KENYA LAW
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Munge v Republic (Criminal Appeal 55 of 2022)
[2022] KECA 1377 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1377 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 55 OF 2022

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

DECEMBER 16, 2022

BETWEEN

WILSON KARIMI MUNGE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen delivered by Hon. Justice R. Nyakundi on 8h June 2021 in High Court Criminal Case No. 14 of 2018))

JUDGMENT

JUDGMENT OF THE COURT

1. This is a first appeal lodged by the appellant, Wilson Karimi Murage, against his conviction for the offence of murder and sentence of eighteen years imprisonment imposed by the High Court (Nyakundi J). The particulars of the offence were that the appellant and one Miriam Waithera Karimi (the 2nd accused) murdered Kevin Mburu Mwangi on February 11, 2018, at Bahati Village in Mpeketoni Division within Lamu County. The appellant and 2nd accused denied the charge and the trial commenced before Lagat-Korir J and was concluded by Nyakundi J The prosecution called ten witnesses during the trial, while the appellant and the 2nd accused gave sworn evidence in their defence and called one more defence witness.

2. Nyakundi J subsequently delivered a judgment on June 8, 2021, wherein it was found that the deceased was unlawfully killed by use of a rope used to strangle him so as to disguise it as an act of suicide, and that the cause of death was manual strangulation. Further, that the murder took place in broad light and the appellant was seen holding the deceased shortly before he was found dead. On the other hand, the evidence was not clear on the role played by the 2nd accused, or whether she was present when the appellant was seen with the deceased. The appellant was accordingly found guilty and convicted of the offence of murder, whereas the 2nd accused was acquitted of the offence. The learned judge

further found that the aggravating circumstances outweighed the mitigating features advanced by the appellant, and imposed a sentence of 18 years' imprisonment for the conviction.

3. Being dissatisfied with the said conviction and sentence, the appellant lodged the instant appeal, and has raised nine grounds of appeal in the memorandum of appeal dated June 25, 2021 filed by his advocate, which revolve around the issue of evaluation of the evidence adduced during the trial. The appellant's case is that there was no evidence either direct or circumstantial that was proved by the prosecution to warrant a conviction of the appellant; that the trial Judge imported his own evidence, created his own proceedings and failed to subject the evidence recorded by his predecessor to exhaustive scrutiny and prudent evaluation; that the appellant was convicted on the basis of uncorroborated, contradictory and inconsistent evidence, hearsay; and circumstantial evidence pegged on the testimony of PW1 which did not connect the appellant with the commission of the offence; and that the learned trial Judge failed to consider the appellant's explanation and testimony in his defence.

4. The appeal came up for virtual hearing on July 27, 2022. The appellant was present appearing from Malindi Prison and was represented by learned counsel Mr Alfred Omwancha, while the respondent was represented by learned prosecution counsel Valerie Ongeti., who was holding brief for learned prosecution counsel Ms R N Karanja. Mr Omwancha highlighted his written submission dated July 20, 2022, while Ms Ongeti relied on submissions dated July 25, 2022 filed by Ms R N Karanja.

5. Mr Omwancha, while placing reliance on various decisions on the burden and standard of proof in criminal cases, including *Stephen Nguli Mulili v Republic* [2014] eKLR, *Miller v Ministry of Pensions* (1947) 2All ER 372 and *Bakare v State* (1987) 1 NWLR (PT 52) 579, submitted that the fact of death was not in question, that the cause of death was indicated in the post-mortem report as suffocation, and that the question was whether the suffocation was caused by the appellant. He argued that this fact was not proved, as there was no evidence as to where, when, why and how the appellant committed the alleged offence, other than circumstantial evidence, speculation, suspicions, assumptions and hearsay by the prosecution witnesses that was contradictory in nature. Further, that the prosecution failed to place the appellant at the scene of the crime at the time of the alleged murder, which was confirmed by PW3 who was the first witness at the scene, nor explain how the appellant was identified as the perpetrator when there were many people at the scene when the body of the deceased was discovered. Therefore, that the prosecution case was premised on circumstantial evidence that failed to meet the threshold set in the case of *Republic v Kipkering Arap Koske & another* (1949).

6. The counsel urged that the trial Judge's determination was not consistent with the evidence on record or applicable law, and that the learned Judge failed to consider and appreciate and evaluate the records of his predecessor (Korir J.) so at to determine the case on its merits. Additionally, the record was clear that no witness testified that the appellant was seen committing the alleged offence, and PW 3 and PW 7 testified to have seen the deceased alive ten (10) minutes prior to him being found dead.

7. The Respondent's counsel's on her part submitted the it was not contested that the deceased, a child aged 11 years and nephew to the appellant, died on February 11, 2018 between the hours of 6.30am and 7.30 am, and that the testimony of the witnesses was in all material respects consistent and corroborative and spoke to the fact that the deceased child was playful and safe on the material morning before his lifeless body was discovered moments later. Further, that the witnesses truthfully spoke to the fact that they did not witness the murder and one or two of them may even have initially interpreted the issue as suicide. The prosecution counsel conceded that the case was founded on circumstantial evidence as there was no eye witness to the murder and placed reliance on the case of *Abanga alias Onyango v Republic* CRA No 32 of 1990 for the test when relying on circumstantial evidence to submit that the totality of the circumstances pointed to the appellant as the perpetrator of the offence.

8. In particular, that the witnesses were able to place the appellant at the scene moments before the discovery of the deceased's body, that the appellant had three days prior threatened the deceased's father, and that it was not disputed that there was a land dispute between the appellant's and deceased's families. Further that the appellant in his reaction and response to the death of the deceased showed no empathy and began fighting with the deceased's father who was his brother, insisting that the matter should not to be reported to the police. Therefore, that the ingredients of murder including malice aforethought were satisfactorily proved in this case. Lastly, that the trial court reproduced in the appellant's defence in its judgment and found it weak on account of the overwhelming evidence by the prosecution and hereby dismissed it.

9. 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 "

10. The main issue in this appeal are whether the appellant's conviction for the offence of murder was based on reliable and sufficient evidence. The fact of the deceased's death is not disputed, nor the cause of the death, which arose from strangulation, and that 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 v Kipkering Arap Koske* [1949] 16 EACA 135 and Sawe v 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 v 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."

11. The sequence of events as narrated by the prosecution's witnesses in this respect was as follows. PW3, the deceased' brother were on the material day, being February 11, 2018 looking after their cows and goats with the deceased, and PW3 left the deceased with the cows and went to the goats, and on coming back after ten minutes found the deceased had been strangled and there was a rope on his neck. PW4, the deceased's father was at home when PW3 came crying and told him that the deceased had hang himself, and on the way he met the appellant who told him it was a small matter and they almost fought. He then took the body of the deceased to the police. PW4 further testified that the appellant and his wife had threatened him three days prior to the death of the deceased.

12. PW1 the deceased's aunt; PW2 and PW7, the deceased's uncles; and PW5 and PW6 who were the deceased's neighbors, all testified to hearing PW3 calling out and crying, and that they went to the

scene and saw the deceased kneeling down with a rope round his neck. PW8, the deceased's mother, was at Mpeketoni town at the time and was called by the chief and village elders and came and saw the deceased at the scene. In addition, PW1 testified that she had earlier seen the appellant and 2nd accused standing nearby, and the appellant holding the deceased up; PW2 testified that he met the appellant shepherding his cattle while on his way to see the deceased's body; while PW5 testified that she had seem the appellant remove his cattle from his homestead and later heard screams from the direction of his house. Both PW1 and PW2 testified to having heard the appellant threaten the deceased's father three days earlier, while PW5, PW6 and PW7 testified as to the remarks made by the appellant on finding the deceased, as to why "they were crying and deceased had hang himself" and that there was no need to inform the police and that the deceased should be taken to the mortuary. PW9, the investigating officer, produced a sketch map and photographs of the scene of crime, while PW10 produced the post mortem report that showed that the cause of death was hypoxia secondary to strangulation.

13. The chain of events from the evidence adduced therefore, was that the deceased went to look after the cattle, was left on his own by PW3 for a few minutes, and the appellant was seen in the vicinity and with the deceased before PW3 came back and found the deceased dead, and kneeling with a rope round his neck. The post mortem report ruled out suicide, and the cause of death was found to be strangulation. The inference that could be drawn from the circumstances is that it was the appellant who caused the death of the deceased, as no other person was placed in the vicinity, and given the time lapse of ten minutes between the last time the deceased was seen alive and later found dead by PW3.

14. It is notable that the appellant did not point out the contradictions and inconsistencies he alleged existed in the prosecution's evidence and while in this respect the evidence of PW7 was not clear as to the time the deceased brought him tea and medicine on the material date, he did testify that the deceased thereafter left and he heard the screams 10 to 15 minutes later and went to the scene where he saw the deceased. We see no contradiction in this respect between his evidence and that of PW3.

15. In addition, the appellant in his defence appears to have provided an explanation for his movements between 5.00am and 6.30 am, when he stated that he went to sell milk at Mpeketoni. He stated that he was back at home by 6.30 a.m., and went to look after his livestock, and that he was proceeding to his home thereafter, when he saw people gathered and the deceased with the rope round his neck. His defence therefore did not break the chain of events that placed him at the vicinity and with the deceased at the time death, which was after 6.30am. We therefore find that the circumstantial evidence used to convict the appellant did meet the required threshold, and his conviction for the offence of murder was therefore safe. Lastly, we also note that the appellant did not make any submissions on the legality of the sentence, which is also upheld.

16. We accordingly find no merit in this appeal, which is hereby dismissed in its entirety.

17. It is so ordered.

Dated and delivered at Mombasa this 16th day of December 2022.

S. GATEMBU KAIRU, FCIArb

...

JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR