



**Ochieng & another v Republic (Criminal Appeal 153 of 2017)
[2023] KECA 1461 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1461 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 153 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 24, 2023**

BETWEEN

ROGERS OMONDI OCHIENG 1ST APPELLANT

MAURICE OCHIENG HAYANGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kisumu
(E. N. Maina, J.) dated 27th July, 2017 in HCCRC NO. 10 OF 2014)*

JUDGMENT

1. The case presented and believed by the High Court (Maina, J.) was that on 18th December 2013, in Nguya Sub-location, Ugunja District within Siaya County, at around 7.30 pm, Nancy Awino Ogumbo, PW1, heard Peter Juma (deceased) calling his mother to open the door to her house. The deceased was her brother-in-law. PW1 decided to check what was happening upon which she saw a group of people beating the deceased. Sarah Atieno, PW2, a sister-in-law to the deceased also came out with a delight solar lamp. When she illuminated it, PW1 saw the 2nd appellant, his son the 1st appellant, his wife Jennifer and his other children, beating the deceased using a panga and a rungu. There was also moonlight that aided her identification of the appellants. She then overheard Jennifer tell them to leave as the job was done, an allegation that was repeated by PW2, PW4, and PW5.
2. PW1 lived in the same neighbourhood with the appellants and so they were well known to her. When PW1 and PW2 moved closer to the scene, they found the body of the deceased oozing blood. The deceased was taken to hospital by his brother. According to PW1, the incident was triggered by the fact that the 2nd appellant's cows had damaged the deceased's crops and when the matter was reported to the Agriculture office, it was ordered that the 2nd appellant should pay the deceased. The 2nd appellant is said to have retorted that he would pay in another way.



3. PW2 testified that she was in her house on the fateful night when she heard someone shout, “wananiuwa”. She got out of the house and recognised the voice as that of the deceased. She went back to her house and took her delight solar lamp and proceeded to the scene of the commotion. When PW2 arrived at the scene, she found the deceased lying on the ground bleeding. The 1st appellant was holding a panga, his wife was holding a jembe, the 2nd appellant was holding a rungu, and the rest of the siblings were holding stones. Apart from the solar lamp she was carrying, there was also a moonlight that helped her in identifying the appellants. She stated that she witnessed the deceased being beaten by the appellants; the 1st appellant cut the deceased with a panga on the head while the 2nd appellant hit him with a rungu.
4. The extent of the injuries inflicted on the deceased were attested to by Dr. Grace Mugure Mboya, PW3, of Jaramogi Oginga Odinga Teaching and Referral Hospital. She testified on behalf of a Dr. Mushela who conducted the post-mortem on the deceased. She testified that the post-mortem was done on 27th January 2014 and it revealed that the deceased had sustained a left parietal depressed fracture and an epidural haematoma. It was concluded that the cause of death was severe head injury due to blunt force secondary to assault.
5. Philister Oloch, PW4, the deceased’s mother testified that on the material night at around 7.30pm, she was sleeping as she waited for dinner when she heard the deceased knock on her door. At first, she was scared of opening the door because her children and those of the 2nd appellant had fought earlier in school prompting the 2nd appellant to beat her. She could also hear pangas being struck against each other and a crowd outside her house. PW4 narrated that she heard the deceased shout,

“Ochieng why are you killing me with your children”.

When she heard her daughter-in-law, PW2, she opened the door and the assailants left. Before they left, PW4 claimed to have identified the appellants among the assailants, and she saw the deceased lying on the ground, bleeding, with a cut on his head. The deceased was taken to hospital by his brother and the assault was reported to the police the same day. One month after the assault, the deceased passed away.

6. Celine Achieng Odhiambo, PW5, a neighbour to PW4, gave evidence that on 20th January, 2014 at about 7pm, she was in her house when she heard some noise. She opened the door and noticed that the noise was at PW4’s house. She proceeded there and found the deceased knocking at the door of PW4. She stated that present at the scene of the incident on that fateful night was the 2nd appellant and his family members including the 1st appellant. She further testified to seeing the 1st appellant cut the deceased with a panga while the 2nd appellant hit him with the handle of a jembe causing him to fall down. The deceased’s brother got a boda boda and took him to hospital. PW5 stated that after that incident, the deceased’s health deteriorated and he later died.
7. After investigations, the appellants were arraigned before the High Court at Kisumu and were charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
8. In a ruling delivered on 9th March 2017, E. N. Maina, J. held that after hearing the 5 prosecution witnesses, she found that the appellants had a case to answer and placed them on their defence.
9. They gave sworn statements and both denied committing the crime. The 2nd appellant testified as DW1 and explained that on the night when the deceased was allegedly assaulted, he was at home with his family. He claimed that he did not have any differences with the deceased who was also his cousin. He attributed the injuries sustained by the deceased to an accident he had on 28th October 2013 while riding a motorcycle. DW1 and DW2 were arrested on 16th January 2014, while the deceased was still



- alive. DW2, the 1st appellant testified that, on 20th January 2014 when the deceased died, he was in custody, having been arrested for alleged assault. He contended that on the day when the deceased was said to have been assaulted, he was at a place called Sega working and he returned home at 8pm. He too alleged that the injuries that the deceased suffered were as a result of a motorcycle accident. He confirmed knowledge of the prosecution witnesses since they were neighbours.
10. In a judgment delivered on 27th July 2017, the learned judge held that the charge against the appellants had been proved beyond reasonable doubt. She found the appellants guilty of murder and sentenced them to death.
 11. Aggrieved by that judgment, the appellants preferred the instant appeal, raising 5 grounds, which are that the judge erred by;
 - a) Sentencing the appellants to mandatory death penalty.
 - b) Failing to scrutinise the evidence of identification with great circumspection thus grossly being misdirected that the evidence on record was properly corroborated to be cogent and credible enough for conviction.
 - c) Failing to re-evaluate and subject the entire evidence on record to fresh scrutiny and analysis.
 - d) Disregarding the appellant's defence evidence on record.
 - e) Convicting and sentencing the appellant when the prosecution did not prove its case beyond reasonable doubt.
 12. At the hearing of the appeal, learned counsel, Mrs Ngire appeared for the appellants while the State was represented by Mr. Oimbo, the learned Prosecution Counsel. They had filed written submissions which they briefly highlighted before us.
 13. For the appellants, it was submitted that in accordance with the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu), the mandatory death sentence imposed on the appellants was unconstitutional. Concerning identification of the assailants, it was argued that since all the prosecution witnesses were relatives of the deceased, they might have been biased in purporting to identify the appellants. Oft-cited authorities on the issue of identification were mentioned for the submission that courts ought to caution themselves before convicting in reliance on evidence of identification.
 14. Mrs. Ngire contended that the prosecution had not proved its case beyond reasonable doubt. For instance, she argued, the appellants were jointly charged yet the prosecution did not prove common intention between them. It was argued that the prosecution failed to prove malice aforethought on the part of the appellants. Further, crucial witnesses like the investigating officer were not called to testify. To counsel, it was not possible that of all the persons who witnessed the alleged attack including, according to PW1, neighbours Brian, Mercy and Ben, it is only the relatives of the deceased who came forth to testify.
 15. It was further contended that the prosecution evidence had many inconsistencies specifically, while PW1 stated that the 1st appellant had a rungu and the 2nd appellant a panga, PW2 claimed that the 1st appellant had a panga and the 2nd appellant a rungu. Moreover, according to PW3, the cause of death was severe head injury due to blunt force secondary to assault. It was argued that such injuries cannot be occasioned by a sharp object like a panga. Counsel pointed out that while the 1st appellant was accused of having murdered the deceased on 18th December 2013, the 2nd appellant was charged with killing him on 20th January 2014 yet the murder happened on the same day.



16. In reply and guided by the Apex Court’s decision in *Muruatetu* (supra), Mr. Oimbo for the respondent conceded that the mandatory death sentence imposed is unconstitutional. He however urged that the matter be remitted to the High Court for resentencing and that, the Court considers the heinous nature of the offence, noting that the deceased was killed in front of his family members who may have been left traumatized. Based on the life expectancy of the appellants, it was urged that they should be given a term sentence of 35 years and 25 years respectively in case their conviction stands.
17. On the question of identification, it was asserted that this was a case of recognition as all the eye witnesses knew the appellants, having lived in the same neighborhood with them. Further, there was sufficient lighting from the moonlight and the lamp that PW2 carried hence the appellants were positively identified. On the failure to call the investigating officer, it was argued, though not borne out by the record, that the same was occasioned by factors beyond the prosecution’s control as they were unable to bond him expeditiously. In any case, it was not demonstrated that failure to call him locked out crucial evidence. Counsel agreed with the trial court’s finding that the prosecution had proved its case beyond reasonable doubt, and thus this appeal is devoid of merit on conviction and it should be dismissed.
18. We have considered the record of appeal as well as submissions made by Counsel. We appreciate our role as a first appellate Court as was stated in *Reuben Ombura Muma & Another vs. Republic* [2018] eKLR;

“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.”
19. The appellants argue that the prosecution failed to prove its case beyond reasonable doubt. They claim that, the trial court did not scrutinise the evidence of identification; the prosecution evidence had many inconsistencies, and crucial witnesses like the investigating officer were not called to testify.
20. The trial court found that this was a case of recognition and not merely visual identification. All the prosecution witnesses, apart from PW3, testified to having identified the appellants, who were their neighbours, at the scene of the crime. Indeed, in their testimony, the appellants affirmed that they knew them. Evidence was further adduced that on the fateful night, there was moonlight and PW2 had a solar lamp. In the circumstances, we agree with the learned judge that were the witnesses to be believed the conditions that night were conducive for identification and the appellants were positively identified at the scene of the crime.
21. Our finding on identification has however to be juxtaposed against the complaint that the prosecution evidence had many inconsistencies, and whether the failure to call the investigating officer adversely affected the prosecution case. The appellants fault the learned judge for disregarding the contradictions in the prosecution evidence to the effect that, there was a discrepancy in the evidence of PW1 and PW2, as to which of the appellants had a rungu and which one had a panga. Moreover, while PW1, PW2 and PW5 testified that the deceased had been cut by the appellants and was bleeding, according to PW3, the doctor, the cause of death was severe head injury due to blunt force secondary to assault. Such injuries, the appellants contend, cannot be occasioned by a sharp object like a panga. Indeed, PW3 pointed out in her evidence that before they carried out the medical procedure, there was no cut on the head of the deceased. We find it to be an extra ordinary fact that three alleged eye witnesses could swear that the deceased was cut with a panga several times on the head yet the medical evidence is that there was no such cut. We note further that contrary to the doctor’s finding, PW4 claimed quite spectacularly that



the deceased had been cut on the head and his brain was coming out, an allegation that was not attested to by any other witness or the post mortem. In considering the issue, the trial court simply stated,

“I am not persuaded that there were any contradictions in the evidence of the prosecution witnesses that would cast doubt on the guilt of the accused persons.”

22. With respect, we think that, had the learned judge fully and carefully analysed the evidence of the prosecution witnesses and in detail, she would have come to the inescapable conclusion that there were several material discrepancies and contradictions that needed to be reconciled. From our perusal of the record, we identify a few more sticky inconsistencies. While PW2 testified in cross-examination that the 1st appellant cut the deceased with a panga, and the 2nd appellant hit him with a rungu, she immediately thereafter negated that assertion by stating significantly;

“If the Doctor says there were no cuts on the head then I will admit I lied’.

23. Both PW1 and PW2 admitted that there were variances between their respective written statements and their testimony in court. PW5 testified in examination in chief that the 1st appellant had cut the deceased with a panga but in cross-examination, claimed that, she forgot to mention his name when she recorded her statement with the police and referred to him curiously as

‘... the one I cannot remember’.

Moreover, apart from contradictions between the witnesses on whether the deceased said anything that night, PW1 claimed that PW2 shouted Jenifer why are you killing Juma together with your children. Contrariwise, PW2, Sarah in her testimony was not clear that she did not say anything. She also made this admission in cross-examinations; when shown her statement to the police:

“That I went to Juma’s house is not correct. It is also not correct that I accompanied Juma to hospital. Those are 2 lies.”

24. In the face of the aforesaid discrepancies in the prosecution case, we re-state what this Court held in the case of *Richard Munene vs. Republic* [2018] eKLR thus;

“We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”



25. This Court while dealing with a similar issue in *Naftali Mwenda Mutua v Republic* [2015] eKLR further reasoned in detail;

“The role of a court of law when confronted with allegations of existence of contradictions, discrepancies and inconsistencies in the prosecution’s case has long been settled. In *Joseph Maina Mwangi versus Republic* Criminal Appeal No. 73 of 1993, the court ruled that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the warding (sic) of section 382 of the *Criminal Procedure Code* whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

[...]

In *Vincent Kasyla Kingo versus Republic* Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See *Josiah Afuna Angulu versus Republic* CRA. No. 277 of 2006(UR) wherein, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence. Also the case of *Charles Kiplang’at Ng’eno versus Republic* CRA. No. 77 of 2009 (UR) in which this Court also sitting as a first appellate court reconciled contradictions, discrepancies and inconsistencies in the prosecutions’ case and found that these went to discredit the prosecution’s evidence as they created doubts as to the appellant’s commission of the alleged offence and allowed the appellant’s appeal in its entirety.”

26. Bearing in mind the foregoing decisions, we are of the considered view that the inconsistencies and contradictions herein are so material as to cast doubt on the culpability of the appellants. It is also troubling that even though two of the key witness admitted to having lied, the learned judge did not deal with this aspect of the case.
27. Moreover, we consider the failure to call the investigating officer to testify without any explanation at all, a matter that should have been interrogated by the learned judge. We think, with respect, the learned judge fell into error when she concluded that the fact that the investigating officer did not testify did not cast a shadow of doubt in the case. In view of the identified contradictions herein, the investigating officer was crucial in giving clarity. It is he who would have testified on his observations at the scene and explained the failure to call the named neighbours who are said to have witnessed the assailant. While we are minded that the prosecution has the discretion to decide on which witnesses are material to be called to testify, we think the investigating officer was such essential witness in the instant case. In this respect we concur with this Court’s sentiments in *David Mwingirwa vs. Republic* [2017] eKLR thusly;

“We think that the state of the evidence called for the adverse inference that the predecessor of this Court spoke of in *Bukenya v Uganda* [1972] 549, at 550 to 551;

“... It is well established that the Director [of Public Prosecution] has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways (sic). First, there is a duty on the Director to call or make



available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case ... Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that these were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution's case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success ..."

Even though in *Bukenya* the non-calling of some two witnesses by the Chief Justice of Uganda at the trial was found to have been non-fatal, the evidence having been sufficient, we think that in the instant case the evidence was barely adequate and the non-calling of the crucial witnesses was fatal to the appellant's conviction. We do not think that Section 143 of the *Evidence Act* divests the prosecution of the duty to call a sufficiency of evidence before a finding of guilt can be entered."

28. The upshot of our consideration of this appeal is that given the state of the evidence adduced, the appellants' conviction was unsafe, justifying our interference. We accordingly allow the appeal, quash conviction and set aside the sentence. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

29. Orders accordingly.

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

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

