Aroko & another v Republic (Criminal Appeal 120 of 2016) [2022] KECA 1044 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1044 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 120 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

SAMWEL ONYANGO AROKO .... 1ST APPELLANT

PAUL OGALLO AROKO .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the judgment and conviction by the High Court at Homa Bay (D. S. Majanja, J) dated 7th July, 2016 and sentence delivered on 19th July, 2016 (H. A. Omondi, J) in Homabay Criminal Case No. 13 Of 2014)

JUDGMENT

1. The appellants, Samuel Onyango Aroko (A1) and Paul Ogallo Aroko (A2), are brothers. They were charged and convicted for the murder of Bernard Okeno Otango (the deceased) on 5th April, 2014 at Sigama village, Upper Kayambo Sub-location in Ndhiwa District. Upon conviction for that offence, which is contrary to Section 203 as read with Section 204 of the *Penal Code*, both were sentenced to death. This first appeal is against both conviction and sentence.

2. The case constructed by prosecution witness is as follows. The homestead of the deceased has five (5) houses. Two (2) belonged to him and three (3) to his sons, Charles Oluoch Okeno (PW1), Kevin Okeno and George Okeno. The houses of PW1 and the deceased are thirty (30) metres apart.

3. It was the testimony of PW1 that on 5th April, 2014 at about 11.00 am, he and the deceased got home, riding on a motorcycle. Upon arrival, he saw a person known to him, Aluoch Aroko, running towards the homestead. At that point, the deceased left the house of PW1. A1 then appeared in front of them wielding a panga. He reached the deceased first and attacked him by cutting him. The assailant then turned on PW1 and the two struggled, holding one another.

4. At that point PW1 felt a cut to his left shoulder. When he turned to see where the blow had come from, he saw Ogallo (A2). When PW1 asked A2 why he had assaulted him, A2 responded by telling him to leave the place and continued assaulting him. At this point A1 too was assaulting the deceased by cutting him with a panga. After A2 overpowered PW1 who had fallen down unconscious under the weight of the assault, he (A2) joined A1 in assaulting the deceased.

5. Upon regaining his consciousness, PW1 found the deceased lying on the ground, face down. At this point he did not see the assailants. Although the eyes of the deceased were open, his heart was not beating. PW1 believed him to be dead. PW1 got help and was taken to Ndhiwa District Hospital by a motorbike rider who had been called by one Kanoti Oketch, a cousin of PW1. He was treated and admitted in hospital for two (2) days.

6. Put on their defence, both appellants gave alibi defences. A1 denied going to the home of the deceased on 5th April, 2014. He told the court that on 3rd April, 2014 he visited his grandmother at a place known as Kakaeta where he stayed for four (4) days before returning home. It was then that he was told by his brother that police officers were looking for him. He surrendered to the police at Ndhiwa Police Station where he was told he was a suspect. He stated that he bore no grudge against the deceased nor did he know whether the deceased had any issues with his father. He further told the court that he was at his grandmother's place together with A2. A2 gave similar evidence.

7. The alibi evidence was supported by Jared Omondi (DW3), a cousin of both appellants. He resides at Kanyamwa Kakaeta. It was his testimony that both appellants came to their grandmother's home on 3rd April, 2014 to assist her and they worked there for four (4) days. That at no time did they go back to Sigama. Angelina Ouko Amollo (DW4) who knows both appellants as sons to her aunt (although she also refers to them as her grandsons) gave similar evidence to the appellants and PW3 regarding their alibi evidence.

8. In the appeal before us, the appellants contend that the learned trial Judge erred by misdirecting himself when evaluating the evidence thereby occasioning a miscarriage of justice; by failing to consider the evidence on record as a whole; by finding the appellants guilty of the offence charged when the evidence could not support it; by failing to note that the evidence of the independent witnesses was contradictory; and failing to consider the evidence adduced in defence. We are urged to allow the appeal, quash the conviction and set aside the sentence imposed.

9. At the hearing of the appeal, learned Counsel Mr. Sagwe appeared for the appellants. In submissions filed on behalf of the appellants, counsel Sagwe drills down on what he saw as inconsistences and contradictions in the prosecution case. The alibi evidence is also highlighted and the learned trial Judge is criticised for failing to evaluate and analyse the defence equally and fairly and failing to give reasons why he accepted one version of events and rejected the other. Various authorities were cited to us including- *Nyazi –vs- Uganda* [1991] EA 228, *Kamkenya & 4 others –vs- Republic* [1987] KLR 458, *Semende -vs- Uganda* 1992 EA 321 and *Nyamamba –vs- Republic* [1983] KLR 559.

10. Learned Prosecution Counsel Ms. Manyal submitted that the prosecution evidence was strong and that the learned trial judge was correct in concluding that the alibi evidence was unbelievable. That any inconsistencies and contradictions in the testimony of the prosecution witnesses were immaterial and of no consequence to the bigger picture. In support of this, the decision of *Njuki & 4 Others –vs-Republic* [2002] KLR 771 was cited.

11. This is a first appeal and the duty of this Court is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated by the predecessor of this Court 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 Vs. 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."

12. It is not in dispute that the deceased died on 5th April, 2014 and the cause of his death was a severe skull fracture as a result of a fatal head injury due to violent trauma. The substantial issue for us to consider is whether there was sufficient evidence to support the conclusion reached by the trial court that the appellants caused the fatal blows. In reaching the decision, the learned trial Judge found that there was direct evidence by PW1, PW2, PW4 and PW5 who witnessed the "entire ordeal."

13. The appellants' counsel, without elaborating, states that the evidence in chief of PW1 differed with the evidence he gave on cross-examination and re-examination and must therefore have been 'cooked'. With respect, throughout his testimony, PW1 was consistent on how the deceased was first accosted by A1 and assaulted using a panga; how he then held A1 so as to restrain him from further assaulting his father; how he was suddenly cut on his shoulder and on turning saw that it was A2 who had cut him with a panga; how he saw A1 continue to assault the deceased; how after he fell, A2 joined A1 in continuing with the vicious assault on the deceased.

14. What, however, emerges from the cross-examination of the witness is that some of the critical aspects of the evidence he gave were not captured in his statement to the police. We think that this would have been a serious flaw in the prosecution case had there not been three other persons who gave evidence on how they witnessed this broad daylight assault.

15. Let us turn to the criticism made of the evidence of PW2. He, too, was an eye witness. The appellants fault him for first stating that at the time of the attack, four (4) people were present being the deceased, PW1 and the two (2) appellants and another who was behind the deceased's house. This is said to contradict his testimony that he was alone at home. Yet the falsity of this submission becomes apparent when the testimony of the witness is taken as a whole;

> " I recall on 5th April, 2014, I was herding cattle at the gate, next to our house, later I came back home. I was alone at home. My father had gone to visit our uncle. He came back with Oluoch my brother. Oluoch was riding a motor bike."

He then narrates how the two appellants emerged from a banana plantation and assaulted the deceased.

16. We turn to the next eye witness, PW4. It is true that at one point in cross-examination she stated:

> " I saw people on that day. I do not recall people I saw."

17. This must however be contrasted with her strong and consistent evidence on how she saw the two (2) appellants assault the deceased and A2 assault PW1, corroborated by the evidence of both PW1 and PW2. Also relevant is her evidence that she knew the assailants as Onyango and Ogallo, neighbours who stayed in the same village.

18. PW5, another eye witness, is faulted by the appellants for testifying on matters that were not recorded in his statement to the police. He has an answer to it;

> " Some parts which I told the police are recorded. The police did not record some statements I made ..."

Critical, nonetheless, is that his evidence supports that of PW1, PW2 and PW4 in material particulars and the appellants were unable to point out any inconsistency. That downplays any effect that the inadequate statement to the police would have on the overall strength of the prosecution case.

19. In the end we uphold the manner in which the learned trial judge dealt with any inconsistencies and contradictions in the testimony of the eye witnesses. The learned judge held;

> " 15. I therefore find that the inconsistencies and contradictions in the testimony were immaterial and of no consequence to the bigger picture. In this respect I am guided by the Court of Appeal decision in *Thomas Kitsoo alias Katiba v Republic* MLD CA Criminal Appeal No. 123 of 2014 [2015] eKLR where the Court observed that;
>
> > We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See *Willis Ochieng Odero v Republic*, KSM CR. APP. NO. 80 of 2004). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.
>
> 16. Counsel for the defence also suggested that the witness testimony was inconsistent with the statements they made to the police as they did not contain certain facts which were disclosed in their respective testimony. In this respect, I am satisfied that the substance of their testimony and their initial statements to the police is that the deceased and PW1 were attacked by A1 and A2. It must be recalled that statements are taken by police officers who ask questions and record answers given to them. Accordingly, the witness may not record every conceivable fact he or she will testify in court. In light of the entire evidence, I am satisfied that the accused culpability is not in doubt."

20. In Criminal Appeal No. 106 of 2016; *Michael Saa Wambua & another v Republic* [2017] eKLR this Court observed as follows on how an alibi can be rebutted;

> " Our construction of section 309 of the *Criminal Procedure Code* and understanding of the principle in the Njuki & 4 Others versus Republic case, (supra) is that there are two ways in which an alibi defence put forth by an accused person may be rebutted. One of them is for the presentation to call evidence in rebuttal. The second is for the court to weigh it

against the totality of the prosecution case. The two courts below weighed the appellants' alibis against the totality of the prosecution evidence, and found the prosecution's evidence especially that tendered through the two eye witnesses Robert and Raphael truthful, credible and therefore ousted the appellants alibi defences. We therefore find no error in the two courts below rejecting the appellants' defences. We affirm that rejection."

21. In the matter before us, the appellants do not allege to have put forth the alibi defence at the time of the arrest or at any time prior to being placed on their defence. At the very latest that defence should have been put forth when the Investigating Officer (PW7) testified. From a common sense point of view, the prosecution did not have an opportunity to lead evidence to rebut an alibi defence that had not been presented. For that reason, the trial court could only deal with the alibi defence by putting it on a scale against the prosecution case.

22. We are unable to fault the following conclusion by the learned trial Judge;

> " 19. I have tested the alibi defence raised by the accused and against the direct testimony led by the prosecution. The prosecution gave clear and convincing evidence as to what happened on 5th April 2015. The incident took place in broad day light and was witnessed by several people. This was not a case of strangers attacking the deceased but rather well known neighbours who had a land dispute with the deceased. The principal witness, PW1 was barely a metre away from the deceased when A1 attacked him. A2 attacked him form (sic) the back and when he turned, he recognised him. The accused were so close to him that there was no chance of mistaken identity. His testimony was corroborated by the other eyewitnesses leaving no doubt as to their identity and actions."

23. In the end, we find no reason to interfere with the trial court's finding on conviction. We think and hold it to be on firm and safe ground.

24. As to the death sentence imposed, we take the view that it is deserved. There was a land dispute between the family of the deceased and that of the appellants, a dispute which was the subject of ongoing court cases. A civilised society must frown upon litigants settling civil disputes by violence and murder.

25. Accordingly, the appeal is dismissed on both conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022.

P. O. KIAGE

……………………

JUDGE OF APPEAL

MUMBI NUGI

……………………

JUDGE OF APPEAL

F. TUIYOTT

……………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR