Mamai v Republic (Criminal Appeal 88 of 2018)
[2022] KECA 649 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 649 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 88 OF 2018

PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJ

APRIL 28, 2022

APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF KENYA AT ELDORET (NGENYE, J.) DATED 18TH APRIL, 2016 IN HCCRA NO. 52 OF 2010

BETWEEN

THOMAS BARASA MAMAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Ngenye, J.) dated 18th April, 2016 in HCCRA NO. 52 OF 2010)

JUDGMENT

1. The murder for which the appellant was arraigned, tried and convicted by the High Court at Eldoret (Ngenye, J.) bore the hallmarks of witchcraft, ritual killing and occultism apparently guided by the hidden hand of one Omoding, a shadowy figure alleged to wield immense dark powers of the underworld, and able to cast spells and kill, as if by remote control.

2. The prosecution assembled some seven witnesses whose evidence was that on 4th September, 2010, Nganga Njuguna (PW3) was in his house in Huruma Estate of Eldoret town in Uasin Gishu when he was alerted to noise emanating from the compound of his brother just across the road. Curious and wishing to investigate, he walked across and found a gathering of people at a swamp nearby. Their attention was on a white sack found in the swamp that was tied at the top. The people untied the sack to reveal a gory sight: inside was the mutilated body of a man. The legs had been cut off and it had cut wounds on the back and neck. 'The pointing finger' of the hand was also cut off. PW3 immediately recognized the body as one of a man who suffered mental illness who had lived with his brother, PW3's neighbour, for a long time. He went and reported at Baharini Police Station and officers came and carried the body away.

3. Coming back home, PW3 noticed blood stains from the scene to his brother's compound that had five rental houses. This led him to go to Eldoret Central Police Station where he reported the matter. He knew the occupant of that first house as a person who hawked goods at Langas stage. He was given two police officers with whom he went to Langas stage. There, they found the suspect selling small wares including groundnuts. They noticed that one of the suspect's shoes and his pair of trousers had bloodstains. The suspect was arrested and he gave the team the key to his house. The police chose not to take him to his house for his own safety as crowds were baying for his blood.

4. There was a small padlock at the door and it was opened using the key he gave. The house had blood spilt all over on the black and white curtain, the table cloth and slippers. Under the carpet they found a small hole which was full of blood while just outside there was a cardigan, identified as belonging to the deceased, that was blood soaked. Eldoret Scene of Crime Personnel led by Sergent Fredrick Simiyu Sirengo (PW4) visited the scene and took photographs of the mutilated body as well as the house of the suspect.

5. The body was identified as that of Samwel Mungai Njoroge by his uncle, James Ngomi (PW1) and brother Joseph Waweru Njoroge (PW2). The latter was a neighbor of the suspect whom he identified as Thomas Barasa Mamai, the appellant herein. The appellant was arrested by the investigating officer Corporal Samson Owaga (PW7) who took possession of the appellant's trousers and shoes and also visited the swamp where the body of the deceased was recovered as well as the appellant's house. He later recorded a statement from the appellant in which the appellant apparently inculpated himself at length claiming to have identified the deceased as the perfect target for Omoding's requirement of the legs and middle finger of "an imbecile person" for Kshs.500,000.

6. We find it curious that there was no objection from counsel then appearing for him to reference to the confession which had not been recorded in accordance with the relevant provisions of the *Evidence Act*. However, the trial court did not rely on the contents of the confession statement and we too shall disregard it.

7. PW7 recounted how on 5th September, 2010 the appellant took him and his team to Malaba on a mission to track down some 3 people he said had visited his house and were responsible for the crime. En-route, PW7 noticed that a black Harrier was trailing them for a long stretch. The appellant claimed that the man in the vehicle was "the reknown witchdoctor Omoding" who, on discovery he had been noticed, overtook them and drove at a speed so high they could not catch up with him when they gave chase. They would later see that vehicle cross the border into Uganda. The appellant took the officers to a house he said belonged to one Namasaja whom they arrested with another called Geoffrey, an alleged fellow collector of body parts for Omoding. When these two were brought to Eldoret, the officers discovered the appellant had duped them as the duo barely knew Eldoret and had hardly ever gone beyond Bungoma. The officers did not attempt to question Omoding as it was never claimed he was given the body parts.

8. PW7 took the appellant for age and mental assessment and had Dr. Chumba take blood samples of the deceased. These were submitted to the Government Chemist with those of the appellant earlier collected at the Moi Teaching and Referral Hospital for analysis. The Analyst report by Henry Sang (PW5) of the Government Chemist concluded that the DNA profiles generated from the table cloth and the appellant's trousers matched those of the deceased. Dr. Richard Chumba (PW5) of the Moi University School of Medicine did a post-mortem on the body of the deceased and observed deep cuts on the occipital region of the head and transecting the spinal cord, amputation of both lower limbs below the knee and amputation of the right ring finger. He concluded that the cause of death was transection of the cord by a sharp object.

9. Upon hearing those witnesses, the learned Judge found that a prima facie case had been made out and placed the appellant on his defense. He gave sworn testimony in which he denied the charge and protested his innocence. He denied telling PW7 that he had visitors on the night of 3rd September, 2009 and denied any knowledge of Namasaja, Geoffrey and Kim. He also flatly denied knowing the deceased and said he could not tell whether there was blood in his house. He admitted knowing Omoding, whom he had heard was a witch doctor who "could cast spells and cause people to eat grass" but denied ever working for him. He denied owning the black pair of trousers produced in court and maintained that his were green in colour.

10. The learned Judge rendered her judgment in which she found the appellant guilty of murder, convicted him and sentenced him to death. This aggrieved the appellant and he filed this appeal before us complaining in his self-crafted memorandum of appeal that the learned Judge erred by; failing to consider the evidence of drunkenness and intoxication under section 13(4) of the *Penal Code*; failing to observe that the person who led the police to the house failed to prove it belonged to the appellant; the case was not proved beyond reasonable doubt; the DNA profiles from his trousers and shoes did not match that of the deceased, and rejecting his alibi defence without proper reason. They were abandoned by his advocate who filed the following supplementary grounds;

    a. The trial court erred in law and in fact by mischaracterizing as direct evidence the evidence used to convict the appellant; and not as circumstantial evidence.

    b. The trial court erred in law and in fact by failing to appropriately evaluate the circumstantial evidence forming the basis for conviction.

    c. That the trial court erred in law and fact in disregarding the alibi defence offered by the appellant.

11. Prior to the hearing of the appeal the appellant's learned counsel Mr. Mutai, filed written submissions which he highlighted in his address to us. He faulted the learned Judge for mischaracterizing the evidence adduced as direct, when it was in fact circumstantial, and then evaluating it inappropriately. Pointing out that the circumstantial evidence was in two strands, namely the samples collected from the scene of recovery of the body and that collected from the appellant, counsel contended that the Government Chemist's evidence was contradictory and exculpatory. He went on to argue that as the appellant was not present when the samples were collected from the scene, he was prejudiced as he was denied the opportunity to challenge the same. He maintained that the evidence tendered "did not point unerringly to the appellant as the perpetrator of the heinous crime." He concluded by stating that the learned Judge disregarded the appellant's alibi defence that he spent the material night at the Moi Teaching & Referral Hospital attending to a friend who had been admitted there.

12. The State opposed the appeal with learned Prosecution Counsel stating that contrary to the appellant's complaints, there was direct and circumstantial evidence proving his guilt. The inculpatory facts were incompatible with the appellant's innocence, including the blood stains on his padlock, the pool of blood in his house and the presence of bloodstains on his trousers, which DNA established belonged to the deceased. Counsel stated that under section 111 of the *Evidence Act*, the appellant had a duty to explain the presence of the deceased's blood on his trousers. He went on to assert that the learned Judge considered and properly rejected the alibi presented by the appellant. He urged us to find that the appellant was properly convicted.

13. Turning to sentence, he submitted that this was a case of ritual killing for purposes of harvesting body parts for use in sorcery. The appellant clearly had a dalliance with the occult and killed the deceased

in a heinous manner. Terming him "more dangerous than a night runner," counsel urged us not to interfere with the sentence of death imposed.

14. In a brief reply, Mr. Mutai pleaded with us, in the event we upheld the conviction, to be lenient with the appellant who is a small scale trader, a hawker trying to eke a living and who would be reformed by a prison term.

15. We have considered the entire record and evaluated the evidence in a fresh and exhaustive manner as we are obligated to do in a first appeal. We proceed by way of rehearing but without the benefit of hearing and observing the witnesses as they testified, for which we make allowance as we make our own inferences and draw our own independent conclusions of fact. See, Rule 29 of the *Court of Appeal Rules*; *Okeno v Republic*[1972] EA 32; *Victor Nthiga Kiruthu& another v Republic* [2017] e KLR.

16. We think, upon a consideration of the entire record that the case against the appellant was amply proved beyond reasonable doubt. Much as there is no witness who saw the appellant actually kill and quarter the deceased, the circumstantial evidence present leads to the irresistible conclusion that in the ordinary course of human affairs, he must have been involved in the butchering of the deceased. Alone or in concert with others he certainly did "hew him as a carcass fit for hounds" in a manner most vile. The circumstantial evidence has been identified by Mr. Mugun, and correctly so from and own examination of the record, as constituting of the following, which, in our respectful view, form a chain so complete as to render the case against the appellant quite iron-clad;

> "- The deceased's mutilated body was found in a sack that had been dumped in a ditch by the roadside, approximately 8 metres from the appellant's residence.A trail of blood led from that site straight to the homestead where the appellant lived.The grass lawn outside the appellant's home had a pool of blood.The gate leading to the house of the appellant had blood stains.The door and padlock to the house of the appellant had blood stains.There was a pool of blood inside the appellant's house. The Investigating Officer (PW7) testified that the appellant gave him the keys to his house. The accused person himself admits that he gave PW7 the keys to his house. PW3 testified that he was present when PW7 opened the door and he noticed there was a pool of blood inside the house. That blood when subjected to forensic analysis, matched that of the deceased.A table cloth recovered from inside the appellant's house was stained with the deceased's blood.The appellant's trouser that he was found wearing hours after the murder was confirmed to have been stained with the deceased's blood."

17. We are left in no doubt whatsoever that the foregoing facts, whether in combination or together as a whole, establish that the appellant was the murderer. One cannot be held innocent of murder when the blood of the brutally and mortally wounded man is found all about and all over one's house and one's clothes unless he gives a plausible explanation as to how such blood came to be in his place of abode and upon his clothes. This is a reasonable expectation, codified in section 111(1) of the *Evidence Act* as "a fact specially within the knowledge of such person" and constitutes an exception to the general rule that an accused person bears no burden in a criminal case. In such circumstances, the accused bears the burden of proving the fact specially within his knowledge on a balance of probabilities. Only he could explain the crimson tide.

18. The fact that evidence is circumstantial does not mean that it is of a weaker character. All that a court is required to do is recognize that the facts constituting it must be such as to extract or lead to the proof of the principal fact by logical and rational inference. It has been held in a long line of cases such as *Republic-vs- Kipkering Arap Koske* [1949] 16 EACA, *Mwangi-vs- Republic* [1983] KLR 522, *Mwangi& Another-vs- Republic*[2004] 2 KLR 32 and *Japheth Morara-vs- Republic*[2019] e KLR that

in a case dependent entirely or exclusively on circumstantial evidence, a conviction can only be entered where the inculpatory facts are incompatible with the innocence of the accused and incapable of being explained upon by any other hypothesis than that of guilt. Further, there must be no co-existing facts that would weaken or destroy that inference which must therefore point unerringly towards the guilt of the accused by forming a chain so complete that the conclusion is inescapable that the accused committed the crime. We are fully satisfied that the evidence against the appellant did meet the requisite standard for proof by circumstantial evidence.

19. The learned Judge has been criticized for mischaracterizing the evidence as direct evidence but we find no substance in the criticism. The part of the judgment that invites the complainant is where the learned Judge expressed herself thus;

> " At the very initial stages of investigations the evidence available was purely circumstantial. I say so because it is PW3 a village elder who tracked some blood stain from where the body lay to the house believed was occupied by the accused. At the time of those events the said house was locked and the accused was not present. However, when the accused was placed in cells the trouser he was wearing and his left shoe were laced with blood stains. This was noted by PW7, the investigating officer. In the presence of PW3, PW7 took possession of the said trouser and shoe and caused them to be subjected to a DNA analysis which was done by PW6. When the accused was taken to hospital for age and mental assessment, his blood sample was taken. During the postmortem exercise blood sample of the deceased was also taken. In addition, when PW7 visited the house of the accused person he also took blood sample with cotton swab consisting of the blood that was strewn all over the house. There was a collection of a pool of blood beneath a PVC carpet that covered the floor. That is where he dipped the cotton swab. From the evidence of PW6, the government analyst, the blood in the cotton swab matched the blood of the deceased. That then entirely clears any doubt that the accused had a direct contact with the deceased. The evidence then available is direct evidence."

20. We think, with respect, that nothing turns on the complaint. There may be merit in taking the view that the evidence remained wholly circumstantial and never direct but, given the overwhelming nature of that evidence, the guilt of the appellant is not at all weakened by the alleged mischaracterization. Indeed, it has been expressed by some scholars that the distinction may not be particularly useful. Way back in 1935, for instance, John H. Wigmore in A Student's Textbook of the Law of Evidence 40, opined, as cited in *Black's Law Dictionary* (Tenth Edition), thus;

> " A little reflection shows that no disputed case will ordinarily be proved solely by circumstantial or solely by testimonial evidence. Ordinarily there is evidence of both kinds. The matter has been obscured by the use of the term 'direct evidence' – a term sometimes used to mean testimonial evidence in general, but sometimes also limited to apply only to testimony directly asserting the fact-in-evidence has no utility."

21. The last matter we shall address is the grouse that the learned Judge did not consider the appellant's alibi defence. We find that complaint to be unmerited as the learned Judge did, in fact, give due consideration to the said defence before dismissing it on account of the overwhelming evidence that placed the appellant at the scene of the crime. The learned Judge properly cited and directed herself on the law on alibi defence as stated by this Court in *Kiarie -vs- Republic* [1984] KLR 739, which is that an accused person does not by putting forward an alibi thereby assume any burden of proving the same, it being sufficient if it introduces in the mind of the court a reasonable doubt. No such doubt entered her mind and none ours.

22. The upshot of our consideration of the appeal against conviction is that it is without merit. The conviction was safe and we affirm it.

23. Turning to sentence, we think that given the callous, blood-curdling and spine chilling manner in which the appellant killed and quartered the deceased and then stuffed his body in a sack before dumping it in a swamp thus stripping him of all human dignity and decency, whether or not he did it out of occult or commercial considerations, he is wholly undeserving of leniency. It is for persons such as him that the death sentence exists in our law books. It was properly imposed and we have neither reason nor inclination to interfere.

The appeal is devoid of merit and is thus dismissed in its entirety.

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

P. O. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR