Karisa v Republic (Criminal Appeal 27 of 2019)
[2022] KECA 50 (KLR) (21 January 2022) (Judgment)

Neutral citation: [2022] KECA 50 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 27 OF 2019

A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA

JANUARY 21, 2022

BETWEEN

KATANA CHENGO KARISA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (W. Korir, J.) delivered on 19th July 2018 in Malindi High Court)

JUDGMENT

1. The appellant was arraigned before the High Court at Malindi on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars set out in the information were that on the 25th March 2016 at Rima Ra Pera village, Dangarani Sub-Location, Mitangani Location, in Ganze District within Kilifi County, the appellant murdered Kahaso Ngumba Kenga. The appellant pleaded not guilty, paving way for a trial. After the full trial the appellant was convicted and sentenced to 30 years imprisonment. Aggrieved by the said conviction and sentence, the appellant filed this appeal.

2. The case of the prosecution was as follows. On 25th March 2016 at about 9:00 pm, PW1 Kahindi Kanze Katana a herder at Rima Ra Pera heard a knock on his door and recognised the voice of the appellant telling him to come out. The appellant was his cousin. PW1 asked the appellant why he had come out at night and the appellant told him that he wanted to tell PW1 something. PW1 went out of his house and saw the appellant holding a panga. The appellant asked PW1 to follow him as he had done some work and wanted PW1 to assist him. The appellant warned PW1 that if he did not follow him, the appellant would harm him.

3. PW1 went with the appellant up to the house of Mzee Ngumbao where the appellant insisted they enter. The appellant who was holding a torch flashed on the bed. PW1 was shocked to see someone

had been killed. The appellant asked PW1 to assist in removing the body. They removed the body and took it to the house owned by one Kalume. This took about 15 minutes. There was nobody else. The appellant told PW1 that it was enough and told him to go and sleep.

4. Fearing for his life, PW1 ran to the forest instead. PW1 returned home the next day at about 7:00 am and found police from Bamba police station had arrived. The police took the body to Kilifi County hospital. PW1 later recorded a statement with the police.

5. On cross examination PW1 stated that it was not unusual for the appellant to wake him up at night but on that particular day, the appellant was like a different person; fearful in his talk and talking very fast. The deceased was his grandmother whose house was not far from their homestead. The grandmother lived with her adult daughter, Riziki, but PW1 did not see Riziki that day or night. He had not heard of any disagreement between the appellant and the deceased. The homestead had 6 houses: PW1's, Charo Kalume's, Safari's, Hare Kalume's and the grandmother's house. The body of the deceased was removed and placed outside Mama Charo Kalume's house. PW1 stated that he did not know who killed the deceased.

6. PW2, Jackson Safiri Kithi a boda boda rider headed home on 25th March 2016 at about 9:00pm and kept his motorbike. He went to his grandmother's house and found the door locked. He knocked several times, which was unusual. A lady, Dama, came out. PW2 entered and Dama locked the door. Dama told PW2 that the accused had gone home and asked for a panga and was not given; that the accused asked for a knife and was equally denied.

7. PW2's grandmother, a nyumba kumi elder, then went to report to the village elder that the appellant had asked her for a panga. Dama told PW2 that they heard someone knocking at the deceased's house and she could hear someone talking to the deceased. As PW2 was talking to Dama, his grandmother came with the village elder and police officers attached to the Chief''s ofiice. They went to the deceased's house. The appellant came to the scene carrying a panga and a torch. The appellant was talking and saying "I have finished her, this is the panga." They tried calling the Assistant Chief but could not get him. PW2 went to the Assistant Chief's house and got him. The Assistant Chief called the police who came in the morning and took the body and the appellant. PW2 saw the deceased's body that morning and saw a cut on the neck.

8. On cross-examination, PW2 admitted that it was not recorded in his statement that he saw the appellant that night but on re-examination he stated that the statement was recorded for him. PW2 stated that the appellant was beaten by the deceased's family members and was in bad condition. He did not see PW1 that morning as he was busy. He had known the appellant for long and that the appellant takes palm wine.

9. PW3, Dama Katana Kira, testified that on 25th March 2016 at about 10:30 pm the appellant came to his house and greeted her. The appellant removed a panga which PW3 identified in court. The accused had a torch which he flashed on the panga and asked her what she could see on the panga. She responded that it had blood. The appellant told her that it was the blood of the deceased.

10. According to PW3, the appellant said he had killed the deceased because she was bewitching him. PW3 asked the appellant where he had killed the deceased and the appellant said that he had done so at the deceased's house. The appellant asked PW3 if she had a book for him to write down that he had killed the deceased. The appellant then left for the shopping centre.

11. PW3 went to a neighbour, one Kitsao Kazungu Kahindi an AP at the Chief's office and they both went to see the deceased who lived nearby. They found the door locked but there was no padlock. In the house they saw the deceased's body which had a cut on the left hand, left breast, chin and neck.

There were children asleep in the other room. When they came out, they found the appellant talking to Riziki Ngumbao; telling her if she wanted to see her mother she should keep quiet otherwise he would deal with her. The appellant and Riziki entered the house and the appellant showed Riziki the body. The appellant asked PW3 why she was there and she said that she just wanted to see the body. The appellant told PW3 to leave and she did so.

12. PW3 returned to the scene at about 5:00 am and found that the body had been removed and placed outside. The appellant had been badly beaten. The police came and took the body and the appellant. On cross-examination, PW3 stated that her home was not far from the appellant's home such that if one shouts in one home it can be heard the in other. That there was no light in the deceased's home and they did not hear any screams. She saw PW2 at the scene and went with him to seek the Assistant Chief. When she returned to the scene the body had been placed outside another house. When the appellant came to her house he came slowly and appeared to be drunk but she did not check properly.

13. PW4, Riziki Ngumbao, testified that on 25th March 2016 she was at Mitangani shopping centre selling palm wine (mnazi) . Between 9 and 10 pm, the appellant came to her place of business and took those who were inside and went with them outside. She heard the appellant saying that he had finished the deceased; that she was a witch and he had cut her with a panga. Some of the customers came and told her what the appellant had said. She had seen the appellant with a panga in his waist; he also had a torch.

14. PW4 decided to close her business and go and check. She went with the appellant and some of the customers followed them. On asking the appellant why he had killed the deceased, he showed her a hirizi, a piece of cloth on his arm, saying that he had been looking for a job but was unsuccessful because the deceased was bewitching him. At the home, they found people outside. The appellant opened the door and PW4 saw the body on the bed. The body had a cut on the hand, breast and neck. PW4 took her children who were in the other room out of the house. The appellant forced one man by the name Kahindi to remove the body outside. The appellant said he would not leave until the police got there.

15. The deceased's family members came and saw the body as the appellant was sleeping outside. They asked who had killed the deceased and PW4 said it was the person sleeping near the body. They tied the appellant and started beating him. In the morning the police came and took the body and the appellant. PW4 stated that she had not seen the appellant and the deceased arguing before, and that she had no grudge with the appellant. On cross-examination, PW4 stated that she was surprised by the appellant's action; that it was as if the appellant was not normal. That he forced Kahindi to assist him to carry the body outside and they put the body outside her grandmother's house.

16. PW5 PC Peter Odhiambo from Bamba police station stated that he helped the investigating officer, Chief Inspector Solomon Sang in the matter. He recalled that on 26th March 2016 at around 5:30 am, he received a call from Chief Inspector Solomon Sang who informed him that there was a murder incident in Rima Ra Pera village. They immediately proceeded to the scene and at the scene they found a huge crowd.

17. They first moved the crowd away from the scene. The body of the deceased was lying dead on a bed and had deep cuts on the left side of the face and chest. The appellant was lying next to the body having been injured by the villagers. He was suspected to be the one who had killed the deceased. They photographed the scene and recovered the murder weapon which was a panga. The panga was next to the deceased outside the house. They loaded the body and appellant into the motor vehicle and proceeded to Kilifi Hospital where the appellant was admitted and the body of the deceased taken to the mortuary. The post mortem was prepared.

18. The appellant was arrested after he recovered and taken to Coast General Hospital for mental assessment. PW5 recorded witness statements from some of the witnesses. From the statements, PW5

established that the appellant started walking around the village saying how he had murdered the deceased. That the appellant even went to the village elder, Dama Katana, and showed her the blood stained panga. The appellant told her how he had killed the deceased. PW5 charged the appellant with the offence of murder. There was no other person linked to the murder apart from the appellant.

19. On cross-examination, PW5 stated that he did not know the owner of the house which was next to the one in which the deceased was found dead. He did not know who placed the panga next to the deceased. None of the witnesses stated that the panga belonged to the appellant. He did not know whether the appellant was forced to lie next to the body or whether he did it voluntarily. It would be incorrect to state that the body was inside a house. That Chief Inspector Sang was transferred to Narok and never recorded a statement. The panga was never submitted for analysis by the Government Chemist.

20. PW6, Dr Zeinat Zahran a medical officer at Kilifi County Hospital produced a post mortem report prepared by Dr Hashim Suleiman. The observation in the post mortem was that the body had deep cuts on the left side of the head and on the neck. The larynx and pharynx were also cut. The third injury was on the left breast. Internal appearance of the body was not done. The doctor concluded that the cause of death was severe head injury and massive haemorrhage secondary to assault.

21. In his defence the appellant made an unsworn statement. He stated that on 25th March 2016 at midnight, he received a call from his sister that somebody had been killed at home. He left for home and found many people. He wanted to know who had been killed. The people asked him why he was pretending that he did not know. He told them that he had just received the news. The people started beating him until he lost consciousness. He came to in hospital after three days. He was taken to Bamba police station. After two days, he was interrogated about the death of the deceased. He denied killing the deceased.

22. In his judgement the learned trial judge began by considering the implication by counsel for the appellant in submissions that the appellant was either intoxicated or had no capacity to form the intention to commit the offence.

    The learned trial judge found that the neither the defence of insanity nor intoxication was raised by the defence. The appellant did not put forward any evidence to show that he had a mental disease at the time he committed the offence. There was unchallenged evidence that the appellant had been taken to Coast General Hospital for mental assessment a report of which was filed with the court. The evidence on record showed that the appellant was of sound mind immediately after the alleged offence. On the defence of intoxication, the learned trial judge held that the appellant never testified that he was inebriated or that he took alcohol without his consent. There was no evidence showing that even if the appellant was drunk that he was drunk to the point of insanity. This defence was also not available to the appellant.

23. The learned trial judge found that the circumstantial evidence adduced overwhelmingly pointed to the appellant as the person who killed the deceased. The claim by the appellant that he only went to the scene after being alerted by his sister could not be believed as he neither named the sister nor called her as a witness. The learned trial judge found that the prosecution had proved the charge beyond reasonable doubt, found the appellant guilty of the charge and convicted him accordingly.

24. At sentencing, the learned trial judge took into account the mitigation and held that although the circumstances of the case did not justify a death sentence, a deterrent sentence was warranted. The learned trial judge sentenced the appellant to serve 30 years imprisonment.

25. Aggrieved by both the conviction and sentence, the appellant lodged the present appeal. The grounds forming the basis of appeal are that the learned trial judge erred in law and in fact by:Failing to consider

that malice aforethought was not proved beyond reasonable doubt.Failing to consider that there was no formal document produced in court to prove the cause of death.Failing to consider that the appellant's arrest had no link with the present matter.Failing to consider that the prosecution failed to prove its case beyond reasonable doubt.Failing to consider that the appellant's defence was not challenged by the prosecution case.

26. On the first ground that malice aforethought was not proved, Mr Kimani, counsel for the appellant, submitted that none of the prosecution witnesses heard or witnessed any physical assault on the person of the victim. That the evidence was purely circumstantial and did not irresistibly point to the appellant as the only person who would have caused the death of the accused.

27. On the second and third grounds, counsel relied on the case of *Sawe v Republic KLR 364* for the proposition that in order to justify a conviction on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. He submitted that PW6 noted deep cuts but the same could not be ascertained for sure if they were inflicted by the appellant or what weapon was used; and neither was the estimated time of infliction of the injuries given. PW5 did not know who placed the panga close to the appellant and did not know whether the appellant was forcibly placed next to the body or of he did so voluntarily. The evidence did not answer the question whether the appellant would have caused the death of the deceased.

28. On the fourth and fifth grounds, counsel cited the case of *Uganda v Sebyala & others [1969] EA 204* to the effect that the accused does not have to establish that his alibi is reasonably true, but only has to create doubt as to the strength of the prosecution case. Counsel pointed to the appellant's statement that he only went to the scene after being called by his sister that someone had been killed at home and on arrival at the scene past midnight, he was beaten by the people who had gathered there until he lost consciousness.

29. Counsel submitted that the prosecution failed to prove the case beyond reasonable doubt. He faulted the learned trial judge for drawing inferences of guilt in observing that the appellant had the opportunity to dispose of the panga, rather than lay down with it next to the victim and go around waking people up. That it was not proved that the recovered panga was the one the accused had, or was the one used to assault the deceased , adding that it was not taken for analysis by the Government Chemist.

30. Mr Jami Yamina, Senior Principal Prosecution Counsel, submitted that the respondent opposed the appeal in its entirety. Counsel submitted that even though the evidence was circumstantial, the learned judge properly applied the test to be met before a court convicts on circumstantial evidence as stated in *Simon Musoke v R EA 715*. All prosecution witnesses were corroborative of each other, and the appellant conveniently omits the other incriminating evidence of his being seen with the blooded murder weapon as he uttered the words that left no other inference to be drawn, other than that of his guilt. The learned judge weighed the exculpatory facts, such as failure to produce photographs of the scene and of the accused, against the inculpatory facts and correctly found the evidence overwhelmingly pointing to the appellant as the culprit. Having established the appellant as the culpable culprit, the post mortem report and doctor's evidence left no doubt as to the nature and point of the injuries depicting no other intention other than to cause the death of the deceased.

31. Counsel relied on the case of *Kalunde Semukula v Uganda Cr Appeal No 11 of 1994* as cited with approval in *Republic v Juma Kituko Mwambegu [2020] eKLR* wherethe Supreme Court of Uganda observed that circumstantial evidence must be narrowly examined keeping in mind that this kind of evidence may be fabricated to cause suspicion on another. It is therefore necessary before drawing the

inference of guilt to ensure that there are no other co-existing circumstances which would weaken or destroy the inference. Nothing came out in the trial that would invite suspicions of planted evidence. There was no doubt that malice aforethought was established against the appellant, more so given that the fate of many other deceased whose deaths are connected to accusations of bewitching others. Counsel contended that the sentence meted out warrants no interference as it is neither harsh nor excessive.

32. As this is a first appeal, the duty of this Court was well elucidated by the predecessor to this Court in *Okeno v Republic [1972] EA 32* as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). 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 conclusions. It must make its own finding 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 had the advantage of hearing and seeing the witnesses."

33. As there was no eyewitness to the actual assault and murder of the deceased, the evidence relied on by the prosecution was substantially circumstantial in nature. The principles applicable in cases turning solely or substantially on circumstantial evidence have been set out in a number of cases. In *Rex v Kipkerring Arap Koske & 2 Others [1949] EACA 135* this Court held that:

> " In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

34. This Court in *Simoni Musoke v R [1958] EA 71* also added that before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. In *Abanga alias Onyango v Republic Cr. App No. 32 of 1990 (UR)* this Court emphasized that in such cases, "the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." The process entails subjecting each link in the chain to close and separate examination before the whole chain is put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge. *See Mwangi & another vs. Republic [2004] 2 KLR 32.*

35. The set of circumstantial evidence that convinced the learned judge to draw an inference of the appellant's guilt was in the appellant's walking around brandishing a blood-stained panga as he invited people to go and see what he had done; those who resisted like PW1 and PW4 were threatened with dire consequences; the appellant himself led the prosecution witnesses to where the body of the deceased was; he told them that he had killed the deceased because she had bewitched him; he specifically told

PW4 that he could not secure a job because of the deceased's charms; and that none of the witnesses had any differences with the appellant prior to the incident.

36. This analysis of the evidence by the learned judge is accurate. The evidence overwhelmingly points to the appellant as the one who had committed the offence. The evidence presented by the prosecution was consistent and corroborative. The appellant went to a number of homes and PW4's place of business brandishing a blood-stained panga. The appellant informed the witnesses he encountered in these places that he had killed the deceased because she was bewitching him. PW3 saw the appellant returning with PW4 from the shopping centre where he had just told PW4 he had killed the deceased and showed PW4 the bloodied panga. PW2 heard the appellant saying that he had finished the deceased with the panga. The appellant led PW4 to where the deceased's body lay. PW4 identified the panga produced in court as the one that was brandished by the appellant that night. The appellant woke up PW1 and forced him to carry the body of the deceased outside. That the photographs of the scene and of the appellant were not produced is not a co-existing circumstance that can sufficiently weaken the inference of the guilt of the appellant when sized up against multiple witnesses to whom the appellant declared killing the deceased while showing them the murder weapon.

37. Malice aforethought was also proved to the required standard as described in Section 206 of the Penal Code:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; ..."

38. The appellant's motive for killing the deceased was made clear by the appellant himself. The appellant had told several of the witnesses that he had finished the deceased because he was convinced that the deceased was bewitching him to the extent that he could not secure a job. The nature of the deceased injuries as described in the evidence produced by PW6 left no doubt that the extent and manner of the injuries inflicted on the deceased were also a sufficient demonstration of malice aforethought. There appears to be no doubt the injuries were intended to cause grievous harm which led to the death of the deceased.

39. In *Bonaya Tutut Ipu and another versus Republic [2015] eKLR*, this Court cited with approval the decision of the Court of Appeal of Uganda in *Chesakit versus Uganda CR App. No.95 of 2004* which stated that:

> " In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

40. The appellant raised an alibi defence when he made an unsworn statement in his defence to the effect that he only went to the scene after being called by his sister at midnight who informed him that

someone had been killed at home. The guiding principles regarding alibi defences at every stage of a trial was set out in *Wang'ombe v Republic [1976-80] 1KLR 1683* where this Court held:

> " When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution."

41. The appellant's alibi when weighed against the prosecution evidence is not convincing. The appellant did not name this sister who had called him at midnight, let alone call her as a defence witness. Conversely, the prosecution evidence, through several consistent and corroborative witness testimonies, placed the appellant at the scene before midnight and showed that he had gone to several homes and the shopping centre before midnight and told several witnesses that he had murdered the deceased.

42. The only conclusion to be made from the foregoing is that the prosecution had proved its case beyond reasonable doubt. The conviction was well founded and the sentence justified.

43. It follows that this appeal must fail and is therefore dismissed.

DATED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR