



**Okoth & 2 others v Republic (Criminal Appeal 163 of 2015)
[2021] KECA 155 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 155 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 163 OF 2015
MSA MAKHANDIA, F SICHALE & S OLE KANTAI, JJA
NOVEMBER 19, 2021**

BETWEEN

MARTIN OUMA OKOTH 1ST APPELLANT

JOSEPH NYARIARO OTIENO ALIAS ABON 2ND APPELLANT

LENCER ANYANGO OKUMBO 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Migori
(Majanja, J.) dated 22nd October 2015 in CRIMINAL CASE NO. 50 OF 2014)*

JUDGMENT

1. Martin Ouma Okoth, Joseph Nyariaro Otieno and Lencer Anyango Okumbo (the appellants) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.** The particulars of the offence were that on the 27th day of November 2013, at Nyoniang' Village, Komenya Sub-location, North Kanyamkago Location of Migori County they murdered Kevin Omondi Abich.
2. The appellants were tried and convicted of the offence and each was sentenced to death. Being aggrieved with both the conviction and sentence, the appellants have now filed this appeal, and probably the last appeal, raising the following grounds of appeal:
 1. The Learned Judge erred in law and fact in relying on confession made to PW3 which fell short of the requirements of Section 25A of the *Evidence Act*



2. The Learned Judge erred in law and fact in holding that the Appellants were at the crime scene when there was contradictory evidence on the whereabouts of the Appellants
 3. The Learned Judge erred in law and in fact in holding that the identification by recognition was conclusive yet the conditions for identification were unfavourable
 4. The Learned Judge erred in law and in fact in convicting the Appellants based on presumption and circumstantial evidence not sufficient to justify any reasonable inference of guilt on part of the Appellants
 5. The Learned Judge erred in law and in fact in passing a harsh and excessive sentence against the Appellants.”
3. The appeal was urged by way of written submissions. When the parties appeared before us for plenary hearing on 5th May 2021, Ms Imbaya for the appellants indicated to court that she would rely on the written submissions filed on 20th January 2021. Mr. Shitsama for the State also relied entirely on his written submissions.
 4. It was submitted for the appellants that during the hearing of the prosecution case in the trial court, PW3 testified that the 2nd appellant went to his home on 27th December 2013 and informed him of what had transpired during the fateful night. That, the 2nd appellant informed him that he wanted to resolve the issue of the relationship between the 3rd appellant (his sister) and the deceased as he wanted the deceased to stop the relationship and that in the process, there was a disagreement and a commotion ensued. He later found out that the deceased had been cut; that he sought help but when he returned, he found the deceased dead. It was thus submitted that the statement by the 2nd appellant to PW3 did not amount to a confession as it was not made in accordance with Section 25A of the *Evidence Act* since PW3, the Area Chief did not fall within the rank of people upon whom a confession should be made. Consequently, the trial court was faulted for relying on the aforesaid confession to convict the appellants.
 5. With regard to ground 2, the trial court was faulted for placing the appellants at the scene of crime solely by relying on the testimony of PW2 which was not corroborated and that further, other than PW2, no other witness placed the appellants at the scene of crime
 6. The trial court was further faulted for holding that the identification by recognition was conclusive, yet the conditions for identification were unfavourable as there was no evidence on record regarding the intensity of the light as would have enabled the recognition of the 1st and 2nd appellants by PW2 in about 1 minute. Further, the trial court did not make any such enquiry as to whether the lighting was dim or bright, considering that the lighting was by a paraffin tin lamp and that in absence of such enquiry, evidence of recognition may not be said to be free from error.
 7. The trial court was further faulted in convicting the appellants based on presumption and circumstantial evidence not sufficient to justify any reasonable inference of guilt on part of the appellants since the only direct evidence allegedly linking the appellants to the offence of murder was that of PW2 which raised doubt as to whether PW2 identified the appellants in the circumstances.
 8. Finally, the trial court was faulted for passing a harsh and excessive sentence against the appellants being the death sentence.



- 9 On the other hand, it was submitted for the State that the identity of the appellants as the persons who stabbed the deceased leading to his death was not in doubt owing to the fact that according to PW2, he saw the appellants in the room brandishing weapons and immediately after, they began a full assault on him. That PW2 also confirmed that the room was well lit and he could easily identify the attackers.
- 10 With regard to the 1st ground of appeal, it was submitted that the question for determination was whether the information given by the 2nd appellant to the chief (PW3), amounted to a confession or it was a mere admission fueled by guilt and an attempt to sway investigations away from him and that a review of PW3's statement indicated that the 2nd appellant did not confess to the crime as he only gave information which information did not in any way draw an inference of guilt on his part and as such was not and could not be subjected to the provisions of Section 25A of the *Evidence Act* as the appellant wished the court to believe.
- 11 With regard to the other ground namely, the holding that the appellants were at the scene of crime when there was contradictory evidence of the appellants' whereabouts, it was submitted that the evidence of PW2 who was an eye witness placed the appellants directly at the scene of crime and that he further confirmed that he knew the 2nd appellant very well as a boda boda operator and that further PW3 and 4 confirmed having seen the appellants at the scene of crime which was the 2nd appellant's home. It was further submitted that PW2 had provided sufficient evidence that the appellants were well known to him and that he had given a detailed review of the size of the house and insisted that the appellants were close to him and with the light from the lamp in a small room, he definitely could make out who they were.
- 12 With regard to ground 4 of appeal, it was submitted that PW2 placed the appellants directly at the scene of crime and was there when the assault began and that there was direct evidence that the judge relied on in finding the appellants guilty. Thus it was not a case of circumstantial evidence.
- 13 Finally, with regard to sentencing, it was submitted for the State that the appellants had not even attempted to inform the court with sufficient reasons and documentation as to their ability to benefit from a reduction in sentence and that they were rightfully convicted for the offence of murder and that if the court deems it fit to resentence the appellants, they be sentenced to 40 years' imprisonment.
- 14 We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate court. This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

"It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."

- 15 A brief analysis of the evidence in the trial court is necessary so as to reach our own independent conclusion on the guilt or otherwise of the appellants. The evidence before the trial court was as follows: PW1 was Dr. Jared Okoth Ndege the officer in charge of Rongo District Hospital and was the one who performed the post mortem in respect of the deceased. According to the post mortem report, the cause of death was severe hemorrhage secondary to deep cut on the left cubital fossa severing the vascular. He further formed the opinion that the injury was caused by a sharp object.



16. PW2 was Geoffrey Onyango Otieno. He testified that on 27th December 2013, he was with his brother Kevin (the deceased) in the house when the deceased received a call from Lencer (the 3rd appellant). That, they then left the house and proceeded to Lencer's house where they found Lencer waiting for them near Abon's house (the 2nd appellant). That, when they entered the house, the door was locked from behind though he did not know who locked it.
17. It was his further evidence that Lencer (the 3rd appellant) lit a lamp and that Martin (the 1st appellant) who was armed with a *panga* while two others whom he knew by the names Odira and Alec were carrying wooden like *rungus* and Abon (the second appellant) asked them why they had gone to his house but they did not respond whereupon he started assaulting them and that the other three (Martin, Odira and Alec) also started assaulting them. That, he immediately kicked the door open and ran home and informed his father what had happened. That, they then left with his father back to the house and found many people who had torches. That they found the deceased in the tobacco *shamba* lying dead on the ground and his left hand had been severed. It was his further evidence that he knew the 2nd appellant, who was also known as Joseph Nyariaro and was a boda boda operator and the 1st appellant as they came from the same village.
18. PW3 was Amos Asingo Keya the Assistant Chief Komenya Sub Location, North Kanyamkago, Uriri Sub-County. It was his evidence that on 28th December 2013, he was at home when he was called by the 2nd appellant who told him that on 27th December 2013, at about 9:00 pm he had hosted his friends who included the deceased and PW2 and that the purpose of the visit was to resolve the relationship between the deceased and the 3rd appellant. That he wanted to warn the deceased over the relationship with his sister, the 3rd appellant and that in the process there was a commotion. That, as he was trying to stop the chaos, in the dark, people ran out and he chased them but was overpowered by the rest of the boys as he tried to stop them and later found that the deceased had been cut and that, he tried to seek help, but when he returned the deceased was dead.
19. PW4 was Charles Ogendo Julu. It was his evidence that on 27th December 2013, he heard the 2nd appellant making noise saying words to the effect that: "what is happening is a shame". That, he then went to the 2nd appellant's home and found some people who included the 3rd appellant and her mother trying to tie the deceased's hand which was bleeding and that he was not dead at the time but when he came back later he found him dead.
20. PW5 was Joseph Oyugi. He testified that on 20th December 2013, he was at home when he received a call from his cousin one Okumbo Okang'a who told him that the deceased had been killed in a homestead called Kocheche at Nyoniang and that PW2 gave him a brief account of the events leading to the deceased's death.
21. PW6 was Chief Inspector David Kemboi, the investigations officer in this case. It was his evidence that on 28th December 2013, he received a report from PW3 to the effect that 2nd appellant had reported to him in the morning that the deceased person had been killed the previous night following a scuffle over the 3rd appellant. That, he proceeded to the scene and was led to a maize plantation, a distance from the homestead where they found the deceased's body lying dead with a cut wound on the left elbow and that some houses had been burnt at the homestead.
22. On the other hand, the appellants gave unsworn evidence and denied having committed the offence. The 1st appellant told the trial court that on 20th December, 2013, whilst at his home, he was shocked to see policemen come to his home wherein he was arrested and taken to Migori and later arraigned at Kisii High Court. He did not know the reason for his arrest.



23. In his defence, the 2nd appellant told the trial court that on 28th December, 2013, he was on his way home when he saw smoke and noise emanating from the direction of his home. Being fearful, he opted to go to the Chief who lived nearby and informed him of the smoke he had seen. The Chief proceeded to the 2nd appellant's home only to return with 3 policemen who arrested him. No one informed him of the reasons for his arrest. On 6th January, 2014, he was arraigned at Kisii High Court.
24. On his part, the 3rd appellant told the trial court that on 30th December, 2013, he was at his home when at about mid-night, he heard a knock at the door. Upon opening, he was arrested and later on (6th January, 2014) taken to Kisii High Court. He denied having committed the offence of murder.
25. With regard to the first issue raised by the appellants faulting the trial court for relying on confession made to PW3 which fell short of the requirements of Section 25A of the Evidence Act, we have carefully and anxiously perused the record and nowhere did the trial court rely on the confession allegedly made by the 2nd appellant to PW3 to convict the appellants.
26. Section 25 of the Evidence Act defines a confession as follows:
- “25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”
27. On the other hand, the *Black's Law Dictionary 9th Edition* by Bryan Garner defines a confession as follows:
- “A criminal suspect's oral or written acknowledgement of guilt, often including details about the crime.”
28. The evidence of PW3 was *inter alia* as follows:
- “.....On 28th December 2013, it was a Saturday, I recall that I was called by Joseph Nyariaro at about 7:00AM. I was at home. He is the 2nd accused in this matter seated in the dock. He thereafter came to my home. He told me that on the 27th December 2013 at about 9:00PM, he heard his friends, who had befriended his sister Lencer Anyango who is in court, one of whom was Kevin Omondi, the deceased and Geoffrey had come upon receiving a call from Lencer. He wanted to resolve the issue of the relationship between his sister and Kevin while sitting in the cottage with Odira Anyanga and Alex, he wanted to warn over the relationship. He wanted Kevin to stop the relationship. He said his friends were there to help. He said that there was a disagreement and a commotion. As he was trying to stop the chaos in the dark while the people ran out. He said as he chased them, he was overpowered by the rest of the boys as he tried to stop them. He found out that Kevin had been cut. He found Kevin bleeding. He tried to seek help but when he returned Kevin was dead. So he called with the information. he did not tell me that the people were armed.....”
29. The above excerpt from the evidence of PW3 can certainly not be said to be a confession within the meaning of a definition of a confession as stated above. As was rightly submitted by the respondent, a review of the above aforesaid statement clearly indicates that the 2nd appellant did not confess to the crime as he only gave information which information did not in any way draw an inference of guilt on his part and as such was not and could not be subjected to the provisions of Section 25 of the Evidence Act. In any event, the 2nd appellant denied having committed the offence. Consequently, nothing turns on this ground.



30. The trial court was also faulted for holding that the appellants were at the crime scene when there was contradictory evidence on their whereabouts.
31. PW2 who was an eye witness to this incident before he managed to escape, clearly placed all the appellants at the scene of crime which was the 2nd appellant's house. His evidence in this regard remained uncontroverted, firm and unshaken even under intense cross examination. Similarly, PW3 testified that the 2nd appellant told him of having hosted his friends namely; the deceased PW2 who had come to his house upon receiving a call from the 3rd appellant and that he wanted the deceased to stop the relationship that he was having with the 3rd appellant. Consequently, this ground of appeal must as well fail.
32. The trial court was also faulted for holding that the identification by recognition of the appellants was conclusive yet the conditions for identification were unfavourable. It is indeed not in dispute that the incident happened at around 10 pm at night and as such conditions might not have been conducive for a positive identification/recognition of the appellants. PW2 who was at the scene of crime gave a vivid description of the events of that fateful night. It was his evidence that when they entered the 2nd appellant's house, the 3rd appellant lit a paraffin lamp and that he could see all the people as the light was adequate. It was his further evidence that the house was a "simba" and was divided by a curtain and that all the people were on one side and the lamp was on a table which was by the wall, that the house was not very big and was about 4 meters across and that the attackers were very close to his side and he could see them very clearly. PW2 further stated clearly and vividly the exact position that was taken by each of the appellants when he testified thus:
- "We found Alec and Odira near the door. Martin was also present near the door. Alec was on the right side of the door and so was Odira. Martin was on the left side. I only know them by those names."
33. The evidence of this particular witness remained firm and unshaken even under cross examination. It was his further evidence that he knew all the four boys who attacked him. That, he knew **Abon**, the 2nd appellant as they used to meet in the village and was a boda boda operator and he even knew where he stayed, and that he used to see her with the deceased. With regard to the 1st appellant, he testified that he knew him as Martin and he knew where he lived though he had not been there. Again, this evidence was never rebutted. This was therefore a case of positive recognition as opposed to identification.
34. In the case of *Anjononi & Others vs. Republic* [1976-80] 1 KLR 1566 it was stated:
- "Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."
35. From the circumstances of this case even if it was at night and for the reasons we have enumerated herein above, we are satisfied that the recognition of the appellants by PW2 who placed them squarely at the scene of crime was free from the possibility of any error. Consequently, nothing turns on this point.
36. The trial court was also faulted for convicting the appellants based on presumption and circumstantial evidence that could not to justify any reasonable inference of guilt on part of the appellants. That the only direct evidence allegedly linking the appellants to the offence was that of PW2 but it was not clear who committed the offence, how and why the offence occurred.



37. In *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR the Supreme Court of Kenya while defining circumstantial evidence stated at paragraph 55 *inter alia* thus:

"The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence..."

38. The evidence that was given by the prosecution witnesses and in particular PW2 was direct evidence as he was present when they were attacked together with the deceased and as such the said evidence cannot be said to be circumstantial evidence. Be that as it may, the trial court while analyzing the evidence at paragraph 19 of the judgment rendered itself thus:

"the deceased died as a result of cut inflicted on him while he was being subjected to violence by the people who were in Abon's house. It is not clear who inflicted the blow and in order to find the accused guilty of murder, the prosecution has to prove that the accused and the others in the house shared a common intention to kill or to do grievous bodily harm."

39. Again, at paragraph 21 the trial court stated thus:

"did the prosecution establish a common intention to kill or cause grievous harm to the deceased? The testimony of PW2 points to a pre-meditated plan. Lencer called the deceased at 10PM to come to Abon's house. When PW2 and deceased entered the house it was dark. When they entered the door behind them was locked and when Lencer lit the paraffin lamp, Okoth, Abon and other assailants were waiting with weapons with which they used to beat PW2 and the deceased who were defenseless. Why lock the door if the meeting was intended to be peaceful? This clearly points to a pre-mediated plan to lure the deceased to Abon's house and harm him."

Nobody could have said it better than the learned trial judge

40. Consequently, and having found that the evidence herein was direct evidence as opposed to circumstantial, this ground of appeal must as also fail.

41. From the circumstances of this case and for the reasons aforesaid, we are satisfied that the appellants' conviction for the offence of murder was safe and sound and well founded and we have no basis to interfere with the same.

42. Consequently, the appellants' appeal on conviction fails and is hereby dismissed.

43. Lastly, it was submitted that the trial judge erred in law and fact in passing a harsh and excessive sentence against the appellants. The respondent while partly conceding to this contention by the appellants and while relying on the decision of *Francis Karioko Muruatetu & Ano v R* [2017] eKLR informed the court that it was not opposing the ground, considering the sentence was imposed before the Muruatetu case. The respondent further submitted that the appellants had however not tendered any evidence to show that they are reformed or are remorseful in any way for their actions so to benefit from a review of the sentence. Consequently, the respondent urged the court to make a finding that the appellants were rightfully sentenced to death. In the event however, that the court was inclined to interfere with the sentence, counsel urged that then they should be sentenced to 40 years.



- 44. The appellants herein were sentenced to death on 16th November 2015, long before the *Muruatetu case* was decided. Although Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya provides for a mandatory death sentence for any person charged and convicted with the offence of murder, in *Francis Karioko Muruatetu case* (supra) the Supreme Court held that the mandatory nature of the death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional as it deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.
- 45. From the circumstances of this case, the deceased was lured to his death by the 3rd appellant. He innocently went to the 2nd appellants' house where the appellants were laying in wait for him with a common intention mercilessly and in a very cruel manner attacked him together with PW2 who was lucky to have managed to escape. Following this blistering attack the deceased succumbed to his injuries. As a matter of fact, his left hand had been cut off. As a result of the appellants' actions, an innocent life was lost.
- 46. We consider the circumstances to be aggravated. Nonetheless and in accordance with the decision in the *Muruatetu case* (supra), we are inclined to interfere with the sentence imposed. We substitute the sentence of death imposed on the appellants with a sentence of thirty (30) years imprisonment.
- 47. The sentence will run from the date of conviction and sentence in the trial court.
The appellants appeal on sentence succeeds only to that extent.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

