Omollo v Republic (Criminal Appeal 96 of 2018)
[2022] KECA 434 (KLR) (11 March 2022) (Judgment)

Neutral citation: [2022] KECA 434 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 96 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MARCH 11, 2022

BETWEEN

JACOB OWAKA OMOLLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Maina, J.) dated 27th February, 2018 in HCCRA NO. 36 OF 2015))

JUDGMENT

1. On 24th June, 2015 at about 10.00a.m. a group of three brothers from Kogocho South Location of Nyando Sub-County in Kisumu drove their cattle in search of pasture. They grazed their herd towards Nyakach but their excursion turned tragic when, at 4.00p.m., they were confronted by a group of about ten armed people who first viciously attacked the animals, slashing them, before turning on the brothers. Two of the brothers John Odhiambo (PW2) and David Owili (PW3) ran for dear life.

2. The third, Paul Okoth, was not so fortunate. He tried to run but he was not fast enough as he had a disability. He fell and was set upon with a club. His two brothers could only watch from a distance and returned to him only when the attackers left him lying on the ground, for dead. The brothers took their kin to his wife Beneta Anyango Akoth (PW1). She cooked him a meal but on returning to the bedroom she found he had fallen to the floor and had vomited blood. His chest was in pain and he was taken to Ahero Sub-District Hospital where he was treated and discharged. Later that night his pain increased and he vomited again before losing consciousness. That long night ended with his being rushed to the Jaramogi Oginga Hospital but he died at break of day.

3. A post-mortem examination on 6th July, 2015 conducted by one Dr. Omondi Mboya, a report whereon was produced by the Investigating Officer, revealed that the deceased's body had contusional injury on the left lateral deltoid region with subcutaneous hematoma as well as contusion injuries on the anterior

chest wall and associated soft tissue edema. There were subcutaneous chest wall laceration with fracture of the left third rib. He concluded that the cause of death was respiratory failure secondary to blunt chest trauma.

4. Meanwhile on 30th June, 2015, the appellant had been taken into custody before he was charged before the High Court at Kisumu with the murder of the deceased. He denied the charge and a trial ensued with the prosecution calling 6 witnesses. The brothers PW2, PW3 and Moses Onyango Kamwoma (PW6), together with Isaac Otieno Awuor (PW5) testified as eye-witnesses and named the appellant as one of the deceased's assailants.

5. At the end of the prosecution case the learned judge (E. N. Maina, J.) placed the appellant on his defence. He elected to give sworn testimony in which he denied being at the scene of the crime at the material time. He raised an alibi that he was miles away at the CDF office in Katito where he stayed, in the company of witnesses that he called in his defense, from early morning until about 4.30p.m. They included Geoffrey Odhiambo Bolo (DW2) and Josephat Ondieki Asewe (DW3).

6. At the conclusion of the trial the learned judge, in a considered judgment remarkable for its brevity at three and a half page found the case against the appellant proved. She then proceeded to convict the appellant and to sentence him to suffer death as by law provided.

7. Aggrieved, the appellant filed a notice of appeal followed by a memorandum of appeal in which it is contended on his behalf that the learned judge erred in law and fact by;

> Accepting uncorroborated identification evidence that did not identify the appellant as a mono-eyed person.Failing to analyze and appreciate the appellant's alibi defence.Failing to find and hold that the evidence of prosecution witnesses was contradictory and untenable.Failing to analyze the evidence and unlawfully accepting the evidence of prosecution witnesses.Imposing a harsh sentence of death on the appellant who was a first offender.

8. At the hearing of the appeal, Prof. Ojienda, learned Senior Counsel appeared, leading Mr. Ngala, for the appellant while Mr. S. G. Thuo, the leaned prosecution counsel was for the respondent. Both had filed written submissions which they highlighted. Going first, Prof. Ojienda contended that the appellant's conviction was against the weight of evidence, which was in fact merely circumstantial and inadequate.

9. Next, counsel addressed what may well be the fulcrum of this appeal, namely the alibi defence which the appellant had raised quite early in the proceedings to the effect that at the time of the alleged offence, he was at Katito receiving his salary. Prof. Ojienda pointed out that the learned judge properly observed that even though the Investigating Officer knew the details of the alibi, he did not investigate it. Counsel faulted the learned judge for not testing that alibi against the testimonies of the prosecution witnesses before concluding, erroneously in his view, that the alibi defence was weak. To the contrary, according to counsel, the alibi evidence was strong and cogent and corroborated by two other defense witnesses. In short, it was inconceivable that the appellant could have been at the scene committing the crime charged and at Katito and Pap Onditi at the same time. The Investigating Officer had no basis for not believing and not investigating the alibi yet there were two witnesses who corroborated it.

10. Prof. Ojienda next took issue with the production by the Investigating Officer of the post mortem report prepared by Dr. Omondi Mboya who was not called as a witness. He contended that experts must be called and examined on their opinions. This was particularly needful in the present case where the cause of death was said to be blunt trauma yet the appellant is alleged to have been armed with a spear, which is an inconsistent weapon. Moreover, the investigating officer did not recover the murder

weapon and did not even visit the scene of crime. Given these inconsistences, the learned judge ought to have acquitted the appellant.

11. Prof. Ojienda next argued that the identification evidence was wanting as no identification parade was conducted to show whether the appellant was among the ten assailants rendering his identification to court by PW2 and PW3 mere dock identification that has nil probative value. Those two witnesses were about 100 metres away and running from the attackers so that there was no cogent evidence that the appellant was at the scene. The evidence of PW5 was no more useful as he claimed to have identified the appellant while hiding in a bush. What is more, he recorded two statements that were contradictory and inconsistent and ought to have been resolved in the appellant's favour. Citing *Wamunga -vs- Republic* [1989] eKLR, counsel pressed that the appellant's alleged identification at the scene was unsafe as it was not free from the possibility of error. He questioned the convergence of identification of only one out of ten people in difficult circumstances including the presence of bushes and distance which should have led the learned judge to be particularly cautious regarding the identification evidence. He urged us to allow the appeal.

12. Opposing the appeal, Mr. Thuo submitted that the testimony of PW1, 2 and 3 amounted to recognition and that the offence occurred in broad daylight. When we questioned him on whether that could be said of PW2, for instance, he answered that the witness "did not say on record that he knew the appellant and for how long."

13. Regarding the production of the post-mortem report by the Investigating Officer, learned prosecution counsel argued that the production was pursuant to section 68 of the *Evidence Act*, and with the concurrence of Mr. Onsongo who was the appellant's counsel at the trials.

14. Turning to the question of alibi, Mr. Thuo conceded that the Investigating Officer "ought to have investigated it and his failure to do so was an oversight" but was quick to add that the said alibi "was not supported by specificity in terms of timings." He added, however, that ordinarily receipts do not show time.

15. The alibi was the beginning point of Prof. Ojiendas' who stated that the distance between the pay point at Pap Onditi and the scene of the crime was 2 hours by walking as testified to by PW2. The learned judge should therefore have found that it was impossible for the appellant to have been at the scene. Thus, he added, had the Investigating Officer investigated the alibi defence, he would have confirmed its veracity.

16. He reiterated that the evidence "left a huge gap" and the learned judge should have returned an acquittal as there was no evidence of recognition. All this evidence amounted to was dock identification and the witnesses gave conflicting testimonies of how they identified the appellant with PW3 even calling him by a strange name, "Ezekiel".

17. We have considered the rival submissions and the authorities cited against the entire record consistent with our duty on a first appeal to subject the entire evidence to a fresh and exhaustive re-evaluation and re-appraisal with a view to drawing our own inferences of fact. We proceed by way of re-hearing but alive to the limitation that we have not had the advantage, enjoyed by the trial court, of hearing and observing the witnesses in live testimony. We make due allowance for that limitation. See Rule 29 of the *Court of Appeal Rules*; *Okeno -vs- Republic* [1972] EA 32.

18. We shall first dispose of the post-mortem report. It is common ground that the same was produced by the Investigating Officer, Inspector of Police Johnstone Mwamburi (PW4). Its maker, Dr. Omondi Mboya, was not called as a witness. We accept as good law the proposition that experts who prepare opinions ought to attend court to provide on the record the basis for their conclusions and, which

is more, to answer any questions on their methods, findings and conclusions as may be put in cross-examination by opposing counsel and the court itself. Their reports are not infallible, less still binding upon the court, which must consider them alongside other evidence. That notwithstanding, and whereas we note the cases and materials cited for the appellant, including the High Court decisions of *Kenneth Mwenda Mutugi -vs- Republic* [2019] Eklr, *Marjan Musot Mukoma -vs- Republic* [2018] eKLR and the South African case of *S -vs- Huma* [1995] 1 SA CR 409 (W) as well as Meint Jes-Van de Walt L's 2003 article "*Expert Odyssey: Thoughts on Presentation and Evaluation of Scientific Evidence*" *South Africa Law Journal (SALJ)* 120, 252-372, we think that nothing turns on the point. The appellant was ably represented by a senior and experienced advocate at the trial and, as pointed out before us by Mr. Thuo, the said counsel expressly indicated to the court that the defence had no objection to the production of the post-mortem report in the manner proposed. We say no more on the subject.

19. We now turn to the contested issue of the appellant's identification at the scene as one of the persons who assaulted the deceased. It is not disputed that whereas the assault occurred at about 4p.m, the identifying witnesses were themselves in fear for their own safety and were running away from the group of ten or so assailants. PW3 said he and his brothers "took to [their] heels" and he only looked back after 100 metres when he saw the deceased being beaten. Even though he claims to have identified Owaka and Ouma Otanda, as did PW2 and PW5, this witness when challenged in cross-examination called the appellant by totally different names namely "Ezekiel" and then again "Moses Jacob Omollo". No other witness attached these names to the appellant and we think there is some substance in the appellant's claim that the identification evidence, which was presented as recognition, did not reach a standard that eliminated the possibility of error. We note that PW5 admitted to have been behind bushes when the attack on the deceased occurred. He also attempted to disown an earlier statement to the police in which he did not mention how far he was from the scene, nor indicate whether the appellant was armed with any weapon at the material time.

20. PW6 also testified to having been so far as not to tell who the herders were but was quick to add that the attackers whom he saw from a distance included "Owaka and Ouma". He said the following in cross-examination;

> " Today I have testified that I ran towards my home. I also testified that where Paul was being assaulted (sic) was far. It is true I ran away and hid in a bush. I hid because I feared for my life. My priority was to save my life. I chose a thick bush such that nobody could see me. I did not write that Owaka was armed with a rungu; panga and spear."

21. It is argued on the appellant's behalf that the evidence of identification was weak and of no probative value in the circumstances as it was essentially dock identification. It was in fact suggested that the constant mention of the appellant alone among more than ten assailants was rehearsed and confined to falsely implicate him in the crime. Without a properly-conducted identification parade, and the eye-witness accounts being inconsistent and contradictory, it was unsafe to base the appellant's conviction on weak identification evidence.

22. The necessity for courts to proceed with caution or circumspection before convicting an accused person solely or mainly on the evidence of a single or multiple identifications has been the subject of numerous court decisions. The caution proceeds from a realization that the spectre and possibility of mistaken identity with its potential for great injustice always looms large. See *Roria -vs- Republic* [1967] EA 583.

23. Thus, reliance should be placed on identification evidence only when such evidence, viewed as a whole, is free from the possibility of errors.

24. We have anxiously considered the learned Judge's treatment of this aspect of the case and we have serious doubts that she approached the evidence with requisite caution. First, we note that the learned Judge seemed to have overlooked the centrality of identification as the determinative issue in the case. Instead, she identified the issues as "whether the accused by an unlawful act caused the death of the deceased and if he did it was of malice aforethought." She spent quite some time in defining before she proceeded to hold that whoever killed the deceased did so of malice aforethought. On the question of identification of the appellant, the learned Judge appears, with respect, to have dealt with it in a rather perfunctory manner and in a brief few sentences of her hardly four-page long judgment;

> " The prosecution witnesses PW2, PW3, PW5 and PW7 testified that they saw the accused person. PW5 even stated that the accused passed by the place he was seated as his cattle grazed, and spoke to him. PW6 also alleged to have seen the accused at close quarters as the attackers ran towards him."

25. The learned Judge in her own words thereafter seems to have accepted that identification evidence as being "very cogent" yet, as we have previously pointed out, there were inconsistencies, contradictions and possible embellishments. Thus, the conclusion seem to have been arrived at without vigorous analysis of that identification evidence to determine whether it was free from the possibility of error. See Wamunga -vs- Republic [1989] eKLR

26. We think, with respect, that had the learned Judge properly examined the full circumstances surrounding the appellant's alleged identification at the scene, she would not have fallen into the error apparent in her treatment of the decisive question of the alibi defence he raised. We have already mentioned that the investigating officer, in what Mr. Thuo for the Republic mildly terms "an oversight" and "a failure," did not investigate the appellant's alibi and did not visit the place where the appellant said he was at the material time. That alibi having been raised very early when the matter was under investigation, and the witnesses in support thereof having been named, the investigating officer had a solemn duty, implicating the justice of the appellant's very prosecution, to investigate it. That the investigating officer ignored that alibi altogether, and it not an idle afterthought, smacked of a reckless neglect of duty and left the prosecution case in an intolerable state. The learned Judge properly made these observations;

> " In this case there is evidence that even prior to the accused being charged he recorded a statement in which he denied the offence and stated he was somewhere else at the time the offence was committed. The investigating officer PW4 admitted that the accused even gave details of where he was first as he has testified in this case. The investigating officer who asked by counsel for the accused if he visited those placed in order to dislodge the alibi, his answer was that he did not do so as he saw no reason for it. He failed an investigating officer (sic). It is always upon the prosecution to dislodge an alibi and he should have investigated the matter further."

27. Indeed, the law has long been settled that an accused person who raises an alibi defence does not thereby assume a burden to prove it. All such a defence does is give notice to the prosecution to call or produce evidence that dislodges that defence as it endeavors to prove its case beyond reasonable doubt. Once the prosecution fails to do so, the defence remains as a probable fact sufficient to introduce into the mind of a court a doubt, that is not unreasonable, as to the guilt of the person accused. Indeed, an alibi defence is to be gauged on the scales of probability only and thus accepted if probable. It ought to be rejected only if it is incredible. See *Kiarie -vs- Republic* [1984] eKLR and *Elizabeth Waithegeni Gatimu -vs- Republic* [2015] eKLR.

28. Applying those principles to the case before us, we think that the appellant's alibi, as given consistently to the investigating officer and unshaken in testimony, to the effect that on the material time he was at Pap-Onditi and Katito all afternoon and nowhere near the scene of crime was probable and credible. He was at the Constituency office and was paid his salary between 3.30 pm and 4.00 pm. Geoffrey Odhiambo Bolo (DW2) a driver in the Nyakach Constituency office testified that he took one Ishmael and the appellant for lunch before they together went for their salary between the same timelines testified to by the appellant. Josephat Ondiek Asewe (DW3), the Deputy Manager confirmed having paid the appellant and others between 3.30pm and 4.00 pm. He went on to state that he was with the appellant between 3pm and 4.00 pm and so it is impossible for the latter to have been at Kochogo, which was 20 Km away, at the time the offence is alleged to have been committed. These defense witnesses were consistent and unshaken in cross-examination. And the prosecution did not call witnesses or evidence to disprove the defence version that the appellant was at Pap Onditi and Katito.

29. Given that state of the record, we think it puzzling that the learned Judge, instead of resolving the conflicting versions in favour of the appellant, stated that "having heard evidence from both sides I find the alibi defense weak." The learned Judge then went on to discount or discredit that alibi as follows;

> " The document produced by the accused only showed he was paid but does not state what time he was paid. It is therefore noteworthy that none of the two witnesses allege to have accompanied the accused person to wherever he said he went."

30. With the greatest respect to the learned Judge, this approach to the alibi evidence was wholly unsatisfactory and plainly erroneous. As we have stated already, the appellant bore no duty to prove his alibi; though in the circumstances, he did. Defense witnesses did testify, as did the appellant, that he was at the Constituency offices and that he was paid his salary between 3.30pm and 4.00pm. The document produced confirmed payment while time was already testified to by all defense witnesses. It was impractical, prejudicial and a misdirection for the learned Judge to expect that the document in proof of payment needed to have a time indication. It is equally impractical for the learned Judge to find weakness in the alibi defence merely because the witnesses "did not swear to have accompanied the appellant to wherever he went" yet their solid testimony was that they were together with him, more than 20km away from the scene of the crime, at the relevant time.

31. We are of opinion that it is not for the court to find strength for the prosecution case in the supposed weakness of the defense case. In the present case, the alibi defence was both reasonable and probable, and it did create a doubt whether the prosecution had proved its case beyond reasonable doubt. Whatever suspicions a court may harbour that an accused person may have been involved in a crime, if they are not supported by the evidence, they must be stilled and the person acquitted if there is a reasonable doubt as to his guilt. The burden to prove the case is always on the prosecution and it never shifts.

32. We come to the conclusion that the appellant's conviction was unsafe. We thus allow the appeal, quash the conviction and set aside the sentence.

33. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR