**Owiti & 2 others v Republic (Criminal Appeal 94 of 2018)**
**[2022] KECA 1412 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1412 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 94 OF 2018**

**MSA MAKHANDIA, PO KIAGE & F TUIYOTT, JJA**

**DECEMBER 16, 2022**

**BETWEEN**

**NICHOLAS OWITI ..... 1ST APPELLANT**

**ELISHA OUSA ..... 2ND APPELLANT**

**DENNIS OMONDI ..... 3RD APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu, (Majanja, J.) dated 27th November, 2017inHCCRC NO. 45 OF 2013.)***

## JUDGMENT

[1] Francis Ojowi Oudu (the deceased) died on May 6, 2012. A post mortem examination conducted on his body at 2.04pm on May 8, 2012 revealed that he had burns on both hands, on the right side of his abdomen and below the neck. He also had a dent on the right eye and a cut wound on the head. Dr MO. Gone who conducted the examination was of the opinion that multiple injuries sustained due to an assault had caused the death.

[2] Nicholas Owiti, Elisha Ousa and Dennis Omondi, the appellants, were charged with the murder of the deceased. In an information dated September 24, 2013, it was stated that on May 6, 2012, the three with others not before court, at Luanda K'otieno beach in Naya sub-location Rarieda district within Siaya county murdered the deceased.

[3] Emily Akinyi (PW1) is the wife of the deceased. On that fateful day, at about 10.00 pm, she was at home when the deceased escorted his cousin to his place of sleep. On his return, someone came and called out the deceased. He heeded the call. After a short while she heard some noise which she at first thought was of people cheering a football match, then she heard people shout "*Mwizi*". She stepped outside

and found the deceased being assaulted. He attempted to get away from the five people assaulting him but could only get so far. They caught up with him before he could reach the nearby Luanda K'otieno Police Post.

[4] As there was security light from a shop, PW1 was able to see the five assailants. They were Owiti (the 1st appellant), mzee (the 2nd appellant) and Omondi (the 3rd appellant). The 1st appellant held the deceased. The 2nd appellant held a panga and the 3rd appellant assaulted the deceased using a stick and rungu. A fourth person who was not before the court poured petrol on the deceased and the 1st appellant set him ablaze using a match stick.

[5] Barack Otieno Odera (PW2) was woken up from his sleep by noise of screams. He made his way to the source of the noise. He found a crowd there. The deceased, a person known to him, was under assault. The deceased called out the names of the people assaulting him. They are the three appellants, all persons known to the him because, just like himself, the three are local fishermen. He was able to see them from the security light from the shop and the moonlight of that night.

[6] It was the testimony of Brian Ouma Otieno (PW4) that on May 6, 2012 at about 1.00am he was woken up from his sleep by about 10 people who made forceful entry into his house. They took his clothes off and took them away. They also took away his kshs 1,500 and a phone and started assaulting him by cutting him. A police officer came to his rescue and managed to get him out of the house notwithstanding resistence from the assailants. PW4 knew some of the people who assaulted him. One of them was Mzee Ousa (the 2nd appellant). He says he was able to see him because of strong moonlight. Police officers took PW4 to the police station. While there a vehicle carrying the deceased, who was his step father, came. He had cuts and burns. He was rushed to hospital but he died before reaching there.

[7] Corporal Jeremy Misuli (PW5) was at the material time a police officer at Luanda K'otieno Police Post. He was woken up from his sleep at about 1.00am on May 6, 2012 by a woman called Dayo Orora who informed him that members of the public wanted to kill someone they suspected to be fishing using poison. He woke up his colleague PC Ireri and, together, rushed to the scene where they found about 50 people. One of them directed him to a house where someone was screaming for help. He found a door to the house shut but not locked. He opened it and introduced himself to three people who were in the room. As the room was dark, he switched on his torch. He knew one of the three people who were assaulting the person. He was Elisha Ousa (the 2nd appellant), a fisherman within Luanda K'otieno. He had known him for almost 3 months. Notwithstanding his plea, the three continued assaulting the victim using pangas and rungus. The 2nd appellant had a panga. He freed the victim from the vicious assault and helped him get away on foot to the police post. Later he rushed to the scene where the deceased was lying with cuts and other injuries. He was still alive. He with other colleagues took both the deceased and PW4 to hospital but the deceased succumbed to his injuries on the way. PW4 was admitted with serious injuries.

[8] Maurice Omoro Oudo (PW6) an in-law of Emily (PW1), the wife of the deceased, identified the body of the deceased for purposes of the postmortem examination. The report with the findings of examination were produced on behalf of Dr Gone by Dr Eve Vile (PW3) as the former had left Jaramogi Oginga Odinga hospital in the year 2012. The highlights of the report are found in the opening paragraph of this decision.

[9] PC Johana Lengasu (PW7) the investigating officer arrested seven people in connection with the murder of the deceased. Amongst the seven were the three appellants.

[10] In their defence, all appellants denied the offence. The evidence of the 1st appellant is that on the night of the death of the deceased he was at a worship vigil up to 12.30pm. In a 45 minutes to 1 hour walk, he

left for his house to sleep. He took two visitors, Zedekiah Onyango and Walter, to his house where the three spent the night. He woke up at 6.00am for his place of work at Luanda and while there, at about 7.00-8.00am, he heard that someone had been killed. Later he met police officers in the company of one Ouma Oduor who pointed him out. The officers asked him to accompany them to Luanda K'otieno police post where he was arrested and told that the reason for his arrest was that he had murdered someone.

[11] On that night of the death of the deceased, the 2nd appellant says that he had attended the funeral vigil of Morris Ouma from midnight to 4.00am and did not hear any commotion. He was arrested on May 6, 2012 as he went to work at the lake. The police officers who arrested him were with one Ouma who identified him as one of the villagers who killed the deceased.

[12] The 3rd appellant who heard some noises at 9.00pm on the night of May 5, 2012 gave testimony that he did not leave his house. On May 21, 2012 his father informed him that he was required at Aram police station. He went there and was arrested. He denied killing the deceased.

[13] George Odhiambo Opel (DW4) was at the funeral of his brother Morris on May 5, 2012. He borrowed a wheelbarrow from the 1st appellant. The 1st appellant accompanied him back to the funeral where he assisted him to dig a grave from midnight to 5.00am. He says that he was with the appellant from 11.00pm to 5.00am.

[14] Zedekiah Onyango Ongote (DW5) does pastoral work with his church named as God's Last Appeal Church. The appellant is one of the worshipers at the church and was in church from 6.00pm to midnight. At midnight the appellant took him and his other visitors to his home where they spent the night until 5.00am when the appellant woke up to go to work.

[15] Grace Auma Omondi (DW6) is the wife of the 3rd appellant. She says she was with the 3rd appellant at home during the entire night of May 5/6th, 2012, from 7.00pm to 7.00am. She too, like the 3rd appellant heard some noise outside at about midnight but both her and her husband did not get out of their house.

[16] In a judgment rendered on November 27, 2017, Majanja, J was satisfied that the witnesses knew the appellants well as they were part of the beach community and were positively identified by PW1, PW2, PW4 and PW5. The learned Judge rejected the alibi defence evidence in the light of the strong eye witness evidence of the prosecution witnesses. Upon conviction, the learned trial Judge sentenced each of the appellants to death.

[17] The appellants are now before us on a first appeal. The appeal raises 4 grounds: -

1. That the learned trial judge erred in law and in facts by finding that there was conclusive positive identification of the appellants whereas the circumstances obtaining at the time of the offence were not favourable for either.

2. Thatthe learned trial judge erred in law and in fact in that he misapprehended the facts, misdirected itself, applied wrong principles and drew wrong inferences to the prejudice of the appellants.

3. Thatthe learned trial judge erred in law by failing to find that the glaring contradictions and inconsistencies in the prosecution's case in favour of the appellants.

4. Thatthe learned trial judge erred in law and in fact by failing to consider plausible and cogent defence advanced by the appellants.

[18] Learned counsel for the appellants Mr Munuang'o relied on his written submissions dated November 26, 2019 without oral highlights. He argues that evidence of identification of the appellants was inconclusive and that on the evidence of the PW2 (the investigation officer) the names of the suspects were given by one Mary Ochoe who was never called to testify and so the appellants had no occasion to challenge her evidence in court. This, we were told, prejudiced the appellants and breached their right to fair hearing as provided by article 50 (2) (3) & (4) of the *Constitution*.

