 19–20, 2014, in Mureko village, Butere District. The prosecution relied on PW1's identification, previous threats by the appellant, and the post-mortem report confirming head injuries. The appellant denied involvement, asserting an alibi that placed him in Belgut, Kericho County, supported by two colleagues. The High Court convicted him and sentenced him to 25 years. On appeal, the Court of Appeal found the alibi unrefuted, raising reasonable doubt, and quashed the conviction, setting the appellant at liberty.

Reported by John Ribia

Criminal Law *– defences - alibi – burden of proof – duty to disprove and discharge of the burden of proof - whether an accused person had the burden to prove that an alibi was true - whether the possibility that an accused person's alibi was true meant that the prosecution had failed to meet its burden of proof, thereby entitling the accused to the benefit of the doubt.*

Brief facts

The appellant was charged with murder under sections 203 and 204 of the Penal Code. The prosecution alleged that on the night of July 19 to 20, 2014, in Mureko village, Butere District, he and others not before the court murdered Juma Okune Shiundu.

The post-mortem confirmed death by severe head injury. The appellant was arrested on August 17, 2014, but he denied involvement, claiming he was in Belgut, Kericho County, teaching. Two colleagues supported his

alibi, stating he was at school invigilating exams and attending a debate on July 19 and at a church service on July 20. However, the investigating officer found no school attendance records for that weekend.

The High Court convicted him and sentenced him to 25 years. The appellant filed the instant appeal on grounds that the High Court erred in not considering his alibi.

Issues

i. Whether an accused person had the burden to prove that an alibi was true.

ii. Whether the mere possibility that an accused person's alibi was true meant that the prosecution had failed to meet its burden of proof, thereby entitling the accused to the benefit of the doubt.

Held

1. Being a first appeal, the mandate of the appellate court was to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses.
2. The prosecution did not entirely discharge its duty of dislodging the appellant's defence of alibi. The appellant's alibi seemed plausible. The prosecution should have called the two witnesses who supported the alibi to testify so that it could test the corroborative effect of the statements that they had given. Having failed to do so, a reasonable doubt had been cast as to whether the person identified at the scene of crime on the material night was actually the appellant.
3. In an alibi defence based on witness testimony, the credibility of the witness either strengthened or weakened the defence dramatically. A successful alibi defence entirely ruled out the accused as the perpetrator of the offence. There was no burden of proof on the accused to prove an alibi. If there was a reasonable possibility that the accused's alibi could be true, then the prosecution had failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
4. An alibi raised a specific defence and an accused person who put forward an alibi as an answer to a charge did not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduced into the mind of the court doubt that was not unreasonable.
5. The appellant mounted a plausible and reasonable narrative at the earliest opportunity that he was in far- away, Belgut, and even mentioned two witnesses who recorded statements. The prosecutions' failure to call the said witnesses could only lead to an inference that their evidence would have been adverse to its case. An alibi defence did not operate to strengthen the prosecutions' case. An accused person who raised an alibi assumed no burden to prove it but the law imposed a duty on the prosecution to wholly disprove it. The prosecution did not discharge that onus. That failure left the alibi as possibly true which in turn injects the prosecution case with the destructive germ of reasonable doubt. The court had no option but to resolve that doubt in the appellant's favour. No amount of suspicion no matter how strong could justify a conviction where a reasonable doubt of guilt lingers

Appeal allowed, conviction quashed and set aside. The appellant was set at liberty unless otherwise lawfully held.

Citations

Cases

1. Bundi , George M'rimberia v Republic Criminal Appeal 352 of 2006; [2007] KECA 310 (KLR) — (Mentioned)
2. Meda , Erick Otieno v Republic (Criminal Appeal 55 of 2015; [2019] KEHC 4959 (KLR) — (Mentioned)
3. Mulinge , Victor Mwendwa v Republic Criminal Appeal 357 of 2012; [2014] KECA 710 (KLR) — (Applied)
4. Muma , Reuben Ombura & Nelson Ochieng Mwaga v Republic Criminal Appeal 130 of 2016; [2018] KECA 704 (KLR) — (Applied)
5. Republic v Daniel Kiarie Wainaina, Eunice Muthoni Kiarie, Julia Waithera Kiarie & Monicah Wangui Kiarie Criminal Case 65 of 2011; [2017] KEHC 3522 (KLR) — Applied

6. Republic v Julius Nyekenye Serikali Criminal Case 21 of 2017; [2020] KEHC 7047 (KLR) — (Applied)
7. Republic v SSM Criminal Appeal 13 of 2019; [2020] KEHC 9782 (KLR) — (Applied)

Regional Court

Terekali & another v Republic [1952] EA 259 – (Mentioned)

South Africa

Ricky Ganda v The State [2012] ZAFSHC 59 — (Applied)

United Kingdom

R v Turnbull & others ([1976] 3 ALL ER 549) — (Explained)

Statutes

Penal Code (cap 63) — sections 203, 204 — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant, Shabir Wachira Wesonga, was arrested and charged before the High Court at Kakamega with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the night of 19th and 20th July, 2014 at Mureko village, Bukafu Sub-location in Butere District within Kakamega County, he jointly with others not before court murdered Juma Okune Shiundu (deceased).

2. The appellant denied the charge leading to a trial in which the prosecution called 8 witnesses in support of its case.

3. Evidence was adduced that on July 20, 2014, at about 1 am, someone kicked open the door of Nelly Apiyo Ongola (PW1)'s house whereupon two people entered and inquired on the whereabouts of PW1's husband, the deceased. PW1 recognised one of them as the appellant, since he was a nephew to the deceased. The two assailants moved next to the bed where PW1 and the deceased were lying, and the appellant pulled the deceased out of the house as his accomplice pinned PW1 down for about 10 minutes. When they left, PW1 went to the house of Choice Nyakowa Okune (PW2), her co-wife, and informed her about the incident. They tried to follow the aggressors, but they became afraid when they saw torches flashing at them. They then decided to seek the help of Asuman Okwayo Shiundu (PW4), a brother to the deceased. A short distance from PW4's home, they found the deceased's body. He had a cut wound on the head and was bleeding. He was also injured on the right eye. A report was made to Butere Police Station and the police went and picked the body of the deceased and took it to St Mary's Hospital, Mumias.

4. PW1 revealed that earlier, on 1 July 2014, the appellant's father, one Wesonga Marambe and the deceased had gone to demolish a toilet at somebody's home when the wall collapsed on him and he was killed. PW2 corroborated PW1's account that on the night of 19th and July 20, 2014 at around 1 am, PW1 woke her up and told her that the deceased had been taken away. They tried to follow-up the assailants but they got scared when they saw flashes of light being directed at them. They thus followed a different route to PW4's home. PW4 got out with his sons and a few meters away they came across the body of the deceased. Five successive witnesses corroborated PW1's testimony that on 1 July 2014, the deceased and the appellant's father were demolishing a toilet when its wall collapsed and killed the

appellant's father. Thereafter, the appellant blamed the deceased for his father's death and on different occasions they heard him vow to avenge that death. Emmanuel Shiundu Andabwa (PW5), testified to having heard the appellant utter the words, 'I am giving Mzee Juma one week and I will have buried him'.

5. The area Assistant Chief, Wilson Namayi Wamalwa (PW6), testified that on 2nd July 2014, the appellant went to his home and asked him to summon the deceased to go and explain how his father passed on but the deceased failed to appear. On 3 July 2014, again the appellant went to find out from PW6 whether the deceased had told him the circumstances under which his father died. On 4th July 2014, a reconciliation meeting was held between the appellant's family and that of the deceased where the deceased explained how the appellant's father perished. To PW6, the two families were reconciled at that meeting.

6. Dr Juma Khayombe (PW7), a doctor at St Mary's Hospital, produced the post-mortem report of the deceased on behalf of Dr F Mose who conducted the post-mortem but had since left the hospital. The findings of the post-mortem were that the deceased had lacerations on the head and on the back both measuring 15cm. There were also lacerations on the right temporal region measuring 3×4 cm. On dissecting the head, it was found that the deceased had a comminuted skull fracture, loss of brain matter on occipital region and massive bleeding in the brain. In the doctor's opinion, the cause of death was severe head injury secondary to blunt trauma.

7. Cpl Francis Anyara Ekapsten (PW8), the investigating officer, testified that between 19th and 20th July 2014, at around 2am, he received a phone call from his deputy informing him of a murder. He teamed up with his colleagues and about 100metres to the home of the deceased, they found his body lying in a pool of blood. They searched the area but they did not find any suspect nor was any murder weapon recovered. PW8 then made arrangements for the body of the deceased to be taken to St Mary's Hospital Mortuary. Subsequently, the Chairman of Community Policing went to Butere Police Station and informed the police that, they had indication that the appellant was the main murder suspect; having alleged that the deceased was the one who killed his father. During his father's burial he had threatened revenge.

8. On 17 August 2014, PW8 and his colleagues proceeded to arrest the appellant. Upon interrogating him, he denied the allegations claiming that when the incident happened be was in Belgut in Kericho County, teaching at a private school. PW8 visited the school but he could not establish whether the appellant was at work on the period in question that is, 19th and 20th July 2014. This is because the two days were weekends, and he was informed that on weekends no attendance register for teachers was kept. PW8 recorded statements from two of the appellants' colleagues namely, Esther Chepng'eno Koech (Esther) and Omar Ochieng Ali (Omar). The two affirmed that the appellant was at work on the concerned dates.

9. At the close of the prosecution's case, the learned judge found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and called no witness. He denied committing the offence, stating that on the ill-fated night he was in Belgut, which is about 200km from Butere where the murder took place. He confirmed the allegation that his father had died while at the hands of the deceased and that, on 3 July 2014, a reconciliation meeting was held between his family and that of the deceased through the Assistant Chief. He, however, denied threatening to avenge his father's death.

10. At the trial, Mwita, J took the evidence of four witnesses. Sitati, J succeeded him and heard the case to completion. The learned judge evaluated the evidence tendered before her and found the

appellant guilty as charged. Thereafter Musyoka, J. took over the matter and, upon consideration of the appellant's mitigation, sentenced him to 25 years' imprisonment.

11. Aggrieved by the judgment and sentence of the High Court, the appellant preferred the instant appeal, based on 3 grounds, which can be summarized that the judge erred in law and fact by;

    a. Failing to evaluate the evidence as a whole and find that the prosecution did not prove it case beyond reasonable doubt.

    b. Relying on evidence of identification when the conditions prevailing at the scene of crime were difficult for any significant identification to be made.

    c. Disregarding the alibi defence tendered by the appellant.

12. During the hearing of the appeal, learned counsel Miss Anyango appeared for the appellant while the respondent was represented by Mr Okango, learned Senior Principal Prosecution Counsel. Both parties had filed written submissions which they highlighted.

13. It was submitted for the appellant that the evidence of PW1, the only person who witnessed the crime, was inconsistent. It was argued that while in examination in chief she indicated that she identified the appellant as one of the assailants with the aid of light from the torch that the appellant's accomplice was carrying, in cross-examination she changed that testimony and stated that she identified the appellant by his voice. Moreover, when she recorded her first statement with the police on 1st August 2014, she did not mention the name of the appellant as one of the perpetrators of the crime. It is when she recorded a second statement a month later that she mentioned the appellant. Counsel asserted that a witness's failure to give the name of an aggressor at the earliest opportunity weakens the evidence of that witness. For this proposition she relied on various decisions including, *Terekali & another v Republic* [1952] EA 259 And *George Bundi M'rimberia v Republic* [2007] eKLR.

14. Ms Anyango challenged the claim that the Chairman of Community Policing was the first to report that the appellant was the suspect behind the deceased's demise and based on that information, the appellant was arrested. She contended that since the Chairman was not a witness at the scene, was never called as a witness and neither did he record a statement, then the information he gave PW8 was hearsay. Citing the often invoked authorities on identification including *R v Turnbull & others* [1976] 3 ALL ER 549, counsel argued that the circumstances of the fateful night were not favourable for positive identification of the appellant. She contended that the learned judge ought to have, but failed to proceed carefully before relying on that evidence.

15. Citing this court's decision in *Victor Mwendwa Mulinge v Republic* [2014] eKLR, counsel asserted that the prosecution never disproved the appellant's alibi defence which he raised from the very beginning that, during the period in question he was away working in Belgut, which is 6-7 hour's drive to Butere where the crime happened. In the said decision, the Court was categorical that the burden of proving the falsity, it at all, of an accused's defence of alibi lies on the prosecution. Miss Anyango pointed out that the Manager of the school where the appellant worked, and another colleague recorded statements supporting the appellant's alibi. The two indicated that the appellant was at school the entire weekend of 19th to 20th July 2014. Counsel further rejected the contention that the appellant had made threats to the effect that he would avenge his father's death. She argued that none of the witnesses demonstrated that they had reported the alleged threats to the police. In the end, counsel urged us to allow the appeal, quash the conviction, set aside the sentence imposed, acquit the appellant, and set him at liberty.

16. Opposing the appeal, Mr Okango submitted that the prosecution proved all the ingredients of murder to the required standard, that is, the death of the deceased and its cause; the identity of the appellant as the person who killed the deceased, and that the killing was with malice aforethought. Counsel urged that the death of the deceased is common ground by all witnesses. As to the cause of death, PW1 to PW5 testified to having seen the deceased with cut wounds on the head and the eye; and PW7 produced a post-mortem report on the deceased wherein the cause of death was recorded as severe head injury secondary to blunt force trauma. Concerning the identity of the person who inflicted the injuries, counsel contended that PW1 gave sufficient circumstantial evidence, which was not controverted, to the effect that, the deceased was dragged from his house on the night of 19th and 20th July 2014, by the appellant and another person; she identified the appellant through recognition; and soon thereafter the deceased was found lying dead a few metres away.

17. Counsel argued that malice aforethought was proved two-fold; the injuries inflicted as described by PW7 caused the death of the deceased; the nature of those injuries showed malice aforethought as provided under section 206 of the Penal Code. Moreover, PW1 to PW6 were consistent that the appellant blamed the deceased for his father's death and vowed to take revenge on him. Mr. Okango dismissed the submission that the conditions were not conducive on the material night for PW1 to positively identify the appellant. He maintained that identification in this case was by way of recognition as stated by PW1, the appellant being a son to the deceased's brother.

18. On the complaint that the learned judge failed to consider the appellant's defence of alibi, a ground which he considered the main one in this appeal, counsel contended that the said defence was considered by the learned judge, and was found wanting. While acknowledging the prosecution's duty to rebut the defence of alibi whenever it is pleaded, counsel submitted that when the defence was raised, the prosecution interrogated it and PW8 through his investigations disproved it. He traveled to Chumo Education Centre in Belgut, the appellant's place of work, and obtained the teachers' attendance register. The register did not have entries for 19th and 20th July 2014. PW8 also obtained the school timetable but the same did not confirm whether the appellant was indeed at the institution. Mr Okango further submitted that the two statements by the appellant's colleagues which sought to support his defence of alibi were contradictory. While Esther, the manager of the institution stated that on 19th July 2014 all teachers were at school to invigilate examinations, Omar, the appellant's colleague indicated that he met the appellant during the day after the lessons, without alluding to there being any examinations. Counsel maintained that the prosecution controverted the alibi defence. He urged that the appeal has no merit and the same should be dismissed.

19. We sought to know from Mr Okango why the two witnesses who recorded statements supporting the appellant's defence of alibi were not called to testify, considering that the appellant had from the onset raised that defence. Counsel's response was that since the incident happened at night, there was no witness who would have confirmed the whereabouts of the appellant that night.

20. In reply to Mr Okango's submissions, Miss Anyango insisted that the appellant raised the defence of alibi as soon as he was arrested and that defence was substantiated by his colleagues. She urged that the defence remained unchallenged.

21. We have considered the record of appeal and the submissions made by the parties and have distilled the primary issue for determination to be whether the appellant's alibi defence was properly interrogated. In determining that issue, we are aware of our role as a first appellate court, as has been re-stated in

numerous decisions of this court including, *Reuben Ombura Muma & another v Republic* [2018] eKLR. This court stated thus;

> " This being a first appeal, our mandate as an appellate court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

22. The appellant through his counsel is adamant that his alibi defence, which he raised as soon as he was arrested, was not dislodged by the prosecution. He contends that the learned judge failed to consider his evidence in that respect. The appellant's alibi is to the effect that when the murder happened, he was away at a place called Belgut in Kericho County, where he worked in a school as a teacher. The place is said to be about 6-7 hours away from Butere where the offence took place. The appellant then relies on two statements recorded by his colleagues, supporting his alibi. According to the statement of one Esther, the manager of Chumo Education Centre, on 19th July 2014, the appellant was among the teachers who were present in school invigilating examinations. Later, there was a debate that ended at 4pm and which the appellant presided over. Esther further alleged that the following day on 20th July 2014, there was a church service at the school that started at 9.00am. The appellant was present, and stayed on up to 8.30pm because he had an evening lesson to teach.

23. Similarly, Omar, another colleague to the appellant averred that on 19 July 2014, while at work he met the appellant in the staffroom. He again later met him during the day after his lessons. Omar claimed that on 20th July 2014, during a prayer day service that started at 9am at the institution, he noticed that the appellant was seated next to him.

24. Conversely, the prosecution is resolute that it displaced the alibi defence. The prosecution counsel explained that the investigating officer visited the institution where the appellant worked, but that he could not get proof of the appellant being in Belgut on the material night, save for the statements given by his colleagues. To counsel, the two statements were contradictory hence not reliable.

25. We observe that in considering the appellant's alibi defence, the learned judge arrived at the following conclusion;

> " 52. I have carefully considered the accused's defence against this circumstantial evidence, as well as Nelly's testimony, and concluded that the defence does not displace the prosecution evidence that the accused person indeed issued threats against the deceased and eventually carried out those threats then he attacked the deceased on the night of 19th/20th July, 2014. I have also looked at the defence exhibits and in particular the teachers (sic) attendance register and note that there was absolutely nothing to stop the accused person from making the 6-7 hour journey from Belgut in Kericho County to Bulafu in Butere Sub-county for purposes of carrying out his mission of killing the deceased whom he perceived as his father's killer."

26. With respect, we think that the prosecution did not entirely discharge its duty of dislodging the appellant's defence of alibi. This is especially so because the appellant's alibi seemed plausible. We think the prosecution should have called the two witnesses who supported the alibi to testify so that it could test the corroborative effect of the statements that they had given. Having failed to do so, a reasonable doubt has been cast in our minds as to whether the person identified at the scene of crime on the

material night was actually the appellant. In this respect we are persuaded by the reasoning of this court in *Erick Otieno Meda v Republic* [2019] eKLR;

> " 18. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie – v- Republic* [1984] KLR, this court stated:
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> > 'An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable '"

27. We further concur with the sentiments of the High Court in *Republic v SSM* [2020] eKLR where Odunga, J. (as he then was) stated thus;

> " 34. It therefore follows that the mere fact that the prosecution's case is believable does not amount to a rejection of the alibi defense. The South African case of *Ricky Ganda vs. The State*, [2012] ZAFSHC 59, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held: -
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> > "The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities... The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.""

28. For the case at bar, the appellant mounted a plausible and reasonable narrative at the earliest opportunity that he was in far- away Belgut and even mentioned two witnesses who recorded statements. The prosecutions' failure to call the said witnesses can only lead to an inference that their evidence would have been adverse to its case. What possible doubts or questions there might be in that alibi defence do not operate to strengthen the prosecutions' case. An accused person who raises an alibi assumes no burden to prove it but the law imposes a duty on the prosecution to wholly disprove it. We are not persuaded that the prosecution herein discharged that onus. That failure leaves the alibi as possibly true which in turn injects the prosecution case with the destructive germ of reasonable doubt.

We are thus left with no option but to resolve that doubt in the appellant's favour. No amount of suspicion no matter how strong can justify a conviction where a reasonable doubt of guilt lingers.

29. Accordingly, we allow the appeal, quash the conviction and set aside the sentence meted upon the appellant. The appellant be and is hereby set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023.

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P.O. KIAGE

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR