Okello v Republic (Criminal Appeal 205 of 2014)
[2020] KECA 956 (KLR) (31 January 2020) (Judgment)

Neutral citation: [2020] KECA 956 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 205 OF 2014

MK KOOME, F SICHALE & S OLE KANTAI, JJA

JANUARY 31, 2020

BETWEEN

BERNARD OTIENO OKELLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Chemitei, J) dated 31st July 2014 in H.C.CR.C. No. 31 of 2012)

JUDGMENT

1. The life of Mary Onyango Oluoch (deceased) was brought to an abrupt end at about 4pm on the 2nd day of May, 2012 through a grotesque murder. The evidence that linked the appellant with the deceased's murder was pieced together from seven (7) prosecution witnesses. JAO, (PW1) a child aged 13 years who was at the time playing within the deceased's homestead, testified that she saw Bernard Otieno Okello, (appellant) and one 'Ongoma' approach the entrance of the compound of the deceased. She knew them well as they were relatives and neighbours; she saw the two men confront her grandfather, whom she referred to as "Mzee".

2. According to the account given by PW1, the appellant asked Mzee why he had bewitched his child and Mzee replied that they should ask the deceased who had done it. Ongoma asked Mzee if he wanted to live or die to which Mzee replied that he chose to die. That is when the appellant hit Mzee on the head with a wooden rod and Ongoma cut him with the panga on the head. Seeing this, PW1 told the trial court that she screamed and scampered for her own safety. After hiding for a few minutes PW1 returned to the house of the deceased and realized that the assailants were still inside the deceased's house. She then ran to where Mzee was and found him bleeding from the head but he was alive. She stated that Mzee was taken to hospital by one Geoffrey Ouma (PW4).

3. Andrew Owino Oluoch (PW2) was the deceased's son. He testified that on the material day at around 5pm he received a call from one Anyango informing him that his father had been attacked by the appellant and one Ongoma. He took a motorcycle and rushed to his parent's home where he found a hysterical crowd. His father had already been taken to hospital but his mother (deceased) who had severe injuries was still alive. The deceased was unconscious but mortally wounded on the stomach and bore cuts on the head. He put her on the motorcycle and rushed her to Ambira Sub-district Hospital but she succumbed to the injuries in the course of the treatment. PW2 said he reported the incident to the Ambira AP camp but was referred to Unguja Police Station. It was while reporting at Unguja Police Station that he saw the appellant already in the cell.

4. After PW2 reported the matter to the police, coincidentally the appellant had taken himself to Ugunja Police Station and told the OCS (PW7) that he had killed a woman, and PW7 locked him in the police cells. PW2 identified the appellant as his cousin, and he also identified the jembe which was used by the assailants to break the window of the house of the deceased as one that belonged to his family. He also identified the broken pieces from the window as the ones that were collected from his mother's house.

5. DOO, (PW3) a minor aged 9, also testified after he was taken through a voire dire examination and was found to possess sufficient understanding of the meaning of being a truthful witness; he gave sworn evidence. He testified that the deceased was his grandmother; that on the material day, he was playing outside her house when he saw the appellant and one Isaiah enter the homestead; that he knew the appellant because he was like a father to him; that he saw the appellant and Isaiah go to the deceased's house; that using a jembe the two broke the window to gain entry to the house; that when he saw them break into the house he started screaming and ran away. After a short while PW3 went back to his grandmother's house and saw her lying on her bed bleeding profusely from the injuries on her head, arm and stomach. On cross-examination, PW3 stated in his own words as follows:

> ... I saw what happened to my grandmother. It is Bernard who had the jembe that he used the jembe to hit my grandmother on the head. I found that he had hit her when I went to the house. I saw him hit the window. I saw him hit my grandmother..."

6. Geofrey Ouma Onyango (PW4) testified that on the material day he was at home when he heard children screaming. He went to inquire why they were screaming and found Mzee bleeding. He said that he saw the appellant, who was his cousin, and named him as the accomplice as he found him at the scene and when he asked him why he had attacked the couple the appellant did not answer. PW4 took Mzee to hospital using a bicycle; at the hospital he was later joined by PW2 who had brought a heavily injured deceased for treatment; she however succumbed to the injuries in the course of the treatment. PW4 said that the deceased had serious injuries on the head, legs, arm and stomach. On cross-examination, PW4 clarified that Mzee and the deceased were his grandparents and that the appellant was his uncle.

7. Dr. Charlse Muturi (PW5) produced the postmortem report which indicated that the cause of death of the deceased was "severe head injury due to trauma by a heavy bladed object". The investigating officer PC Chrispinus Lumwachi (PW6) produced the jembe as exhibit no. 2; the pieces of broken window as exhibit no. 3; the mason wood as exhibit no. 4; photographs taken at the scene as exhibit 5; a sketch plan of the homestead as exhibit 6; and a photograph of the deceased at the mortuary as exhibit no. 7. On cross-examination, he maintained that he was the one who interviewed the two minors, PW1 and PW3 who in his opinion were eye witnesses of the murder.

8. CI Muthee Nyaga (PW7) was the deputy OCS at Unguja Police Station at the material time. He testified that on the material day the appellant brought himself to the police station and said that he

had killed a woman. A few hours later, PW2 came and reported that his parents had been assaulted and he named the appellant and another accomplice as the perpetrators. PW2 identified the appellant at the police station. C.I. Nyaga went with (PW2) to Ambira District Hospital and saw both victims. The deceased was in a critical condition with cuts on the stomach, hand and head. They both went back to the police station but he received a call later that the deceased had succumbed to her injuries. He sent PC. Kinyua to Siaya Mortuary to confirm the death. He also visited the scene of the crime and collected the pieces of broken window which were produced as exhibits.

9. As a consequence, the appellant was arraigned before the High Court Kisumu and charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence stated that on 2nd May 2012 at Ambira Sub Location, Ugunja District, Siaya County, within Nyanza Province, jointly with another before the court murdered one Mary Onyango Oluoch.

10. The appellant denied killing the deceased and stated that it was one Isaiah who beat her and when he went to the scene, Isaiah jumped out of the window and disappeared. He further stated that he tried to take the deceased to hospital but she was too heavy to carry. He denied having made a confession to the police that he had killed a woman and stated that he only went to the police station to report the matter but he was arrested and charged with murder that he did not commit. On his part he did not call any witness.

11. After weighing the evidence adduced by the seven (7) prosecution witnesses, and the defence by the appellant, the learned trial Judge was convinced that the prosecution had established their case beyond a reasonable doubt. This is what the learned Judge posited in his own words in a pertinent paragraph of his judgment;-

> Even though there seemed not to be direct evidence of how and who assaulted the deceased, the thread of circumstantial evidence shows the accused gained entry into the house via the window forcefully where the deceased had locked herself and the result thereafter was the deceased being found in a pool of blood. There is no other person who was suspected of the killing. Even more intriguing is the accused surrendering himself to the police. I do not buy his line of evidence that he tried to assist the deceased whom he found lying down and injured but she was too heavy. Equally, he ought to have called the wife of Isaiah who had notified him of the ordeal. Even if Isaiah escaped, there is no reason advanced to show that his wife refused to testify on behalf of the accused. I find that his surrender to the police was an act of guilt on his part and perhaps out of fear of harm by the deceased's family."

Consequently the appellant was convicted for murder and given the mandatory death sentence.

12. This is the judgment that has provoked the instant appeal that is predicated on some five (5) grounds of appeal to wit;

(i) That the learned Judge failed to properly analyze the evidence;

(ii) That the learned Judge failed to consider the appellant's defense;

(iii) That the learned Judge relied purely on circumstantial evidence;

(iv) That the learned Judge failed to conduct proper voire dire examination of the minors; and

(v) That the learned Judge failed to consider the appellant's mitigation during sentencing.

13. At the hearing of this appeal, Mr. Yego, learned counsel appeared for the appellant. In support of the appeal, counsel challenged the prosecution's eye witness's evidence as having been irregularly obtained as the voire dire evidence of the minors was not taken correctly; he also contended the same evidence

was contradictory and could not form the basis of a safe conviction. On sentencing, counsel contended that the trial Judge did not give the appellant the opportunity to mitigate and prayed that the sentence be interfered with.

14. Opposing the appeal was Mr. Muia learned prosecution counsel relied on his written submission and made some oral highlights. Counsel submitted that the prosecution evidence was consistent; that apart from the evidence of the two minors, PW3 placed the appellant and his accomplice Ongoma at the scene of the crime; that the appellant was seen armed with the jembe that was used to break the window and to kill the deceased; that PW3 recognized him because he was like a father to him; that the evidence of the eye witnesses was corroborated by PW5 who confirmed the cause of death; and that the appellant went to the police station and told the OCS that he had killed a woman, a matter that was confirmed soon after when PW2 went to report the same incident. On the procedure of taking voire dire evidence, counsel referred to Section 382 of the *Criminal Procedure Code* and insisted that there was no error in the procedure. On sentencing, counsel insisted that the aggravating circumstances of the instant case justified the appellant being condemned to suffer the death penalty.

15. In reply, Mr. Yego asserted that Section 382 of the CPC refers to errors in the procedure but the law guiding the evidence of PW1 & PW3 is the *Evidence Act*. On the appellant's alleged confession, counsel contended that that the appellant had gone to report what Ongoma had done.

16. We have considered the record of appeal, the grounds and deliberated on the submissions by counsel and the law. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and make our own conclusion but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and give allowance for that. In Mwangi vs. Republic [2004] 2 KLR 28 this Court stated:

> In Okeno v R [1972] EA 32 the predecessor of this Court stated, inter alia: '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 v R [1975] EA 336). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 v Sunday Post [1958] EA 424."

17. As aforestated, the prosecution's case rested entirely on the evidence of the two minors, PW4 who responded to the screams and saw the appellant at the scene which was largely circumstantial. Although this could have been taken together with the evidence of PW7 that the appellant took himself to the police station and said he had killed a woman which fact was soon thereafter confirmed by other witness, the trial Judge seemed not to have given much weight to the evidence of PW7 regarding the so called 'confession' but all in all he found all the evidence together unerringly pointed at the appellant and none other as the one together with his accomplish who struck the fatal blow on the deceased.

18. The tests to be applied in a case determinable on circumstantial evidence were set out in the case of; Abanga alias Onyango vs. Republic CA CR.A No 32 of 1990 (UR) as follows;

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

    i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and

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."

19. The central issue falling for our determination is whether the prosecution discharged the burden of proof as required that it was the appellant with his accomplice and none other who killed the deceased. Whether it was him that struck the fatal blow or his accomplice, is immaterial as the law is clear under Section 21 of the *Penal Code* states that when two or more persons form a common intention to commit a crime in conjunction with one another, criminal liability will be attributed to each person even though only one or some of the parties to the undertaking may have committed the criminal conduct itself. For common intention to apply, the evidence must show that the appellant was present at the scene when the crime was committed; was aware of the assault on the deceased; had manifested common intention with the other perpetrators by himself performing some act of association with their conduct; and had the requisite mens rea. (see S v Mgedezi & others (415/1987) [1998]ZASCA 135)

20. That said, we have to consider the veracity of the evidence of PW4 and the two minors who saw the appellant a person well known to them, savagely attack their grandfather and thereafter gaining entry to the house of the deceased by breaking the window. The children screamed and scampered out of fear but on return with PW4 they found the deceased had been cut severally and later succumbed to those injuries. The evidence of the two minors was corroborated by that of PW4 that he heard children screaming and when he went to inquire at the deceased compound what had happened, he found Mzee bleeding profusely and took him to the hospital. While at the hospital PW2 brought the deceased to same hospital with severe injuries. To us this evidence established that it was the appellant with his accomplice who were last seen gaining access to the deceased house and viciously attacked and left her for dead in the house.

21. There was a challenge raised by counsel for the appellant in regard to the voire dire evidence which in his view was not properly administered before the testimony of PW1 was received. The record does not indicate whether voire dire was administered to PW1 before her testimony was taken on 21st November, 2011. However the record reflects the answers of PW3 when he testified the same day. Although the administration of voire dire on minor witnesses is a statutory requirement under Section 125(1) of the *Evidence Act* and Section 19 (1) of the *Oaths and Statutory Declarations Act*, there is no specific format for such administration; the trial court can either write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make conclusion after the dialogue; or the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter. In Patrick Kathurima vs. Republic Nyeri CRA 137 of 2014 this Court after reviewing some case law on the subject observed thus:

> It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina vs. Compell (Times) December 20, 1982 and Republic vs. Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

22. It is apparent on the record of proceedings that in response to the questions put to PW3 during the voire dire examination, he stated that;

If one tells lies he is a sinner. He will be burned. I shall tell the truth."

In Sula vs. Uganda [2001]2 EA556 the Supreme Court of Uganda ruled that:

A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

The record shows that both PW1 and PW3 were subjected to cross-examination by the appellant's counsel Mr. Nyanga and their answers were found by the learned trial Judge to be coherent and truthful, unlike in the Kathurima case (supra). Therefore, in our view, failure by the trial Judge to record the questions put to the minor witnesses during their voir dire examination was not fatal to the prosecution's case as counsel for the appellant had an opportunity to cross-examine them. Moreover, the Judge seemed to have properly recorded the evidence of PW3 such that even if the evidence of PW1 were to be disregarded, the prosecution's case still would stand on the evidence of PW3.

23. We find the death of the deceased was confirmed by the postmortem report which showed the deceased died of severe head injuries caused by a heavy bladed object. The appellant was placed at the scene of murder by three witnesses, the two minor children who saw him violently attack Mzee and thereafter gaining entrance to the deceased house through the window which they smashed with a jembe. Although none of the witnesses saw the appellant and his accomplice strike the fatal blow on the deceased, piecing together the evidence adduced, the learned trial Judge inferred from the circumstances prevailing that the tapestry pointed only at the appellant with his accomplice as the people who caused the death of the deceased. In his judgment, the trial Judge concluded as follows;

(a)) The death of the deceased occurred;

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice aforethought.

24. Whether or not malicious motivation was established, we agree with the learned trial Judge that the statutory elements of malice aforethought as set out in Section 206 of the *Penal Code* were established:

206. 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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit felony."

We are satisfied from the nature of injuries sustained by the deceased that they were inflicted with the requisite mens rea.

25. Another line of evidence which we find was not considered by the trial court was the evidence of PW7 who was the Deputy OCS and had arrested the appellant after he took himself to the police station and said he had killed a woman. Granted that perhaps this evidence did not comply with the rules of confession, PW7 testified according to what he saw with his own eyes and heard with his ears and was also subjected to intense cross-examination. He recorded in the Occurrence Book what he heard and perceived the appellant to have said that he killed a woman. To us this is another tapestry that points to the appellant as the one who committed and caused the death of the deceased which should have been taken as other evidence. We find just like the trial court that the defence by the appellant that it was Isaiah who committed the murder was displaced by the strong evidence by the prosecution witnesses who placed the appellant at the scene of murder. For the aforesaid reasons we find no merit in the appeal regarding the conviction of the appellant which we uphold.

26. On the death sentence, we have to take into consideration the recent developments in jurisprudence on sentencing following the Supreme Court's decision in Francis Karioko Muruatetu vs. Republic & Another [2017] eKLR, where courts were advised to consider mitigating factors as put forward by an accused while bearing in mind that sentencing is a judicial function. On conviction, the appellant prayed for leniency stating that he was the sole breadwinner for his three (3) children. Bearing in mind that the appellant was also a first offender, not of course losing sight of the savage attack and pain inflicted on the deceased, we are inclined to substitute the death sentence with a term sentence of thirty (30) years imprisonment from the date of conviction.

27. In conclusion this appeal therefore fails on conviction but the sentence is substituted to a term of (30) years imprisonment from the date of conviction.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JANUARY, 2020.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR