



REPUBLIC OF KENYA



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**Mwasigwa v Republic (Criminal Appeal 2 of 2020)
[2022] KECA 422 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 422 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 2 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 4, 2022**

BETWEEN

VINCENT MAGHANGA MWASIGWA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (J. Kamau J.) dated 22nd June 2017 in High Court Criminal Case No. 6 of 2015)

JUDGMENT

1. Vincent Maghanga Mwasigwa, the Appellant herein, was one of three accused persons charged with the murder on 21st May 2015 of Paul Righa Mwakoshi (hereinafter “the Deceased”), at Bura Mission area in Mwatate sub-county within Taita Taveta County. The Appellant was convicted of the said offence and sentenced to death after a trial in the High Court.
2. The prosecution called six witnesses during the trial. The first witness (PW1) was, Dr. Nashat Fadhloon, the Deputy Medical Superintendent at Moi County Referral Hospital Voi, who performed a post mortem on the Deceased on 25th May 2015. PW1 produced a post mortem report dated 25th May 2015, and testified that date of death was 22nd May 2015, and that the Deceased’s face was burnt beyond recognition; both his upper and lower limbs had 4th degree burns and no fractures were identified. Further, that no internal examination was done, as he formed the opinion that the cause of death was asphyxia (suffocation) secondary to the 4th degree burns to the face.
3. Joseph Nyambu Maghanga, PW2, testified that he was the Deceased’s older brother, and that he travelled to Bura on 22nd May 2015 upon receiving a phone call from Doncia Wakesho, the Deceased’s wife, informing him that the deceased did not sleep in their home which was unusual. Further, that on the way, he heard people saying that someone had been burnt and could not be recognized. Upon meeting with Doncia Wakesho, he advised her to report the Deceased’s disappearance to the police



- which she had not done, and she then went with Robert, PW2's nephew to the police station to make a report and find out if the burnt person was the deceased.
4. PW2 further testified that he had previously seen and knew the Appellant, who used to cultivate land he had been given by the Deceased. Further, that before he died, the Deceased had told PW2 that the Deceased's wife was having an affair with the Appellant, who was consequently stopped from cultivating his land. It was also his testimony that upon cross-examination that Doncia, the Deceased's wife, told him that she and the Appellant killed the deceased at Mdendelenyi near Kwa Mwatoza, during the day and threw his body on the road at night, after she was interrogated at the deceased's home a day after the funeral.
 5. The testimony of Hope Mghoi Magdalene Mwangura (PW3), was that she was a businesswoman with a shop at Bura, and that she sold paraffin on 21st May 2015 to the Appellant, who was her regular customer and neighbour for three months. That the next day she heard that someone had been burnt, and went to the place where the body was by the roadside, but could not recognise the person. She testified that she only got to now that it was the Deceased, whom she knew as he used to supply her with charcoal, from people who alleged that he was the person who had been burnt.
 6. PW4, Robert Maghanga Mjomba, testified that on 22nd May 2015 he went to his mother's house, found that she had been called by Doncia, the Deceased's wife, because the deceased did not sleep at his home. He testified that they found the Deceased at the mortuary on 22nd May 2015 together with Doncia Wakesho and Tobias Mugongo, and that they identified the deceased from his legs which were the only part of his body not burnt, and from his left big toe which had a cracked nail. He also confirmed that he was present when the post mortem was carried out on the body of the Deceased.
 7. Inspector Peter Kyalo of the Forensic Crime Scene Support Service, Voi, testified as PW5. His evidence was that he went to the crime scene where he found an African male burnt beside the road. He took photographs of the deceased person which he produced in Court. He also testified that they could not go to where the body was because it was steep therefore, the pictures were taken from a far hence, they could not confirm if there was paraffin, kerosene or petrol used at the scene.
 8. Sergeant Stephen Sankuli, the investigating officer (PW 6), on his part testified that on 22nd May 2015, the Chief of Bura Mission had called him informing him of a burnt body that had been found beside the road. He booked the incident in the Occurrence Book and went to the scene, and found the Deceased's body burnt beyond recognition. He then called the CID crime officers from Voi who took photographs, and since the people around could not identify the deceased, he informed the area Chief to call a Baraza to find out if anyone could recognize him. The body of the Deceased was then taken to Moi Referral Hospital Mortuary, and on the same day, one Paul Righa informed them of his missing uncle, and was able to identify the Deceased at the mortuary.
 9. On 27th May 2015, PW6 received a call from the AP Camp at Bura Mission that the Appellant and the 2nd Accused person in the trial had been arrested by members of the public near the scene of crime, and while at the camp, Doncia Wakesho, the Deceased's wife, was also brought and booked as the 3rd Accused person. PW6 detailed the account of the events that occurred on the day the Deceased died, as narrated to him by the Appellant. The Appellant in this respect told PW6 that he and the 3^r Accused person were in a relationship, and that on the fateful day, the 3rd Accused person was in the Appellant's house and the Deceased followed her to the house. That there was a scuffle between the Appellant and the Deceased whereupon the 3rd Accused hit the deceased with a stone and managed to escape. He testified that the Appellant narrated to him how he hit the Deceased on the head with the same stone, resulting in the deceased's death. It was his further testimony that the Appellant admitted dragging the body of the deceased to a bush where he hid it, before moving the body on a wheelbarrow to the



place where the Deceased was found and burnt him. PW6 further testified that the 3rd Accused in her statement made to police officers also recounted similar events.

10. PW 6 produced as exhibits the stone used to hit the Deceased which was recovered from the Appellant's house, the wheelbarrow used to move the Deceased's body recovered from the Appellant's house, some burnt clothes recovered from the 3rd Accused, a burnt blanket used to cover the Deceased, and a bloodstained jacket recovered from the bush where the Deceased had been hidden.
11. The Appellant gave sworn testimony in his defence, and testified that he did not know the Deceased as he had never met him. He also stated that he did casual work. His account of events was that he was the neighbour of a cousin of the deceased, and that on 22nd May 2015 at about 11.30am, the neighbour asked the Appellant to accompany him to a funeral of his cousin. They went to the funeral meeting and gave their contribution and as he was leaving, the mourners started to attack him accusing him of causing the death of the deceased, and he was taken to AP Camp at Bura. He further stated that he did not go to PW3's shop on 21st May 2015. Further, he denied knowing or having any relationship with the 3rd Accused and testified that he saw her for the first time in the Court.
12. The High Court in its judgment was not convinced by the Appellant's defence of alibi, and was not convinced of the truth of the Appellant's testimony that he did not know the Deceased. The High Court, while citing section 21 of the Penal Code, found that each of the actions of the Appellant and the 3rd Accused person made each other liable for the death of the Deceased. The said Court also found that the Appellant and the 3rd Accused person did not present co-existing factors to weaken the inference of guilt on their part. The Court was satisfied with the prosecution evidence that the Deceased died as a result of the unlawful act of the Appellant and the 3rd Accused person; that the actions were done with malice aforethought. The court concluded that the appellant and the 3rd Accused person were involved in the death of the Deceased and they were found guilty of the offence and each sentenced to suffer death.
13. The Appellant, being dissatisfied with the said conviction and sentence, has proffered this appeal by a memorandum of Appeal received on 9th December 2019. There are no grounds of appeal in the said memorandum of appeal. During the hearing of the appeal, the Appellant was represented by Ms Bennette Nzamba, who relied on submissions dated 29th November 2021, while Mr. Allen Mulama, Principal Prosecution Counsel, appeared for the Respondent, and also relied on submissions dated 26th November 2021.
14. As this is a first appeal, the duties of this Court are set out 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. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”



15. The main grounds of the appeal that can be gleaned from the submissions filed by Ms. Nzamba, were that the conviction of the Appellant was based on inconsistent, contradictory and inadequate evidence, that the threshold for conviction on the basis of circumstantial evidence was not met. Ms. Nzamba in this respect submitted the witnesses gave different theories whereby it was alleged that the deceased died as a result of severe burns whereas on the other hand it was alleged that the deceased died as a result of suffocation. Therefore, that there was insufficient evidence to prove the Appellant caused the deceased's burns and subsequent death.
16. Further, that the evidence by the prosecution in the trial Court was circumstantial with glaring inconsistencies and no direct evidence putting the Appellant at the place of the incident. Reliance was placed on the cases of *Josephat Manoti Omwancha vs Republic [2021] eKLR* and *Omar Mzungu Chimera vs R Criminal Appeal No 56 of 1998* as regards the circumstances when a conviction can be based on circumstantial evidence. The counsel further submitted that the trial Court needed to make sure that there were no co-existing circumstances or factors which would weaken or destroy the inference as to the Appellant's guilt, and the failure to address the inconsistencies and or inadequacies in the prosecution evidence was fatal.
17. Lastly, that the evidence produced as exhibits was not taken for DNA testing and therefore it was a mistake for the trial Court to consider the said evidence as admissible and sufficient to warrant a conviction. In conclusion, this Court was urged to adopt the reasoning in *PON vs Republic [2019] eKLR* where a conviction was quashed and sentence set aside after this Court formed the view that in a case founded on circumstantial evidence, missing links that are critical to the core of the case could create sufficient doubt, which would entitle the Court to acquit for lack of evidence to the standard required. Ms. Nzamba accordingly urged us to set aside the Appellant's conviction and sentence on these grounds.
18. Mr. Mulama on his part submitted that the Appellant's conviction was safe, and he analysed the evidence adduced in the High Court and cited the decision in the case of *Republic vs Ahmad Abolfathi Mohammed & another [2019] eKLR* that admission of a material fact coupled with circumstantial evidence can seal an accused person's guilt. Counsel submitted that even though there were gaps in terms of subjecting the recoveries made from the Appellant's house to DNA, the admission by the Appellant together with the circumstantial evidence was enough to arrive at a conviction as the Court did. Further, the actions of the suspects themselves and not their statements were used by the trial Court to arrive at the conviction. As for the sentence, Mr. Mulama submitted that the Sentencing Guidelines identifies the aggravating circumstances attendant to commission of crimes. It was his view that the Appellant's ferrying of the Deceased from the initial scene of death, setting his body on fire, and attending the burial were aggravating fact that this court needs to consider.
19. The two issues arising for determination in this appeal are firstly, whether the Appellant's conviction for the offence of murder was based on reliable and cogent evidence, and secondly, whether the sentence imposed upon the Appellant was legal. On the first issue, the fact of the death of the Deceased was proved by PW4 who identified the burnt body as his, and was not disputed. PW5 also produced photographs of the burnt body of the deceased as evidence. The cause of death was clear from the evidence of PW1, that it was due to suffocation arising from the 4th degree burns he suffered to the face, which was burnt beyond recognition. There was thus no inconsistency or contradictions in this regard.
20. As regards the identity of the person who caused the said burns and death, the evidence adduced in this regard was partly circumstantial and also based on admission by the Appellant of his participation. PW6 in this respect detailed the events leading to the death of the Deceased, as explained by the Appellant. The Appellant however denied any knowledge and involvement in the deceased's death in



his defence. In the circumstances, his statements to PW6 cannot legally qualify to be a confession, and can only be treated as an admission if PW6 evidence is found to be credible and reliable.

21. The Supreme Court of Kenya in the case of *Republic vs Ahmad Abolfathi Mohammed & another [2019] eKLR* clearly and exhaustively explained out the distinction between an admission and confession, being that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction. The Supreme Court proceeded to hold as follows as regards admissibility of admissions:

“[48] We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects’ commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material (sic), ideally the Police are required to invoke the provisions of Section 25A of the *Evidence Act*. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the *Evidence Act*, are admissible.”

22. On our part, we find PW6’s evidence as to the Appellant’s admission to be credible, as he was consistent in his testimony as regards the account of events narrated by the Appellant, and he produced exhibits that corroborated the account. In addition, there was also independent evidence corroborating the Appellant’s participation in the death of the Deceased by the evidence of PW 3 that the Appellant purchased paraffin on the day the Deceased was burnt.
23. We further find the Appellant’s denial not to be credible for two reasons. Firstly, he denied the existence of a relationship between himself and the deceased’s wife, however PW6’s account of this relationship was corroborated by PW2’s evidence that the Deceased had confided on the relationship and that was the reason he had stopped the Appellant cultivating his land. Secondly, the participation of the Appellant in the death of the Deceased was corroborated by the evidence of PW2 that the Deceased’s wife admitted to him that she killed the Deceased together with the Appellant. The admission by the Appellant was therefore not only on material facts, but was sufficiently corroborated and is consequently admissible.
24. It is notable that the evidence of PW2 and PW3 was in this respect circumstantial evidence. Coupled with the evidence of PW6 on the Appellant’s admission, we find that the legal threshold to sustain a conviction against an accused person based on circumstantial evidence was met. The threshold as stated in *R vs Kipkering Arap Koske [1949] 16 EACA 135* is that such evidence must exclude co-existing



circumstances which would weaken or destroy the inference of guilt. In *Sawe vs Rep [2003] KLR 364*, this Court expressed that:

“In order to justify 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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

25. Lastly, as regards the sentence of death meted on the Appellant, this was a mandatory sentence provided by section 204 of the *Penal Code*, and legal at the date of sentencing on 22nd June 2017. However, since then, the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another vs Republic, (2016) eKLR* has held that the mandatory sentence of death in section 203 and 204 of the Penal Code deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis. This Court is thus clothed with the duty to consider whether or not the Appellant herein was deserving of a lesser sentence in light of his mitigation and the circumstances of the case.
26. The High Court in this regard observed and acknowledged the Appellant’s mitigation that he was a first offender, he asked for leniency and he had orphans who depended on him, but noted that the sentence was mandatory and the offence against the deceased was heinous and called for full force of the law. We have considered the circumstances in which the offence took place, and the change in the law that now gives us discretion to impose determinate sentences in murder cases. However, we are also mindful of the aggravating factors arising from the actions of the Appellant after the death of the Deceased, including the Deceased’
27. We consequently find that the Appellant’s conviction for the offence of murder was safe, and uphold the said conviction. We however allow the appeal against the sentence and set aside the sentence of death imposed upon the Appellant, and substitute therefor a sentence of thirty-five (35) years’ imprisonment from the date of the Appellant’s conviction by the High Court.
28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 4TH 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

