Kereu v Republic (Criminal Appeal 92 of 2018)
[2023] KECA 1243 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1243 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 92 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

DUKE RONALD KEREU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (C.B. Nagillah, J.) dated 8th January, 2015 in HCCRA Case No. 50 of 2009)

JUDGMENT

1. The appellant, Duke Ronald Kureu may well be a matricide that the prosecution presented him to be and which Sitati, J. believed, convicting him of the offence of murder in a judgment read on her behalf by Nagillah, J. on January 8, 2015. Whether the evidence presented proved that offence beyond reasonable doubt is the question this judgment must resolve.

2. It is not in dispute that on June 15, 2009 in Gucha District of the then Nyanza Province, Teresia Nyanchama, who was the appellant's mother, was the victim of attack by a panga wielding person or persons. She sustained two cut wounds, one to the head and the other to the neck, killing her on the spot. A post mortem examination by Dr Omwoyo Willis (PW4) at the Tabaka Mission Hospital Mortuary established the cause of death as cardio-respiratory arrest due to brain damage and acute hemorrhage.

3. What is not clear is the identity of the person or persons who inflicted those injuries. The prosecution called on EK (PW1), the younger sister of the appellant. She was said to be 15 years old, when she testified on July 13, 2010 before Musinga, J. (As he then was) but she must have been at least 16 years old as she was born in 1994. Her testimony was inconsistent and of little help to the prosecution case.

She testified that on the fateful day at about 8.00pm, she was at home with her younger siblings E (sic) and H, and cousins Z and F, as well as the deceased. Just after supper, she narrated:

> " Some people came and told us to lie down. I knew them by appearance. They hit my mother. They did not say anything to her. They cut her with a panga. Thereafter they ran away. I did not know their names. I had never seen them before."

4. That testimony is not what the prosecution expected and appeared to be quite different from what she had recorded with the police. In fact, is seemed to deal a serious blow to the prosecution's case. Faced with that dilemma, the prosecutor, Mr Mutai applied that she be declared a hostile witness whereupon Musinga, J made this order:

"Court: The witness is declared a refractory one and may be cross-examined by the State-Counsel."

5. Even though Musinga, J had rather curiously called PW1 a refractory witness, Makhandia, J (as he then was) who took over the hearing stated, properly, that she had been declared a hostile witness. In the ensuing cross-examination by Mr Gitonga, the State Counsel who took over the conduct of the matter from Mr Mutai, she totally repudiated and disavowed her statement, with which she was confronted, swearing that it was false, and that she had been forced to record it as was, apparently by her uncle, one Benson Mokuru. She maintained that she did not open the door for the appellant that night and that the appellant was not at home, as he was away in Kericho. She insisted that she did not know the identity of the person who killed the deceased.

6. The only other eye-witness called by the prosecution and described by Mr Imbali State counsel as "a star witness" is 15-year- old EKM (PW5). His account was that on that evening the appellant, who is his elder brother, came home where the witness was with the deceased, a younger sister called Happiness, his cousins and PW1. The appellant sat down and had a conversation with the deceased asking her what her plans for the following day were. He then suddenly "put out the lights and then slapped my mother twice using the sides of the panga." Answering questions for the trial court, the witness said that after putting out the lamp, "he used the spotlight and that is how I was able to see Duke striking my mother." During cross examination, the witness stated that he had not seen the panga before the lamp was put off. He also alluded to a quarrel between the appellant and the deceased but on a previous occasion. He was not questioned about and did not give details as to the date and nature or cause of that quarrel. We note from the record that at the end of PW5's testimony, the then prosecutor, the latest in a rather long line of them, stated that the witness "wished to address the court before leaving." It is not clear whether the court granted that request and if so what was said, as the next thing recorded is, "PW5 is now released."

7. That was the state of the prosecution evidence when the learned judge found that the appellant had a case to answer and placed him on his defence. He gave an unsworn statement in which he recounted how the deceased was his father's 2nd wife and there were misunderstandings after his father took on a 3rd wife. He questioned why his step brothers and uncles, who did not like his mother's presence at the home after his father left for Kericho and Tinderet, were not summoned to record statements. He maintained that even though he was angry, he could not kill his mother who looked after him, built him a house and even "paid my dowry." (sic)

8. In finding the prosecution case proved and convicting the appellant, the learned judge relied heavily, nay exclusively, on the evidence of PW5 and expressed herself as follows;

> " Ezekiel says that he saw the accused strike the deceased with a panga twice on the head after the accused had engaged the deceased in a little conversation about he plans she had for

> the following day. Although Edna denied that the accused was at home on the material night I have reached the conclusion that Edna perjured herself when she denied that the accused was not at home at 8,00pm on July 15, 2009. I took the evidence of E. I observed his demeanor both during examination in chief and during cross-examination. He remained steady throughout his testimony in chief and remained unmoved even with rigorous cross-examination.
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> ...
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> I am satisfied by the evidence given by E that just before he struck the deceased with a panga the accused switched off the tin lamp, turned on his torch and then struck the deceased in very strategic places in the head and neck. The two blows were so serious that the deceased suffered damage to the spinal cord at C6-C7 and subsequent nervous system damage. The deceased had no chance of survival."

9. Following the conviction, Nagillah, J who read the judgment on behalf of the learned judge proceeded to order him to suffer the mandatory death sentence.

10. Aggrieved by both conviction and sentence, the appellant has appealed to this Court. By a memorandum of appeal dated November 20, 2020 by his learned counsel Ms. Anyango Ida Rayner, the appellant complains that the learned judge erred in law and fact in the following respects:failing to evaluate the evidence as a whole and observe that the prosecution never proved its case beyond reasonable doubt;relying on evidence of identification without observing that the prevailing conditions were absolutely difficulty for significant identificationdisregarding the appellants defence.

11. The appellant also challenges the mandatory death sentence imposed, arguing that the same is being unconstitutional.

12. At the hearing of the appeal, Ms Anyango appeared for the appellant while Mr Patrick Okango, the learned Principal Prosecution Counsel represented the Republic. They orally highlighted the written submissions they had previously filed.

13. Ms Anyango sought to juxtapose the testimony of PW5 with that of PW2 who was equally present at the scene and questioned the safety of his testimony regarding the identification of the appellant as the assailant given poor lighting. She stated that there was evidence showing the appellant was not at the scene but at far way Kericho. She next assailed the prosecution failure to connect the appellant to the panga allegedly recovered which, moreover, was not tested forensically to establish whether indeed it had the deceased's blood if at all it was used to mortally assault her. Counsel rested by blaming the prosecution and the learned judge for failing to note that there was bad blood between the deceased and her in-laws.

14. Mr Okango opposed the appeal. He urged us to take the evidence of the hostile PW1 "with circumspection" and maintained that the appellant was placed at the scene and identified by PW5 who could not have been mistaken, being his brother. Answering questions we posed to him, counsel conceded that PW5's evidence was indeed that the appellant allegedly slapped the deceased with the side of the panga as opposed to cutting her with it. He also was unable to give any explanation for the prosecution's failure to call the other children who were present on the fateful night conceding, correctly and significantly, that there were "apparent glitches and lacunae in the prosecution case."

15. These concessions were latched on by Ms Anyango who, in her reply, asserted that the prosecution case "started leaking" when PW1 recanted her statement and that the various missteps showed that the prosecution "dropped the ball."

16. We have carefully perused the record and evaluated the entire evidence in discharge of our duty on first appeal which is to proceed by way of rehearing and subject all the evidence to a fresh and exhaustive scrutiny before making our own inferences and reaching independent conclusions on the guilt or otherwise of the appellant.

17. We do so alive to and having warned ourselves that, unlike the trial court, we did not have the benefit of seeing and hearing the witnesses in testimony. And we have made due allowance for that. See *Okeno Vs Republic* [1972] EA32.

18. We think the appeal turns on the related issues of whether the evidence marshalled by the prosecution sufficed to prove the guilt of the appellant beyond reasonable doubt and whether he was properly and safely identified at the scene as the deadly assailant against his own mother, the deceased. We think, with respect, that the case would probably have been made out had PW1 given the testimony the prosecution hoped and expected she would. Everything unraveled when she disavowed whatever she told the police implicative of the appellant. Instead of advancing the prosecution case, she seemed to strike a fatal blow to this its very heart, all but fully exonerating the appellant in her categorical denial that he was at the scene and that he attacked the appellant. The prosecution inevitably and successfully applied for her to be declared a hostile witness.

19. In the ensuing cross examination by the learned state counsel, the witness maintained that what she stated in court was true and resiled from the written statement given to the police that apparently implicated the appellant. She went further to state that she was forced by her uncle PW3, to implicate the appellant in that prior statement. We find it curious that when it was PW3's turns to testify, this aspect of the case was not put to him by either side or by the learned judge. Be that as it may, whatever PW1 stated to the police, and whatever its motivation, did not amount to evidence and did not therefore advance the prosecution case that was before the court.

20. What that meant, essentially, is that on the critical question of identification of the appellant as the deceased's assailant, all we had was the sole testimony of PW5. His evidence was that he did not see the appellant with the panga prior to the putting out of the lantern. He then stated that he saw the appellant, by the aid of the torch the appellant had, unleash and wield a panga with which he slapped the deceased twice. He did not testify that the appellant cut the deceased. We doubt that the evidence of this witness, without more, was cogent and consistent enough to lend assurance that he did see the appellant inflicting the mortal strikes upon the deceased. It has long been acknowledged that mistakes do occur – even in the alleged recognition of close friends or relatives. The danger of mistaken identity, and the attendant miscarriage of justice, is ever-present calling for the greatest circumspection by the courts, especially when dealing with the evidence of a single identifying witness under difficult circumstances. See *Wamunga v Republic* [1989] KLR 424.

21. Given the categorical statements of PW1 that the appellant was not at the scene, and which would be taken in favour of the appellant as the person accused, the prosecution should have done more to dispel any doubts. There is no reason or explanation given for the failure to call any of the other eye-witnesses who would then have corroborated the testimony of PW5. Such omission leads to a justifiable inference that their evidence might have been adverse to the prosecution case. This is because, in the circumstances of this case, the evidence of the other children was essential to establish the guilt or otherwise of the appellant. See *Bukenya & Others v Uganda* [1972] EA 594. There was no attempt to subject the panga to forensic analysis to prove that it was indeed used to cut the deceased. Nor was there any evidence led that any blood was found on the appellant's clothes.

22. These gaps, readily admitted by the learned prosecuting counsel as "glitches" and "lacunae," lead to the inevitable conclusion that the appellant's conviction was not safe.

23. In the result, it is, without relish, that we quash the conviction and set aside the sentence. The appellant shall thus be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OCTOBER, 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