Nasimiyu & 2 others v Republic (Criminal Appeal 67 of 2017)
[2022] KECA 890 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KECA 890 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 67 OF 2017

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

MAY 27, 2022

BETWEEN

JANET NASIMIYU ..... 1ST APPELLANT

CHRISTINE MURICHO ..... 2ND APPELLANT

PHYLIS MATINGI MURICHO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 24th March, 2016 in HCCR NO. 16 OF 2012)

JUDGMENT

1. The appellants were arrested and arraigned before the High Court at Bungoma 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 April 18, 2012at Bukirimu village in Bumula District of the Bungoma County, they murdered Simon Kundu Muricho.

2. The appellants denied the charge leading to a trial in which the prosecution called 6 witnesses in support of its case. PW1, a wife to the deceased testified that on April 16, 2012she had an argument with the deceased which led to the deceased chasing her away. However, after a while she decided to go back home and when she arrived she found people and vehicles in their compound. She was informed that her husband had been killed and his blood had been found in the house of the 1st appellant. The body of the deceased was near his house. PW1 further stated that she went to the house of the 1st appellant and observed that there were attempts to wash off the blood, an assertion that was corroborated by PW2, a nephew to the deceased and by PW4, a police officer.

3. Later, a worker who had been employed to dig trenches for water pipes found some blood stained clothes buried in soil and he showed them to her. PW1 identified the clothes as; a trouser for her deceased husband, a 'top' for the 1st appellant and a headscarf for the 2nd appellant. Also buried in the soil was a blood stained black wire and a piece of mattress. It was the testimony of PW1 that there was a dispute in the family following the killing of the 1st appellant's husband on February 1, 2012 by a mob justice over a stolen bicycle. The 2nd appellant had alleged that the deceased is the one who killed her husband, and she had threatened that there would be another death.

4. PW2, a 16-year-old nephew to the deceased confirmed that as of April 18, 2012, PW1 had fallen out with her deceased husband and left. PW2 further testified that on April 18, 2012, his deceased uncle went to the house of the 1st appellant and a child was sent to inform him that he would remain there. Since PW2 could not sleep alone, he decided to also go to the house of the 1st appellant where he found his uncle together with all the appellants. That night he spent the night in the kitchen of the 3rd appellant with the son of the 3rd appellant, where they later realised that they had been locked inside. The next morning, the door to the kitchen was opened by the 1st and 3rd appellants who then took their hoes and went to the farm ("*shamba")*. PW2 also followed them to the farm. Somebody then called them to go home. At first the 1st and 3rd appellants refused to go but they later did. At home they found his uncle dead with his body near his house. The body had cuts at the back of the neck. PW2 deposed that he and neighbours followed the blood trail and it led them to the house of the 1st accused, a claim supported by PW3 and PW4.

5. PW2's testimony was supported by PW3, a neighbour, who stated that on April 19, 2012, while passing through the compound of the deceased, he saw the body of the deceased lying on the ground. He tried calling the 1st and 3rd appellants from the farm but they were not responding. He called another neighbour and together with the father of the deceased they followed the blood trail which lead them to the house of the 1st appellant. There, they found blood on the floor and on the seat. There was also water sprinkled on the floor and blood in a cup in the 2nd appellant's house.

6. PW4, a police officer, adduced evidence to the effect that on April 19, 2012at around 8am he was called and informed that there had been an incident at Bukirimo village where someone was found dead. He went to the scene of the crime in company of his colleagues and found that the deceased had been murdered. When he checked the body there was an injury on the back of the neck and there was blood. PW4 established that the 1st appellant and the 3rd appellant slept in the house where the trail of blood was found on the night of the incident, that is on April 19, 2012. Further, before the deceased died he had gone to the 2nd appellant's house where he found the 1st appellant cooking, and where he ate, then he left for the 1st appellant's house. PW4 testified that he suspected the 3 appellants for the murder of the deceased because it was in the house of the 1st appellant that the deceased died, and she was living with the 3rd appellant. The 2nd appellant was similarly implicated because she was the mother to the 1st appellant's husband who had been killed by 'mob justice', and she was among the persons last seen with the deceased.

7. PW5, another wife to the deceased corroborated what had been stated by PW1, that there had been a dispute in the family wherein the appellants blamed the deceased for the death of the 1st appellant's husband who was also a son to the 2nd appellant. PW6, a 13-year-old minor, and a son to the 2nd appellant deposed that one day when he came home from the farm he found his deceased brother dead and people surrounding his body but he did not know what happened to him.

8. At the close of the prosecution's case, the learned judge found the appellants had a case to answer and placed them on their defence. The appellants gave unsworn statements and denied committing

the offence. The 1st appellant, DW1, a sister in-law to the deceased, stated that on April 18, 2012, a day before the incident, she went to the market and went back home at 7pm. The following day on April 19, 2012, she woke up and went to the farm to plant maize together with the 3rd appellant. While in the farm, they were called by PW3 and soon thereafter neighbours and the police gathered at the homestead. The crowd started pushing her around and she was arrested by the police. The 2nd appellant, DW2, a step-mother to the deceased, testified that on the material day she had gone for a funeral at the home of the deceased's sister. It was while there that she was informed by people that the deceased had died. She went back home and found many people whereupon she was arrested by the police. On her part, the 3rd appellant, DW3, a step-sister to the deceased and daughter to the 2nd appellant, testified that on the fateful day she was in the farm planting maize when PW3 called them and told them that the deceased was lying outside his house. When they got to the homestead, she was arrested by the police.

9. Four successive Judges heard the matter, ending with Ali-Aroni, J who evaluated the evidence tendered and found the appellants guilty as charged. She then sentenced them to death.

10. Aggrieved by the judgment and sentence of the High Court, the appellants preferred the instant appeal. They each lodged separate memorandum of appeal based on 12 similar grounds, which can be summarized that the judge erred in law and fact by;

    a) Holding that the deceased was murdered in the absence of a post-mortem report to confirm the cause of death.

    b) Holding that the appellants murdered the deceased on the basis of circumstantial evidence which did not link the appellants to the death of the deceased.

    c) Holding that since the appellants were seen in the company of the deceased in the early hours of the night of the alleged murder, then they must have participated in the murder of the deceased.

    d) Failing to accord the appellants the benefit of a doubt.

    e) Failing to comply with section 200(3) of the criminal procedure code.

    f) Being biased against the appellants in her analysis of the evidence.

    g) Proceeding on the premise that a case of grievous harm had been proved when there was no such evidence.

    h) Proceeding on the premise that the only sentence available to the appellant was that of death.

11. In the end the appellants prayed that both the conviction and sentence be set aside.

12. During the hearing of the appeal, learned counsel Mr. Momanyi appeared for the appellants while the respondent was represented by Ms. Okok, the learned prosecution counsel. Both parties had filed written submissions which they highlighted orally.

13. It was submitted for the appellant that proof beyond reasonable doubt was not established as the appellants were convicted on the basis of suspicion. Counsel protested failure by the prosecution to produce the post-mortem report, arguing that in murder cases it was mandatory for the cause of death to be proved. It was further asserted that allegations of traces of blood being found at the 1st appellant's house were not good enough because samples of the blood had been taken to the government chemist but no analysis had been submitted to the court. The learned Judge was faulted for relying on the decision in *Republic v Chweya and another* [1973] E A 500 for the proposition that the absence of medical evidence as to the death and cause of it is not fatal and the prosecution is open to produce

and rely on other evidence to establish the facts. Counsel's basis for that argument was that the learned Judge did not enumerate the evidence relied upon by the prosecution. It was also contended that the prosecution failed to link the appellants to the murder of the deceased. Ultimately counsel urged us to give the appellants the benefit of doubt and set aside the conviction and sentence.

14. Opposing the appeal, the learned prosecution counsel submitted that the appellants were properly convicted based on strong circumstantial evidence. Further, the appellants had the motive to kill the deceased, evinced by the fact that the 2nd appellant, who was the deceased's step-mother, had sworn to have him dead because she blamed him for the death of her son who was killed by 'mob justice' 2 months earlier. Counsel asserted that the appellants were the ones last seen with the deceased on the material night. They were all in the house of the 1st appellant and traces of blood were found in that house. It was further contended that even though there was no post-mortem report, the death of the deceased was not disputed, witnesses having seen the body of the deceased which had cuts at the back of the neck. Moreover, non-production of the government chemist analysis of the blood was not fatal, contended counsel.

15. Ms. Okok affirmed that the evidence of PW1 and PW5 revealed the motive behind the deceased's death, being that the appellants had harboured a grudge against the deceased because they suspected that he was party to the killing of the 2nd appellant's son, who was also husband to the 1st appellant and a brother to the 3rd appellant. Further, according to PW1, the 2nd appellant had threatened that there would be another death in that household following the death of his son. Counsel asserted that evidence of a trail of blood leading to the 1st appellant's house and of attempts to conceal the blood stains by washing them away pointed to the appellants' guilty mind. It was also submitted that the prosecution had discharged its burden of proof beyond reasonable doubt hence the appellants were properly convicted.

16. Concerning sentencing, Ms. Okok submitted that the death sentence was the mandatory sentence at the time, having been imposed on 24th March 2016, way before the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic & 4 others* [2017] eKLR, which held that the mandatory nature of the death sentence was unconstitutional. In any case, counsel contended, the appellants had opted not to mitigate and the matter meets the threshold of a death penalty, the appellants having killed the deceased in cold blood.

17. We have considered the record of appeal and the submissions made by the parties and have distilled the issues for determination being whether the prosecution proved its case beyond reasonable doubt in the absence of a post-mortem report, and whether the appellants deserve a sentence reduction in line with the decision in *Francis Muruatetu*(*supra*). Before delving into these issues, we note that one of the grounds of appeal alleges that the learned Judge failed to comply with section 200(3) of the Criminal Procedure Code, although there were no submissions on the same. The section provides that where a succeeding Magistrate or judge commences proceedings where part of the evidence has been recorded, an accused person may demand that any witness be re-summoned and re-heard. Contrary to the appellants' allegations, the proceedings indicate at page 34 of the record that before the learned Judge proceeded with the matter, the provisions of section 200 of the Criminal Procedure Code were explained to the appellants and they agreed to proceed from where the previous Judge had stopped. Therefore, nothing turns on that complaint.

18. In determining the issues, we have identified we are aware of our role as a first appellate Court as was stated in *Reuben Ombura Muma & another v Republic* 2018] eKLR;

> "This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

19. The appellants contend that the prosecution having failed to produce the post-mortem report, the cause of death was not proved and hence the case was not proved beyond reasonable doubt. They further allege that there was no evidence to link them to the death of the deceased. In response, the prosecution asserts that the appellants were convicted based on strong circumstantial evidence linking them to the death of the deceased. In evaluating this aspect of the matter, the learned Judge observed that even though the post-mortem report would normally confirm details of the deceased, including the fact and cause of death, in this case there was no doubt that the deceased had died upon bleeding profusely from injuries on his neck. The learned Judge further noted that the post-mortem report had not been produced because the doctor who had performed the post-mortem was not bonded in good time, and the court declined to give the prosecution further adjournments after granting them the same on several occasions. In the circumstances the learned concluded that in order for justice to be done to all, it was paramount that the court considers the circumstances surrounding the case. According to the learned Judge, it was possible to convict a person for murder in the absence of a post-mortem report, but on the basis of strong circumstantial evidence. Reliance was placed on *Republic v Chweya* (*supra*) And *Republic v Charles Tatino Hesa* Criminal Case No 95 of 2010 for this proposition.

20. We concur with the holding of the learned Judge. In the absence of direct evidence linking the appellants to the commission of the offense, there is no doubt that the court had to resort to circumstantial evidence. The evidence adduced at the trial was that the deceased was last seen with the appellants before his death. PW2, a 16-year-old minor testified that on the night of the incident he was at the deceased's home when a child was sent to inform him that the accused would be sleeping at the 1st appellant's home. Since he could not sleep alone, he decided to join his uncle at the 1st appellant's home where he found all the 3 appellants. PW4 also confirmed that on the material night, the deceased had eaten at the 2nd appellant's home and gone to the 1st appellant's home where the 3rd appellant also stayed. PW1, PW2, PW3, and PW4 all testified that a trail of blood was traced from the deceased's home to that of the 1st appellant, and that there was evidence of attempts to conceal or erase the blood in the house of the 1st appellant. Further, it was revealed that a pair of trousers belonging to the deceased, a 'top' for the 1st appellant and a headscarf for the 2nd appellant were discovered buried in soil in the compound by a worker some four weeks later. The fact of the deceased's death was never in contest and the nature of the injuries visible on his stricken body established that the crimson trail of blood emanated therefrom and those injuries were fatal.

21. Doubtless, the foregoing evidence shows that the deceased was last seen with the appellants and hence they were duty bound to explain what happened to the deceased. As this Court stated in *Mungai v Republic*[2021] KECA 51 (KLR) [Per Nambuye, Karanja & Kiage, JJ.A.]

> "14. The presence of a dead woman half buried in a house, with a shovel, a panga and a knife with the sharp items stained with the blood of the blood group of the deceased, are facts which the law of evidence recognizes as being especially within the knowledge of the appellant as the owner of the house who was present at the material time and was obligated to explain. Falling in the same category are the bloodstains that were found on the appellant's shoes and shirt. Only he could explain the ghoulish find of the body and the damning presence of the deceased's blood on his personal apparel.

15. Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the Evidence Act permits the court to presume the existence of any fact which is likely to have happened, regard being had to the common course of natural events and human conduct.

16. The law on circumstantial evidence is quite settled that all the inculpatory facts must lead irresistibly to the conclusion of the guilt of the person accused and that there should be no co-existing facts or circumstances that weaken that inference or that are capable of explanation on any reasonable hypothesis consistent with his innocence. See *Rex v Kipkering Arap Koske & anor* [1949] 16 Eaca, 135, *Simon Musoke v Republic* and *John Chebii Sawe v Republic*.

[...]

18. It has been stated and is worth repeating that calling evidence circumstantial does not lessen its value or lower its probative force. The co-existence of relevant facts can form a chain so strong and so complete as, to leave no doubt whatsoever as to the perpetrators guilt. With respect, this in one such case".

(Emphasis ours)

22. We are also persuaded by the holding of Makhandia, J Mohammed & K I Laibuta, JJA in *Moingo & another v Republic*[2022] KECA 6 (KLR). The learned Judges dealing with the "last seen Doctrine", a feature of circumstantial evidence, as follows;

22. "The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of *Moses Jua v the State* [2007] PELR-CA/11 42/2006)".

23. In view of the foregoing authorities, and the evidence that the 2nd appellant had threatened that there would be another death in the family, following the killing of his son by mob justice, we are satisfied, as was the learned Judge, that the evidence implicating the appellants was overwhelming. Accordingly, their conviction was proper, and the appeal against it is dismissed.

24. Last is whether the sentence should be reduced in light of the Supreme Court decision in *Francis Karioko Muruatetu*(*supra*). As correctly submitted by the prosecution counsel, by the time the impugned judgment was rendered, Muruatetu(supra) had not been decided. We cannot therefore fault the learned Judge for following the statute law then in existence. We note that the appellants chose not to mitigate at the trial court, but we cannot hold it against them. They may well have considered it an exercise in futility given the mandatory sentence.

25. In the circumstances, while the appeal on conviction fails, it succeeds on sentence. We quash the death sentence and order that the file be remitted to the High Court at Eldoret for purposes of a full

resentencing hearing. The matter shall be mentioned before the Presiding Judge of that court within fourteen (14) days hereof for appropriate directions as to the said resentencing hearing.

Order accordingly.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF MAY, 2022.

P. O. KIAGE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR