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Njoroge v Republic (Criminal Appeal 363 of 2019) [2022] KECA 1262 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1262 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 363 OF 2019

PO KIAGE, J MOHAMMED & M NGUGI, JJA

NOVEMBER 18, 2022

BETWEEN

SAMSON KAMAU NJOROGE .... APPELLANT

AND

AND REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale, (Chemitei, J.) dated 19th September, 2019 in HCCR NO. 21 OF 2012)

JUDGMENT

1. Samson Kamau Njoroge (the appellant) brought this appeal against his conviction and sentence of 25 years' imprisonment by the High Court at Kitale (Chemitei, J) for the offence of murder.

2. The appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence whereof were that on the night of 9th and May 10, 2012 at Naisambu area within Trans Nzoia County he murdered Alice Wangui Kamau (the deceased).

3. The prosecution's case hinged on the testimony of six (6) witnesses. (PW1), the father of the deceased testified that the appellant and the deceased had a personal relationship and had a child together in 2008.

   However, the appellant had neglected his parental responsibility as the father of the child, and the deceased had lodged a child maintenance suit against the appellant.

4. A text message received by Eunice Wairimu (PW2), an aunt to the deceased, on the material day (May 10, 2012) and sent from the deceased's phone prompted her together with the deceased's mother and sister, Peninah Wamboi Kamau, (PW3), to report the deceased as missing. The alarming text indicated that the deceased had been kidnapped, though it did not state by whom, and went on to assert that the deceased was tied up with a rope and was being raped.

5. Veronica Njeri Wamboi (PW6), was a house-help at the appellant's home. She testified that the appellant left for work on May 9, 2012 and did not go back home that evening but turned up at 6.30 a.m on the material day. He had then sent PW6 and his sister in law, one Lucy, to the shop to buy sugar. Upon her return from the shop, PW6 found the appellant washing his clothes, and thereafter, he proceeded to wash his car. PW6 testified that she found it strange that the appellant was washing his clothes. He had washed a shirt and trousers, the clothes he had worn when he left home the previous day. PW6 noticed that the clothes were not clean and had brown blood stains, so she re-washed them. At this point the appellant left for work but did not use his car as he usually did.

6. PW6 and the appellant's wife noticed that the padlock to the borehole in the appellant's compound was new and the key was missing.

7. On May 14, 2012, the police retrieved the deceased's body from the said borehole in the appellant's compound. A post mortem examination of the body of the deceased was performed by Dr Gakundi and the report was produced by Dr Okumu Moses (PW4). The findings of the post-mortem were that the body had multiple cut wounds on the scalp – right and left temporoparietal regions. The report indicated that the cause of death was "cardiopulmonary failure due to hemorrhage due to cut wounds on the skull."

8. In his unsworn statement of defence, the appellant stated that he met the deceased in Court on 9th April (sic), 2012, as they had a children's case for maintenance of their child; that thereafter he went on a drinking spree the whole night; that he slept in his car that night since the road to his home was muddy; that on the way home in the morning, his car had a puncture which he repaired; and that his clothes were dirty and muddy and when he got home, he showered and washed the clothes. He questioned why the results of the blood sample taken were not produced as well as the padlock and other items taken from his compound by the police.

9. In its decision, the trial court (Chemitei, J.) found the appellant guilty as charged and sentenced him to 25 years imprisonment.

10. Aggrieved by his conviction and sentence, the appellant filed the instant appeal in which he raises eleven grounds of appeal: that the learned Judge erred: by directing the parties to file written submissions as opposed to oral submissions in the presence of the appellant in open court; by not considering that crucial witnesses who could have corroborated the prosecution witnesses on the murder were never called to reach a just decision; by failing to take into account that the appellant's alibi defence was not considered; by failing to consider that the prosecution's case was based on doubtful, questionable, inconsistent, contradictory and untrustworthy evidence; by failing to appreciate that the cause of death was not directly attributable to the appellant; in finding malice aforethought when no such evidence was available on the record; and that the circumstantial evidence set out by the prosecution was capable of several hypothesis and was not to the required standards to be the basis of a sound conviction.

11. When the appeal came before us for hearing, learned counsel Mr.

    Tuiyott, appeared for the appellant while Mr. Mwenda Muriithi, the learned Prosecution Counsel appeared for the State.

12. In urging the appeal, Mr. Tuiyott pointed out that in the trial court's judgment, the learned Judge conceded that the Investigating Officer was not called by the prosecution to testify. Counsel asserted that this was a fatal omission in light of the fact that the Investigation Officer was a key witness. He cited the case of *Bwaneka v Uganda* [1967] EA 768 for the proposition that it was the duty of the prosecution to call as witnesses, the police officers who investigated the case and charged the accused.

13. Mr. Tuiyott further submitted that it was the evidence of PW5 that blood samples removed from the appellant's car were taken for analysis; that the prosecution closed its case without calling the Government Chemist as a witness or producing the results from the Government Chemist on the samples; that the blood sample taken could have been from the appellant or the deceased and it was necessary for the samples to be matched or linked.

14. Counsel also submitted that PW6 testified that on the fateful night, one Lucy was allegedly present. It was his submission that Lucy should have testified as a key witness.

15. As regards the appellant's defence of alibi, counsel submitted that the trial court did not consider the appellant's alibi; that the appellant stated that on the fateful night, he was out with his friends drinking; and that the appellant was not accorded an opportunity to summon any witnesses.

16. Mr. Muriithi opposed the appeal and submitted that the prosecution called six (6) witnesses who were adequate to establish the truth and prove the case beyond any reasonable doubt. Counsel also cited the case of Bwaneka v Uganda (supra) for the proposition that the prosecution should call all witnesses that are necessary to establish the truth. He conceded that the Investigation Officer was not called as a witness and that the blood sample analysis taken from the appellant's car was not produced as evidence.

17. As regards the appellant's alibi defence, learned counsel submitted that the appellant did not prove his alibi. Counsel concluded by urging the Court to dismiss the appeal as the six (6) witnesses proved the case beyond all reasonable doubt; and that the circumstantial evidence points to the fact that the appellant murdered the deceased.

18. This being a first appeal, we are required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and reach our own conclusion, always bearing in mind that we neither saw nor heard any of the witnesses and have to give due allowance. In the oft-cited case of *Okeno v Republic* (1972) EA 32 the predecessor of this Court stated that:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. (1957) E.A. 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 v Sunday Post*, (1958) EA 424)"

19. We have considered the record of appeal, the written and oral submissions by counsel and the authorities cited, and we believe that the following issues arise for determination:

    a. Whether the appellant was accorded a fair trial.

    b. Whether the circumstantial evidence relied upon by the learned trial Judge to convict the appellant met the threshold for finding a conviction based on circumstantial evidence.

    c. Whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses.

    d. Whether the appellant's alibi defence was ousted by the prosecution evidence.

20. The appellant alleges that he was not accorded a fair trial on the ground that he was not given an opportunity to make oral submissions at the conclusion of the trial. Instead, parties filed written submissions. We have perused the record and we note that the appellant was at all times represented by

counsel. Indeed, the learned Judge gave directions that both parties file written submissions. We note that at paragraph 20 of its judgment, the trial court noted that it had received closing submissions from the prosecution, but not from the appellant. Nothing in the record indicates that either the appellant or his counsel informed the Court that they wished to make oral submissions.

21. This Court finds nothing on the court record that demonstrates any miscarriage of justice or prejudice to the appellant; there is no evidence of any objection raised to the filing of written submissions or the manner in which the proceedings were conducted and this Court is therefore satisfied that the appellant was accorded a fair trial.

22. It is common ground that the prosecution case against the appellant primarily rests on circumstantial evidence. On circumstantial evidence, the approach we take is that established in a well-trodden path of this Court in numerous decisions. We take it from *Sawe v Republic* [2003] KLR 364); *Wambua & 3 others v Republic* [2008] KLR 142; *Mwendwa v Republic* [2006] 1KLR 137, *Kipkering Arap Koskei & Kirire Arap Matetu* [1949] EACA 135), *Peter Mugambi v Republic* [2017] eKLR, and *Dorcas Jebet Ketter & another v Republic* [2013] eKLR in which the following guiding principles were crystallized:

    i. The inculpatory facts must be incompatible with the innocence of the accused.

    ii. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

    iii. There must be no other existing circumstances weakening or destroying the inference; and that

    iv. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

23. We have considered the evidence before the trial court against the above principles. We note that the trial court took into consideration various incriminating factors that led it to conclude that the appellant murdered the deceased. These are, first, the appellant's testimony that indeed he was with the deceased on May 9, 2012 for a court hearing involving their child; the conduct of the deceased on the material day; the evidence of PW6 that the appellant was washing his clothes which was unusual; the brown stains on the appellant's clothes; the blood stains on the appellant's car; and the fact that the deceased's body was found in a borehole located inside the appellant's compound.

24. Having evaluated the evidence before the trial court, we are satisfied that the inculpatory facts in this case are incompatible with the innocence of the appellant, and are incapable of explanation upon any hypothesis other than that of guilt of the appellant. The evidence of the deceased's father, PW1, was that the appellant and the deceased had a son, and there was a children's case between them regarding the maintenance of the child. On the material day, the appellant and the deceased had an appearance in court on the case. PW2, the deceased's aunt, had received a message from the deceased that she had been tied up and was being raped. PW3, the deceased's sister, had received a message from PW2 concerning the incident and they had reported the matter to the police. The evidence of PW6, who had been employed to do housework in the appellant's house, was that the appellant had not returned home on May 9, 2012 in the evening as he usually did. He had arrived the following day, Wednesday at 6.30 a.m and sent her to the shop to buy sugar. She had returned home to find the appellant washing his clothes, which was unusual. She noted that the clothes, which were on the clothesline, had brown stains and she decided to wash them afresh. The appellant had also washed his car, then left it at home when he went to work. An examination of the appellant's vehicle, according to PW5, showed that it had blood stains.

25. The evidence of PW5 was further that the body of the deceased was recovered from a borehole in the appellant's compound. PW6 had testified that she and the appellant's wife had noted that the borehole had a new padlock, whose key they could not find.

26. Our consideration of the totality of the circumstantial evidence tendered by the prosecution as summarized above leads us to the inescapable conclusion that the appellant was responsible for the assault on the deceased, and that he did so with malice aforethought.

27. Malice aforethought is defined in Section 206 of the *Penal Code* as:

> "(a) an intention to cause the death 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;
>
> c. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

28. From the injuries inflicted on the deceased, it is clear that the appellant intended to cause the death of or to cause grievous harm to the deceased. PW4 testified that the deceased had multiple cut wounds on the scalp. The injuries were evidently inflicted on the deceased by the appellant with the intent to kill him.

29. Further, the prosecution presented evidence of motive on the part of the appellant. While motive is not a requirement for the offence of murder to stand, it is helpful in establishing the element of malice aforethought. This Court in the case of *John Mutuma Gatobu v Republic* [2015] eKLR held as follows:

> "There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

30. The prosecution called upon the relatives of the deceased, including the father of the deceased (PW1) to prove that the appellant had a motive to murder the deceased. The appellant and the deceased had a child together, while from the record, the appellant was a married to another woman. From the statement by the appellant, he and the deceased had attended court on May 9, 2012 as they had a case regarding the maintenance of their child. From the evidence on record, this was the last time that the deceased was seen alive.

31. From the foregoing, we are satisfied that the mens rea of the appellant was proved beyond a reasonable doubt. The learned Judge did not err when he found that the injuries on the deceased were intended to cause her grievous harm, and therefore constituted malice aforethought and that motive for the murder was to avoid the responsibility of taking care of two families.

32. The appellant has also challenged his conviction on the basis that the prosecution failed to call crucial witnesses. In addressing a similar argument regarding the alleged failure by the prosecution to call crucial witnesses in a criminal trial, this Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR expressed itself as follows:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of

that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

33. In *Bukenya & others v Uganda*, the East African Court of Appeal held that:

    i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. [Emphasis supplied].

34. We have considered the appellant's complaint that the prosecution did not call a number of witnesses in support of its case. The uncalled witnesses include the Investigating Officer, the Government Chemist and one Lucy, the appellant's sister-in-law.

35. Section 143 of the *Evidence Act* provides that:

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The responsibility of the prosecution is to call witnesses who are sufficient to prove its case. In *Keter v Republic* [2007] EA 135, this Court held:

> " That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt

36. In the circumstances of this appeal, we find that the prosecution called a sufficient number of witnesses to prove that the appellant committed the crime for which he is charged.

37. Turning to the appellant's alibi defence, the position in law on the role of the Court at the trial and now this Court on appeal in instances where an accused person raises an alibi defence is as has been crystallized by the predecessor of the Court and reiterated by this court in numerous decisions including the case of *Leonard Aniseth v Republic* [1963] EA 206 at pg 208, para 9 Sir Ronald Sinclair, P expressed himself on this issue as follows:

> " ...A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer..."

38. In *Saidi v Republic* [1963] EA 6, it was held inter alia that:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law assume and burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable."

39. In *Seketoleko v Republic* [1967] EA 531 at page 533 paragraph FG Sir Udo Udoma, CJ.: had this to say:

> " As a general rule of law, the burden of proving the guilt of prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. The burden always rests on the prosecution.

In *Republic v Johnson* (1961) 3 All ER 969 the general principle of law applicable to an alibi defence was enunciated. It was laid down as a general rule of law that, if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence; and that the burden of proving his guilt remains throughout on the prosecution. As stated by this Court in *Victor Mwendwa Mulinge v Republic* [2014] eKLR:

> " ...it is the law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."

40. The appellant argued that the trial court ignored his alibi defence. An alibi defence seeks to disprove or cast doubt on the prosecution's case by showing, on a balance of probabilities that the accused did not commit the offence as he was not at the locus in quo. The alibi defence ought to be heard against the evidence tendered before the court. In this case, the alibi defence raised by the appellant was a mere denial and did not shake the overwhelming evidence tendered by the prosecution. The learned Judge did not therefore err in rejecting it. The appellant's appeal against conviction therefore fails and is dismissed.

41. As regards sentence, this being a first appeal, the Court is at liberty to consider whether the trial court properly exercised its discretion in sentencing the appellant. From the record, the appellant was sentenced to imprisonment for a term of 25 years. Counsel for the appellant asserted that the sentence meted out on the appellant was, in the circumstances, harsh and excessive. On the other hand, the respondent submitted that the punishment for murder prescribed in the Penal Code is death and that the sentence meted out was therefore lenient.

42. We have considered the sentence meted out on the appellant against the facts of the case. The facts show that the deceased, a young woman in her thirties, was attacked viciously and had multiple cut wounds on her scalp, leading to her death. The circumstantial evidence established that the appellant carried out the attack, then hid her body in a 30 meter deep borehole in his homestead. The young woman was the mother of his infant son. It was a needless, cruel and heartless crime. We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them with malice aforethought and that his conviction for murder was merited. We find that the sentence meted out on him was fair and proportionate to his crime, and we find no reason to interfere with the sentence.

43. In the result, the appeal fails in its entirety and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

……………………………**.**

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR