Kahindi v Republic (Criminal Appeal 33 of 2018)
[2022] KECA 493 (KLR) (1 April 2022) (Judgment)

Neutral citation: [2022] KECA 493 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 33 OF 2018

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

APRIL 1, 2022

BETWEEN

HABEL KAHINDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe. J) dated 19th October 2017 and delivered by Hon. Justice Weldon Korir on 15th January 2018 in Malindi High Court Criminal Case No. 6 of 2015)

JUDGMENT

1. Habel Kahindi, the Appellant herein, was one of three accused persons charged with the murder of Edward Fondo Charo (hereinafter "the deceased") on 25th April 2015 at Mbuzi Wengi Village, Shella Sub location in Malindi Sub County. After pleading not guilty to the charge, a trial was conducted, in which the Prosecution called six witnesses in support of their case. The Appellant chose to remain silent when called upon to defend himself, and was subsequently convicted for the offence of murder and sentenced to imprisonment for thirty (30) years.

2. Being dissatisfied with the said conviction and sentence, the Appellant proffered this appeal by way of a Notice of Appeal dated 29th January 2018 and Memorandum of Appeal dated 11th April 2014. The Appellant faulted the trial Judge for failing to consider that the two elements of mens rea and actus reus were not proved; failing to consider that his arrest had no link to the case and finally, failing to consider his defence. The appeal was canvassed during a hearing held on 2nd February 2022 by Mr. Okoth Odera, the learned counsel representing the Appellant, who relied on written submissions he filed on 1st February 2022. Mr. Allen Mulama, Principal Prosecution Counsel, appeared for the Respondent and also filed written submissions.

3. 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 v 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."

4. The facts giving rise to this appeal, as summarised from the evidence adduced in the trial Court are as follows. Emmanuel Menza Noti, PW 1, who was a brother of the deceased, testified that on 25th April 2015 at about 10.00 am to 11.00 am, he was with about 50 other people who had been called to a construction site at a place known as Mbuzi Wengi in Malindi, to dig a trench on the land belonging to his father, Jafeti Noti (PW5). While digging, 3 people arrived on a motor cycle, told them to move out and asked for the deceased. When the deceased came, the Appellant identified him by saying '*Ndio yule*', ("he is the one"), and that Kazungu Fondo also known as Onyango, and Kirimo Fondo, who were with the Appellant and the co-accused persons in the trial Court, attacked him with *panga*s (machetes), which they removed from their shirts. The deceased tried to get away but he slipped and fell, since it had rained and the ground was muddy.

5. PW1 further narrated that the deceased was hit on the head twice by Kazungu Fondo (Onyango), while the Appellant cut him on the face and Kirimo stabbed him with a knife. PW1 thereupon hit the Appellant with a stick, who started chasing him while holding the panga, and PW1 ran to inform Stella Salama, the deceased's sister, about what had happened. When he returned to the scene, he did not find the attackers and the deceased was already dead. He testified that Kirimo rode the motor cycle when they came to the site, and that he recognized the assailants as they were his relatives.

6. Samson K. Mbithe Mwambire, (PW 2) was also at the construction site on that day, and testified that he had been given a casual job of digging foundation for a fence. Further, that it rained on that day, and at about 11.00 am, while he was with deceased, PW1, the contractor one Archpus, and the foreman called Amir, three people on a motor cycle, parked it and came to where they were. They asked for the deceased, and when they saw him, they removed pangas which were on their backs, whereupon the deceased started running and they ran after him. The 1st accused (Kazungu Fondo alia Onyango) hit the deceased with a panga on the head while the deceased was running, and the deceased slipped and fell. He tried to get up and the Appellant hit him on the face. That the deceased tried to block the attacks with his hands but his fingers and nose were hit and he fell. Kirimo then stabbed the deceased on the stomach several times until the intestines came out. The three then boarded their motor cycle and left, after also threatening the people on the site. PW2 testified that he had known the three persons for about 5 years, and saw them clearly on that day.

7. Japeth Noti Charo (PW 5), the deceased's father, testified that on 25th April 2015 at about 8.30 am, he talked to the deceased and left for his farm in Marereni. He was later called by one Samsom Chula who informed him that there had been a fight, and his child was killed. He returned to the scene at Mbuzi Wengi and found the police at the scene, and the body of his son lying on the ground with cuts on the face and head, and several penetrating wounds in several places with intestines coming out of the

abdomen. The deceased was taken to Malindi District Hospital, and that the post mortem was done in his presence. He testified that he was told by Samson Chula that Kazungu, Habel and Kirimo were the killers, and that he knew the accused persons very well as the 1st Accused was his uncle's son, and the 2nd Accused (Appellant) was his biological brother's son. PW5 confirmed that there had been an attempt to burn his office in November 2006 and he filed a report of arson against the Appellant, and that the Appellant had instituted a court case against him concerning land.

8. Gabriel Kosgey who was based at the CID office in Meru and previously in Malindi testified as PW3, and stated that he had worked as a police officer for 23 years and as a Scene of Crime officer for 8 years. Further, that on 25th April 2015, at about midday, he was approached by the Officer Commanding the Station (OCS) in Malindi, one Chief Inspector Omollo, to accompany him to a scene of crime in Malindi. On arrival, they found the deceased lying behind Mgaduni Bar with several stabs on the stomach and intestines protruding. He took six photographs of the scene which he produced as exhibits, together with the certificate showing that he was the one who took the said photographs.

9. Sergeant Hezron Mokonya (PW6) was the investigating officer. He testified that on 25th April 2015, a report of the murder was made to Malindi station and he went to the scene at Mbuzi Wengi with the OCS, where he found a big crowd, and saw the body of the deceased on the ground with injuries on the back, on the palms, stomach with intestines protruding, and stab wounds. After PW3 took pictures, they took the body to Malindi District Hospital Mortuary. PW6 testified that the evidence of the eye witnesses led to the arrest of the accused persons, and that the witnesses had mentioned Kazungu Fondo the 1st accused person, Habel (the Appellant) who was the 2nd accused person, and Kirimo the 3rd Accused person, who was by then deceased, as the attackers. Further, that they were told that the accused persons had used pangas and knives, though they were not recovered on them.

10. The post mortem examination of the deceased was conducted on 25th April 2015 at Malindi District Hospital by Dr. Stephen Chiroya (PW 4), who testified that the body was of a male African of normal physique and had deep cut wound on the face and on the right parietal region; fracture of the nasal and facial bones; cut wound on the occipital rations with a fracture; the brain was exposed; a deep penetrative wound on the right shoulder region but did not touch the lungs on the right side; a penetration wound on the back which touched the lungs on the right side; a cut wound that penetrated to the abdominal cavity from the right back side, and finally, that the intestines were protruding. He did not open the body since he formed the opinion that the cause of death was severe head injury and the penetrating abdominal and chest injuries which were caused by a sharp object.

11. The High Court in its judgment delivered on 15th January 2018, found that doubts were raised as regards the 1st accused person's participation in the crime and acquitted him, but that the Appellant, who was the 2nd accused person, was seen and identified as participating in the attack on the deceased together with the 3rd accused person who was by then deceased, and that they had the intention to cause harm to the deceased having come to the scene with pangas. Therefore, that the prosecution had proved its case beyond reasonable doubt against the Appellant.

12. The main issue arising from the grounds urged in this appeal from the said High Court's decision, is whether the Appellant's conviction for the offence of murder was based on reliable and sufficient evidence. Mr. Odera, learned counsel for the Appellant, urged this issue along three fronts. Firstly, he stated that the burden of proving guilt beyond reasonable doubt rested on the prosecution, and it was not for the Appellant to tender evidence to challenge the evidence of the prosecution and should not be penalized for his choice of silence. That the accused person has no duty in law to raise a serious defence or elicit crucial evidence by cross examination, and the cases of *Boniface Okeyo vs Republic* [2001] eKLR and *Joseph Kimanzi Munywoki vs Republic* [2006] eKLR were referenced in this regard.

13. Attention was also drawn to Article 50 (2) (a) of the *Constitution* on the presumption of innocence until proven guilty and Article 50 (2) (i) of the *Constitution* on the right to remain silent. It was their submission that the trial Judge did not expect the Appellant to remain silent but to give evidence challenging the prosecution, thereby shifting the burden of proof to the Appellant which was a grave infringement of the Appellant's rights under Article 50 (2) (a) and (i) of the *Constitution*.

14. Secondly, while still on the issue of proof, Mr. Odera urged that there were contradictions and discrepancies that raised reasonable doubt as to the number of people who chase the deceased who were stated as three by PW 1 and PW 2 while PW 6 testified that according to eye witnesses it was two; the colour of the motor cycle which was stated as red by PW 1 and PW 2 while PW 6 said it was blue, whether the deceased spoke to the assailant as testified by PW 1, while PW 2 stated that the deceased did not talk; the time the incident happened, which PW 1 stated it was 10.00am while PW2 stated it was about 11.00 am; and on how the culprits left the scene, with PW1 stating that he did not know how they left; PW 2 stating they left aboard a motorcycle while the 1st Accused stated that he went to the scene aboard a tuk tuk (a motorised rickshaw with three wheels).

15. Lastly, Mr, Odera submitted that three people were charged with the offence, one of them died in the course of the trial, and the prosecution failed to prove its case against the 1st Accused while the trial Judge convicted the Appellant, who chose to keep quiet, on the same evidence. It was thus a grave error for the trial Judge to convict the Appellant on the basis of the same evidence that acquitted the 1st Accused.

16. Mr. Mulama, the learned counsel for the Respondent, in reply submitted that the trial Court properly considered the elements of murder and applied the same to the case at hand. He made reference to PW 1's testimony where he said he knew all the three accused persons, and that it was the Appellant that hit the deceased with a panga on the face. Further, that this was corroborated by the testimony of PW2 and PW4 who conducted the post mortem. In addition, that the deceased was attacked in broad daylight by the Appellant who inflicted injuries on the deceased as witnessed by PW 1 and PW 2, with the intention of causing grievous harm. Therefore, that the prosecution discharged its burden of proving its case beyond reasonable doubt by direct evidence, and if there was any inconsistency in the evidence, it did not go the root of the case.

17. The Respondent placed reliance on the case of *John Mutuma Gatobu vs Republic* [2015] eKLR where the Court of Appeal, stated that law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, and can rely on the nature of the injuries sustained by the deceased as proof of malice aforethought. The counsel for the Respondents further submitted that under section 21 of the Penal Code, criminal responsibility attached individually and therefore it was not automatic that if the 1st Accused was acquitted then the other accused persons may be acquitted. Further, that under Article 50 (2) (i) of the *Constitution*, every accused person has the right to a fair hearing including to remain silent and not testify during the proceedings. Therefore, that upon the Appellant exercising his right to remain silent, the trial Court was bound to weigh the evidence as presented, and whether it was sufficient to sustain a conviction, and the trial Judge rightly found that it was proved that the Appellant caused the death of the deceased.

18. We find it prudent to restate at the outset that the ingredients of the charge of murder that require to be proved beyond reasonable doubt are the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought. Section 203 of the *Penal Code* in this regard provides that any person who of malice aforethought causes death of another person by

an unlawful act or omission is guilty of murder. The element of malice aforethought is provided in section 206 of the Penal Code as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;...

19. The fact of the death of the deceased is not disputed, and PW1, PW2, PW3, PW4, PW5 and PW6 all testified as to seeing the deceased being attacked and seeing his body at the scene of the crime on 25th April 2015, and photographs of the body were also produced in evidence. PW4 performed a post-mortem on the deceased, and testified as to the cause of death, which is also not disputed. The Appellant was placed at the scene of crime and was positively identified and recognised by PW1 and PW2 as one of the attackers who inflicted the injuries on the deceased with a panga, that caused the death of the deceased. The intention to cause the death was thus also established as held by this Court's decision in *John Mutuma Gatobu vs Republic [supra]*.

20. The Appellant's case is that despite this evidence, the trial Court made an error in convicting him arising from certain inconsistencies in the evidence, and in acquitting the 1st accused person on the same evidence. The Appellant also suggests that he was convicted because he opted to remain silent and the 1st accused person was acquitted because he gave evidence in his defence.

21. We will first address the arguments made by the Appellant as regards the inconsistencies in the evidence adduced by the prosecution. This Court in this regard observed as follows in *Phillip Nzaka Watu vs Republic* [2016] eKLR, :-

> " ...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

22. We note that the alleged inconsistencies on the colour of motorcycle used by the attackers and the number of persons who attacked the deceased was as between the evidence of PW1 and PW2 and that of PW6. It is notable in this respect that PW1 and PW2 were eyewitnesses to the commission of the offence, while PW6 was reporting on what he was told by persons who were not called as witnesses to testify. In the circumstances, no error was made in relying on the evidence of PW1 and PW2 which was the direct and reliable evidence. On the inconsistencies alleged as regards the time of commission of the offence, it is notable that PW1 stated that the time was between 10 am and 11am, while PW2 and PW6 stated that the time was 11am, and there was thus no inconsistency in this regard, as the evidence on the commission of the offence was consistent that it took place during the morning hours.

23. Lastly, the inconsistency as regards how the 1st Accused person went to the scene of the crime, where he alleges to have gone by a tuk tuk and not in a motorcycle, is in our view not material. He was placed at the scene by PW1 and PW2, and the 1st Accused also admitted to have been at the scene of the crime. On the whole, we find the inconsistencies in the evidence were minor and not material, and that the prosecution did prove beyond reasonable doubt that the Appellant participated in the attack and inflicted injuries that led to the death of the deceased.

24. On the arguments that the Appellant was convicted on the same evidence that acquitted the 1st accused person and because he chose to remain silent, it is notable that the right to remain silent is one of the rights to a fair trial and guaranteed by Article 50 (2) (i) of the *Constitution*. It does not absolve the prosecution from its burden of proof. We have however found that the prosecution did discharge this burden of proof, therefore there was no error made by the trial Court in conviction of the Appellant based on the evidence adduced by the prosecution. The trial Judge in this respect made the following observations in his judgment:

> The second accused opted to remain silent. It is incumbent upon the prosecution to prove its case beyond reasonable doubt. Article 50(1) of the *constitution* provides for the right to remain silent and not to testify during the proceedings. The contentions by PW1 and PW2 to the effect that it is the 2nd accused who inflicted injuries upon the deceased on the face and hands remain unchallenged. The evidence of PW1 and PW2 s corroborated by the findings of PW4 in his post mortem report..”

25. In our view the trial Judge simply restated the law and analysed the evidence adduced, and we do not read the judgment as having placed any obligation on the Appellant to produce evidence. We however do note the Appellant’s concerns that the trial Court did on the same evidence acquit the 1st accused person, but the remedy in this respect is not an acquittal of the Appellant, since we have found that the case against him was proved beyond reasonable doubt. It is upon the Prosecution to appeal, if it is aggrieved by the said acquittal.

26. As regards the sentence of 30 years’ imprisonment imposed on the Appellant, the trial Court in this regard acknowledged the Appellant’s mitigation and circumstances surrounding the commission of the offence, and exercised its discretion in favour of the Appellant by not imposing the death sentence. We therefore see no reason to interfere with the sentence, which was a legal sentence in light of the decision by the Supreme Court of Kenya in *Francis Karioko Muruatetu & another vs Republic*, [2016] eKLR 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.

27. We accordingly find that this appeal has no merit and the same is dismissed in its entirety.

28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 1ST 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