Longalom v Republic (Criminal Appeal 22 of 2015)
[2022] KECA 725 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 725 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 22 OF 2015

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

APRIL 28, 2022

BETWEEN

JAMES EDAPAL LONGALOM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of the High Court of Kenya at Nakuru (Wendoh, J.) dated 4th February 2015 in H.C.CR.C. No. 50 of 2010)

JUDGMENT

1. James Edapal Longalom, (the appellant) has come to this Court on appeal against the conviction and the death sentence meted out against him by the High Court at Nakuru (Wendoh, J) for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the information were that on 4th November, 2007 at Loikes Village in Samburu Central District he murdered Namenju Loriu. He denied the offence and the case proceeded to full trial with the prosecution calling a total of seven witnesses. When placed on his defence, the appellant testified on oath but called no witnesses.

2. It was the prosecution's case that Akai Lusaru (PW1) went to the house of Namenju Loriu (the deceased), on the date in question at around 2.30 pm and, while there, a person identified as James Edapal (the appellant) entered the house, asked for water to drink and he was given. The said James told the deceased that he wanted to spend the night in that house, but the deceased declined the request and asked the appellant to leave. The deceased and PW1 went outside the house. The appellant followed her outside. He is said to have held the deceased by the hand, twisted her neck and she fell down, the appellant then ran away. The deceased sent PW1 to call the deceased's sister Nakoru (PW2) who lived about 200 meters away. When PW1 and PW2 went back to the scene, they found the deceased still lying there, but she could not speak. They looked for transport and took her to Maralal District Hospital only for the doctor to declare her dead. The two reported the incident to the police station.

The appellant was arrested the following day at the hospital where he had been tricked to go and visit the deceased not knowing that she was already dead.

3. Regina Ntele Lusene (PW3) testified that she is a sister to the deceased and, on 4th November, 2007 she was at her house in Akwaru when at about 7.30 pm, she was informed that the deceased had been assaulted. She corroborated PW2' s evidence and added that she knew the appellant as a brother-in-law to the deceased. She narrated to the court how they tricked the appellant to go and visit the deceased at the hospital so that he would be arrested when he got there.

4. Murungule Ekataba (PW4) and Emmanuel Ngimero (PW6) identified the deceased's body to the doctor on 8thNovember, 2007 for purposes of post mortem which was conducted by Dr. Lucy Mantawa.

5. Mark Mainde, (PW7) was the investigating officer in this matter. He received the report on the deceased's death and subsequently arrested and charged the appellant. He also visited the scene, took the sketch plan and recorded statements from the witnesses and later had the appellant charged with the offence of murder.

6. In his defence, which was tendered on oath, the appellant told the court that he left his home to bury his relative in Itan where he spent the night and, the next day, he went to visit his brother Long'elet, who was the deceased's husband. He found the deceased with the children, she gave him food and he stayed there till 4.00 p.m. He then went back to the funeral and the next day went to Maralal town for burial. He then met some women who told him to visit his sister-in-law (the deceased) who had been admitted in hospital. He did so only to find her dead. He denied the allegation that he wanted to sleep at the deceased's house saying that it was taboo to sleep with his brother's wife. He denied the murder and insisted that he did not know who had committed the offence.

7. Upon consideration of the evidence on the record, the trial court held that the ingredients of murder which must be established are: proof of the fact and cause of the death of the deceased; proof that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the appellant (actus reus) and proof that the unlawful act or omission was committed with malice aforethought (mens rea).

8. The court held that in the absence of a medical report, there still was direct evidence that it was the appellant who had caused the deceased's death. According to the learned Judge, the case fell under the exception to the general rule that medical evidence must support the cause of death. The evidence of PW1, 2 and 5 was that the deceased was bleeding from the nose and mouth which suggested that the twisting of the neck may have caused severe injury to the neck, muscles and vessels which resulted in the immediate death. The court did not believe the appellant's defence and, instead, found that the ingredients of the offence of murder were established and, as a result, the appellant was convicted of the offence and sentenced to death as already stated.

9. Being aggrieved, the appellant filed this appeal relying on grounds, inter alia, that the learned judge erred in law by not complying with section 211 of the Criminal Procedure Code; by convicting the appellant on insufficient evidence and one that was not proved beyond any reasonable doubt; convicting the appellant on hearsay evidence; convicting the appellant whenthe cause of death was not established; shifting the burden of proof onto the appellant; failing to analyze the evidence before convicting the appellant; failing to call the medical doctor and failing to appreciate that the investigating officer did not produce any tangible evidence or exhibits which could incriminate the appellant. It is instructive to note that there is no ground challenging the sentence, the matter introduced in the submissions.

10. This appeal was heard virtually on 5th October, 2021, when the appellant was represented by learned counsel Mr. Felix Orege, with Miss Serling Joyce learned prosecution counsel appearing for the State. Mr. Orege relied on the memorandum of appeal and further memorandum of appeal and the supplementary grounds of appeal as well as his written submissions. In oral highlights of his submissions, Mr. Orege emphasized that the only eye witness was PW1 as nobody else was present when the alleged incident happened. He submitted that none of the witnesses saw any physical injuries on the deceased and posited that, in the absence of the post mortem report, the deceased could have died of causes other than a broken neck. Counsel also placed heavy reliance on the fact that the postmortem report was not produced in evidence and the cause of death was, therefore, not proved and that the appellant was, in the circumstances, entitled to an acquittal. Even though there was no ground of appeal with regard to the death sentence, counsel urged us to apply the principles set out in the Supreme Court decision of *Francis Karioko Muruatetu vs Republic* [2017] eKLR and reduce the appellant's sentence should the conviction be sustained.

11. With regard to the failure to produce medical evidence, this Court has been called upon to be guided by its decision in *Chengo Nickson Katama vs Republic* (2015) eKLR, where the Court held that in the absence of the medical evidence recording the death of the deceased, the effect of such an omission was that, in the absence of the documents indicating the exact treatment which the deceased received, it was not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause. It is on record that the deceased underwent the post-mortem examination, but the report was not produced in court. The trial Judge speculated that due to the sudden death of the deceased, the cause of death was due to twisting of the neck. The appellant has entreated this Court to fault this finding by the High Court.

12. On sentencing, we were urged to exercise our discretion and reduce the same on the grounds that the sentence imposed was unconstitutional based on the recent development of law in the case of Francis Karioko Muruatetu & another vs Republic (2015) eKLR, where the Supreme Court declared the mandatory aspect of the death sentence unconstitutional. The Court is being urged to exercise its discretionary power to substitute the sentence for a more lenient sentence in the event appellant's conviction for the offence charged is sustained.

13. Opposing the appeal, Miss. Serling Joyce submitted that the prosecution witnesses who testified were credible and consistent, and that their evidence was sufficient to sustain the conviction. Learned counsel reiterated that PW1 had witnessed the incident as narrated in her evidence. She urged that the circumstantial evidence adduced was proof beyond reasonable doubt that the appellant caused the death of the deceased. To buttress this argument counsel cited this Court's decision in *Peter Mugambi vs Republic* [2017] eKLR. Counsel submitted further that even in the absence of a medical doctor's report, the evidence of PW1 irresistibly directly pointed to the appellant as the person who was with the deceased as at the time she met her death. The absence of the postmortem report did not, in her view, water down the prosecution case on who caused the death of the deceased. Reliance was placed on this Court's decision in *Dorcas Jebet Ketter & Another vs Republic* [2013] eKLR where the Court held that: -

> " It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence. In this case, the body itself was not recovered so that it would have been futile for a medical expert to even be called upon to give evidence on body he never saw; a body that never reached his clinic or mortuary for examination all because it was not there. In our view in such cases once the evidence, circumstantial or otherwise leaves no doubt in the mind of the court that death

did occur but the body was disposed of in one way or the other probably to destroy evidence and defeat justice, a court of law, properly directing its mind to the law and seeking to do justice cannot abdicate its duty to ensure justice."

Finally, it was submitted that the sentence imposed was legal and this Court should uphold it.

This is the first appeal and our role was succinctly set out in the case of *Okeno vs Republic* [1972] EA as hereunder:

> " it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

14. We have re-analysed the evidence adduced before the trial court as rehashed above. Having carefully re-considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties in support of their rival positions herein, the issues that arise for our determination are as follows, whether: Section 211 of the *Criminal Procedure Code* was complied with; the ingredients of murder were proved; the prosecution proved its case beyond reasonable doubt; it was fatal for the prosecution not to call the medical doctor as a witness and whether, in the circumstances, the sentence imposed on the appellant ought to be reviewed.

15. On the question of non-compliance with section 211 of the Criminal Procedure code, the section requires that the rights of an accused person be explained to him at the close of the prosecution case after the court places an accused person on his defence. This is meant to assist an accused person make an informed decision on the best way to tender his defence to the court. The record shows that after the court ruled that the prosecution had made out a prima facie case against the appellant, he was duly informed of his rights on the options available for him to make his defence. In response, counsel for the appellant Mr. Bichanga indicated to the court that he had not yet discussed with the appellant on what kind of defence to present, at that point, the court fixed the defence hearing to 18th September, 2014 and his bond was extended. On 15th September, 2014 the record shows that learned counsel Mr. Bichanga and Mr Chirchir appearing for the appellant and the state respectively were in attendance. A Turkana interpreter was also present in court and the appellant's counsel informed the court that they were ready to proceed and that the appellant would give sworn evidence. The logical conclusion to be drawn from the above sequence of events is that the appellant was given sufficient time to consult with his counsel on the mode of defence he was going to adopt, and that what was communicated to the court by counsel was what the appellant had instructed him to state. Undoubtedly, there was compliance with section 211 of the CPC and that ground of appeal, therefore, fails.

16. All the other grounds boil down to the question as to whether the prosecution proved the charge against the appellant beyond all reasonable doubt. The ingredients for the offence of murder, which must be proved beyond reasonable doubt in order to secure a conviction as stated in Antony Ndegwa Ngari v. Republic (supra) are: the death of the deceased and the cause of death; that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought.

17. From the entirety of the evidence before the Court, there is no dispute that the deceased died on the evening in question. She was healthy one minute and had cooked and was conversing with PW1. As at the point when the appellant found the deceased with PW1, all was well with the deceased. Even as at the point the appellant was making advances at the deceased, she was healthy and was on her feet. PW1, the only eye witness said that the disagreement came in after the deceased turned down the appellant's advances. There was no other intervention between the appellant and the deceased before

the appellant got hold of the deceased and dropped her onto the ground. The last person to touch the deceased before she sustained the complications that evidently led to her death was the appellant.

18. This brings us to the doctrine of causation, which simply refers to the relationship of cause and the effect between one event or action and the result. Was there a correlation between the appellant dropping the deceased onto the ground and her death? We have no doubt in our minds that the two events were related. It could be possible that the deceased had a health condition which had nonetheless not manifested itself before the appellant's action, and had remained unnoticed but for the appellant's action of dropping her to the ground. Criminal law nonetheless prescribes that we must take our victims the way we find them, hence the egg shell, or thin skull rule. The deceased may have had a fragile neck or skull or indeed any other health condition, but she had not died from the same and only died after she was pushed by the appellant. It is worth noting that the deceased was pronounced dead on arrival at Maralal District Hospital before any other intervention. This makes the appellant directly responsible for the act that caused the deceased's death.

19. Whereas medical evidence by way of a post mortem form is important to confirm and corroborate evidence on the cause of death, there is no hard and fast rule that the cause of death can only be proved through production of a post mortem form. See this Court's decision in Dorcas Jebet Ketter & Another v. Republic (supra) where the Court dispensed with the production of a post mortem report where the body was not recovered. We are satisfied that the actus reus was proved.

20. As regards the issue of mens rea, there is no evidence that the appellant went to the deceased's house with the intention of killing her. We also note that he was not armed with any weapon and nor had he used any weapon to inflict injury on the deceased. In view of the paucity of evidence on the nature of the injuries leading to her death, the intent to kill or cause grievous bodily harm on the deceased as defined under section 206 of the Penal code was not proved to the required threshold. To that extent therefore, we can only find the appellant guilty of the unlawful killing of the deceased, which translates to manslaughter and not murder. In the result, we set aside the conviction for murder and substitute therefor a conviction for the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code. We also set aside the death sentence meted out by the trial court.

21. On the sentence, we have noted the mitigation tendered before the trial court whereby the appellant was said to be a first offender, married to 2 wives with 15 children. We were also told that he is 50 years old, he has reformed while in prison, and undertaken some courses while serving his sentence. We also note that he has been incarcerated for the last 7 years. We think a sentence of 15 years' imprisonment is mete and just in the circumstances of this case. He is sentenced to 15 years' imprisonment from the date of conviction. We so order.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR