Kago v Republic (Criminal Appeal 101 of 2019)
[2022] KECA 647 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 647 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 101 OF 2019

DK MUSINGA & F SICHALE, JJA

APRIL 28, 2022

BETWEEN

EDWARD WAITHIRU KAGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 22nd March 2017 in HC.CR. Case No. 21 of 2014)

JUDGMENT

1. The appellant was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 14th day of February, 2014 at Miiri Village, Kanjai Sub-location of Githunguri District within Kiambu County, the appellant murdered Peter Kamau Waithiru , hereinafter referred to as the deceased."

2. After a full trial where the prosecution called a total of 11 witnesses, the appellant was convicted of the said offence and sentenced to death as by law prescribed.

3. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant faulted the trial court for convicting him in the absence of sufficient identification evidence; for relying on evidence that was inconclusive; for failing to properly and carefully analyse the prosecution evidence, and for relying on inconclusive circumstantial evidence.

4. The appellant urged this Court to allow the appeal or in the alternative vary the sentence, taking into consideration the Supreme Court pronouncement in *Francis Karioko Muruatetu & 2 Others v Republic*[2014] eKLR.

5. This being a first appeal, this Court is under an obligation to consider the evidence that was adduced before the trial court, evaluate it itself and draw its own conclusion in deciding whether the judgment should be upheld. See *Okeno v Republic* [1972] EA 32.

6. A summary of the prosecution evidence was that on the material day (14th February 2014) at about 6 p.m., Jane Ngendo Kamau, PW1, a sister-in-law to the deceased, was heading home from a nearby market when she met the deceased and they started walking together. All over a sudden, the appellant emerged from a banana plantation holding a panga and struck the deceased on the head. The deceased fell down and PW1 started screaming as she ran away from the scene. After about 15 minutes when a crowd of people had gathered at the scene, PW1 returned there and saw the deceased's lifeless body lying on the ground. He had been beheaded by the appellant. The appellant was not at the scene.

7. Hannah Wangari Getheiye, PW2, is a cousin to the appellant. She was one of the people who heard PW1 screaming. As she was rushing to the scene she met the appellant running very fast downhill. She tried to talk to him but the appellant pushed her aside and continued running. When PW2 reached the scene of the crime she found the deceased's body lying on the road. She started screaming, calling for help.

8. Dominic Ngugi Waithiru, PW3, a brother to the deceased, also heard screams emanating from the scene of the crime and as he headed there, he met PW2 who told him that the deceased had been murdered. PW3 was also told by PW2 that she had seen the appellant running away from the scene of the crime. PW3 decided to proceed to Githunguri Police Station to report the incident. He found the appellant outside the report desk with handcuffs. The appellant told PW3: "I have finished with that one. You are next." PW3 recorded his statement with the police, including the threat that had been made by the appellant. Thereafter several police officers visited the scene, including PC Pius Ndweko, PW4, PC Jackson Kiprop, PW5, and PC Henry Mwiti, PW6. They all saw the beheaded body of the deceased. PW5, a Scene of Crimes Officer, took several photographs of the deceased's body which he produced as exhibits before the trial court.

9. PW6 told the trial court that on the material day he was at the report office, Githunguri Police Station, when the appellant walked in at around 7.20 p.m. and requested to be placed in the cells. When PW6 asked him why he wanted to be put in the cells, the appellant said that he had killed a person. PW6 noticed that the appellant had blood stains on his hands and on his shirt. PW6 observed that the appellant appeared anxious and was sweating. The witness notified the District Criminal Investigation Office, (DCIO), Chief Inspector Samuel Agutu, PW11, the investigating officer in the case who interrogated the appellant before he was placed in the cells.

10. On his own volition, the appellant told the investigating officer that he had killed the deceased. PW11 organised for a postmortem to be conducted on the deceased's body, which revealed that the cause of death was decapitation and haemorrhage.

11. In his defence, the appellant told the trial court that on the material day at about 6.20 p.m., he went to Githunguri Police Station after receiving a call from his brother, Peter Kamau Kago, DW2, that together with their mother had been arrested and were at Githunguri Police Station. Immediately he arrived at the police station he was arrested and put in the cells. The appellant denied having murdered the deceased or even having been anywhere near the scene of the crime on the material day.

12. DW2, a matatu driver, testified that on the material day he was stopped by police officers and taken to Githunguri Police Station. He telephoned his mother and when she went to check on him at the police station she was also arrested. He was given a mobile phone by one of the police officers at the

station and he telephoned the appellant who proceeded to the police station to check on him and their mother. As soon as the appellant arrived there he was also arrested, DW2 alleged.

13. In the impugned judgment, the trial court held that there was direct evidence of PW1, an eye witness, that it was the appellant who murdered the deceased. There was also sufficient circumstantial evidence of PW2, PW6, PW9 and PW11 that pointed at the appellant as the person who had committed the offence. In respect of the circumstantial evidence, the learned judge stated;

> The first piece of circumstantial evidence was by PW2. She was a first cousin of the accused because their fathers were brothers. She met the accused coming from the direction where she shortly later found the deceased's body. It was also the direction from which she saw PW1 running backwards from as she screamed. Having been seen running away at top speed from the scene where the body was found, placed the accused squarely at the scene of crime soon after the murder. The incident took place in broad day light and being first cousins and having held him by the collar, PW2 had a very clear and good opportunity to see and identify the accused. The evidence of PW3, her uncle whom she met as she ran from the scene while screaming after seeing the body shows consistency on PW2's part. PW3 confirmed that PW2 reported to him about the deceased's body and also about meeting with the accused running from the scene of murder. That evidence adds credence to PW2's evidence."

14. Regarding the appellant's defence, the trial court held that although the appellant had denied that he was at the scene on the material day, there was sufficient evidence that he was seen running away from the scene. The trial court further held that under section 111(1) and 119 of the *Evidence Act* the appellant had a statutory burden to explain why he was running from the scene of murder soon after the offence was committed.

15. It is against this backdrop that we now proceed to consider the grounds of appeal as argued before us by the appellant's defence counsel, Mr. Ratemo Oira. On the issue of identification of the appellant, we note that the offence was committed at around 6 p.m. when there was sufficient daylight. The only eye witness, PW1, was walking with the deceased when the appellant emerged from a banana plantation and viciously attacked the deceased, killing him instantly by beheading him. PW1 is a close relative of both the appellant and the deceased and in her cross examination by the appellant's defence counsel before the trial court, PW1 said that there existed no grudge between her and the appellant. We therefore have no reason to doubt her evidence

16. The evidence of PW1 regarding identification of the appellant was corroborated by that of PW2 who met with the deceased as he ran away from the scene shortly after PW1 saw the appellant beheading the deceased.

17. In our view, there was therefore sufficient identification evidence by both PW1 and PW2 as rightly pointed out by the trial court. The appellant, having been seen running away from the scene shortly after the offence was committed, he was under an obligation to explain himself to the court. Section 111(1) of the Evidence Act states as follows:

> 1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

18. In light of the foregoing, we find no merit in the ground that challenges the evidence of identification of the appellant.

19. Regarding the totality of the prosecution evidence, we do not agree with the appellant's submission that it was inconclusive in any way. We believe the evidence pointed exclusively at the appellant as the person who committed the murder. Apart from the evidence of PW1 and PW2, the appellant also threatened to kill PW3 just as he had done to the deceased. We equally believe the evidence of PW4, PW6 and PW9 regarding the appellant's utterances relating to the death of the deceased. However, the appellant's conviction was not based on the alleged confession; it was properly founded on direct and circumstantial evidence as rightly summarized by the trial court.

20. All in all, we find no merit in this appeal regarding the appellant's conviction.

21. On the issue of sentence, the appellant, having been duly convicted of murder, was granted an opportunity to mitigate but he declined to do so. The learned judge stated as follows:

> The accused did not wish to give any mitigation in this case. I have considered the facts and circumstances of this case. This was a most vile act. The accused decapitated the deceased. The deceased was his paternal uncle. Most importantly, the accused has shown no remorse for his action. I noted that the accused has been in custody since March 2014 when he was arraigned in court for this offence. Having considered all these factors, I sentence the accused to death as by law prescribed."

22. The appellant's defence counsel rightly submitted that the Supreme Court decision in Francis Karioko Muruatetu & others v Republic (supra) did not outlaw the death sentence but merely stated that it was not the only sentence that can be passed upon a person convicted of the offence of murder. Counsel urged us to set aside the death sentence and substitute therefor with any other appropriate sentence. On the other hand, Mr. Hassan Abdi, learned prosecution counsel for the respondent, supported the sentence that was passed by the trial court, saying that were no mitigative factors to warrant the variation of the death sentence.

23. On our part, we think that the learned judge's observations regarding the appellant are quite correct and do not warrant the variation of the death sentence. The appellant beheaded his uncle for no apparent reason and did not show any remorse, either before the trial court or before this Court. In the circumstances, we find no reason to interfere with the sentence passed by the trial court. Consequently, we dismiss this appeal in its entirety.

24. This judgment is rendered under rule 32(2) of this Court's Rules, the Hon. Lady Justice Koome (as she then was) having ceased to hold the office of Judge of Appeal upon her appointment as the Chief Justice.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is atrue copy of the original

Signed

DEPUTY REGISTRAR