Khamis alias Wepukhulu v Republic (Criminal Appeal 77 of 2017)
[2023] KECA 1459 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1459 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 77 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

SALIM KHAMIS ALIAS WEPUKHULU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (Ali-Aroni J.) dated 2nd March 2017 in Criminal Case No. 10 of 2012)

JUDGMENT

1. The appeal before us epitomises the tragedies that sometimes engulf family relations in our society. The testimony (or lack thereof) of the key prosecution witnesses also aptly encapsulates the Gikuyu proverb, which may have an equivalent in the Bukusu language: 'Tutikuhe hiti keri!' ('We will not give the hyena two of our children!)

2. The appellant, Salim Khamisi alias Leonard Wepukhulu was charged before the High Court in Bungoma with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against him stated that on the night of 10th /11th March 2012 at Namibila Village, Machakha sub-location within Bungoma County, he murdered George Maseti Wepukhulu. The victim of the alleged murder was his older brother.

3. The appellant was tried before the High Court in Bungoma, with the prosecution calling five witnesses. The principal witnesses in the trial were the appellant's mother, Agnes Wepukhulu(PW1, Agnes) and his uncle, Samuel Buyera Kwoi (PW2, Samuel).

4. In her evidence, Agnes testified that on 16th March 2012, she was at home at about 3:00pm with the deceased children. The deceased called her to a neighbour's home and informed her that he would leave his children under her care as his wife had left him for the neighbour. It was her further testimony that the deceased later came to her house at about 8.00 p.m., collected water and went to his house.

5. Agnes further testified that the following morning, the appellant went to her home, collected animals which they used for ploughing, and went to look for his brother to assist with the ploughing. He then went back to Agnes and asked her to accompany him, presumably to the house where the deceased was. She went with him and found the deceased lying dead. It was her testimony that the deceased lived alone and did not share his house with anyone. Further, that the appellant also lived alone.

6. Agnes denied that the appellant and the deceased had quarrelled and averred that they had a good relationship and never fought or quarrelled. She stated that the deceased had quarrelled with a neighbour over the deceased's wife the day before he was found dead.

7. Samuel testified that on 17th March 2012, at about 8.00 a.m., he heard someone, whom he realised was his sister-in-law, Agnes, screaming. He rushed to the deceased's house and found him lying dead. He did not find the appellant at the scene, and he denied his statement to police that he had found the appellant at the scene. It was his testimony also that he did not see any injuries on the deceased. He also denied that he had seen a hammer at the scene that morning.

8. PC Daniel Maritim (PW3), stationed at the material time at the Lwakhakha Police Station in Bungoma testified that a murder suspect, the appellant, had been brought to the police station. With the Officer Commanding Station and other officers, he went to the deceased's house where he found the deceased's body lying on a bed, covered with a blanket. Upon uncovering the body, they found that the deceased had a 'cracked face' (sic) and was bleeding from the left ear.

9. PC Maritim testified that he interrogated those present, the deceased's mother (PW1), his uncle (PW2) and the appellant. They also combed the compound and found fresh blood. PC Maritim stated that an administration police officer from Tulienge AP camp who was at the scene informed him that the appellant had been arrested by members of the public, who had also given them a hammer, produced before the trial court, alleged to have been used by the appellant to harm the deceased. His testimony in cross-examination was that Agnes had told him that the deceased and the appellant lived in one house and used another as a kitchen, and that the appellant and the deceased had quarrelled.

10. The fourth prosecution witness, Judith Wakhungu Wepukhulu (PW4), identified the body of the deceased for the purpose of the post mortem, which was performed by Dr. Mansur Ramzan.

11. From the post mortem report on the body of the deceased, it emerged that the deceased had blisters on the abdomen, thigh and trunk; there was bleeding from an abrasion on the left ear pinna; the left temporal area had laceration approximately 60mm and the left temporal area was swollen. The deceased also had a crushed left temporal fracture with epidural haematoma extending to the occipital area. He had brain contusion with massive oedema and intercranial pressure. According to Dr Ramzan, the cause of death of the deceased was cardio pulmonary arrest resulting from massive intracranial pressure as a result of intracranial haemorrhage (bleeding) following a blunt head trauma.

12. At the close of the prosecution case, the appellant was placed on his defence. He gave a sworn statement in which he testified that he found his brother dead on the 17th of March, 2012 when he went to wake him up in his house, as they lived in separate houses, so that they could go to work together. He denied the contents of his statement to the police. It was his testimony that he was not arrested by members of the public with a hammer.

13. The trial court permitted the prosecution to call the officer who had recorded the appellant's statement under inquiry. This officer, Chief Inspector Charles Chelelego Chepkonga (PW6), went to see the appellant at Lwakhakha Police Station. He recorded an inquiry statement in which the appellant stated that the deceased had quarrelled with their mother on 16th March 2012, and their mother had

complained to him about it. That the appellant went to the house he shared with the deceased and asked him about it, and they quarrelled. The deceased took a panga and threatened to cut the appellant and the appellant took it away from him and gave it to their mother.

14. According to PW6, the appellant further stated that he hit the deceased with akala shoes and asked him to stop fighting him, which he did and went to sleep. The appellant stated that he left the deceased sleeping the following morning, but returned to find him dead. The trial court, however, ruled in its judgment that the statement fell short of a confession as contemplated under section 25A of the *Evidence Act*.

15. Upon analysing the evidence before it, the trial court noted that the prosecution did not have any direct evidence save for what the investigating officer, PW3, had gathered. It noted that PW3 found fresh blood in the compound and PW1, the mother of the deceased and the appellant, had informed him that her two sons had quarrelled. That the investigating officer had also found that the appellant had been arrested by members of the public and a hammer recovered from him. The trial court further noted that PW3 had noted that the deceased had a fractured head and had blood oozing from his ear, and he formed the impression that the deceased and the appellant had fought.

16. The trial court found that the circumstantial evidence presented by the prosecution pointed to the appellant as the person who had murdered the deceased. It noted that while PW3 had observed that the deceased had external injuries, PW1 and PW2 testified that he had no visible injuries. That they also did not allude to the blood that was oozing from his ear, and they were also silent on the fresh blood found in the compound. PW3 had also testified, on the basis of information given to him by PW1, though she later recanted it in her evidence in court, that the appellant had fought with the deceased. The court therefore found that, from the circumstantial evidence, the only inference to be drawn was that the appellant was the one who killed the deceased.

17. The trial court therefore found the appellant guilty as charged and sentenced him to death, noting that this was the only penalty prescribed in law for the offence of murder.

18. Aggrieved by both his conviction and sentence, the appellant has preferred the present appeal in which he raises three grounds of appeal in his memorandum of appeal dated 18th May, 2022. In his submissions, he reduced these grounds to two, that the trial court erred in law and fact in:

    i. convicting the appellant based on presumption and circumstantial evidence not sufficient to justify any reasonable inference of guilt on his part;

    ii. passing a harsh and excessive sentence against the appellant.

19. As this is a first appeal, our duty is to re-evaluate the evidence presented before the trial court and reach our own conclusions. In doing so, we bear in mind that we have neither seen nor heard the witnesses- see *Okeno v Republic* [1972] EA 32.

20. We have considered the evidence presented before the trial court, as well as its decision. There is no contestation about the death of the deceased. As the post mortem report produced by PW4 indicated, the deceased died as a result of cardio pulmonary arrest resulting from massive intra cranial pressure as a result of bleeding following blunt head trauma. The prosecution's case was that it was the appellant who caused the death of his brother. Its case revolves primarily around the circumstantial evidence garnered through the testimony of the investigating officer, PW3. Part of this evidence emerges also from the recanted statements of PW1, the mother of the deceased and the appellant, and PW2, their uncle.

21. This evidence is basically that the appellant, some time in the evening of 16th March 2012, quarrelled with his brother. They fought. The appellant hit his brother with a hammer. There was fresh blood in the compound where the appellant and the deceased lived. While PW3 saw that the body of the deceased had a 'cracked face' and blood oozing from the left ear, his mother and uncle testified that they saw no visible injuries. The trial court found that the circumstantial evidence before it was sufficient to lead to the inference that the appellant, with malice aforethought, had murdered his brother.

22. In his submissions dated 18th May, 2022, the appellant submits, and this is undisputable, that there was no direct evidence linking him to the death of the deceased. The trial court had convicted him on the basis of circumstantial evidence which it found had placed him at the scene of the crime, and that the hammer used to hit the deceased's forehead was found with the appellant.

23. The appellant submits that PW3 stated that he interviewed police officers and learned that the appellant was arrested by the public, who gave the hammer used in the crime to one of the officers. He submits, however, that neither the officer nor the person who handed over the hammer to the officer testified in court. None of the prosecution witnesses saw the appellant carrying the hammer, and it is unclear if the hammer had blood stains.

24. It is the appellant's submission further that the circumstances of the case raise significant doubts regarding the identity of the offender, the manner in which the offense was committed, and the motive behind it. The unclear circumstances surrounding the death of the deceased prevent the use of the circumstantial evidence to convict the accused.

25. In submissions dated 4th July 2022, the respondent submitted that contrary to the appellant's submissions, the trial court did not make any errors in its application of circumstantial evidence, and was correct in its finding that the appellant murdered his brother. The respondent notes that the trial court, which saw and heard the witnesses, observed that PW1 and PW2, the appellant's mother and uncle, attempted to conceal evidence against the accused.

26. This appeal raises two main issues: whether the circumstantial evidence presented before the trial court was sufficient to lead to an inference of guilty against the appellant. If it was, then this Court would uphold his conviction and consider the second issue: whether the sentence imposed on the appellant was harsh and excessive in light of the Supreme Court decision in *Francis Karioko Muruateru & Another-vs-Republic* (2017) eKLR.

27. As we consider the first issue against the prosecution evidence in this matter, we bear in mind that the burden of proof is always on the prosecution, and it is a high burden: beyond reasonable doubt. Secondly, we bear in mind the principles developed in our jurisprudence with respect to conviction of an accused person on the basis of circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court stated:

> "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: -
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> > "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.'"

28. In *Sawe v Republic* [2003] KLR 364 this Court held as follows:

> " 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 on. 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 is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

29. The question we then need to address is this: what was the circumstantial evidence that the prosecution presented before the trial court, and on the basis of which the court returned a verdict of guilty? In its judgment, the trial court observed as follows:

> " 15. PW3 and PW5 the doctor gave injuries sustained by the deceased PW3 saw injuries that were external and this was corroborated by PW5 upon doing post mortem examination. The injuries were serious yet PW1 and PW2 in their testimony said that the deceased had no visible injuries. Blood was coming from the left ear of the deceased they did not allude to it. There was fresh blood in the compound yet PW1 & PW2 were silent on this. PW3 on investigations established that the deceased and the accused had fought the previous night. This piece of evidence was not displaced by the defence. The witness informed the court that the information was given to him by PW1 although PW1 recanted this in court, with this information in my considered opinion the prosecution has succeeded in proving that the circumstantial evidence gathered point to no other as the killer of the deceased but the accused. The prosecution has placed the accused squarely at the scene of crime and having had an altercation (information gathered from PW1) This information and explanation was not displaced by the defence. Further a hammer was found with the accused. The injuries are evident that a blunt object was used in inflicting the fracture of the deceased head.
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> PW1 & PW2 attempted to conceal evidence against the accused. However, the truth has come out through circumstantial evidence and the only inference to the drawer is that the killer was no one else but the accused." Emphasis added).

30. Our own analysis of the evidence leads us to find that some of the ingredients of the offence of murder were established. The cause of death of the deceased, as emerged from the evidence of PW5, was blunt force trauma to the head, leading to cardiopulmonary arrest. Whoever caused this injury to the deceased did so with malice aforethought as defined in section 206 of the *Penal Code*, for the infliction of such an injury could only have been intended to cause the death of the deceased. What is in contention is whether the appellant was the perpetrator.

31. The prosecution relied on the evidence of PW3, the investigating officer, who, in turn, relied partly on the recanted evidence of PW1, the appellant's mother, and PW2, the appellant's uncle. PW3's testimony was that when he went to the scene and lifted the blanket covering the deceased, he saw that he had a 'cracked face', and was bleeding from the left ear. The deceased, according to the information that PW3 had received, shared a house with the deceased. PW3 testified that he had visited the scene

and had noted that there were only two houses very close to each other. One was used as a kitchen and the other for sleeping. The respondent's contention is that this unchallenged evidence supports the prosecution case that the appellant and the deceased were in the same house. It is its submission that the appellant failed to show how the deceased could have died in the same house without his knowledge or involvement.

32. PW3 also testified that the appellant had been arrested by members of the public with a hammer, and that the hammer had been given to an Administration Police Officer, who had then given it to him. While the hammer was produced as an exhibit in court, neither the member of the public who handed over the hammer to an administration police officer, nor the administration police officer, were called to testify with regard to the recovery of the hammer from the appellant. There was, therefore, no evidence before the trial court that linked the appellant with the alleged murder weapon.

33. The prosecution sought to rely on what PW1 and PW2 stated in their statements to the investigating officer, PW3. PW1 allegedly stated that the appellant and the deceased had fought the night before. PW2 had stated that when he heard PW1 screaming and went to the house that the deceased shared with the appellant, he found the appellant there. However, both these crucial witnesses disowned their statements to the investigating officer. Their evidence before the trial court was that there had been no conflict between the appellant and his older brother, the deceased. They had not seen any visible injuries on the deceased. They had not seen the blood in the compound which PW3 said he had noted. The deceased and the appellant lived in different houses.

34. Taking into account the above matters and the principles with regard to when a court can rely on circumstantial evidence, we are constrained to find that there was no circumstantial evidence that met the criteria enunciated in the case of *Sawe v Republic* (*supra*). Further, contrary to the findings of the trial court, the appellant did not have a burden to 'displace' any of the prosecution evidence-indeed, he could have remained silent. The burden, always, remains on the prosecution, to prove its case against the appellant beyond reasonable doubt.

35. We must observe that it is possible, indeed probable, that the appellant fought with his brother, and that he hit him with a hammer, thereby causing his death. However, the evidence before the trial court does not lead to this conclusion. PW 1 and PW2 may have renounced their statements to the investigating officer to conceal evidence against the appellant. Indeed, as observed by counsel for the respondent, PW1 may have been in a dilemma, as the mother of both the appellant and the deceased, on which side to take. Her recanting of the statement she had made to the investigating officer may well have been an attempt to save her surviving son. Whatever the court's view of the conduct of PW1 and PW2, however, there was no evidence before it, in the face of the recantation of the statements of PW1 and PW2, that established, beyond reasonable doubt, that the appellant was the one who caused the death of the deceased.

36. We are satisfied, therefore, that the appellant's appeal against his conviction is merited, and we allow it.

37. The second issue that arises for our determination relates to the sentence imposed on the appellant by the trial court. The appellant submits that upon conviction, he was sentenced to death contrary to the holding in *Muruatetu* which declared the mandatory death sentence unconstitutional. He prays that the matter be remitted to the High Court for re- sentencing.

38. The respondent has conceded the merits of this ground. It submits that while sentencing the appellant, no mitigation was recorded from him. Its view, therefore, is that this Court should remit the matter to the High Court for re-sentencing.

39. Having found, however, that the appellant's conviction was not safe, we need not enter into a consideration of this ground. We hereby quash the appellant's conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 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