Kai v Republic (Criminal Appeal 60 of 2020)
[2022] KECA 1283 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1283 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 60 OF 2020

P NYAMWEYA, SG KAIRU & JW LESSIT, JJA

NOVEMBER 18, 2022

BETWEEN

KAHINDI MWASAMBU KAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi delivered by Hon R Nyakundi on June 18, 2020 in Malindi High Court Criminal Case No 14 of 2016)

JUDGMENT

1. This is a first appeal lodged by the appellant, Kahindi Mwasambu Kai, against his conviction for the offence of murder and twenty-eight (28) years imprisonment sentence imposed by the High Court (Nyakundi J) in a judgement delivered on June 18, 2020. The particulars of the offence were that on the 20th day of September 2016 at Matsangoni Kona Mbaya village within Kilifi County, the appellant jointly with others not before court, murdered Harrison Mwandeje Tinga. The appellant, denied the charge and the trial commenced before Chitembwe J, and was subsequently concluded by Nyakundi J after compliance with section 200 of the *Criminal Procedure Code*. The prosecution called seven witnesses during the trial, while the appellant gave unsworn evidence in his defence and called two witnesses.

2. The prosecution's evidence was that the appellant, who was the deceased's nephew, was seen by the deceased's wife (PW1) going to buy palm wine with the deceased, and later taking the palm wine with the deceased at the deceased's house on the night of September 20, 2016. PW1 testified that she left the two taking the palm wine and went to sleep, and was later woken up by a bang, and upon going out of her room, found the deceased lying down outside with a cut with on the back of the neck. She testified that the appellant and his wife had earlier alleged that the deceased was a witch, and that he had caused the death of their child. PW5, a neighbor, also testified that the deceased purchased palm wine from

him on September 20, 2016, and that he later heard screams from the deceased's wife and went to the scene where he found that the deceased had been cut on the neck.

3. The deceased's brother, PW2, and one of the deceased's nephews, PW3, testified to having been informed of the death of the deceased; and that they went to the deceased's home and saw that he had been cut on the neck, PW3 also testified to the allegations made by the appellant and his wife during the burial of their child that the deceased was a witch and was the one who had killed the child, as did PW4, another of the deceased's nephew, and the deceased's son who testified as PW6. The last prosecution witness (PW7) was the investigating officer, and he testified that received the report of the death of the deceased, went to the scene where he saw the deceased with a cut on the neck, and interviewed the deceased's wife and later recorded statements. PW7 produced the post mortem report as an exhibit, as well as a reflector jacket and shirt recovered from the appellant's house.

4. In his defence, the appellant testified that on September 20, 2016 he was at his shop, and after closing it at 7.30 pm, he proceeded with his friends to watch a soccer match that was to start at 9.45 pm, which is where he heard of the death of the deceased. He denied killing the deceased. DW2 testified to being in the company of the appellant at Mwarabu where they watched soccer up to 11.30 pm, and where they also heard of the death of the deceased; while DW3 testified that he went to the scene of the crime after hearing screams therefrom, and found that the deceased had been cut on the neck.

5. The learned trial judge found that the evidence of PW1 as corroborated by PW2 to PW6 proved the death of the deceased, and that the autopsy proved that the death of the deceased was no accident. Further, that the evidence of PW1 was to the effect that the appellant was last seen with the deceased taking palm wine, and that there was no intervening factor displacing the appellant from the scene from the time he went into the home of the deceased and the time the screams rent the air about the deceased's death and that he failed to explain the circumstances and controvert the description given by PW1 of the circumstances leading to the death of the deceased. Lastly, that the wound targeting the deceased's neck was foresight on the part of the appellant that death would ensue to the victim. The High Court therefore reached the conclusion that the appellant committed the offence.

6. Being aggrieved by his conviction and sentence, the appellant challenged the decision of the High Court in his Memorandum and Grounds of Appeal on the grounds that the prosecution case was riddled with material contradictions; that the appellant was not properly identified as the assailant, and that the appellant was denied his right to disclosure under article 50(2)(a)(b)(j) and (m) of the *Constitution*. The appeal came up for virtual hearing on July 13, 2022, and the appellant was present appearing from Shimo La Tewa Prison, and was represented by learned counsel Mr Ngumbau Mutua, while the respondent was represented by learned prosecution counsel Ms Valerie Ongeti. The appellant's and respondent's counsel highlighted their respective written submissions dated July 6, 2022 and July 12, 2022.

7. The appellant's counsel urged that the learned trial judge relied on the evidence of a sole witness being PW1, whose circumstantial evidence did not meet the test set out in the case of *Ahamad Abolfathi Mohammed vs R* (2018) eKLR, as all the circumstances taken cumulatively did not form a chain so complete to ensure that the appellant could not escape liability. He noted that PW 1 stated that it was only the appellant who had visited the deceased while the investigating officer's testimony was to the effect that the deceased was visited by more than two visitors, and the evidence of PW6, was that there were three visitors who visited the deceased on the material night. In addition, that there was no eye witness and hence doubt as to who committed the offence. Lastly, that the learned judge denied the appellant the right to a fair trial as guaranteed under article 50 (2) (j) of the *Constitution*. The counsel argued that the prosecution introduced and relied on the discovery of a garment midstream during the trial which intended to further connect the appellant with the offence, which did not form part of the

exhibits. He concluded that all things considered, it was very unlikely that the appellant committed the offence. That there was only suspicion and suspicion was not enough to sustain a conviction.

8. The respondent's counsel placed reliance on the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR on the key ingredients of the offence of murder, and submitted that the death of the deceased was not in dispute and was attested to by PW 1, PW 2, PW 3, PW 5 and PW 6 who saw the body of the deceased with a deep cut on the neck and as evidenced by the post mortem produced by PW 7 which confirmed that the deceased died of massive haemorrhage secondary to assault. On the question of the death being unlawful, the counsel placed reliance on the case of *Republic vs Boniface Isawa Makodi* [2016] eKLR that every homicide is presumed to be unlawful except where the circumstances make it excusable, and that the deceased having died from a deep cut wound on the back of his neck and given the nature of the injuries, it could be safely concluded that the death was unlawful and was not authorised by law. On the appellant's participation in the commission of the offence, the respondent's counsel submitted that the court relied on circumstantial evidence, and that the appellant was the last person to be seen with the deceased person.

9. Further, that while the burden of proof always rested on the prosecution under section 107 of the *Evidence Act* to prove the case against the accused person beyond any reasonable doubt, there were instances when the law placed a duty on an accused to explain certain facts particularly those peculiarly within his own knowledge as provided in section 111 (1) of the *Evidence Act*. However, that when the appellant was put on his defence, he did not tender an explanation on what may have transpired on the material night as he was drinking the palm wine with the deceased. On the allegations made of the deceased being a witch, the counsel cited the decision in the case of *Patrick Tuva Mwanengu vs Republic* [2007] eKLR, that the belief in witch craft does not justify, deviation from law by private infliction of punishment on a suspected witch, except in cases where the accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been proved. That no such imminent danger was pleaded or shown in the present case. In any event that the deceased's injuries were severe in nature and could not be said to be accidental but a clear indicator that the attacker knew or ought to have known that the injuries inflicted would cause harm.

10. Lastly, on the denial of the appellant's right to information and disclosure, the respondent's counsel asserted that the appellant was represented at all times by an advocate during the trial and at no point was the element of lack of disclosure noted and neither did he raise any objection to non- availability of any material documents. Further, the prosecution was required to avail to the court all relevant evidence to enable the court make an informed as held in the case of *Bukenya & Other vs Uganda* (1972) EA 549. Therefore, that there was sufficient circumstantial evidence that pointed to the appellant as the only person who must have murdered the deceased.

11. In a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon as stated in *Okeno v Republic* [1972] EA 32:

> " 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 "

12. The main issues in this appeal are whether the appellant's conviction for the offence of murder was based on reliable and sufficient evidence and if his rights of disclosure were violated. The fact of the deceased's death is not disputed, nor the cause of the death, which arose from a cut to the deceased's neck, and the High Court based its conviction of the appellant as the person responsible for the

death on circumstantial evidence. The threshold required to be met in this regard was stated in *R vs Kipkering Arap Koske* [1949] 16 EACA 135 and *Sawe vs Rep* [2003] KLR 364 that such circumstantial evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Abanga alias *Onyango vs Republic* Cr Appeal No 32 of 1990 (UR) the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The said tests are:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. Similar tests were set out in *Ahamad Abolfathi Mohammed vs R* (supra). In the present case the main evidence of the appellant's participation in the death was that of PW1, that the appellant was seen drinking with the deceased earlier on the night that the deceased died. PW1 then went to sleep and was later woken up and found the deceased dead. There is thus an intervening period, on which the High Court found as follows:

> " ....In the instant case, the circumstantial evidence stems from the time accused person visited the home of the deceased at night on June 20, 2016 under the pretext that he wanted his company to enjoy a bottle of palm wine. Then comes the actual unlawful act of taking a panga and inflicting a fatal wound around the neck part of the body. There just was no time between the time of the murder and when (PW1) came out of the bedroom to save his life by taking him to the hospital. That cut wound occasioned instant death and the accused whom (PW1) expected to be at the scene had already taken flight. The unlawful act targeted the neck because of its vulnerability and the accused foresight was that death will ensue of his victim. The defence does not address the fact that in violently assaulting the deceased he did not intend to cause death or grievous harm. The accused therefore from the circumstantial evidence must reasonably have foreseen that death..."

14. However, a perusal of the record does not show any evidence adduced on the findings made by the High Court as to the events that happened during the intervening period, which appear to have been based on assumptions made by the court on the likely course of events. On the contrary, there appears to be contradictory evidence adduced as to what transpired that night. Upon cross examination PW1 stated as follows:

> " I cannot estimate the time it took before hearing the bang I can say about 2-3 hours. I saw my husband had fallen. I saw someone running away. I did not see Kahindi. After entering my house I didn't get out until I heard the loud bang. I did not see the person who was running properly. The jacket was inside while the reflector was on top. I saw the clothes at the time of killing. I'm seeing the clothes for the second time. After the police took the body we went to Kahindi's place and took the clothes..."

15. It is notable in this regard that PW1 had testified earlier that she could not see properly and that the lighting was from a hurricane lamp. PW6 testified that PW1 told her it was three males who had gone

to their home at 8.00pm including the appellant to talk to his father, and that one left. PW7 likewise testified that PW1 had told him that two people, one of them being the appellant had gone to the home at 7.00pm and one of them was not arrested. It is our finding that there were inconsistencies and gaps in the evidence adduced that created doubt and a break in the chain of circumstances, and that required to have been resolved in the appellant's favour.

16. On the alleged violation of the appellant's right to disclosure, this duty is provided for under article 50 (2) (j) of the *Constitution* as follows: "the accused has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence". This right and duty is normally exercised as a pre-trial discovery and case management process in criminal cases, and was explained in the case of *Juma & Others vs A G* [2003] 2 EA 461 as follows:

> "We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence. In this connection it is for the prosecution to establish special circumstances upon which any limitation to the right of access may be based. The state must adduce evidence in individual cases to establish precisely what documents or statements or premises to be protected and the basis for such limitation."

17. It is notable that there is no record of an application made by the appellant or his counsel to be availed any documents or list of exhibits before or during the trial that was denied by the High Court, for us to make a finding that there was a violation in this regard. Specifically, on the production of the shirt as an exhibit, the objection made by the appellant's counsel was as follows: "I object to the production of the shirt because it has featured nowhere in the proceedings". The objection therefore appears to have been as regards the relevance and basis of the said exhibit. The High Court admitted the exhibit and noted that the defence can substantiate it. It is notable in this regard that PW1 had testified that the appellant was wearing a reflector and shirt, which were later recovered from the appellant's house, and PW7 testified to having taken the items as exhibits, and there was therefore a foundation laid for their production as exhibits. We therefore find no merit in this ground of appeal.

18. In conclusion, we find merit in the appeal to the extent that the circumstantial evidence used to convict the appellant did not meet the required threshold, and the said conviction was therefore not safe. We accordingly quash the appellant's conviction for the charge of murder, and set aside the sentence imposed upon him of twenty-eight years imprisonment. The appellant is set free forthwith unless otherwise lawfully held.

19. It is so ordered.

Dated and delivered at Mombasa this 18th day of November 2022.

S GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P NYAMWEYA

.....

JUDGE OF APPEAL

J LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR