



**GOW v Republic (Criminal Appeal 434 of 2012)
[2022] KECA 77 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 77 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 434 OF 2012
MSA MAKHANDIA, A MBOGHOLI-MSAGHA & RN NAMBUYE, JJA
FEBRUARY 4, 2022**

BETWEEN

GOW APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the decision of the High Court of Kenya at Nakuru
(R.P.V Wendoh, J.) dated 22nd November, 2012 in HC. CR. C. No. 55 of 2009)*

JUDGMENT

1. GOW, “the appellant” is trying his luck through this Court on this first appeal which may as well be the last. He was arrested, charged and convicted in Nakuru High Court for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on or about 15th June 2009 in Nakuru District he murdered BO. The appellant denied the offence and the case proceeded to plenary hearing with the prosecution calling a total of 9 witnesses in support of their case.
2. It was the prosecution’s case that George Osia Kira (PW1) on 15th June 2009 whilst in his office someone approached him soliciting for funds to bury EO’s (PW7) son, BO “the deceased”. He was further informed that it was rumored that the appellant had killed the deceased and had scheduled burial for the following day. He then reported the incident to the police.
3. Evans Matwere PW2, a resident of the area on 24th May 2009 found the appellant’s wife in his house who told him that the appellant had beaten the deceased leaving marks on his body. He went to the appellant’s house and told him that what he had done was wrong. On 16th June 2009 he came from work and found people gathered and upon inquiring he was told that the deceased had been taken ill and had been rushed to hospital by the appellant. On 18th June 2009 he learnt that the deceased had passed on.



4. Margret Akinyi PW3, also a resident of the area, on 15th June 2009 was in her house when the appellant visited and informed her that the deceased was critically ill and he wanted her to go and check on him. On arrival at the appellant's house she found the deceased diarrhoeing and asked the appellant to rush the deceased to hospital. APC Jacob Mutuga and Kalicha Mohamud (PW4) and (PW5) respectively testified that on 11th June, 2009 together with other police officers from Njoro police post received information that there was a suspect who had killed a child and had planned to bury the body the following day. The following morning they went to the appellant's house and found PW7 and the body of the deceased. PW4 who ended up being the investigating officer of the case further testified that upon interrogating PW7, she disclosed to him that the appellant had on several occasions physically assaulted the deceased.
5. On 19th June 2009, Dr. Noah Oloo Kamidigo (PW6) conducted a post-mortem on the body of the deceased after, ROA (PW8) grandmother to the deceased and John Chacha PW9 one of the police officers who removed the body of the deceased to the mortuary identified the body to him. The two noted that the deceased was bleeding from the nose, ears and the body had dark spots on the left side and chest. PW6 upon examination, formed the opinion that the cause of death was as a result of hypovolemic shock due to internal abdominal hemorrhage from the ruptured spleen due to blunt force injury to the abdomen.
6. EO (PW7), the mother of the deceased lived with the appellant in Egerton as a boyfriend. On 15th June 2009 she prepared breakfast and left the deceased playing with other children outside. Later in the evening when she came back from her chores, she was informed that the appellant had taken the deceased to hospital. She proceeded to the hospital and found that the deceased had been placed on oxygen. She went back home and left the appellant taking care of the deceased. She later learnt that the deceased had passed on. She further stated that the deceased could not speak but was afraid of the appellant. She denied ever seeing the appellant do anything untoward to the deceased.
7. Upon the close of the prosecution case, the court ruled that the prosecution had established a prima facie case and put the appellant on his defence. In an unsworn statement the appellant stated that on 15th June 2009 PW7 prepared breakfast for all of them including the deceased. Done with the breakfast he left with PW7 for work leaving behind the deceased playing with other neighbours' children. He returned home at about at 2.30pm and found the deceased having vomited and diarrhoead on himself. He administered traditional medicine to the deceased before he sought assistance from PW3 who advised him to take the deceased to hospital which he did. The deceased was admitted due to dehydration and was treated. Unfortunately he passed on the same night. He denied having anything to do with the death of the deceased as he was his biological father.

Upon evaluation of the evidence, law and submissions of counsel the trial court was convinced that the appellant had committed the offence, convicted him and thereafter sentenced him to 25 years imprisonment having considered the mitigation he had proffered.

8. The appellant was aggrieved by the judgment of the High Court and therefore preferred this appeal on the grounds, that the trial court erred in law by: finding that the prosecution had proved their case beyond doubt, misdirecting itself in convicting and sentencing the appellant on the circumstantial evidence; convicting and sentencing the appellant based on inconsistent, contradictory and incredible evidence; failing to note that crucial witnesses were not summoned to tender their evidence; misdirecting itself by convicting and sentencing the appellant based on its own theories; disregarding the appellants defence and treating the prosecution evidence in isolation. The appellant therefore prayed for the appeal to be allowed, conviction be quashed and the sentence imposed set aside.



9. During the plenary hearing of the appeal, the appellant was represented by Mr. Morande learned counsel whereas, Ms. Wang'ele learned prosecution counsel appeared for the state. Counsel for the appellant urged us to find that the trial court erred in finding that the prosecution had discharged the burden of proving the information preferred against the appellant beyond reasonable doubt. That the prosecution had not proved any of the ingredients of murder. That the appellant did not dispute the death of the deceased, but disputed the fact that he was responsible for the death. That none of the prosecution witnesses tendered evidence connecting him to the death of the deceased. He maintained that the evidence of PW7 which was critical did not at all connect him to the death of the deceased. If anything it exonerated him as she had testified that she had never seen the appellant assault the deceased. It was submitted that the conviction of the appellant was premised on circumstantial evidence which was not water tight. We were referred to the case of *Abanga Alias Onyango vs. Republic, Criminal Appeal No. 32 of 1990 (UR)* on the conditions that ought to be met before a conviction based on circumstantial evidence can be sustained. Those conditions were however not met in this case. It was further submitted that no evidence was tendered to show that the appellant was violent towards the deceased nor that he was not the biological father. However the trial court went ahead and relied on imaginary evidence, its own presumptions and theories to find that the appellant was abusive of the deceased on account of him not being his biological son; that the court doubted how PW7 would have left the child to play with other children without a grown-up present. It was not the duty of the court, according to counsel to assume the role of the prosecution witness and render its own opinion on what the prosecution witness ought to have adduced in evidence.
10. In addition the trial court was accused of failing to consider the inconsistencies and contradictions in the prosecution evidence. For instance PW4 testified that he noticed that the deceased's female parts were swollen whereas the deceased was a male child. Further it was the evidence of PW2 and PW4, that PW7 informed them that the appellant used to assault the deceased but when giving her own evidence, PW7 testified that she had never seen the appellant do any harm to the deceased at any given time. On critical witnesses not called to testify, the appellant pointed out that the doctor who first examined the deceased should have been called. That witness would have shed light on how the deceased could have sustained the injuries noted on the body of the deceased. To buttress this argument this court was referred to the decision in *Patrick Kathurima vs. Republic [2015] eKLR* where this court held that the conviction was unsafe and quashed it observing that the prosecution failed to call crucial witnesses. In addition, we were urged to find that the trial court did not consider and sufficiently interrogate the appellants alibi defence. Rather it relied on its own opinion that PW7 would not have gone to work leaving behind the deceased alone without a grown up person to take care of him to dismiss the defence.
11. The appeal was opposed with Ms. Wang'ele submitting that the prosecution witnesses who testified were credible and consistent. Their evidence was sufficient to sustain the conviction. The appellant did not have a good relationship with the deceased as testified to by PW4. That PW7 had informed him that the appellant was cruel to the deceased. This evidence was corroborated by PW2 who testified PW7 had gone to his house on 21st May 2009 and showed him the injuries inflicted by the appellant on the deceased. PW7 had further testified that the appellant had been left with the deceased when she went to work and therefore he was the last person seen with the deceased. Counsel submitted that the appellant only took the deceased to hospital as a cover up of his actions. The appellant's defence that he went to work and left the deceased playing with other children, was therefore an afterthought. In the premises she sought the dismissal of the appeal in its entirety.



12. This is the first appeal and our role was aptly captured in the case of *Okeno vs. 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 vs. R.* [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 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.”

13. Having carefully considered the record in the light of the rival submissions above and the principles of law relied upon by the respective parties, the issues for our determination in this appeal are whether: the offence of murder was proved; circumstantial evidence led was sufficient to sustain a conviction, failure to call key witnesses undermined the prosecution case and whether the trial court disregarded the defence put forth by the appellant. The appellant was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. To prove the offence the prosecution was obliged to demonstrate beyond reasonable doubt: the fact of death and its cause and that the appellant committed the unlawful act or omission that led to the death of the deceased and; lastly, there was malice aforethought by the appellant in the commission of the act. See *Titus Ngamau Musila Katitu vs. Republic* [2020]eKLR.
14. The death of the deceased was really not in dispute. All the witnesses who testified confirmed such death. Indeed even the appellant himself conceded to this fact. The icing on the cake was of course the testimony of PW6, the Doctor who conducted the post mortem on the body of the deceased and concluded that the cause of death was shock due to internal abdominal hemorrhage and a ruptured spleen caused by blunt injury on the abdomen.
15. The death of the deceased and its cause having been established, can it be said with certainty and precision that the appellant caused the unlawful death of the deceased? From the record it is quite apparent that there was no direct evidence linking the appellant to the death of the deceased. Rather the evidence that linked the appellant to the death of the deceased was purely circumstantial. In *Joan Chebichii Sawe vs. Republic* [2003] eKLR, this Court commenting on reliance on circumstantial evidence to sustain a conviction observed:
- (i) 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 hypotheses than of guilt.
 - (ii) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
 - (iii) The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
 - (iv) Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”



16. All the prosecution witnesses did not see the appellant cause any harm to the deceased on the material day that could have led to his death. Though PW2, testified that PW7 had taken the deceased to his house on 21st May 2009 and showed him marks inflicted on him by beatings from the appellant, we are not certain that these are the beatings if at all that could have led to the demise of the deceased. In her testimony PW2 did not exactly point out on which part of the body he observed the marks. He made no mention of marks on the abdominal part of the body, yet it was PW6's evidence that the cause of death was blunt trauma to the abdomen resulting in the rupture of the spleen. It is common ground that both PW7 and the appellant left for their various chores. According to the duo whose evidence was uncontroverted they left the deceased playing with the other children. Is it possible that as the deceased played as aforesaid he could have sustained those fatal injuries? Such possibility cannot be completely ruled out. It was also the evidence of PW3, that the appellant had gone to her house and informed her that the deceased was sick and she advised him to take him to hospital which he did. Surely if there was any intention to kill the deceased by the appellant could he have taken the trouble to alert the said witness of the deceased's condition and even take him to hospital. This action by the appellant does not show a person bent on killing the deceased. We do not think that there was any basis for the conclusion reached by the trial court that in taking the deceased to hospital the appellant was engaging in a cover up and that it was self serving. Again there was evidence that, concerned with the deceased's state of health when he came back from work, the appellant took upon himself to administer traditional herbs in a bid to alleviate his condition. Once again this is not a conduct befitting a guilty mind. PW7 confirmed that upon learning that the appellant had taken the deceased to hospital she followed him there in the evening and found them in the hospital. In addition it was the evidence of PW7 that after the visit she later left them in hospital and went home. How could she have left the deceased with the appellant knowing only too well that he was a danger to the deceased. This witness too testified that she had not witnessed the appellant ever assault the deceased. The appellant lamented and rightly so in our view that the initial doctor who examined the deceased and noted some injuries should have been called to testify and shed light regarding those injuries and what could have caused them. Given the above gaps in the chain of the circumstantial evidence we are satisfied that the circumstantial evidence led by the prosecution did not irresistibly and poignantly point to the appellant as the perpetrator of the crime. Indeed there are several exculpatory facts that are consistent with the innocence of the appellant. It would appear that the prosecution case was anchored purely on suspicion and as already stated suspicion perse, however strong, cannot provide a basis for inferring guilt. See also *Joan Chebiichi Sawe Vs. Republic* (supra). The trial court appeared to have been carried away by the evidence of PW1 that he was informed that the appellant was suspected of killing the deceased and burial had been set for the following day which information led the police to arrest the appellant. Apart from creating suspicion this evidence was of no value at all and was in any event, hearsay. Further there was a claim that the appellant hated the deceased because he was not his biological child hence the violence he visited on him. However this claim was refuted by PW7 and the appellant. Of all the witnesses, who were best placed to know who sired the deceased?
17. From the record it is clear that the appellant's defence was given short shrift by the trial court. Had the trial court given due consideration to it and considered the gaps we have alluded to above, we are certain that it could have reached a different conclusion other than that the appellant was guilty of the offence charged.
18. That being our view of this appeal this far, we do not think that we should consider the issue of malice aforethought and even the other grounds of appeal. Accordingly we allow the appeal, quash the appellant's conviction and set aside the sentence imposed. We direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.



DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

