RKB v Republic (Criminal Appeal 27 of 2015)
[2022] KECA 925 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KECA 925 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 27 OF 2015

MA WARSAME, F SICHALE & J MOHAMMED, JJA

AUGUST 19, 2022

BETWEEN

RKB ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Meru (Lesiit,J.) dated 30th May, 2013 in CRA no. 58 of 2005)

JUDGMENT

1. The appellant, RKB faced a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. In the information, it was alleged that on May 23, 2005at Antibankai village, Atimba Sub-location in Meru North District of the then Eastern Province, he murdered Joseph Murungi M'Ikiara.

2. The trial was initially conducted by Sitati, J. (now retired) and partly heard by Ouko,J (now SCJ). However, on July 18, 2012, Lesiit, J. (now JOA) ordered that the case be heard *de novo*. Subsequently, on May 30, 2013, the appellant was found guilty of the offence of murder. Further, the court found that the appellant's age was "not clearly known" and sentenced him to serve at the President's pleasure. The appellant was dissatisfied with the said outcome, hence this appeal.

3. In an undated homegrown Memorandum of Appeal, the appellant listed eight (8) grounds of appeal of which we shall advert to later in this judgment.

4. On November 9, 2021, the appeal came before us for plenary hearing. Mr. Mutegi Mugambi, learned counsel for the appellant highlighted the written submissions dated November 8, 2021. Mr. Masila, learned counsel for the State not having received the appellant's submissions did not file submissions in response. However, he opted to forego the filing of written submissions and opted to proceed orally.

5. Mr. Mugambi's submission was that the appellant's conviction was based on circumstantial evidence and that the only reason for the appellant's conviction was the purported dying declaration made to PW1, the deceased's daughter. Counsel submitted that whereas PW2 was the first to get to the scene, the deceased could not answer his questions; in refuting the dying declaration, counsel pointed out that whereas PW1's evidence was that the deceased died in the police vehicle, he wondered why the deceased did not talk to the police; that the Inspector who received the appellant from PW2 and who received the murder weapon was never called as a witness and that the trial court erred in refusing the appellant's defence of alibi.

6. In opposing the appeal, Mr. Masila pointed out that PW2 was present at the scene and he saw the appellant who was armed with a panga; that the deceased made a dying declaration to PW1; that no witness was left out deliberately as one had died and the other one could not be traced although they had testified before the trial commenced denovo; that the post mortem report gave the probable type of weapon as a panga, and finally that, the defence of alibi was not raised at the earliest opportunity.

7. We have considered the record, the appellant's written submissions, the oral submissions made before us and the law.

8. This being a first appeal, our mandate as a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case is as set out in the oft-cited decision of *Okeno vs. Republic [1972] EA 32*, where this Court stated thus:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions....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 conclusions. Only then can it decide whether the magistrate's findings and conclusions 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 ..."

9. Suffice to state that the deceased was hacked to death on May 23, 2005. The deceased's daughter, Mari Nchoro (PW1) arrived at the scene after having been called. She found the deceased's leg and hand chopped off and the parts placed by his side. According to her, the deceased informed her that he had been cut by Robert (the appellant herein). At the time, the deceased was clear that he would not get to Meru while still alive. As she accompanied her father to hospital in a G.K. vehicle, she witnessed him breath his last.

10. The Assistant Chief of the area, Gervasio Kiberia (PW2) was also at the scene, having been called. He too found the deceased's leg and hand having been chopped off. He arrested the appellant.

11. The Executive Officer of the court produced the post mortem report as the basis for invoking Section 77(1) and Section 33 of the *Evidence Act*, which had been laid by P.C. Joshua Kiambati (PW4) who could not trace Dr. Ringera who carried out the post mortem on the body of the deceased and carried out the appellant's age assessment. According to the doctor, the deceased died due to massive bleeding from major cuts. The P.3 form filled on 14th June, 2005 gave the appellant's age as "probably 18 years old"

12. In his sworn statement of defence, the appellant told the trial court that on the fateful day, he left his home at 7 a.m. His mission was to pluck miraa at a village called Antubankui. He returned to his home at 5 pm but he was arrested by P.W.2 for no apparent reason.

13. In summing up the evidence, Lesiit, J (as she then was) found that:

> " There was no eye witness of the incident. The first person at the scene of incident from those who testified was P.W.2, the Area Chief. He found the accused with a panga and the deceased on the ground with the hand and leg of the right side already cut. PW3 was next at scene and found deceased alone. PW1 followed and found PW3 and her father the deceased alone. Even though there was no eye witness, there was evidence that the accused was found at the scene with a probable weapon and with deceased with the amputated leg and hand next to him.
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> In Abanga alias Onyango vs. Republic the court of Appeal quoting Rafaer case supra, with approval observed:
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> > " "In the case of Rafaeri Munya alias Rafaeri Kibuka vs. Reginam The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.
> >
> > This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence".
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> In the instant case, the accused was found with a panga with the deceased whose leg and hand of the right side had just been chopped off. He was found by the local chief who knew both well. He was arrested by the Chief and taken to the area D.O from where PW4 and other police officers took him away to custody."

14. On our part, we are in agreement with the learned judge's conclusion that the appellant was responsible for the death of the deceased.

15. On the alibi defence, the learned judge found:

> " "The Accused explanation was a denial. He put forward an alibi as his defence, that he was nowhere near that scene and further that he was not arrested anywhere near there.
>
> Evidence of his arrest by PW2 received corroboration from PW1 and PW4 who confirmed that accused was found detained by the Area D.O. It is to the D.O. that PW2 took the panga and the accused after arrest. It cannot be denied that the accused was arrested by the Area Chief soon after the incident at the very scene.
>
> I did not believe the accused alibi defence. He was telling an obvious lie. He was at the scene at the time deceased was grievously injured. His denial that he was not at the scene of incident does not assist him. PW2 was not shown to have had any reason to falsely implicate the accused. They had no grudge between them. I believed PW2 was telling the truth."

Again, we agree with the learned judge.

16. As regards failure to call material witnesses, again the trial count found:

> "'The prosecution has explained that Joseph Meme could not be called because he is deceased. The lady Beatrice could not be found as she had relocated. Unlike the cited cases, there was an explanation offered by the prosecution why the witnesses were not called. In the circumstances, an adverse inference that the prosecution left them out as their evidence would have been adverse to the prosecution case cannot be made in this case. Their evidence is in the previous proceedings and was in favour of the prosecution. I do not agree with the proposition by Mr. Omari, in view of the unique circumstances of this case. Nothing turns on this point."
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> And that:
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> > "'There was the dying declaration by the deceased to his daughter PW1. It was at the scene soon after the incident. The deceased informed the daughter that it was Robert who cut off his limbs. She said Robert even joined them in the police vehicle thereafter and that PW1 knew him very well and was clear in her mind that it was him who the father was implicating with the injuries."

17. In our view, the conviction was properly founded.

18. On the age of the appellant, Dr. Ringera who carried out the age assessment came to the conclusion that the appellant was "probably 18 years".

19. Given the inconclusive finding on the age of the appellant, we too think that it was only proper that his age be taken as being below 18 years. Accordingly, the order of detention at the President's pleasure was well founded.

20. The upshot of the above is that we find no merit in this appeal.

21. It is hereby dismissed.

22. This judgment has been delivered in accordance with Rule 34(3) of this Court's Rules, J. Mohammed, J.A. having declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

M. WARSAME

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR