Ongaro & another v Republic (Criminal Appeal 50 of 2016) [2022] KECA 1248 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1248 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 50 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 4, 2022

BETWEEN

EDDY ODONGO ONGARO .... 1ST APPELLANT

ZEITUN ANYUNGO ODONGO .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (D.S. Majanja, J.) dated 10th February, 2016 in High Court Criminal Case No. 62 of 2013)

JUDGMENT

1. SA. A big, important-sounding name for a little boy who did not live much past his first month of life. He was deprived of life, according to the prosecution, by his parents, the appellants before us. Or, if the appellants' defence is accepted, he did not exist at all.

2. The information that the prosecution presented against the appellants, husband and wife, stated that in the period between the 20th and 27th day of August, 2013 at [Particulars withheld] Village, Ochimbo Hills in Homa Bay County, they jointly murdered SA. They were charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and were sentenced to death by the High Court sitting in Homa Bay (Majanja J).

3. Aggrieved by their conviction and sentence, the appellants preferred two separate appeals before this Court, being Criminal Appeal No 50 0f 2016- Eddy Odongo Ongaro v Republic and Criminal Appeal No 55 of 2016- Zeituni Anyungo Odongo v Republic. The appeals were consolidated at the hearing before us.

4. In a joint Memorandum of Appeal dated 18th November, 2019 and filed in Court on the same date by Georgine J. Imbaya, Advocate, on their behalf, the appellants raise four grounds of appeal: that the trial

court erred in law and fact in: holding that the prosecution had proved its case against them beyond reasonable doubt; convicting them based on presumption and circumstantial evidence not sufficient to justify any reasonable inference of guilt; disregarding their defence and merely dismissing it without considering and giving it due effect; and in passing a harsh and excessive sentence against them.

5. The theory of the prosecution case was that on July 16, 2013, the 2nd appellant gave birth to the appellants' third child, a son, whom they named SA. There were, however, differences between the appellants regarding the paternity of the child. Between 20th August 2013 and 27th August 2013, the appellants took the child to the Ochimbo Hills but did not return with him. He was never seen again.

6. The 1st appellant's father, Samuel Luang'o Ongaro (Ongaro), who passed away before the trial of the appellants, reported the child's disappearance to the police who visited the scene with the appellants and only recovered a baby's clothes. The baby's body was never recovered.

7. The prosecution case was presented through 7 witnesses. APC Corporal William Ruto (PW 2), was the officer in charge, Ndiru AP Camp. It was his testimony that Ongaro went to the camp on 2nd September 2013 with the 2nd appellant. Ongaro introduced the 2nd appellant as the wife of his son, the 1st appellant. He reported that his infant grandchild, whom he referred to as A, had disappeared. PW2 asked the 2nd appellant where the child was and she responded that she and the 1st appellant had taken him somewhere.

8. PW2 called Ngegu Police Post and gave the information to the in-charge, Sergeant Korir, who informed him that there were officers on patrol. PW2 agreed to meet at Nyangweso with other officers. With PC Waithaka (PW1), the 2nd appellant and the Assistant Chief of the area, they proceeded to Ongaro's home where they picked up the 1st appellant. The appellants led PW2 and his colleagues to Ochimbo Hills.

9. It was PW2's testimony that at the Ochimbo Hills, the base of which was swampy, forested with bushy thickets and sparsely populated, the 2nd appellant led them up the Hills to the place where she said that she and the 1st appellant had left the child. The 1st appellant followed them up the hill. They did not find any child but found pink baby trousers and a pink baby shawl, both of which had soil markings. Nothing else was found at the scene. PC Bett (PW3) took possession of the items and handed them over to the investigating officer, Inspector Odenyo (PW 7) who, after collecting all the evidence, caused the accused to be charged with murder.

10. PC Peter Waithaka (PW1), who was on patrol in the area, was informed by his superior officer that PW2 needed assistance in the Nyangweso area. He and PC Nelson Bett (PW3) joined PW2 at Nyangweso where they found him with Ongaro and the 1st appellant. They proceeded up Ochimbo Hills where they found the soiled baby trousers and shawl.

11. PC Nelson Bett (PW3) was on patrol with PW2 when they received a call to assist PW2 at Nyangweso. They found him with Ongaro and the appellants and proceeded to Ochimbo Hills. The 2nd appellant led them up the hill to the place where she stated she had left the child. PW3 recovered the pink baby trousers and shawl where the 2nd appellant stated she had left the child, but no child was found.

12. The appellants were certified fit to stand trial in a report prepared by Dr. Ayoma Ojwang (deceased) who had examined them on 16th September, 2013. The report was produced by Michael Ocholla (PW 4), a clinical officer.

13. Nancy Kulei (PW 6), the officer in charge of Ndiru Health Centre and custodian of the records at the facility, testified that on 16th September 2013, an officer from Homa Bay Police Station came to inquire whether the 2nd appellant had given birth at the facility. PW6 went through all the records and

confirmed that the 2nd appellant was admitted on 16th July 2013 and had attended the ante natal clinic four times. Her name was recorded in the Maternity Register as 'Cytony Anyunga' from Kanyiriema village/sub-location, aged 25 years and married. The clinic record indicated that this was her third pregnancy; she had labour pains before admission; and had delivered a live baby, at 9 months, on 16th July 2013 without any complications. No birth notification number was given for the child.

14. PW6 produced an extract of the Maternity Register (exhibit 6) for July 2013 and the Immunization Register (exhibit 7) which confirmed that the child had been immunized at birth. The Register, however, indicated that the mother did not follow up on the other immunizations. The baby had been registered as 'Baby Z', and the father was recorded as 'Eddy Odongo'.

15. While the 1st appellant's father had died at the time of the trial, he had, following his report to the police regarding the disappearance of his grandson, recorded a statement with PW5, PC Ben Kiplagat, on 6th September 2013 at Homa Bay Police Station. The statement was admitted into evidence as exhibit 5.

16. PW7, the investigating officer, gave evidence essentially along the same lines as PW1, PW2 and PW3. He stated that he had, on 3rd September 2013, revisited the area where the baby clothes had been found with two other officers and the appellants but did not find anything. He had also searched the appellants' homestead and found no sign of the child. He had interviewed PW6 and confirmed that a child had been born at Ndiru Clinic. He had also established from statements made by the appellants that there were differences over the paternity of the child. Ongaro, the 1st appellants father, had surmised that the 2nd appellant may have conceived following a rape incident in Kisii where she had been working.

17. Upon considering the prosecution evidence, the trial court found that the appellants had a case to answer and placed them on their defence. The appellants gave sworn evidence and called one witness. The 1st appellant (DW1) testified that the 2nd appellant (DW 2) was his wife and that they had two children, BOO and WAO. He denied that they ever had any other children or a child by the name SA. It was his testimony that between 20th and 27th August 2013, he was doing his normal work as a boda boda rider and he was surprised to be arrested. He stated that there was bad blood between him and his father, Ongaro, who said that he was born out of wedlock and wanted him to get out of the home.

18. The 2nd appellant denied that she had delivered a child known as SA, asserting that she had only had two children with the 1st appellant. On 2nd September 2013, she was at home when her father in-law, Ongaro, came with police officers and arrested her and the 1st appellant. She had accompanied her father in law and the police to Ochimbo Hills. She denied knowledge of the baby clothes recovered at the scene. She further denied that she had worked in Kisii or anywhere else.

19. The 1st appellant's mother, Silpah Adhiambo Ongaro (DW 3), the wife of Ongaro, testified that the appellants were married and lived in the same homestead as she and Ongaro. She supported the 1st appellant's contention that the relationship between him and Ongaro was acrimonious as she gave birth to him before she married Ongaro. She further supported the appellants' defence that the 1st appellant had not given birth to any other child apart from BOO and WAO.

20. Upon considering the above evidence, the trial court was satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. It accordingly found them guilty of the offence of murder and sentenced them to death.

21. Miss Imbaya appeared for the appellants at the hearing of their consolidated appeals. There was no appearance for the State, though served. Ms. Imbaya relied on written submissions dated 18th November, 2019.

22. The appellants submit that the burden of proof in cases of murder is on the prosecution to prove that the appellants caused the death of the deceased, and that they did so with malice aforethought. While the prosecution case was that the appellants murdered a child known as SA, no evidence was tendered to show that this was the name of the deceased. The evidence of PW6 was that no notification of birth was given for the alleged child, while PW7 testified that he searched the appellants' house but found no signs of a child. It was the appellants' submission that despite the fact that a child's clothes were recovered from Ochimbo Hills, there was no indication that the said clothes belonged to the deceased.

23. The appellants submit further that the prosecution did not produce any evidence that a child had been born and was alive for one and a half months. They observe that the records produced by PW6 indicated the name of the mother was Cytony Ayunga and Zeitun Ayunga, and further, that PW6 denied having seen the 1st appellant in hospital. The appellants submit that despite these discrepancies, the trial judge concluded that a child was born to the 2nd appellant and that the 1st appellant was the father.

24. The appellants further submit that the trial court had shifted the burden of proof to them by requiring them to explain what really transpired. Further, that the trial court had erred by relying on circumstantial evidence to convict them. No-one saw the appellants murder the child; there were no photographs of the scene at Ochimbo Hills; nor were there indications of a grave or bones. The trial court could not therefore rely on circumstantial evidence as there was no child in the first instance, which is why a body was not found.

25. Regarding the death sentence meted out on the appellants, it was submitted that the Supreme Court in *Francis Francis Karioko Muruatetu & another v Republic [2017] eKLR* had declared the mandatory death sentence unconstitutional. The appellants submit that in the event that this Court finds the appellants guilty, it should consider the period the appellants have spent in custody and refer the matter back to the High Court for resentencing.

26. We have considered the record of appeal and the submissions by the appellants. As the first appellate court on this matter, we are under an obligation to re-evaluate the evidence and reach our own conclusions. In doing so, we are required to bear in mind that we have neither seen nor heard the witnesses, which the trial court had the advantage of doing- see *Okeno v Republic [1972] EA 32*.

27. The appellants have raised four main grounds of appeal which correspond to the four issues that we believe arise for determination in this appeal. The first is whether the trial court erred in relying on circumstantial evidence to find that the prosecution had proved its case against the appellants beyond reasonable doubt; whether the circumstantial evidence was sufficient to raise a reasonable inference of guilt against them; whether the trial court had ignored the appellants' defence; and finally, whether the sentence imposed on the appellants was harsh and excessive.

28. In order to make a finding that an accused person has committed the offence of murder, the trial court must be satisfied, beyond reasonable doubt, that the accused persons committed the unlawful act that caused the death of the deceased; and that the accused persons committed the said act with malice aforethought- see *Anthony Ndegwa Ngari v Republic [2014] eKLR* in which this Court held that:

> "For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought."

29. Before addressing any other issue in this appeal, we must first address a question critical to the prosecution case against the appellants: whether a baby known as SA was ever born to the appellants. The evidence before the trial court, which we have considered, is that the Maternity Register (Exhibit 6) for the month of July 2013 showed, at entry No 9, that a child had been born to a parent known as 'Cytony Ayunga.' The said Cytony Ayunga had been admitted to the health centre on 16th July 2013. She had a normal delivery of a full term male child. No notification of birth was issued, but this was not unusual as the Register showed that no birth notifications were issued on that day.

30. Exhibit 7, the Immunisation Register also placed before the trial court by PW6, showed that the birth of a male child, 'Baby Z', was registered, with 16th July 2013 as the date of birth. The name of the father was recorded in the Register as 'Eddy Odongo' while the name of the mother was recorded as 'Zaituni Ayunga'. The child was given the initial polio vaccination but was not brought back for further immunization.

31. Having considered this evidence, we are unable to fault the conclusion reached by the trial court that from his perusal of the two registers:

> "Despite the spelling mistakes, the two registers read together recording the birth and vaccination of the child leave no doubt that a male child was born to Zeitun and that the father was Eddy. The fact that no notification of birth was issued was not irregular as it is evident that the birth notifications were also not issued for the other children recorded in the registers. The truthfulness of the record was also corroborated by the fact that Zeitun had given birth at the health center twice before, a matter confirmed by Eddy.
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> 15. I also find that PW6 C was an honest witness. She did not know the accused personally and had no reason to lie or alter records to the detriment of the accused. l therefore find and hold that Zeitun gave birth to a male baby boy on is" July 2013 and that the contemporaneous record reflected that the father was Eddy and that after the child was born he was not brought back to the clinic for further vaccination. l therefore reject the testimony of the accused and DW3 that Zeitun did not give birth to a baby boy. I also find that the reference to the child as 'Baby Z' or the absence of the child's name or denial by the accused that the child was known as SA does not take away from the basic fact: that Zeitun gave birth to a baby boy who is the subject of the information before the court."

32. We agree with these findings of fact by the trial court. PW6, the health officer in-charge at Ndiru Health Centre, produced the Maternity and Immunization Registers for July 16, 2013. A child, recorded in the Register as 'Baby Z', had been born at 1.45 a.m. on that day. He was born full term, and was the only child recorded as having been born on that date. He had received his first immunization, but the evidence of PW6 was that he was not taken back for other vaccinations.

33. While the name of the mother indicated in the Maternity Register was 'Cytony Anyunga,' we are satisfied that it is the 1st appellant who gave birth at the clinic to 'Baby Z' and indicated his father as 'Eddy Odongo'. The trial court, in our view, correctly found that the evidence of PW6 was credible and reliable with respect to the birth of the child.

34. Regarding the death of the child, the evidence presented by the prosecution is that Ongaro, whose statement had been taken and was produced by PW5, had reported the disappearance of his grandson, whom he referred to as A, to the police. The evidence of PW3 and PW5 was that Ongaro had made the

report in the company of the 2nd appellant. On 2nd September 2013, PW2 and PW3, in the company of other officers and the appellants, had conducted a search for the baby at the Ochimbo Hills, a swampy, bushy area. The evidence of PW3 was that the 2nd appellant had led them up the hill to the place where she said that she and the 1st appellant had left the baby. While the search did not result in the recovery of the baby or his body, it had resulted in the discovery of baby clothes, a pair of soiled pink baby trousers and a pink baby shawl.

35. In addressing the issue whether the appellants had caused the death of the baby in view of the fact that a body was never found, the trial court observed as follows:

> " 18. The fact that the body of the baby was never found does not automatically exculpate the accused. The Court of Appeal in Dorcas Jebet Ketter and Another v Republic ELD CA CRIM APP. No 10 OF 2012 [2013] eKLR quoted with approval the decision of the New Zealand Court of Appeal in R v Harry [1952] NZLR 11 (3rd Digest Supp) where the court stated that;
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> > At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

36. There was no direct evidence before the trial court that showed that the appellants had murdered their baby. However, there is cogent evidence that the appellants had a baby boy on 16th July 2013; and that baby had disappeared about one month and a few days after his birth. The 1st appellant's father had reported the disappearance to police. Upon a search conducted in the place where, according to PW3, the 2nd appellant stated that she and the 1st appellant had left the baby, pink baby trousers and a pink shawl were found at the scene.

37. There was no-one to identify them as belonging to baby Austin, the appellants having denied that he had been born at all. However, given the evidence that the area was swampy and bushy and far from habitation, there was no explanation for the baby clothes unless they had been left at the scene by the appellants. We observe that, as the appellants submit, there was indeed no body found at the scene. There is therefore no way of telling whether the appellants actually murdered the baby, or left him to die in the bushy, swampy area, either from exposure or from wild animals whose tracks the searchers, according to PW3, noted at the scene.

38. Whatever the manner of the child's death, the fact of the appellants leaving a child of one month and a few days outside in the bush is sufficient demonstration that they caused his death, and that they did so with malice aforethought, defined in section 206 of the *Penal Code* as follows:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> (a) an intention to cause the death of 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;... (Emphasis added)

39. The core of the appellants' challenge of their conviction is that the trial court relied on circumstantial evidence to convict them. It is correct that there was no direct evidence linking the appellants to the death of the infant. Indeed, as the trial court found, no body was found at the scene. The appellants argue that no body was found because no baby had been born to them. We have already found, however, as did the trial court, that a baby had been born to the 2nd appellant on 16th July 2016. The child had received the first immunization but was never taken back for others. With respect to his death, the only evidence available was circumstantial: the report of Ongaro to police; the evidence of the police officers who searched the Ochimbo Hills with the appellants and Ongaro; the pink baby trousers and pink shawl found at the scene.

40. The principles to be applied in determining whether or not to rely on circumstantial evidence were set out by this Court in Abanga alias *Onyango vs Republic C.A No32 of 1990* (UR) as follows:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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;
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> 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."

41. In *Chirchir v Republic (Criminal Appeal 51 of 2018) [2021] KECA 1 (KLR)* (23 September 2021) (Judgment) this Court held that:

> "On circumstantial evidence, this Court has over the years developed and distilled the principles applicable in cases turning solely on circumstantial evidence. The principles are that; to justify the inference of guilt, the evidence must irresistibly point to accused as the perpetrator of the crime, that inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, that the chain of events must be so complete that it establishes the culpability of the Appellant, and no one else."

42. The circumstantial evidence before the trial court, in our view, regarding the conduct of the appellants in relation to the child leads to the inescapable conclusion that the inculpatory evidence is incompatible with the innocence of the appellants. Once it was established that a child had been born to them; that the child had disappeared; that it had been taken to the Ochimbo Hills; that clothes belonging to a baby had been found at the scene where the 2nd appellant and her father in law led the police in conducting a search for the child, it was impossible to come to any conclusion other than that the appellants had, with malice aforethought, caused the death of their child.

43. Which leads to the final issue for consideration in this appeal: whether the trial court had considered or had disregarded the appellants' defence. The evidence of the appellants and their sole witness, the mother of the 1st appellant, was to deny that a child had been born to the appellants. The trial court

considered this defence. In the face of the direct evidence of PW6 regarding the birth of the child, however, the trial court found, correctly in our view, that this denial could not displace the prosecution evidence regarding the birth of the child. In the circumstances, we find no basis to fault the trial court for dismissing the appellants' defence.

44. In the result, we find no merit in the appellants' appeal against conviction, and we accordingly dismiss it.

45. The final ground raised by the appellants relates to the death penalty imposed on them. The decision of the trial court predates the Supreme Court decision in Francis Kariokor Muruatetu & Another vs Republic (2017) which declared the mandatory nature of the death sentence for the offence of murder under section 203 as read with section 204 of the Penal Code unconstitutional.

46. We note from the record that following the conviction of the appellants, they were not given an opportunity to mitigate, the trial court having observed that the death penalty for the offence of murder is mandatory. The Supreme Court in Francis Karioko Muruatetu & Another v Republic (supra) held that courts must consider the circumstances of each case, the mitigation provided, if any, and impose an appropriate sentence, including the death penalty where the circumstances so require.

47. In this case, we are satisfied that the interests of justice require that the matter be remitted to the High Court to consider any mitigation offered by the appellants and pass an appropriate sentence in line with the directions of the Supreme Court in Muruatetu.

48. We accordingly direct that the matter be placed before the High Court in Homa Bay fourteen (14) days from the date hereof for the purpose of taking a date for mitigation and re-sentencing.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR