Chai v Republic (Criminal Appeal 30 of 2020)
[2022] KECA 495 (KLR) (1 April 2022) (Judgment)

Neutral citation: [2022] KECA 495 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 30 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

APRIL 1, 2022

BETWEEN

DUME KITSAO CHAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement and sentence of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 5th August, 2020 in High Court Criminal Case No. 10 of 2016)

JUDGMENT

1. The Appellant Dume Kitsao Chai was charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the night of 2nd to 3rd September, 2016 at Sosoni Village, within Kilifi County,jointly with others who were not before the Court, murdered Mercyline Kache Charo. The Appellant pleaded not guilty and the matter proceeded to trial before the High Court at Malindi where he was convicted in a Judgement delivered on 5th August 2020 and sentenced to life imprisonment.

2. This is a first appeal. We have duly considered the record of appeal, the judgment of the High Court, the memoranda of appeal by the Appellant and submissions by the respective learned counsel, and the authorities that they cited. This is in line with the principles enunciated in the *Okeno v. R* [1972] EA 32:

> " 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 v. R. [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E.A. 424."

3. Before delving into the appeal, let us give a summary of the evidence adduced before the High Court, which was as follows; The prosecution called a total of 9 witnesses. Erastus Charo, PW1 was the father to the deceased and he testified that the last time he saw his daughter alive was on 31st August 2016 at around 10.00 a.m., when she told him that she was unwell and needed to visit Mnarani Hospital for checkup and would not go to school that day.

   PW1 testified that on the morning of 1st September 2016, he expected the deceased to report to school, but on further inquiry he realized that she had not gone. On further inquiry back at home, he learnt from the deceased's grandmother PW4 that the deceased had left during the day to have her hair plaited. According to PW3, the mother of the deceased and PW4 the grandmother of the deceased, after the deceased informed her father that she needed to go to see a doctor, they saw her again later that day at 7 p.m. when she ate dinner with PW4 before going to bed. The next day she left to have her hair plaited and both PW3 and PW4 did not see her alive again. PW1 decided to report his daughter missing to the village elder when she did not return home on the 1st September 2016.

4. On 3rd of September 2016, early morning PW3 and PW4 and others saw the body of the deceased lying motionless on the ground near her home which was also near that of the Appellant. In the course of investigations, PW1, PW5 and PW6 led PW9, the DCIO to the Appellant's house where they found fresh blood on the floor, clothes and on a bed. In addition, the deceased's blood stained lesso, clothes, and a foetus were recovered from the Appellant's pit latrine. Dr. Khadija Nassir, PW7, a Medical Officer at Kilifi County Hospital conducted a post-mortem examination on the deceased's body and concluded that she succumbed to injuries caused by a fracture to the base of her skull, fracture to the cervical spine and post-partum hemorrhage.

5. According to further DNA examinations and a subsequent report compiled by the George Lawrence Okinda, a Government Analyst, PW8 found that the blood samples generated from 5 exhibits, that is, the bed frame, mattress cover, clothes and blood on the floor of the Appellant's house, and the foetus matched the DNA profiled from the deceased. The conclusion reached was that the blood on the Appellants bed and floor of his house, and that on the various pieces of clothing identified by her sister PW2 to belong to the deceased was from the deceased. The conclusion on the foetus was that there was maternal relationship between the foetus and the deceased.

6. The Appellant was placed on his defence and he elected to remain silent, which is his right. The Court found that the issue for determination was whether the prosecution fully discharged the burden of proof beyond reasonable doubt against the Appellant. The learned Judge found that the prosecution case relied purely on circumstantial evidence. The Court found that the evidence adduced revealed that the Appellant's house had streams of blood, to the cover mattress, bed sheets, towels, T-shirts, lessos and black bra which blood, as confirmed by PW8 matched the blood drawn from the deceased. In the pit latrine a foetus was recovered and cloth wear positively identified to be that of the deceased. The learned trial Judge also found that the post mortem examination revealed that the deceased died as a result of a spinal injury with a fracture to the cervical spine and, fracture to the base of the skull. The Court found that the prosecution had proved that there was an unlawful act, inflicting fatal injury; that given the fact the clothes of the deceased and her blood was found in the deceased house, and the foetus, all led to the conclusion that the crime was committed by the Appellant in exclusion of any other person. The learned trial Judge convicted the Appellant for murder contrary to Section 203 of the Penal Code, and sentenced him to life imprisonment.

7. The grounds of appeal raised before us are three; one that the learned Judge erred in law and fact by failing to find that the offence of murder was not proved beyond reasonable doubt; that the learned Judge erred by meting out a sentence that was harsh and excessive; and, that the trial Court at the sentence hearing failed to take into account the period the Appellant had been in lawful custody as he awaited trial contrary to section 333(2) of the *Penal Code*.

8. Ms. Aoko learned counsel on record for the Appellant contended that the prosecution failed to prove its case beyond reasonable doubt. Counsel urged that the learned Judge erred for relying on circumstantial evidence which had an incomplete chain of events; that the prosecution failed to prove that the Appellant participated in the unlawful act that led to the deceased death; that the prosecution did not show that the Appellant forced the deceased to procure the abortion. Counsel relied on the case of *R. v Kipkering Arap Koskey & Another* 16 EACA 135 urging that how the deceased got the fracture and who inflicted the injuries that caused the fracture were never addressed by the prosecution to justify an inference of guilt on the part of the Appellant.

9. Ms. Aoko challenged the trial Court for the sentence imposed urging that it was manifestly excessive as such a sentence can only be justified in exceptional circumstances in the rarest of the rare cases where the alternative of imprisonment is demonstrably inadequate. Counsel cited *Benard Kimani Gacheru v. Republic* (2002) eKLR for the proposition that this Court can tamper with the sentence being a matter left to the discretion of the Court. In addition, the Appellant referred the Court to the Sentencing Policy Guidelines and section 333(2) of the Criminal Procedure Code in agitating that the life imprisonment was not appropriate in the circumstances and the Court was invited to vary the sentence and allow the appeal.

10. The learned Prosecution Counsel, Ms. Vallerie Ongeti represented the State in this appeal. Opposing the appeal, learned Prosecution Counsel submitted that the prosecution case satisfied the elements of murder enunciated in *Antony Ndegwa Ngari v. Republic* (2014) eKLR which was supported by circumstantial evidence that pointed to no one else but the Appellant as the only person who must have murdered the deceased. Counsel urged that the cause of death was proved to be cervical fracture and a base skull fracture. Counsel urged that injuries sustained by the deceased were severe in nature and could not be said to be accidental. That the deceased clothes and her blood found in the Appellant's house and the foetus found in Appellant's pit latrine had blood which matched the deceased DNA; and the lack of an explanation from the Appellant of how all the items came to be in his house, was sufficient ground to convict.

11. On the issue of sentence. Ms. Ongeti submitted that while this Court has in the past departed from meting out a life sentence in view of the Supreme Court decision *Francis Kioko Muruatetu & Another –v- R* (2017) eKLR, the circumstances in this particular matter were brutal and that the trial Court correctly applied itself in sentencing the Appellant.

12. We have considered the material placed before us and the issues commending themselves for our determination are twofold; whether from the circumstantial evidence adduced before the trial Court, an inference can be drawn that the Appellant was guilty of the murder of the deceased and, secondly on severity of sentence, whether this Court can tamper with it. First off, we start from the undisputed fact that the nature of evidence relied on in this case was purely circumstantial evidence, as none of the 9 witnesses who testified for the prosecution witnessed how or by whose act the deceased died.

13. We have considered the learned trial Judge's analysis and evaluation of the evidence. The learned Judge came to the following observation:

> " Against this background PW1, PW3, PW5 in company of PW9 – CPL Amos Wambua, explained that on making a visit to the scene the following salient features abound: (1). That the accused house had streams of blood, to the cover mattress, bed sheet, towels, T-shirts, lessos and black bra. (2). In the adjacent pit latrine a foetus was recovered and cloth wear positively identified to be that of the deceased. Their evidence was buttressed with that of George Okinda – (PW8) the government analyst who on receipt of the exhibits from PW9 CPL Wambua did carry out a DNA profile. For instance, PW8 told the Court that the bed rail generated a DNA profile that matched the DNA profile from the blood sample of the deceased. The discovery of a foetus would lead one to conclude that the deceased died of premature abortion hence inevitably casting a doubt as to whether accused played any role in accelerating the death. The culpability of the accused is nevertheless found in the medical evidence of the pathologist (PW7) Dr. Khadija.
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> According to PW7 the deceased had suffered spinal cord injury with a fracture to the cervical spine and, fracture at the base of the skull. This evidence certainly represents the Law (sic) under the offence of murder contrary to Section 203 of the Penal Code. This is more so because the deceased could not have fractured her own spine and base of the skull as a consequence of intending to procure an abortion. The medical view on the cause of death is that prima facie there was unlawful act, inflicting fatal harm. This was diagnosed with certainty by PW7."

14. After analyzing and evaluating the entire evidence, the learned Judge came to the following conclusion:

> " The context of the prosecution evidence was such that the witnesses articulated a dichotomy pointing at the accused person founded on the burden of proof of beyond reasonable doubt. As is evident from the above evaluation in the face of the proven facts, in my view all elements of the offence underlying the provisions of section 203 of the Penal Code have been discharged by the prosecution to justify a conviction for the offence.... In the case before me it may be that the evidence is largely circumstantial but as stated by the prosecution witnesses the actual facts are known to the accused. He had therefore the right under section 111 (1) of the Evidence Act as it now exists, to explain when and how he parted with the deceased before she met her death. Going by the guide in R v Jenkins (supra). The only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty of the crime."

15. Considering the judgment of the learned Judge, we are satisfied that he applied the correct principles of law, and to the correct facts of the case. The analysis and conclusions of the Court cannot be faulted. On our part, as pertains to the circumstantial evidence, it is clear that the Appellant opened the door to his house the same morning that the body of the deceased was found lying dead between his house and the home of the deceased. Inside the house were streams of blood on the floor, on the frame of the bed, and in the beddings and mattress. That blood was found to match with the DNA profile generated from the blood of the deceased. It was proof that the deceased was inside that house at some point before she died. The cause of death was fractures to the cervical spine and the base of the skull, and post-partum haemorrhage. Given those circumstances, as the learned Judge observed, statutorily as required under section 111(1) of the *Evidence Act*, the Appellant had an explanation to make, either

of how he parted with the deceased, or of how she met her death, or how her blood came to be on the floor of his house, and on his beddings and bed. He made no explanations.

16. Section 111 reads:

> 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:
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> 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.
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> 2. Nothing in this section shall—
>
> a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
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> b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
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> c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity." (Emphasis ours)

17. The Supreme Court in Republic v Ahmad Abolfathi Mohammed and another Petition No. 38 of 2018 determined when Section 111 of the Evidence Act comes into play, and stated:

> " Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction."

18. We have on our part subjected the evidence to a fresh analysis and evaluation and do find that the prosecution did proof that part of their case comprised a situation that was within the knowledge of the Appellant. The blood in his bed, the deceased's clothes found in his house and in his pit latrine and the foetus from the deceased in his pit latrine; the deceased body outside not far from his homestead were all facts within the Appellant's knowledge. Having chosen not to explain anything concerning them and the proven facts, we are in agreement with the learned trial Judge that the only inference that the Court can make is that the Appellant was the one who committed the acts that led to the fractures. The fractures contributed to the deceased death. To that extent the learned counsel for the Appellant was not correct to say that the prosecution should have adduced any further evidence to prove the Appellant participated in the murder. The circumstances proved were sufficient, and proved that no one else except the Appellant could have committed the offence. The inference of guilt drawn on these facts as against the Appellant were correct and safe to found a conviction. We find no merit in the appeal against conviction.

19. As to the severity of sentence, Section 379 (1) (a) & (b) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court thus:

> " 379. Appeals from High Court to Court of Appeal
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> 1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—
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> a. against the conviction, on grounds of law or of fact, or of mixed law and fact;
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> b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law."

20. We are well guided. In regard to the severity of sentence, the learned trial Judge in the ruling on sentence states that he considered the mitigating circumstances urged by the Appellant. However, we find no mention of what these circumstances were on the body of that ruling. We note that there were directions given by the Judge on 9th July 2020, to the effect that counsels file submissions in mitigation and submissions on aggravating circumstances by the defence and prosecution respectively. There is no Pre-sentence report from the Probation, or a Victim Impact Statement. These are not on record. However, the trial Court did conclude that "the Appellant resorted to violence as a way of resolving a dispute that may have existed (sic) acted in a barbaric manner occasioning the death of the deceased."

21. In *Francis Muruatetu & another v Rep*, the Supreme Court of Kenya Petition No. 15 and 16 of 2015, the Court, considering the effect of that case to the future application of the Sentencing Guidelines with regard to mitigating factors after conviction before sentence in murder cases gave guidance as follows:

> " [71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: -
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> a. age of the offender;
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> b. being a first offender;
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> c. whether the offender pleaded guilty;
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> d. character and record of the offender;
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> e. commission of the offence in response to gender-based violence;
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> f. remorsefulness of the offender;
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> g. the possibility of reform and social re-adaptation of the offender;
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> h. any other factor that the Court considers relevant.
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> 72. We wish to make it very clear that these guidelines in no way replace judicial discretion.They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process..."

22. In the same case of *Muruatetu V Rep*, supra, the Court in regards to the application of mitigation by the accused before sentencing, held as follows:

> " It is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty."

23. The two holdings make it very clear, and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide. From the ruling of the learned trial Judge we do not see what mitigating factors were considered. To justify a life sentence, the ruling should have spoken to it, showing in black and white what the Court considered. In the absence of any demonstration of factors that could have led to such a sentence, we find that the same excessive.

24. 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 life imprisonment imposed upon the Appellant, and substitute therefor a sentence of twenty-five (25) years' imprisonment from the date of the Appellant's conviction by the High Court.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 1 ST DAY OF APRIL 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