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Kimeu v Republic (Criminal Appeal 67 of 2020) [2022] KECA 440 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KECA 440 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 67 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 18, 2022

BETWEEN

CARLOS MULI KIMEU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment, conviction and sentence of the Mombasa High Court by Hon. Lady Justice Dorah Chepkwony delivered on 11th April, 2019 in High Court Criminal Case No 12 of 2012)

JUDGMENT

1. The Appellant, Carlos Muli Kimeu, was charged with one count of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 29th February, 2012 at VOK Estate in Kisauni District, jointly with others not before court murdered David Matu Mwendaka.

2. The Appellant was convicted and sentenced to 25 years' imprisonment after a full trial. Being aggrieved with the conviction and sentence he lodged this appeal. In the memorandum of appeal, the Appellant challenges the judgment of the High Court on the grounds the learned trial judge erred in law and facts by failing to evaluate and analyze the entire evidence and find there was no concrete evidence to convict; applied wrong principles of law and procedure in arriving at her decision on the basis of circumstantial evidence; that the case was not proved beyond any reasonable doubt; that the evidence adduced did not support the charge; and, that there was variance between the evidence and the charge. It was sought that the conviction and sentence be set aside and that the Appellant be set at liberty.

3. The appeal was heard virtually with Mr. Kalimbo learned counsel, appearing for the Appellant and Prosecution Counsel Ms. Valleria Ongeti learned counsel appearing for the State. Both counsel highlighted their filed submissions.

4. This is a first appeal. We have duly considered the record of appeal, the judgment of the High Court, the memoranda of appeal by the Appellant and submissions by the respective learned counsel, and the authorities that they cited. This is in line with the principles enunciated in the case of *Okeno v. R [1972] EA 32* where the court held:

> " 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] 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. (See *Peters v. Sunday Post,* [1958] E.A. 424)."

5. Moreover, we are guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law (*Republic v Oyier [1985] 2 KLR 353*; *Burn v Republic [2005] 2 KLR 533*).

6. Before delving into the appeal, let us give a summary of the evidence adduced before the High Court, which was as follows; The Prosecution marshalled a total of 13 witnesses in their endeavour to prove their case. The prosecution case was that on the 29th February 2012 the deceased was seen at his place of residence by several persons including the caretaker and night guard of the apartments where he lived, PW1 and PW5 respectively. These two saw him enter the premises at around 7:30 p.m. PW6 the girlfriend of the deceased who lived one floor above him saw him at 8pm, when he passed by to greet her. She expected him later for dinner but he did not return, instead she received a message telling her that he had rushed back to town due to an emergency. The deceased was not seen alive again.

7. Instead on the 3rd March 2012, neigbours were discomforted by a foul smell emanating from his house and they called the caretaker of the building, who in turn called the police. The police broke into the house. His bedroom was locked, and it was PW6 who gave the keys to the bedroom door. Upon opening the bedroom, the decomposing body of the deceased was found, lying on the floor facing up. Post mortem examination on his body established that the deceased died due to a slit throat and several deep stab wounds on the body, which the doctor said also contributed to his death.

8. Investigations revealed that the Appellant, who used to live with the deceased for some years before he moved out not long before the incident, had visited the deceased on the material night, and had preceded him to his house by half an hour. That was the evidence of PW1 and PW5, the caretaker and guard who were at the main gate as he entered VOK estate that night. A neighbor of the deceased who lived adjacent to the deceased, PW3 saw the Appellant leave the house of the deceased at 10:30 p.m. PW3 and the Appellant had been lovers before and so she followed him to the roof top where he went, to find out why he had not told her that he was coming. PW3 had heard commotion of people quarreling and struggling inside the deceased's house at around 8:30 p.m. on the material night, and so she asked him if he heard such a thing. He denied. Over the next two days that followed, the Appellant kept calling and sending her text messages warning her not to divulge the information that he had been to the deceased's house.

9. The Appellant denied the charge in his defence and gave sworn evidence where he admitted knowing and living with the deceased before he was told to move out. He admitted that on 29th February, 2012 he went to the deceased's house to receive a cheque that the deceased had promised him. He did not find him at home so he decided to wait at the roof top for the deceased to arrive. He told court that he checked severally at the deceased's house; that at 8.45 p.m. he went to the house and found it unlocked but the deceased was not there, so he entered the house and watched TV until about 9.30 p.m.; that he then left the house and went upstairs where he waited; that he returned again to the house and waited for the deceased in the sitting room as the bedroom was locked and the deceased was unavailable on phone.

10. The Appellant denied murdering the deceased. He testified that he received a text from the deceased's phone that instructed him to write a figure of Kshs.85,000/- on the blank cheque that the deceased had given him in January.

11. The Appellant told court that he sought to open an account so as to cash the cheque, however, he did not meet all the requirements for account opening, prompting him to call the deceased phone on 3rd March, 2012 and the phone was answered but later switched off. He testified that he found out that the deceased had been stabbed; that he was later visited by police officers who arrested him and took him to Nyali police station on suspicion of being involved in the murder of the deceased.

12. The submissions in support of the appeal were filed by C.K Mwero Advocates. Learned Counsel Mr. Kalimbo highlighted those submissions and urged that there was no eye-witness to the murder; that there was no motive proved; no nexus was proved between the Appellant, fraud and the murder of the deceased; that the evidence of the prosecution witnesses was not sufficient to convict the Appellant and urged the court to acquit the Appellant.

13. Mr. Kalimbo urged the court to find that PW3 was not a credible witness being a former girlfriend of the Appellant, that her evidence should have been taken with caution as she was on a vengeance mission, and cited section 14 of the *Evidence Act*. Counsel submitted that the conviction was based on alleged forgery of deceased's cheque, and urged that there was no handwriting expert to prove fraud on the part of the Appellant, and that the offence of forgery had no nexus with the murder charge that the Appellant faced; and, that the evidence tendered did not point towards the Appellant as the perpetrator.

14. Counsel relied on the case of *Musili Tulo v R, Criminal Appeal 30 of 2013* for the proposition that the circumstantial evidence that was used to convict the Appellant was full of gaps and inconsistencies and that the Appellant was deserving of an acquittal or alternatively a lesser sentence. Counsel relied on the case of *Erick Odhiambo Okumu v R, Criminal Appeal 84 of 2014*, and argued that the prosecution did not meet the conditions set for a conviction on the basis of circumstantial evidence and therefore sought that the court to find that the Appellant was wrongly convicted and release him.

15. Ms. Ongeti learned Prosecution Counsel urged that the death of the deceased was not contested, and that the only issue raised was the identity of the perpetrator of the offence. She urged that the prosecution was relying on circumstantial evidence, and urged that there was sufficient evidence from PW1 and PW5 who saw the Appellant enter the deceased house. That PW3 saw him leave the deceased house, and even had a conversation with him before he left. That the Appellant's constant calls and texts to PW3 to warn her not to mention he had been in deceased house that night, supports the prosecution case. Counsel urged the court to find that the Appellant in his defence admitted having been in the deceased's house that night.

16. Having considered the memorandum of appeal and the submission by counsel, we find that the issues for determination are whether the circumstantial evidence met the requisite tests to sustain a conviction against the Appellant, whether the learned trial judge properly evaluated and analyzed the evidence before her, whether PW3 was a credible witness and whether the appeal should succeed.

17. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See *Nyambura & Others-vs-Republic, [2001] KLR 355*).

18. We have analyzed and evaluated afresh the evidence adduced in this case from both sides. We have also perused the judgment of the learned judge. We find that she correctly identified the issues for determination in the case and dealt in great length with all the evidence adduced, including that of the Appellant.

19. There are facts which were not in dispute. It is not in dispute that no one witnessed the murder, and that the prosecution is relying on circumstantial evidence. It was not disputed that the Appellant lived with the deceased in the latter's house before his own family, in the words of PW6, his elder sister, told him to get his own house. There is no dispute that the Appellant frequented the deceased's house even after he stopped living with him. There is no dispute that on the material night the Appellant entered the house of the deceased at 7 p.m. before the deceased came home, and that he left after 10:30 p.m.. There is no dispute that the deceased was not seen alive again, and that his decomposing body was found on 3rd March 2012, 3 days after he was last seen alive.

20. The principles which apply, in order to test the probity of circumstantial evidence are well settled. The Court of Appeal in the case of *Musili Tulo vs Republic* [2014] eKLR stated thus:

> " Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."

21. In *Abanga alias Onyango vs Republic Cr. Appeal No. 32 of 1990 (UR)* the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The court held thus:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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."

22. On the issue of circumstantial evidence, the learned Judge considered what constitutes circumstantial evidence, applying case law, coming to the right conclusions that such evidence must be narrowly examined because evidence of this nature can be fabricated, and that further it is necessary that the court must, before drawing the inference of guilt, be sure there are no co-existing circumstances which could weaken or destroy such inference. And finally, that the burden of proof lay with the prosecution and never shifts to the defence.

23. The learned Judge analyzed and evaluated the evidence. She found that the Appellant was seen by PW1 and PW5, the caretaker and night guard at VOK estate where the deceased lived, enter the premises at 7 p.m. They knew him before as he lived there with the deceased for some time. That the deceased followed half hour or forty-five minutes later. That PW3 first heard commotion in deceased house for 5 or 6 minutes at 8:30 p.m., causing her to get out of her house to check. She remained outside there until 11pm when she saw the Appellant come out of deceased's house. Before that PW3 kept seeing someone peeping from the deceased's door but could not make out who it was. When the Appellant came out of the house, she followed him, and even had a conversation with him. The Learned Judge found that the Appellant admitted that he was in the deceased's house that evening, and that he confirmed what PW3 questioned him about and concluded:

> " Clearly, the unshaken and consistent evidence of PW3 demonstrated the accused person's conduct on the material night to the day the deceased was found lying dead in his house as that of a person whose behavior was suspicious and uneasy"

24. The Appellant's counsel has invoked section 14 of the *Evidence Act* and urged that PW3 was not a credible witness, that she was on a vengeance mission, and that her state of mind was doubtful. Section 14 of the *Evidence Act* provides:

> " Facts showing state of mind or feeling
>
> 14. (1) Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
>
> 2. A fact relevant within the meaning of subsection (1) of this section as showing the existence of a state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.
>
> 3. Where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of subsection (1) of this section, the previous conviction of such person is also relevant."

25. Section 14 falls under Chapter 2 of the Act which deals with admissibility and relevance. The section is a guide to courts when determining whether facts adduced in the proceedings are relevant and admissible. The section is very clear that, *inter alia*, facts which show the existence of a state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person is admissible.

26. There was no evidence adduced by either the prosecution or defence in regard to PW3's state of mind, or any such allegation against her. Even the Appellant himself in his defence made no disparaging remark against her. The defence did not raise this issue at the trial. In particular, we note that no question was put to the witness challenging her intentions towards the Appellant, whether good or bad. We have analysed the evidence again to determine whether there was any reason to doubt the propriety or credibility of this witness and find none. The allegations made against PW3 are not merited.

27. Mr. Kilomba for the Appellant challenged the Court's handling of the evidence in regard to fraud, and urged that no evidence was adduced to prove this. The court considered that aspect as it analyzed the evidence of PW4 and PW9 in regard to the Appellant's effort to open an account, after which he deposited a cheque of Kshs.85, 000/- purportedly written and signed by the deceased on 29th March 2012; how the Appellant lied to the bank officials that the deceased could only pick his phone at a specific time, and how a person answered the deceased's phone identifying himself as the one, only for PW4 to learn that the deceased was found dead that same day. She also considered the documents found in deceased's desk, one which sought to withdraw a criminal charge against the deceased for loss of 140, 000/ from his account.

28. The issue of fraud came out very clearly in the evidence of PW4 and PW9. The Appellant approached PW9 on the 1st March, 2012 and requested to open an account with the bank, NIC Bank Nkrumah Road. He was given the requirements on the same day. On the next day, he returned with the KRA certificate, copy of his identity card, passport size photograph of himself. Since he indicated to PW9 that he did not have a utility bill or a tenancy agreement he was asked to have an introduction filled by a bank customer. On 3rd June 2012, the Appellant took the introduction form, P. Exh. 5 purportedly signed by the deceased, and a cheque drawn on the deceased's account in the Appellant's favour P. Exh. 11. PW9 noted that the signatures on both documents were not similar to the ones held by the bank. She therefore tried to call the deceased using his phone number held by the bank. When she could not reach him, PW9 escalated the matter to the Manager. The Appellant told them to call deceased between 12 p.m. and 12:30 p.m. as he was travelling. Indeed, when the Manager called at that time, in the presence of PW4, she heard someone answer the deceased's phone and introduce himself as David, the deceased. That was the same day that the deceased was found dead.

29. The significance of this evidence is that the Appellant had a cheque with signature purported to be that of the deceased. Where did he get that cheque, and who signed it? His evidence in court was that he had gone to collect it from the deceased on 29th February but he never found him at home. He then changed and said that the deceased had given him another cheque earlier which is the one he wrote the amount of 85000/=, as directed by the deceased through a text message. That explanation did not impress the learned trial judge neither does it impress us. The only explanation for this is that the Appellant stole the cheque from the deceased the day he visited him on 29th, filled and signed it. Furthermore, the fact that he suggested to PW9 the exact time to call the deceased's phone so that she may reach him, and it happened, shows that he also knew who had the phone and that they were collaborating in order to cash the cheque.

30. After analyzing and evaluating the entire evidence, the learned trial judge concluded:

> " From all the facts I have singled out hereinabove, they form a cumulative claim (sic) that leads (sic) onto draw a conclusion that no one else but the accused person murdered the deceased, although the motive has clearly come out. As for whether or not the accused did this intentionally, the manner in which the deceased body was described found the deceased lying down on his back with a pillow over his face' clearly shows that the intention of his attacker was to smoother him to death."

31. On our own evaluation and analysis of the evidence, we are satisfied that the learned trial Judge applied her mind correctly to the issue of circumstantial evidence. The Appellant was placed at the scene of murder by PW1, PW5 and PW3. The Appellant admitted in his own defence that he had gone to the deceased house to collect a cheque from him. The evidence of PW6, the Appellant's own sister was that the Appellant had a key to the house of the deceased, and that the other two keys were with the deceased and an uncle of the deceased. The Appellant did not contest that evidence of PW6. We find that from

this evidence, the prosecution was able to prove that the Appellant had access to the deceased's house on the material night, and had both the opportunity, the chance and the time to commit the offence.

32. The evidence of the cheque with the deceased's forged signatures fortifies the prosecution case that the Appellant had paid the deceased a visit that day in order to get the cheque from him through which he could access funds from the deceased's account. There is no other explanation of how he could have accessed the cheque except on the day in question. That also explains the commotion that PW3 heard inside the deceased's house at 8:30pm that night, and the person she saw peeping at the door from that time until the Appellant emerged at 10:30 or 11p.m. The door was locked from then until police broke in. PW7 confirmed this in his evidence that on 2nd March, one day after the deceased did not report to work, he found his house door locked.

33. In regard to malice aforethought, the court found that nature of injuries inflicted on the deceased, to the extent his intestines were protruding through the stab wounds, numerous number of stab wounds and the slit throat, and concluded that the intention of the attacker was to cause the deceased death, and thus had formed the necessary malice aforethought for the charge of murder.

34. Under section 206 of the *Penal Code* the circumstances which constitute malice aforethought are set out as follows:

> " 206. 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;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

35. The legal position on malice aforethought is that the same can be inferred from the nature of the injury causing death and the manner in which it was inflicted. In *Daniel Muthee -v- Rep. CA No. 218 of 2005 (UR)*, Bosire, O'kubasu and Onyango Otieno JJ.A., while considering what constitutes malice aforethought observed as follows:

> " when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.
>
> In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

36. In this case, we have no doubt, as the learned judge found that the nature of the injuries, the areas targeted, and the severity of the same is a clear demonstration that the one who inflicted the injuries intended to cause the deceased death, and therefore malice aforethought was proved against the Appellant.

37. The Appellant's counsel raised the issue of the murder weapon not being found, and that therefore the offence was not proved. Failure to produce the murder weapon of itself was not fatal to a conviction as long as the Court finds that even in the absence of the murder weapon, the post mortem report established beyond reasonable doubt that the injuries causing death were not self-inflicted. See *Ekai v. Republic (1981) KLR 569* and *Karani v. Republic (2010) 1 KLR 73*.

38. We have come to the conclusion that the prosecution established the circumstances from which an inference of guilt is sought to be drawn, that the facts cogently and firmly established unerringly pointed towards guilt of the Appellant, and that taken cumulatively, the circumstances form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Appellant and no one else.

39. On the issue as regards sentence the Appellant was sentenced to serve twenty-five year's imprisonment. It is notable that under section 203 as read with section 204 of the Penal Code, there is a death penalty. The Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another v. Republic, (2016) eKLR* held:

> " a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."

40. The effect of that decision was that courts were clothed with power to exercise discretion and determine the appropriate sentence to impose, when considering the sentence of persons convicted of murder contrary section 203 as read with section 204 of the Penal Code, including the sentence of death. In this case the learned trial judge exercised her discretion and opted to impose a determinate sentence in a well-reasoned ruling delivered on the 11th April, 2019 in which she considered the Probation Report and the submissions on mitigation given by counsel on the Appellant's behalf. We find no reason to interfere with the learned Judge's exercise discretion.

41. On our own evaluation of the entire evidence, we like the High Court, have come to the conclusion that the charge against the appellant was proved by overwhelming and credible evidence. Accordingly, this appeal is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2022

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR