



Chea alias Kogan & 2 others v Republic (Criminal Appeal 26 & 27 of 2021 (Consolidated)) [2023] KECA 1320 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1320 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 26 & 27 OF 2021 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

ANDERSON THOYA CHEA ALIAS KOGAN 1ST APPELLANT

CHENGO KADHENGI MKAMBA 2ND APPELLANT

SULUBU KADHENGI MKAMBA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Malindi delivered by W. Korir J. on 13th June 2019 and sentence by R. Nyakundi on 9th October 2019 in Malindi High Court Criminal Case No. 11 Of 2016)

JUDGMENT

1. The Appellants, Anderson Thoya Chea alias Kogan, Chengo Kadhengi Mkamba and Sulubu Kadhengi Mkamba (hereinafter the 1st, 2nd and 3rd Appellants), have lodged this appeal against their conviction for the offence of murder in a judgement delivered on 13th June 2019 by the High Court at Malindi (W. Korir J.) and 20-year imprisonment sentence imposed on each of them by Nyakundi J. on 9th October 2019 in Criminal Murder Case No. 11 of 2016. The particulars of the offence were that the Appellants, on 31st July 2016 at Kandigani village in Magarini Sub-County within Kilifi County, jointly with others not before court murdered Nelson Mwachilumo Mrima.
2. The Appellants, having denied the allegations against them before the High Court, went through a trial process which commenced before Chitembwe J., and in which the prosecution called 9 witnesses, whose testimony in summary is as follows. James Zawadi Mwachilumo (PW1) the deceased's son, testified that the deceased went to check on his land and was killed on the Appellants' land. He saw cuts on the deceased's hand and the head, as well as his father's blue sandals and red sandals which he



- suspected belonged to the killer. He however did not witness the killing. Bendera Chanjera (PW2) the deceased's wife, testified that there was a dispute over land that the deceased had purchased from the Appellants, who wanted the land back. She testified that the deceased went to check on the land and he did not return, and she was later informed that he had been killed.
3. Julius Mwabonje Mrima (PW3), the deceased's brother, testified that on 31st July 2016, he was at his home at around 1.00pm when he received a phone call from the area Assistant Chief, who informed him that the deceased had been killed. He then went to the scene with the police and saw the body lying on the land of Johana Kadhengi's family, and the body had cuts on the face, one foot was broken, cuts on the left hand and cuts on the back of the head. He also saw two pairs of sandals at the scene, a red and green pair, and that after photographs of the scene were taken, the body was taken to Malindi General Hospital, and during the post mortem he identified the body of the deceased. PW3 further testified that the deceased had bought land from one Katana Mukonge who bought land from Johana Kadhengi's family, and started salt harvesting on the land, but stopped when he was called to a teacher's college. That Johana's family then sought to reclaim the land that had been sold by their father leading to a land dispute. He told the Court that he knew Sulubu Kadhengi and Chengo Kadhengi and pointed at the 2nd and 3rd Appellants in Court.
 4. Similar testimony was given by Nzingo Munga Konde (PW4) another of the deceased's wife; Charo Kazungu Mrima (PW5), the deceased's son; and Alla Kai Mirima (PW6), the deceased's cousin; who all testified, that the deceased had purchased land from the Appellants and there was a dispute over the same as the Appellants wanted to reclaim the land. At this point the conduct of the trial was taken over by W. Korir J., and the Appellants elected to have the suit proceed from where it had reached after the learned Judge applying section 200 of the Criminal Procedure Code.
 5. PW7, a witness under witness protection testified that he was at work at the scene and was alerted by screams. He saw the deceased being cut by four persons with pangas (axes), and he identified three of the assailants as the Appellants. PW7 told court that he did not see anyone in the area apart from the Appellants. Fadya Swaleh (PW4) produced the post mortem report and testified that the post mortem was conducted on the deceased by a Dr. Ankore, whose handwriting he was familiar with. The examination revealed that the deceased had deep cut wounds on the head, the forehead and the left hand; that he had a missing finger. The cause of death was revealed as a deep cut wound on the head.
 6. The last prosecution witness was PC James Munyes Lokadon (PW9) the Investigation Officer, and his testimony was that the investigations revealed a protracted land dispute between the deceased and the Appellants' family namely Civil Case No 400 of 2015, where the deceased and his brothers were the plaintiffs, while Sulubu Kadhengi and Chengo Kadhengi, the 2nd and 3rd Appellants were the defendants, and that he formed the opinion that the land dispute was the motive of the murder. He testified that the slippers recovered from the scene were believed to belong to the deceased and one of the Appellants, and that he was not able to make arrests immediately until early September 2016 when he identified an eye witness, which is when he arrested the Appellants and brought them to Court.
 7. After the close of the prosecution case, the High Court found that a prima facie case was established against the 1st, 2nd and 3rd Appellants and they were put on their defence. In his defence, the 1st Appellant (DW1) gave his unsworn testimony and denied knowing the deceased or the other Appellants or being related to them. He narrated that on 31st July 2016, a Sunday, he went to his work place at Kensalt and worked up to 4.00pm when he heard that someone had been killed at Katshoni. He went home and joined people at the scene at 5.30pm. Further, that he was injured on the leg and did not go to work on 24th August 2016, and that he was arrested on 31st August 2016. The 2nd Appellant (DW2) also gave unsworn testimony that he had a land dispute with the deceased, won the case and he was



given the land. He testified that on 7th May 2016, he left for Garissa and came back on 6th August 2016. He produced a bus ticket as exhibit. He stated that when he arrived home, he found that the deceased had been killed and denied knowledge about the killing of the deceased. He further testified that the deceased had disputes with Swaleh Abed and his brother Julius Mkanje.

8. The 3rd Appellant (DW3) in his unsworn testimony likewise denied killing the deceased, and stated that he was on bed rest on the material day as evidenced by treatment notes that he produced as an exhibit. He denied any dispute with the deceased as at the time of his death, and stated that that the disputes were with a Mabonje and a Swaleh Abed. Johana Kadhengi Mkamba a brother to the 2nd and 3rd Appellant testified as DW4 and stated that he did not know the 1st Appellant, and that there was a land dispute between DW4's family and the deceased, and that the same was resolved in DW4 family's favour by the time the deceased was killed. He also testified that the deceased had a land dispute with Swaleh Abed Saidi and Ali Mohamed, though he did not know how the dispute was resolved. He further testified that the 3rd Appellant worked on the farm and was injured on 26th July 2016, was treated and was in bed from 26th to 31st July 2016, but he could not tell where the 3rd Appellant was on 1st August 2016. The last defence witness was Kazungu Baya Katana, a cousin of the 1st Appellant, who testified as DW5 and stated that he was staying with the 1st Appellant in the same house, and that on 31st July 2016, the day of the death of the deceased, he left the 1st Appellant in the house and they met again at midday. That when he arrived at lunch hour, the 1st Appellant had gone where the body was and came back around 5.00pm.
9. The learned Judge found in the judgment rendered on 13th June 2019, that the evidence of PW7 was truthful, therefore it was safe to convict the Appellants on his evidence. The court discounted the 1st Appellant's defence as he could not have been at work on a Sunday; that the 2nd Appellant's evidence did not indicate that he was on bed rest; that it was not true that the impugned land dispute was settled because PW6's evidence was to the effect that the dispute is pending dispute in court. The court discounted the evidence of the 3rd Appellant that he was in Garissa; that in view of the positive identification by PW7, the 3rd Appellant was among those who killed the deceased. The court therefore rejected the Appellants' defences. The Appellants were found guilty of the offence of murder and convicted, and after their considering mitigation, the learned Judge sentenced each one of them to serve 20 years' imprisonment.
10. It was this decision that prompted the instant appeal. The Appellants have raised three grounds of appeal in their supplementary memorandum of appeal dated 12th May 2023 namely, that the learned trial Judge erred in basing the conviction on the evidence of only one witness in disregard of the inconsistencies; in unnecessarily placing the most crucial witness on witness protection and thereby denying the opportunity to see and hear him and assess his demeanor; and in disregarding the defences raised by the Appellants. The appeal came up for virtual hearing on 18th May 2023. The Appellants were present appearing from Malindi Prison and were all represented by learned counsel, Mr. Magolo, while the Respondent was represented by the learned Principal Prosecution Counsel, Ms. Mwaura. The learned counsels both highlighted their respective written submissions dated 12th May 2023 and 22nd July 2021.
11. In a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In *Okeno vs Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole



evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be

supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

12. The first issue raised in this appeal is whether the conviction of the Appellants on the evidence of a sole witness was sound. The concerns raised by the Appellants that the sole witness was also a protected witness will also be addressed under this issue, as they turn on the question as to whether the witness's evidence was reliable. Mr. Magolo in this regard submitted that PW7 witnessed the incident on 31st July 2016 and only reported it to James, the deceased's son after a month, while the investigating officer on cross examination stated that the eye witness came forward and reported the incident after 16 days and never told anyone. Further, that PW 7 in his testimony stated that the 2nd Appellant cut the deceased on the back, the 3rd Appellant cut him on the head and the fourth person cut him on the hands, while the post mortem report on external appearance noted cuts on the head and hand and no cuts at all on the back as claimed by the witness.
13. In addition, that PW7 testified that his relationship with the accused was not good and the trial Judge should not have solely relied on his evidence considering the inconsistencies and it was thus unsafe to convict the Appellants based on PW7's evidence. Lastly, that PW7 was the only eye witness and a crucial witness who was unnecessarily put on witness protection and the trial Court recognized that it thereby denied itself the opportunity to see and hear and assess his demeanor. The counsel urged that in the circumstances, obscurity of the identity of the witness under protection was a violation of the Appellants' right to fair trial because it was unnecessary and the accused were entitled to meet their accuser.
14. Ms. Mwaura urged that death and its cause was proven by the evidence of PW7 who was the main witness and who testified as to the injuries inflicted by the Appellants on the deceased, which evidence was corroborated by the post mortem report. Further, that the trial Court also considered other circumstantial evidence of the land dispute, and that even though PW7 was under witness protection, he was cross examined by the Appellants, and the trial Court warned itself of the dangers of relying on a single identifying witness and found the witness to be honest.
15. It is not in dispute that the trial Court relied on the evidence of a single eyewitness (PW7) for the finding that the Appellants caused the death of the deceased. It has been reiterated in various judicial decisions including *Roria vs Republic* (1967) EA 583, *Charles O. Maitanyi vs Republic* (1985) 2 KAR 7, *Wamunga vs Republic* (1989) KLR 424 and *Ogeto vs Republic* (2004) KLR 19, that the trial court should carefully scrutinize the evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. The credibility and reliability of this witness is therefore critical in order to sustain a conviction, and the court must be particularly alive to the dangers of poor observation, faulty recollection, reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest. The quality of evidence in this respect must make up for the lack of quantity.



16. In the present appeal, we are alive to the fact that PW7 observed the attack on the deceased from a reasonably short distance and in broad daylight, as observed by the trial Court:

“25. Having noted the limitations surrounding the testimony of PW7, I now proceed to assess his evidence. PW7 stated that he knew the deceased and the accused persons prior to the incident. He insisted that he knew the accused persons by their names as they lived in the same village. He stated the part of the body of the deceased that each of the four killers cut. His testimony was consistent with the findings in the post-mortem report. The witness never wavered when placed under intense cross-examination by the defence counsel.

26. The witness stated that he observed the happenings from a distance of about 20 metres. It cannot therefore be said that there was mistaken identity.”

17. We do not find the discrepancies in PW7’s evidence as regards the location of the cuts on the deceased’s body material or necessarily fatal, as they were not of such magnitude as to raise substantial doubts as to the death of the deceased or its cause. As explained by this Court in *Richard Munene vs Republic* [2018] eKLR:

“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.”

18. Upon careful evaluation, we however find PW7s evidence to be unreliable in two material respects. Firstly, the PW7 did not report what he had witnessed and observed about the death of the deceased until after a month later, and even then to the deceased’s son and not the appropriate authorities. This course of action in our view creates doubts in our mind, not only as to the correctness of the account given by PW7 as regards the death of the deceased given the time that had lapsed, but also PW7’s motivation in eventually coming forward with the information. Secondly, PW7 admitted to having had prior disagreements with the 2nd and 3rd Appellants which created doubt as regards his independence and impartiality.

19. The learned trial Judge, after acknowledging that these disagreements did exist, held as follows:

“27. The questions put to the witness by the defence counsel created an impression that the accused persons knew who the witness was. Nothing emerged during the testimony of the witness that can lead this court to the conclusion that he had reason to give false testimony against the accused persons. Indeed the honesty of the witness was enhanced by his concession that he had differences with the accused persons prior to the murder. Although the genesis of the disagreement was not stated, after the prosecutor indicated that pursuing the issue would disclose the identity of the witness, there is no reason to conclude that the disagreement could have made the witness to give false testimony against the accused persons. It is difficult to imagine why the witness would



abandon the comfort of normal life and opt for witness protection in order to nail the accused persons if he did not see them kill the deceased.”

20. In addition, the trial Court also noted that there were other persons other than the Appellants who had a land dispute with the deceased, and there were therefore other co-existing circumstances, which weakened the inference of guilt on the part of the Appellants. Lastly, the trial Court identified the limitations in relying on the evidence of a single identifying witness who was also a protected witness, when it held as follows:

“ 23. The order placing PW7 under witness protection was made on 12th July, 2017 meaning the accused persons all along knew who PW7 was. In my view therefore there was no need to conceal the identity of the witness when he testified. If the witness was threatened as alleged by the prosecution then it was simply sufficient to place him under witness protection or even relocate him. Concealing his identity could not serve any purpose unless the defence was not supplied with the statement of this witness or information on his identity was redacted. This, in my view, could only have been done with the leave of the court and the record does not disclose that permission was sought to withhold or redact the statement of this witness.

24. In availing a veiled witness who testified through the court assistant, the prosecution denied this court an opportunity of hearing and seeing the witness as he testified. The court did not therefore have the opportunity of assessing the demeanour of the witness.”

21. The correct approach in the circumstances would have been for the trial Court to proceed with caution and circumspect, bearing in mind that the witness was a single identifying witness. It is thus our finding that the evidence of identification of the Appellants by PW7 as the persons who caused the death of the deceased, and on their alleged land dispute with the deceased as evidence of malice aforethought, was highly unsatisfactory and inadequate. It is therefore not safe to rely on the said evidence to sustain the

Appellants’ conviction.

22. The second issue raised in this appeal is whether the trial Court considered the defences raised by the Appellants. Mr. Magolo submitted that the learned trial Judge erred in disregarding the defences raised by the Appellants. Further, that the trial Judge erred when he held that the defence of alibi came late in the day and the prosecution was not given a chance to rebut it. Mr. Magolo in this respect submitted that all aspects of the Appellants’ alibi were asked on PW 7 during cross examination. Ms Mwaura’s position was that the alibi defences were an afterthought and were raised late in the day.
23. This Court has held in the cases of *Kiarie vs. Republic* [1984] KLR 739 and *Karanja vs Republic* [1983] KLR 501 that an alibi raises a specific defence and an accused person who put up an alibi in an answer to a charge does not in law thereby assume any burden of proving that answer and that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution, and that it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. In *Victor Mwendwa Mulinge vs Republic* [2014] eKLR, this Court (Kihara Kariuki (PCA), Musinga & Gatembu, JJ. A), while referring to the decision in *Karanja vs Republic* [1983] KLR 501 held that:

“ in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the



case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.”

24. In the circumstances of the present appeal, given that we have already found that PW7’s evidence was unreliable, we find that there was no cogent evidence that placed the Appellants on the scene of the crime, and the prosecution did not displace the Appellants’ alibi defences, which were supported by independent evidence.
25. All in all, we are of the view that the doubts raised by the prosecution’s evidence must be resolved in the Appellants’ favour, and we accordingly allow the appeals by the 1st, 2nd and 3rd Appellants, quash their conviction for the offence of murder and set aside the sentence of twenty (20) years imprisonment imposed on each of them. We order that the 1st, 2nd and 3rd Appellants be forthwith released unless otherwise lawfully held.
26. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