[19] Counsel argues that even if it is assumed that the record was erroneous and the Mary Ochoe referred to by the investigating officer was Emily Akinyi (PW1), still, the trial court considered the identification evidence of PW1 and PW4 to be unsafe. The following observation by the trial Judge was cited;

> " 15. From the evidence, it is clear that the witnesses knew the accused as this was a beach community where people were living close to each other. The resolution of the case against the accused turns on the circumstances of identification particularly the source of the light. Regarding the source of light, PW1 recalled that there was a security light outside when she saw the accused assaulting the deceased. When asked about the light in cross-examination, the (sic) stated that there was a security light but agreed that in her initial statement that she recorded the light was moonlight. PW2 recalled that he was able to identify the accused because of security light from the shop and the moonlight. PW4 talked about strong moonlight. PW5 told the court that there was electric light outside and that he had a spotlight which he shone in the
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> PW4's house. I am more inclined to believe PW5 who states that there was electric light outside which is corroborated by PW2. Although PW1 and PW4 were clear that there was sufficient light, there appreciation of the source of light may have been clouded by the fact that they were active participants and victims of the incident. What is clear though, is that the witnesses testified that there was sufficient light which provided circumstances for positive identification. I therefore conclude that indeed there was sufficient light provided by electric security lights at the shops at Luanda K'Otieno."

[20] It was submitted that the trial court then proceeded on to rely on the identification by PW2 and PW5 yet the investigating officer did not base his arrest on the two witnesses.

[21] Counsel contends that visual identification in criminal cases can cause a miscarriage of justice and should be carefully tested (Wamunga v Republic [1989] KLR 424) and that evidence of identification by recognition at night must be absolutely water light to justify a conviction. It was contended that PW1 gave contradictory statements on the source of light, at one time saying it was the moonlight and at another that it was a security light. PW4 on the other hand spoke of a moonlight. As regards PW5, it was submitted that the only appellant he was able to recognize by way of recognition was the 2nd appellant.

And even then the identification by PW5 was unsafe because the 2nd appellant was only seen assaulting PW4 and not the deceased.

[22] Making arguments on the alibi defence raised by the defense, the appellants refer to the decision in *Athuman Salim Athuman v Republic* [2016] eKLR in which the court held:

> " It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. (Ssentale v Uganda[1968]

EA 365]. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution (Wang'ombe v Republic [1976-80] 1 KLR 1683]. As was stated in R v Chemulon Wero Olango [1937] 4 EACA 46, the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act."

[23] We were urged to find that the prosecution failed to discharge this burden and the appellants' unchallenged alibi defence remain unimpeached.

[24] Turning to the sentence, the appellant argues that being first offenders and remorseful of the offence, the court erred in imposing the death penalty which is the maximum sentence and this amounted to over punishing the appellants.

[25] For the State, learned counsel, Mr Okango, senior principal prosecution counsel, urged that there is no law that requires the prosecution to call each and every person interviewed during the course of investigation and that only frowns upon failure to call a key witness whose testimony is material to the determination of the matter and whose testimony may be prejudicial to the prosecution's case (Republic v Chege Macharia Njeri [2017] eKLR). It is submitted that the appellants have not demonstrated the crucial aspect of Mary Ochoe's evidence or that her absence prejudiced them. It is asserted that PW1, PW2, PW4 and PW5 positively identified the appellants and placed them at the scene.

26. It is further submitted that arguments that there were contradictions of the evidence of PW5 were unfounded. That while PW5 never saw the appellants assault the deceased he saw the 2nd appellant assault PW4. As regards the 1st and 3rd appellants, PW1 and PW2 saw them assault the deceased.

[27] Turning to the defense case, the state contends that as the defence of alibi was raised for the first time at defence, the trial court is under an obligation to weigh it as against the totality of the prosecution's evidence (*Juma Mohamed Ganzi and 2 others v Republic* [2005] eKLR. It is submitted that the trial court correctly found the prosecution case was not shaken by the appellants' purported alibis.

[28] Regarding the sentence, the position of the State was that the appellants should benefit from the jurisprudence in *Francis Karioko Muruatetu & another v Republic* and this matter be remitted back to the High Court for resentencing.

[29] This is a first appeal and our mandate is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we have not seen or heard the witnesses testify and due allowance must be given for that handicap. See *Okeno v Republic* [1972] EA 32.

[30] We agree with counsel for the appellants that this appeal invites us to determine the following issues:

1. Whether there was conclusive positive identification of the appellants
2. Whether the trial court considered the plausible appellants' defence of alibi which were never challenged and remained uncontroverted by the prosecution
3. Whether the death penalty should be visited upon the appellants

We add an additional issue; whether the failure to call one Mary Ochoe should be held against the prosecution.

[31] The attack and assault of the deceased happened in the dead of the night at about midnight. The cornerstone of the prosecution's case was the supposed eye witness accounts of PW1 and PW2. The evidence of PW1 is that after her husband left the house, she had shouts of "mwizi mwizi" and so she

went outside to check. There, she saw five people assaulting the deceased. She was able to recognize the three appellants and a fourth person Dan as they were people she knew. As to the source of light, her testimony was that there was light from a security light outside. Under cross-examination she stated;

> " There was security light which enable (sic) me to see them.
>
> .....In my statement I wrote moonlight but it was security light"

[32] As to PW2, his testimony was that;

> " There was security light from the shop and covering the whole area. I identified the people. There was light from the moon also."

[33] The witness had also stated;

> " I was about 30 meters from the scene. I couldn't identify what they were using to beat him."

[34] Regarding the light, the trial court's observations were as already reproduced elsewhere in this judgment.

[35] To be deduced from the evidence and as correctly held by the trial court was that there were two sources of light being the security light and the moonlight.

[36] The appellants have, however, sought to downplay the strength of the evidence of PW1, drawing from the observation of the trial court that it may have been clouded by the fact that she was one of the victims of the incident.

We think that in the absence of evidence that was independent of that of PW1, it would be unsafe for the trial court to find that there was positive identification. Yet there is support of her evidence by PW2 who stood 30 meters away and was able to see the people who assaulted the deceased. PW2's further evidence was that the deceased mentioned the names of those who were assaulting him. They were Omondi, Elisha and Nicholas Owiti. These are the three appellants. He also saw the three assault the deceased.

[37] Turning to another aspect, while it is true that PW5 did not see the deceased being assaulted there were two incidents on that night which had a nexus. One involving the assault of the deceased and another of a person PW5 named as Washington but who our analysis will shortly show is PW4. PW5, a police officer, went to the scene where PW4 was under attack and he was able to recognize the 2nd appellant as one of the assailants. He was able to see them using light from his torch light and electricity light from a security light outside.

[38] It was the evidence of PW4 that a group of 10 people invaded his house, stripped him naked, took some kshs 1,500 from him, and a mobile phone and started to assault him. A police officer came to his rescue and he managed to get outside the house where he was able to see some people who he recognized. They were amongst people who assaulted him. One was Mzee Ousa the 2nd appellant. It is however not readily clear whether PW4 who gave his names as Brian Ouma Okoth was one and the same person as Washington Ouma who PW5 rescued as no clarification was made in this regard. The evidence of PW5 is that after the rescue of Washington and the deceased, he rushed both of them to hospital. The deceased succumbed to the fatal wounds while Washington was admitted with serious injuries.

[39] The evidence of PW4 was that:

> " The police took me to the police.....A vehicle came at (sic) to police station with my step father cut and burned. We were then rushed to the hospital. On the way to Russia he died before. We reached I was brought to hospital Russia."

[40] To be deduced from this evidence is that PW4 is one and the same person referred to by PW5 as Washington Ouma.

[41] From this collective evidence the following emerges. The deceased was assaulted in a place where there was moonlight and security light; as to the intensity of the light PW4 described the moonlight as strong; while PW2 described the security light from the shop as covering the whole area. It was because of this light that PW1 and PW2 were able to see and identify the three appellants as amongst person who viciously assaulted the deceased and set him on fire. The identification was by recognition as the three appellants were known to the two witnesses prior to the incident as persons hailing from the same lake community as of the two witnesses. There was further elaboration as to how PW2 was able to see and recognize the appellants, he was just 30 meters from the scene.

[42] The case against the second appellant was stronger still. On the same night that the deceased was assaulted, PW4 too was physically attacked by some 10 people who caused him grave harm. According to PW5 who visited both scenes of attack, they were 200 meters apart. Using light from a torch he was carrying, he was able to recognize the 2nd appellant as amongst the people who were assaulting PW2 and who continued to do so notwithstanding his repeated requests that they stop. This interaction enabled PW5 to see and recognize the 2nd appellant, a person he had known for about three months.

[43] While it may be true that the appellants were not on trial for the assault of PW4, still, it is circumstantial evidence as to who may have attacked and caused fatal wounds to the deceased. It would have to be a strange coincidence that at least two sets of witnesses saw the 2nd appellant on that night armed with a panga. The totality of the evidence points to the 2nd appellant as being amongst the people who assaulted two people at two different places but which were at close proximity.

[44] There was therefore strong evidence against all the three appellants that their alibi evidence needed to debunk. The alibi evidence was first raised during the defence although the appellants had opportunity to raise it during the course of the investigations or when cross examining the prosecution witnesses.

So while the general rule is that it is the onus of the prosecution to disprove an alibi defence (see *Juma Mohamed Ganzi & 2 others v Republic* [2005] eKLR), it would be impossible here because of the timing of the defence.

Raising an alibi defence for the first time at defense hearing deprives the investigators of an opportunity to affirm or to disprove it through investigations. The approach was therefore for the trial court to put that defence on a scale against the prosecution case with the late alibi defence suffering the suspicion that, because it was not raised earlier, it is no more than an afterthought. Addressing the question of a late alibi, this court in *Victor Mwendwa Mulinge v R* [2014] eKLR observed;

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v R, [1983] KLR 501 ... this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it

can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

[45] The 1st appellant stated that on that night at about 12.30am, he and Zedekiah Onyango and Walter, his visitors went to sleep at his house. He slept there and did not leave his home until at about 6.00am Zedekiah gave evidence to corroborate this testimony. According to him, Owiti left the house in the morning at about 5.00am. While the 1st appellant spoke of having taken two visitors, namely Zedekiah and Walter to his house to sleep. Zedekiah does not mention Walter. He testified that:

> " By midnight, Nicholas took me and my other visitors to his house."

It is therefore unclear whether the 2nd appellant invited only two or more than two persons from the church to his home on that night. Second, while it was the discretion of the defense as to the number of witnesses to call, Walter may have explained away the apparent discrepancy. In addition, the 1st appellant did not explain why he could not have raised the alibi earlier than at the defense stage. The effect of all these is to somewhat weaken the alibi evidence when put on scale against the strong prosecution evidence we have analyzed.

[46] We turn to the 2nd appellant. Beginning with observing that the prosecution evidence against him was the strongest of all. His alibi evidence was that he was at the funeral of Morris Ouma where he stayed from midnight to 4.00am. George Odhiambo gave strong evidence in support of the 2nd appellant's alibi evidence. He stated that, at his request, the 2nd appellant agreed to accompany him to his home where the two dug the grave from midnight to 5.00am. His testimony was that he was with the 2nd appellant from 11.00pm to 5.00 am and the 2nd appellant could not have killed the deceased.

[47] No doubt, this alibi defence is plausible. But again the 2nd appellant did not explain why he could not raise this apparently strong defence at the investigation stage or in the very least in the course of the prosecution case to give the investigators an opportunity of investigating the alibi so as to affirm or disprove it. In these circumstances, we just like the trial court, hold that the scale tips in favour of the unassailed prosecution case. The same fate befalls the alibi defence of the 3rd appellant.

[48] We now say something about the argument by the appellants that the trial court should have drawn a negative inference against the prosecution for failing to call one Mary Ochoe who was a crucial witness as she was the identifying witness. PW7, the investigating officer, told court that on arrival at the scene he and his colleagues found PW5, the deceased wife Mary Ochoe and the deceased who was still unconscious. He further stated that Mary named the three appellants as amongst the people she saw assault the deceased. PW1 who gave her names as Emily Akinyi was one of the eye witnesses. The testimony of PW6, a brother to the deceased, was that Emily (PW1) called him at about 2.00am and told him what had happened to his brother and she gave the names of the appellants as some of the assailants. It is unclear whether Mary Ochoe and Emily Akinyi refer to one and the same person yet it is not true as suggested by the appellants that the police arrested and charged them only on the strength of the information given by Mary Ochoe. The four eye witnesses whose evidence we have held give a strong foundation to the prosecution case all recorded statements. The information they gave to the police incriminating the appellants must have influenced the police to arrest the appellants and the DPP to bring charges against them. We have found their evidence to be strong and credible and sufficient to found a safe conviction without more evidence. At any rate, there is no negative inference to be made of the absence of Mary Ocheo (if indeed she is not Emily Akinyi) because the information she supposedly gave the police incriminates and does not exonerate the appellants.

[49] Regarding sentence, the death sentence was imposed before the decision of the Supreme Court in Francis Muruatetu. The State graciously and correctly concedes that the appellants should benefit from

the jurisprudence of that decision. At trial, the mitigation given by counsel for the three appellants was simply that all three were remorseful. We think that the appellants deserve the opportunity to give a more spirited and complete mitigation. A resentencing hearing offers that widow.

[50] Ultimately we dismiss the appeal on conviction. We however allow the appeal on sentence but remit the same back to the High Court for resentencing. So that this matter is brought to a speedy end, we direct that it be mentioned before the High Court at Kisumu within 14 days of this Judgment for directions on resentencing. The appellants shall remain in prison custody till then. Those are our orders.

**DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2022.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**F. TUIYOTT**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR.**