Moingo & another v Republic (Criminal Appeal 90 of 2018)
[2022] KECA 6 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 6 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 90 OF 2018

MSA MAKHANDIA, J MOHAMMED & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

JOHN KIMANZI MOINGO ..... 1ST APPELLANT

JAMES OTIENO OCHIENG ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 25th June, 2019 in High Court Criminal Case No. 9 of 2016)

JUDGMENT

1. The appellants, John Kimanzi Moingo and James Otieno Ochieng, were at all material times in the employment of Kisima farm, the property of Konoinua Community, located 7 Kms. from Ongata Rongai in Kajiado County as water vendor and supervisor respectively. PW1, Harrison Mutisya Kyalo was the farm administrator. The deceased, Paul Njiri, was their workmate employed in the farm as a herdsman.

2. On the night of 20th and 21st February 2013, PW 1 received a telephone call from the 2nd appellant, who informed him that some goats and sheep which were under the deceased's care had gone missing. He instructed the appellants to report the matter to the police. In the meantime, he instructed the appellants and the deceased to carry out a search for the missing livestock. One week on, the search was in vain, and the deceased had disappeared from the farm prompting the Community's Board of Directors to summon the appellants to explain the loss. The trial court was not told what transpired immediately thereafter.

3. On the fateful day between 20th February and 1st March 2013, PW2, Abraham Thuo, a pastor at Life in Christ Fellowship Church neighbouring the Farm, was in his house when he heard someone calling him in distress shouting in Kiswahili: "Pastor, wananiua" (Pastor, they are killing me). Coming out of

the house, PW2 saw the appellants dragging the deceased toward their compound. According to him, the deceased had injuries on the forehead. Upon inquiry, the appellants told him that the deceased was the cause of the missing livestock for which their employer was blaming them. He pleaded with them to stop assaulting the deceased. He retreated into his house while the appellants dragged the deceased back to the farm.

4. Some days later, PW2 met the 1st appellant, who informed him that the deceased had gone missing, and that the livestock had still not been recovered. PW3, George Peter Karanja (a driver with Konoinua Community) told the trial court that the appellants worked at the Community's farm aforesaid together with the deceased, and that he learnt of the missing livestock from the farm, which were under the care of the deceased, after which the management commenced a search for the missing livestock and the deceased. In the course of his duties, PW3 received information that the appellants were under investigation for the missing livestock and the deceased's disappearance.

5. PW4, CPL Johana Tanui, a Scenes of Crime Officer, told the trial court that on 8th August 2013, in the company of PW1, PW3, PW8 (Johanson Oduor, the Chief Government Pathologist), PW10, CPL Frederick Ole Kamwaro (one of the investigating officers), and the appellants, together visited Kisima Farm where he witnessed the exhumation of the deceased's remains.They had been led to the scene by the 1st appellant. Following exhumation of the deceased's body, PW8 carried out an autopsy leading to the finding that the deceased died of "head injury from blunt trauma."

6. PW5, Charles Charagu, a police detective attached to Ole Kasisa Police Post, told the trial court that sometime in 2013, while at the police post, he received a report from PW3 (the Community's driver) regarding a confession by the 1st appellant in connection with the death of the deceased. On receiving the information, PW5 made arrangements for PW3 and others concerned to visit the scene to verify the 1st appellant's confession with regard to where the appellants had buried the deceased's remains. On arrival at the scene, PW5 prepared a brief for further action by his superiors. It is then that PW6, Kingsford Nyaga (a police officer), recorded a charge and cautionary statement from the 2nd appellant, witnessed by PW9, PC Stephen Manyiego. Likewise, PW7, SSP Benson Kasyoki (a Senior Superintendent of Police) also recorded a charge and cautionary statement of the 1st appellant.

7. Recording the 1st appellant's charge and cautionary statement, PW7 took him through the requirements precedent as mandated by the Out of Court Confession Rules, 2009. After taking him through the Rules, the 1st appellant voluntarily agreed to record a statement, which he signed as evidence by endorsing its contents. In his testimony, PW7 told the trial court that, in his charge and cautionary statement, the 1st appellant "... blamed the 2nd appellant for what befell the deceased as the principal perpetrator" of the offence with which they were charged.

8. In his charge and cautionary statement recorded in Kiswahili on 5th August 2013 and witnessed by PW11, part of which we have taken the liberty to interpret here, the 1st appellant stated that when the deceased tried to escape, the 2nd appellant gave chase whereupon the deceased got caught up in a barbed wire fence and fell. The 2nd appellant then rained blows and kicks on him to restrain him. The 2nd appellant then requested the 1st appellant to help him confine the deceased in the store so that he could go to call the police. Instead of getting him into the store, he continued beating him with a hoe handle trying to force him to tell the truth as to what had happened to the missing livestock. That is when the deceased mentioned three names of people who he said had stolen the missing livestock. The 1st appellant went on to state that the 2nd appellant locked the deceased in the store, and they went to sleep. The following morning at about 6.00Am, they opened the store and found the deceased dead. It is then that the 2nd appellant picked a hoe and a spade, and went to dig a grave where he buried him as the 1st appellant kept watch. Four days later, dogs unearthed the deceased's body and began mutilating

it. Seeing this, the 2nd appellant reburied the deceased and placed stones on the grave, warning the 1st appellant never to tell anyone about the incident lest he kills him.

9. According to PW7, the 1st appellant confessed that "... the deceased was assaulted and thereafter locked in the store for the night. In the morning, they went to the same store only to find him groaning in pain and bleeding from the nose." PW7 told the court that the 1st appellant denied participating in inflicting injuries on the deceased, but pointed a finger of blame on the 2nd appellant. PW11, PC Douglas Chege was present as witness to the 1st appellant's confession. PW12, Cpl. John Namuso, testified confirming the testimonies of PW5, PW9 and PW10 on the nature of the investigations carried out, and the subsequent indictment of the appellants in Kajiado High Court Criminal Case No. 9 of 2016 where the appellants were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code.*

10. The particulars of the offence were that on the 20th night and the 21st day of February 2013 in Rangau Village within Kajiado County, the appellants jointly murdered Paul Njiri. They denied the offence. In his sworn testimony, the 1st appellant retracted his confession and stated that he knew nothing of what happened to the deceased after fleeing from the farm. According to him, he heard of the deceased's demise from PW1, the farm administrator. In his testimony, he denied assaulting the deceased after they apprehended him. All in all, he denied knowledge of what befell the deceased. The 2nd appellant called 1 witness in his defense, one Dr. Peter Muriuki Ndegwa, a pathologist.

11. Dissatisfied by the conviction and sentence of the High Court (R. Nyakundi, J.), the appellants filed this appeal on the grounds that the learned Judge convicted them on the basis of hearsay and contradictory evidence; and in failing to find that most crucial witnesses were not summoned to testify. The grounds of appeal set out in the appellants' undated "Grounds of Appeal" filed separately may be summarised as follows:

    a. that the learned judge erred in law and fact when he convicted the appellants on the basis of hearsay evidence that lacked substantial proof;

    b. that the learned Judge erred in law and in fact by convicting the appellants despite the fact that "crucial witnesses" were not summoned to testify contrary to section 150 of the Criminal Procedure Code; and

    c. that the learned Judge erred in law and in fact in convicting the appellants on contradictory evidence, and by failing to consider their defence.

    They pray that the appeal be allowed, conviction quashed and the sentence imposed on them set aside.

12. At the hearing of their appeal, the appellants were represented by Mr. Edward Asitiba while Ms. Mativu (holding brief for Ms. Mary Wang'ele) represented the State. Learned counsel for the appellants adopted his written submissions dated 3rd December 2021, which he highlighted orally and, in response, Ms. Mativu adopted and orally highlighted her written submissions dated 6th December 2021. In addition to his written submissions, learned counsel for the appellants filed a list and bundle of authorities dated 3rd December 2021.

13. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.

14. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya v R* 1957 EA p.336. In that case, the Court cited with approval the case of *Figgis*

v R 19 KLR p.32, which had adopted the principle in *The Glannibanta (2)* (1876) 1 PD p.283 where the Court had this to say at p.287:

> " ... the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were ... material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

15. In the same vein, the East Africa Court of Appeal in the often-cited case of *Okeno v R* [1972] EA p.32 at p.36, observed that –

> " 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 v R* [1957] EA p.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] EA p.570). It is not the function of the first appellate court merely to scrutinise 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, see *Peters v Sunday Post* [1958] EA p.424."

16. Applying the principle enunciated in the foregoing persuasive authorities, we have carefully examined and evaluated the evidence presented by the prosecution in support of the charge against the appellants together with the defence proffered by the appellants at the hearing in the High Court, and make the following findings of fact, which are, in our considered judgment, established beyond reasonable doubt in answer to the aforesaid substantive grounds on which this appeal stands or falls.

17. Having carefully considered their Memoranda of Appeal lodged separately, the record of appeal, the respective written and oral submissions of learned counsel, we are of the considered view that this appeal stands or falls on three main issues:

    a. whether the learned Judge admitted hearsay or contradictory evidence;

    b. whether the learned Judge failed to allow the calling of key witnesses at the trial; and

    c. whether the learned Judge disregarded the appellants' defence.

18. In their first ground of appeal, the appellants allege that the learned Judge erred in law and in fact in admitting hearsay and contradictory evidence. It is noteworthy, though that, at the hearing of the appeal, learned counsel for the appellants did not demonstrate what constituted the alleged hearsay or contradictory evidence. In his written and oral submissions, which we need not belabour, learned counsel submitted that "the superior court erred in law by convicting the appellants on the strength of the hearsay evidence that was never proved beyond reasonable doubt." According to him, "the Judge failed to appreciate the fact that the appellants' arrest was based on mere suspicion and proceeded to convict them basing such conviction on purely circumstantial evidence."

19. Suffice it to observe that the alleged hearsay or contradictory evidence were neither identified nor elaborated at the hearing of the appeal before us. The 12 prosecution witnesses gave direct evidence of what they saw and did. They narrated the contents of reports given by other witnesses, who also testified at the trial in the High Court. That cannot be termed as hearsay. In *Kinyatti v Republic [1984] eKLR*, this Court stated that –

> " Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact."

20. With regard to the learned counsel's submission that the prosecution witnesses' inability to confirm the precise date on which the deceased disappeared amounts to contradictory evidence, we disagree. The evidence adduced at the trial was that the deceased was last seen in the hands of the appellants, who locked him up in a store before he disappeared. The appellants were the last to see him. Nothing would have been easier than to tell the court how and when the deceased disappeared. They kept that to themselves and crossed their fingers in the hope that his disappearance would remain a mystery. Thus, the doctrine of Last Seen operates against their defence.

21. On the doctrine of Last Seen, the court in the Indian case of *Deepack Sauna v State of Delhi CRL. A .174 /2004* had this to say:

> " In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt."

However, and as already stated, this was not the case here! The evidence tendered by the prosecution witnesses was direct and not hearsay at all.

22. The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of *Moses Jua v the State [2007] PELR-CA/11 42/2006)*.

23. The appellants also fault the trial court's finding on the cause of the deceased death, whose cause they claim to have been contradictory as between the opinion of the two pathologists. In our considered judgment, it matters not whether the deceased died of the blunt trauma to the head, internal bleeding, broken ribs or limbs, as long as there was sufficient evidence of brutal assault by the appellants. Accordingly, we find no basis for those allegations.

24. This Court in *Erick Onyango Odeng' v Republic [2014] eKLR*, citing with approval the Uganda Court of Appeal's decision in *Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA p.6* in which it washeld:

> " With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained, will usually, but not necessarily, lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness, or if they do not affect the main substance of the prosecution's case."

In our view if there were contradictions and or inconsistencies in the prosecution case, they were minor and did not go to the root of the prosecution case.

25. That settles the two limbs of the first issue, and we now turn to the second ground of appeal. The appellants challenge their conviction on the ground that crucial witnesses were not summoned to testify at their trial. This is yet another of the unsubstantiated grounds. We are at a loss as to who those "crucial witnesses" were and who ought to have called them. It is not the business of the court, but that of the prosecution and the defence, to determine who they wish to call as witnesses. The prosecution called 12 witnesses who, in its view, served to substantiate the charge against the appellants. The appellants testified and called one witness. What more was expected of the trial court, we do not know.

26. Article 50(2) of the Constitution provides that "every accused person has the right to a fair trial," which includes the right "... (k) to adduce and challenge evidence." This court is alive to the fact that there is no legal requirement in law on the number of witnesses required to prove any particular fact. That is the essence of Section 143 of the *Evidence Act* which provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." In *Keter v Republic [2007] 1 EA p.135*, the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

27. In view of the foregoing, the appellants' second ground of appeal fails. As for the third ground that the learned Judge disregarded the appellants' defence, we have not been told how. The two were heard. They said all they wanted to say. They called a pathologist whose opinion was recorded and considered by the trial court. Save for a few details on which PW8 and DW1 differed, their findings were not substantially in issue as regards the actual cause of the deceased's death. The learned judge duly considered the defences and was satisfied that they did not displace the strong case put forth by the prosecution. All evidence points to the inescapable conclusion that the deceased died in consequence of injuries inflicted on him by the appellants.

28. As regards the sentence imposed on the appellants, no ground was advanced on this account. The issue was raised in submissions by learned counsel for the appellants, who requested the Court to "... quash the sentence imposed and set the appellants free" or, in the alternative, "... substitute the conviction of murder with that of manslaughter and set aside the life sentence imposed and substitute the same for one of the imprisonment for the period that each of the appellants have already served."

29. We hasten to observe that we find no legal or evidential basis for finding that the appellants were guilty of an offence other than that with which they were properly charged before the trial court – murder. Section 204 of the Penal Code imposes a mandatory sentence of death on any person convicted of murder. Moreover, the appellants' Grounds of Appeal did not allude to any challenge on the sentence

meted on them, and which was raised by the defence counsel in his submissions at the hearing of the appeal. In the circumstances, we find no basis to disturb the learned Judge's finding on the sentence meted on the appellants.

30. It is noteworthy that the learned Judge called to mind the principle that a mandatory sentence goes against the grain of judicial discretion. He took into consideration this principle, which was underscored by the Supreme Court in F*rancis Karioko Muruatetu & another v Republic, [2017] eKLR* where theCourt had this to say about the mandatory nature of the death sentence under section 204 of the Penal Code:

> "Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."

31. We have considered the circumstances leading to the deceased's death, but find nothing to fault the learned Judge's conviction of life imprisonment in place of the mandatory death sentence. Having also considered the evidence on record, the written submissions of learned counsel for the appellants and learned State counsel, we find that the appellants' appeal herein on both conviction and sentence fails and is hereby dismissed in its entirety. Orders accordingly.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR