Shikari v Republic (Criminal Appeal 19 of 2016)
[2021] KECA 302 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 302 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 19 OF 2016

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

DECEMBER 17, 2021

BETWEEN

CHARO KENGA SHIKARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((An appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 2nd November, 2015 in High Court Criminal Case No. 19 of 2011))

JUDGMENT

1. The Appellant herein, Charo Kenga Shikari, was charged with the murder of Haluwa Shikari on 2nd June 2011 at Okote Village in Chengoni Location in Kwale County.The Appellant took plea on 8th June 2011 where his response was recorded as 'it is true'. The trial nevertheless commenced before Hon. Justice G. Nzioka on 2nd May 2012, who heard four prosecution witnesses, and was presided over by Hon. Justice M. Muya from 17th June 2013, who heard one prosecution witness and the Appellant's defence. The Judge found that the prosecution had proved its case beyond reasonable doubt, and convicted the Appellant of the offence of murder in a judgment delivered on 9th December 2015. The Appellant was consequently sentenced to suffer death.

2. The Appellant, being dissatisfied with the said conviction and sentence, has proffered this appeal by a memorandum of Appeal accompanied by four grounds of Appeal. As this is a first appeal, the duties of this Court are set out in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence.

> The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions.
>
> Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

3. The facts adduced before the trial Court in this respect were as follows. Corporal Ita Wandai Letula (PW1) testified that on 2nd June 2011, one Juma Kenga came to Sivavoni Police post at 6.00 am and reported that the Appellant, who was his brother, had killed his wife by cutting her neck.

   PW1, accompanied by a PC Andrew Kiplimo, then proceeded to the scene to find a body injured on the neck, and a panga where the body was lying. They then took the panga and arranged for the body to be taken to the mortuary. PW1 produced the panga as an exhibit during the trial by PW1. A few days later, on 4th June 2011, Juma Kenga went back to the police station and told PW1 that his brother had come home, whereupon PW1 and PC Andrew Kiplimo went to the Appellant's residence and arrested him. These facts were reiterated by PC Andrew Kiplimo, who testified at the trial as PW2.

4. Juma Kenga on his part testified as PW3, and stated that in June 2011 he heard noise and repeated shouts namely ''I am being killed", coming from his brother's house. He then saw Haluwa Shivari, the deceased, running away and falling down, and a man following her carrying a panga. He testified that he could not identify the man neither did he know him. At this point Mr Gioche, the Prosecution Counsel, sought and was granted leave by the trial Court to treat PW3 as a hostile witness, and PW3 was cross examined on the statement he had recorded with the police. PW3 confirmed that he had told the police officers that it was his brother who came out with a panga.

5. Doctor Lucy Ann Wahome (PW4) who worked at Coast General Hospital, testified that she performed a post-mortem on the body of the Deceased on 10th June 2012 , and that the cause of her death was haemorrhage due to severed blood vessels and asphyxia due to a severed trachea. The last prosecution witness was Chief Inspector John Murruru (PW5), the investigating officer. He went to the scene, where he found a lady who had been murdered, with injuries on the neck and hands. He also found Juma Kenga, Corporal Ita Wandai Letura, and PC Andrew Kiplimo at the scene, and testified that the murder weapon, which was a panga, had already been taken from the scene. PW5 further testified that the Appellant emerged from his hiding place and was arrested three days later. According to the investigating officer, the Appellant was the husband of the Deceased, and had alleged that the Deceased had a child who was not fathered by him.

6. After the prosecution closed its case, the trial Court ruled that the Appellant had a case to answer. The Appellant gave sworn testimony and testified that alleged killing took place on 2nd June 2011 but he was on duty the whole night burning charcoal at Kulalu forest, a distance of 12 hours by bicycle. He testified that he had a daughter with the Deceased, and denied the existence of family disputes or killing his wife.

7. During the hearing of the appeal, the Appellant was represented by Mr. Gicharu Kimani, who relied on submissions dated 21st September 2021, wherein he collapsed his grounds of Appeal, to two, namely that the conviction was entirely based on circumstantial evidence and that malice aforethought and motive was not established. Mr. Allan Mulama, Principal Prosecution Counsel, appeared for the Respondent, and also relied on submissions dated 15th September 2021, wherein the appeal is conceded. The Respondent in this respect conceded the appeal on the ground that the Appellant's

conviction was unsafe, arising from the reliance by the trial Court on the evidence of PW3 who was declared a hostile witness.

8. The main issue arising in this appeal is whether the Appellant's conviction for the offence of murder was based on reliable and cogent evidence. Mr. Gicharu in this respect submitted that none of the witnesses saw first-hand any physical assault on the person of the victim, and all the evidence on record was purely circumstantial. Reliance was also placed on the case of Sawe vs Republic (2003) KLR 364 as regards the circumstances when a conviction can be based on circumstantial evidence. The learned counsel for the Appellant further submitted that the trial Court erred in drawing an inference and conclusion as to the Appellant's guilt, as no photographs of the scene and the recovered panga which was alleged to be the murder weapon were produced, nor was the said panga proved to be the one the Appellant used to assault the Deceased.

9. The Court's attention was also drawn to the decision in the case of Uganda vs Sebyala & others (1969) EA 204 that an alibi raises doubt, and the counsel submitted in this regard that the Appellant arrived home past midnight after receiving the news of the deceased's death. He urged that the prosecution failed to prove the ingredients of the charge of murder and malice aforethought, and that the prosecution witnesses' testimonies created doubt and thus failed the test of proof beyond reasonable doubt.

10. Mr. Mulama on his part submitted that the Respondent was constrained to concede the appeal, and cited the decision in the case of *Odhiambo vs Republic* [2008] KLR 565 that the Court was not bound by the said concession. Two grounds were relied upon for the concession. First, that the evidence tendered by PW3 who was declared a hostile witness devoid of other corroborating evidence is not credible to base a conviction. The counsel opined that the law on how to deal with the evidence of a witness who turns hostile is now settled and was aptly discussed by this Court sitting in Kisumu in *Abel Monari Nyanamba & 4 Others vs Republic* [1996] eKLR where it found that even though the evidence of a hostile witness is still indeed evidence, it is evidence of little value and cannot be the basis of a conviction, because the unreliability of the said testimony must itself introduce an element of reasonable doubt.

11. Reliance was also placed on the decisions to this effect in *Ndungu Kimanyi vs Republic* [1979] KLR 282 and *Batala v Uganda* [1974] EA 402. It is thus his submission that such evidence as tendered should thus be rejected inbwhole, more so noting that no investigations were carried out, and that the trial Judge in erred by finding that identification by the impugned witness was above board. The counsel also made reference to section 161 and 163 (1) (c) of the *Evidence Act*, which set out the circumstances under which a party calling a witness could proceed to impeach the credibility of his own witness by demonstrating inconsistences with previously recorded statements or even oral statements.

12. The second ground relied upon was that the provisions of Section 200 (3) of the Criminal Procedure Code were not complied with, and the Appellant was not informed of his right to resummon witnesses, particularly, as the Court that took over the matter only heard one witness, and proceeded to convict the Appellant on the basis of evidence of a witness who had turned hostile. Further, that the record is indicative of the fact that it is the Appellant's Advocate who responded as to how the case was to proceed, and it is not indicated if the Appellant was informed of his rights as per the law and thereafter asked his views and the same reflected on the record.

13. Counsel for the Respondent was of the view that even though the Appellant was represented, the legal safeguard in section 200 is afforded to suspects during trial and not simply for the convenience of counsels of either sides or of the trial court.. The decisions in *Abdi Adan Mohamed vs Republic* [2017] e KLR and *Ndegwa vs R* [1985] KLR 535 were cited for the position that the Court should inform

the suspect on the available options to proceed with and render its decision after hearing both sides, should there be divergent views as to how the case should proceed. The Respondent therefore asked this Court to quash the conviction and sentence based on the unsafe and uncorroborated evidence.

14. We will commence our determination with the issue raised by Mr. Mulama on compliance by the trial Court with section 200 of the Criminal Procedure Code, and if the Appellant's rights were violated in this respect.

The relevance of this section to the issue before us, and as explained by this Court in Ndegwa vs R (1985) KLR 535 and Abdi Adan Mohamed vs Republic [2017] eKLR, is that it is desirable and important for the final arbiter in a trial to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. Section 200(1) and (3) in this regard provide as follows:

> " 200.
>
> (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
>
> a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
>
> (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment. .....
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.
>
> (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

15. Section 201 of the Criminal Procedure Code in this regard applies the provisions of section 200 to Judges of the High Court. The trial record in this respect shows that the trial proceeded before Muya J. on 17th July 2013, after Nzioka J. had heard four prosecution witnesses, and the proceedings on section 200 of the Criminal Procedure Code were recorded as follows at page 17 thereof:

> Tanui for the State:
>
> Matter is part heard.
>
> Court:

Section 200 of the Criminal Code explained

M. Muya-Judge Mr. Mushelle:

The matter can proceed from where it reached Court:

Matter to proceed from where it reached. M. Muya-Judge"

16. Two facts are evident from the proceedings. The first is that the Court discharged its duty and explained directly to the Appellant his rights under section 200 of the Criminal Procedure Court. Second, since Mr. Mushelle was the Appellant's counsel in the trial Court, this Court can only infer and conclude that he had instructions and authority from the Appellant as regards on how to proceed. In any event, under Article 50 (2) of the Constitution, an accused person has a right to legal representation and to choose, and be represented by an advocate, who in law is deemed to be his or her agent.

17. We are mindful in this respect of the decisions by this Court to the effect that it is mandatory under section 200 that a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses; that it is a right exercisable by the accused person himself and not through an advocate, and that a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. See in this regard the decisions in *David Kimani Njuguna vs Republic* [2015] eKLR and *John Bell Kinengeni vs Republic* [2015] eKLR.

18. The above decisions are distinguished in that unlike in the present appeal, there was a complete failure therein by the trial Judge to inform the accused of their rights under section 200(3) of the Criminal Procedure Act. For example, in David Kimani Njuguna v Republic [2015] eKLR this Court noted that the trial Judge recorded as follows:

> "COURT: By consent of Counsel for the accused and state counsel, this matter to proceed from where Lady Justice Mugo left."

19. In addition, it is also our view that once the trial magistrate or judge complies with this statutory duty, this Court, being an appellate court and not having had the opportunity to observe the Appellant and his counsel during the trial , is not in a position to make a conclusion that the response by the Appellant's counsel was made without consultation or authority. In addition, the Appellant was personally present in court and had every opportunity to dispute or object to any representations made by the counsel on his behalf, and of communicating and demanding that witnesses be resummoned. However, the trial record indicates that the Appellant did not do so, and the only conclusion this Court can make in the circumstances is that the Appellant's counsel response was made upon instructions from the Appellant.

20. Lastly, as noted by this Court in *Abdi Adan Mohamed v Republic* [supra], even where there is a demand to resummon witnesses, section 200 is to be applied sparingly. In *Nyabutu & Another v. R* [2009] KLR 409, this position was explained thus;

> "By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial."

21. We therefore find that there was compliance of section 200 of the Criminal Procedure Code, and that the Appellant was not prejudiced by the trial proceedings before Muya J.

22. On the sufficiency and probative value of the evidence adduced in the trial Court, it is necessary to restate that the ingredients of the charge of murder that require to be proved beyond reasonable doubt are the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; that such unlawful act or omission was committed with malice aforethought. Section 203 of the Penal Code in this regard provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

23. The body of Haluwa Shikari, deceased, was seen by four prosecution witnesses, namely Juma Kenga, Corporal Ita Wandai Letura, PC Andrew Kiplimo and Chief Inspector John Murruru , who went to the scene of the crime on 2nd June 2011 and testified to finding the deceased already dead, and with injuries on the neck. Dr. Lucy Ann Wahome (PW4) who performed a post-mortem on the deceased and produced the post mortem report in the trial Court, and informed that the cause of death was loss of blood and asphyxia due to the trachea of the deceased being severed by a cut.

    The fact and cause of the deceased's death were therefore proved beyond reasonable doubt.

24. The Appellant's role if any, in the said death, is what is in contest in this appeal. The Appellant's brother Juma Kenga, recanted his statement to the prosecution of having seen the Appellant chasing the deceased with a panga, and was consequently declared a hostile witness by the trial Court. The trial Court in its judgement relied on the evidence by Juma Kenga to find that the identification of the Appellant at the scene with the deceased and murder weapon was proved beyond reasonable doubt. The reliance by the trial Court on the evidence of Juma Kenga has been challenged by both the Appellant and Respondent on two fronts. First, that the evidence did not meet the required threshold for circumstantial evidence to convict the Appellant , and second that the said evidence was unsafe as he was an hostile witness.

25. The legal threshold to sustain a conviction against an accused person based on circumstantial evidence as stated by the Court in *Rex vs. Kipkering Arap Koske* [1949] 16 EACA 135, is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In *Sawe vs Rep* [2003] KLR 364, this Court expressed that:

> " In order to justify on circumstantial evidence, the inference of guilt, the 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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

26. As already noted, Juma Kenga, one of the prosecution's witnesses, was declared a hostile witness by the trial Court at the instance of the prosecution. A witness is treated and declared as hostile when the Court reaches a conclusion that he or she is not desirous of telling the truth, and this was demonstrated at the trial when Juma Kenga was cross examined on the statement he made to the police as to the identity of the person he saw running after the panga, and he confirmed to have told the police that it was the Appellant, yet during his evidence as the trial he claimed not to know the person.

27. The evidence of such a witness is untrustworthy and unreliable and is of negligible and little weight (see the decisions in *Alowo v. Republic* [1972], EA 324, Batala v Uganda [1974] E.A. 402 and Abel Monari Nyanamba & 4 Others vs Republic (1996) e KLR. The chain of circumstances as regards the identity of the Appellant as the person who caused the death of the deceased was therefore weakened by this unreliable evidence, and the trial Court also erred in solely relying on the evidence of Juma Kenga as regards the Appellant's identification.

28. The question therefore that needs to be answered by this Court in exercise of its duty to review the evidence, is whether there was any corroborating evidence on the identification of the Appellant as the person who caused the death of the deceased. It is notable in this respect that there were two other witnesses, namely Corporal Ita Wandai Letura and PC Andrew Kiplimo who testified as to the identity of the perpetrator of the offence. The test that this Court will apply in order to determine whether the evidence of the two witnesses was sufficient is whether it was contradicted, and if not, whether it would lead to an inference in the mind of a reasonable person which is beyond reasonable doubt that the Appellant caused the death of the deceased.

29. Both Corporal Ita Wandai Letura and PC Andrew Kiplimo who were police officers, testified that they had received a report from Juma Kenga that the Appellant had beaten and cut his wife, and when they went to the scene of the crime accompanied by Juma Kenga, they indeed found the Appellant's deceased wife and a panga next to the body. In addition, the two witnesses testified that Juma Kenga willingly went to the police station a second time to report that the Appellant had returned home, leading to his arrest. The two witnesses were therefore not only credible but consistent in their account of the report they received about the Appellant, and his role in the death of the deceased, and confirmed the evidence given by Juma Kenga in this regard.

30. In addition, the two witnesses also retrieved the panga from the scene of crime and produced it as an exhibit in Court, which was independent collaboration of the murder weapon used by the Appellant in causing the death of the deceased.

31. The Appellant alleges that he was not at the scene of the crime when the offence occurred. It was in this respect held by this Court in *Karanja vs Republic* (1983) KLR 501 that the defence of an alibi should not just be mentioned in passing, and that cogent evidence must be given on it that raises a reasonable doubt that the accused person was not at the scene of the crime at the material time. In addition, the defence of alibi must be given at the earliest opportunity, to enable the prosecution respond. See also in this regard the decisions of this Court in *Kiarie vs Republic* [1984] KLR, *Victor Mwendwa Mulinge vs R*, [2014] eKLR, and *Erick Otieno Meda vs Republic* [2019] eKLR.

32. Even though the Appellant stated he did not know the time the deceased was killed, and that he was burning charcoal the whole night on 2nd June 2011 at Kulalu forest where he claimed to have gone with a group of people, he did not call any witness to confirm his alibi. The Appellant's statement is therefore not supported by any cogent evidence and is also not convincing, given that there was evidence adduced that he went into hiding after the commission of the offence. The prosecution's evidence as to the Appellant's identification and involvement in the death of the deceased was therefore not contradicted.

33. As regards the element of malice aforethought, section 206 of the Penal Code provides that:

> " 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;...

34. In this regard the nature of the injuries inflicted on the deceased were such that they were intended to fatal, as the deceased's windpipe was essentially severed. We therefore find from the foregoing, that there was sufficient collaborating evidence on the identification of the Appellant as the person who caused the death of the deceased, and that the evidence on the chain of events in this regard can only lead to that inference and conclusion.

35. We accordingly uphold the conviction of the Appellant for the charge of murdering Haluwa Shikari on 2nd June 2011 contrary to section 203 of the Penal Code. As regards the sentence of death meted on the Appellant, this was a mandatory sentence provided by section 204 of the Penal Code, and legal at the date of sentencing on 19th December 2015. However, since then, the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v. Republic*, (2016) e KLR has held that the mandatory sentence of death in section 203 and 204 of the Penal Code deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis. This Court is thus clothed with the duty to consider whether or not the Appellant herein was deserving of a lesser sentence in light of his mitigation and the circumstances of the case.

36. The trial Court in this regard observed and acknowledged the Appellant's mitigation that he was a first offender and that he was remorseful but expressed that there was only one mandatory sentence. The Appellant has also been in custody since he was first arraigned in Court on 8th June 2011. We have also reconsidered the circumstances surrounding the commission of the offence.

37. We accordingly allow the appeal on sentence and set aside the death sentence imposed upon the Appellant by the trial Court, and substitute therefor a sentence of twenty-five (25) years imprisonment from the date of conviction.

37. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR