Chiragu & another v Republic (Criminal Appeal 104 of 2018)
[2021] KECA 342 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 342 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 104 OF 2018

MSA MAKHANDIA, A MBOGHOLI-MSAGHA & HA OMONDI, JJA

DECEMBER 17, 2021

BETWEEN

DAVID MUNYUI CHIRAGU ..... 1ST APPELLANT

SAMUEL MUNGAI NGANGA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 24th March 2017 in HC.CR. Case No. 19 OF 2015)

JUDGMENT

1. By an information dated 14th April 2014, the High Court of Kenya at Kajiado was notified that David Munyui Chiragu and Samuel Mungai N'gang'a, hereinafter "the appellants" were suspected to have intentionally and deliberately caused the death of one, Catharine Kanini Muiwa hereinafter "the deceased". Accordingly, they were to face the information charging them with the offence of murder contrary to section 203 as read with section 204 of the *penal code*, the particulars being that the duo on or about the night of 25th and 26th day of January 2014 at unknown time at Nkama village, Kuku location in Loitoktok district within the county of Kajiado, murdered the deceased. When presented to court they entered a plea of not guilty to the information and soon thereafter their trial ensued. At the conclusion thereof they were found guilty of the offence, convicted and sentenced to death.

2. Aggrieved by the conviction and sentence, the appellant preferred this appeal on the grounds that the trial court erred in law by: basing the conviction on sole identification evidence by PW1 without warning himself of the dangers of convicting on such evidence; failing to observe that corroboration of PW1's evidence was lacking yet the same was absolutely necessary; failing to observe that the burden of proof was not discharged to the required standard; and that the provisions of section 169(1) of the

Criminal Procedure Code ("CPC") were not complied with despite the appellants testifying on oath and advancing an alibi defence.

3. However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of *Okeno V. R. [1972] EA 32*, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw and observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also *Erick Otieno Arun V. Republic [2006] eKLR*. In undertaking this exercise, we mustof necessity go over the evidence presented before trial court albeit in summary.

4. PW1, FM, the 3rd born daughter of the deceased and class five pupil at [Particulars Withheld] Primary School testified that she used to live with the deceased at Loitoktok. On 25th January 2014 at about 8 pm, the deceased left the house to purchase flour. After sometime, she came back in the company of three people. She was able to see these people courtesy of a tin lamp that she had lit. Among them were the appellants whom she knew very well as they used to frequent their house being acquaintances of the deceased. However, the third person was unknown to her. Whilst in the house, they had a long conversation with the deceased. That the 1st appellant and the other person soon left, leaving behind the deceased with the 2nd appellant. later they too left and that was the last time she saw the deceased alive. As soon as the last two left she retired to bed only to be awakened by knock on the door and upon opening, the third unknown person entered and went straight to where the deceased kept her money and took the same as well as her two cell phones and left. The deceased did not turn-up that night. The following day she went to school but her aunt one, Felister Ngina (PW2) came for her and in the company of the head teacher, they proceeded to Loitokitok Police Station to record a statement. That she was again taken back to the same police station sometimes in February 2014 and asked to identify the person(s) she had seen in their house on the fateful night. She identified the appellants in two separate police identification parades.

5. PW2 Felista Ngina Mulwa on 27th January 2014 learnt from her Sister-in-Law, Scolastica Mwikali that the deceased, who was her sister was missing from her house. She went to the house and in the company of the sister-in-law aforesaid proceeded to Illasit police station to file a missing person report but were instead directed to Loitokitok police station. They thereafter continued searching for the deceased in various Hospitals but all was in vain. Several days later on their way home whilst at a bus stage near the deceased's residence, a lady crossed into the Bush to relieve herself but immediately, ran back into the road. She beckoned her and she accompanied her back into the bush only to be met by a dead body. She identified the body as that of the deceased. Police officers were contacted who soon came and removed the body to the mortuary.

6. PW3 Hanna Njeri Wambata the landlady to the deceased saw the deceased alive on 25th January 2014 going to the market but never saw her again. She only heard her voice again at about 9.00 p.m. on the same day when she was calling her children to open the door for her. A few days later at about at 2.00 p.m. she heard screams from the road and when she went to the scene, she found that the body of the deceased had been discovered.

7. PW4, Joyce Mukulu Katunga, a neighbour of the deceased, at about 9.30p.m heard the deceased calling out PW1 to open the door. Shortly thereafter she heard the deceased in a conversation with some other people and after sometime all went silent and she slept. The following morning after church service she was informed by PW1 that the deceased had not returned home. That it was much later that she had screams and saw people gathered by the roadside and was informed that the deceased had been killed.

8. PW5 C.I. John Nyangaresi Dibao was stood down only to testify as PW7. Thus there was no PW5 recorded, as a witness. PW6, Dr. Stephen Mutiso, conducted a post-mortem on the body of the deceased on 30th November 2014. He noted that the forearms and thighs had blisters and there was puffiness on the face, with bruising on the torso and thighs; the spinal column and cervical spine was fractured with the spinal cord being severed. He formed an opinion that the cause of death was due to the fracture of the cervical spinal cord due to either trauma to the neck or strangulation. However, he was unable to establish the day or time of death.

9. PW7 CIP John Nyangares Libao was requested by the Investigating Officer, PW8 to conduct an identification parade. He described how he conducted the parade twice for both appellants and PW1 was able to identify the appellants from the respective parades. He confirmed that both parades were conducted in accordance with the police force standing orders.

10. PW8 IP Jonathan Munga Mbwana, the Investigations officer on 27th January 2014 whilst in office at Loitoktok, received a telephone call from the Deputy OCS, IP John Libai who informed him that there was a dead body of a female found in a thicket bush. He proceeded to the scene and caused the scene to be photographed and the body was soon thereafter removed to Loitokitok District Hospital mortuary. Upon interrogating PW1, he started looking for the two appellants as suspects. He and other police officers were able to arrest them whereupon a police identification parade was conducted by PW7 and the two appellants were positively identified by PW1. He then prepared an information charging the appellants with murder of the deceased.

11. At the close of the prosecution case, the appellants were found with a case to answer and put on their defence. They all opted for sworn statements of defence. The 1st Appellant denied the offence stating that on the fateful day he was at his house with his wife and family from 7pm until he retired to bed and never left the house until the following morning. He confirmed that PW1 was well known to him before the identification parade. He called his wife, Grace Njoki Munya, as his witness. She testified that the 1st appellant was with her throughout the fateful night and at no time did he leave the house.

12. The 2nd appellant equally denied the offence and stated that he was at all times at his house. That he only learnt that the deceased was no more on 27th January 2014. He knew PW1 as he used to undertake repairs in their house. He too called his wife, Leah Wanjiru Mungai, as a witness. She stated that her husband was on the material night with her throughout and never left.

13. Upon conclusion of the trial, the court was satisfied that the prosecution in their quest for Justice for the deceased had proved beyond reasonable doubt that the deceased had been murdered by the appellants and proceeded to convict them accordingly. Upon conviction the appellants were sentenced to death.

14. Aggrieved by the conviction and sentence, the appellants lodged the instant appeal citing sixteen grounds in the supplementary memorandum of appeal which have condensed as follows, that the trial court erred in law in; failing to note that the identification parade was faulty; holding that the appellants were properly identified by PW1; convicting them without the prosecution calling crucial witnesses; convicting them whilst relying on the evidence of a single identifying witness who was a minor and without warning itself of the dangers of basing a conviction on such evidence; failing to analyze the entire evidence properly; convicting the appellants when the prosecution evidence did not meet the required standard of proof; failing to give the appellants' defence of Alibi a fair, objective and open-minded consideration and casually rejecting the same; misapprehending the facts and law; relying on circumstantial evidence that was of the weakest kind and convicting the appellants on the basis of mere suspicion. Finally, the appellants maintained that the sentence imposed on them was harsh, excessive

and mandatory in nature and therefore contrary to the prescriptions by the Supreme Court in *Francis Karioko Muruatetu & Anor V Republic [2017] eKLR*

15. At the hearing of this appeal, Mr. Ondieki, learned counsel appeared for the appellants while Ms. Mativa, learned prosecution counsel, appeared for the Respondent.

16. The appellants submitted that the trial court relied heavily on the testimony of PW1 without interrogating the veracity of her testimony and without cautioning itself of the dangers of such reliance. That there were critical witnesses that were not summoned to testify. They included the lady who found the deceased's body and CP Ochieng who took photographs of the scene of crime. That there were missing links in the prosecution case which created doubts that should have been resolved in favour of the appellants. Those missing links include the fact that the body was discovered by the lady who never testified, unknown person took the money and cell phones from the deceased's house immediately after the appellants had left, the time of death could not be ascertained by PW6, that there were several flaws in the prosecution evidence regarding the identification of the appellants for instance, the intensity of light illuminated by the tin lamp in the deceased's house was not interrogated, nor its position vis a vis the appellants, the distance between PW1 and the appellants coupled with the fact that PW1, the key witness was a child of tender years gave room for the possibility of error. That the identification parade was conducted with the same members which offended the rules and regulations governing such parades being the force standing orders and was thus prejudicial to the appellants. Further PW8 who was the investigating officer was part of the team that conducted the identification parade which was also against the force standing orders. Further, that no evidence of the first report and description of the appellants before the identification parade was led as required.

17. It was submitted that having not called the lady who discovered the body and failure by PW6 to pinpoint the exact day and time that the deceased could have been killed was a clear indication that the prosecution did not prove their case beyond reasonable doubt. The appellants also accused the trial court offailing to consider the defences of alibi advanced by them. Further that the several contradictions and inconsistences in the evidence of PW1 and PW8 were not given due consideration by the trial court which is testimony to the fact that the trial court failed to evaluate the evidence properly.

18. On circumstantial evidence, the appellants submitted that there were several missing gaps in the prosecution's case and the chain of events were broken; for instance PW4 testified that she heard people talking and being welcomed into the deceased's house but she didn't see them. The deceased's body was discovered by a lady who never testified. PW3 equally testified that she did not see the appellants when the deceased asked the children to open the door. PW6 could not establish the time of death which meant the death could have occurred the very morning the deceased's body was discovered. As such suspicion rather than evidence was relied upon to convict the appellants. On the basis of the foregoing the appellants prayed for the appeal to be allowed in its entirety.

19. In opposing the appeal, it was submitted that the identification parade was conducted properly and the appellants were pointed out by PW1 as she knew them very well since they were frequent visitors at their house. That the witnesses that were called by the prosecution were sufficient to prove the prosecution case against the appellants and there was no need for multiplicity of witnesses. That there was sufficient light in the house which made it possible for PW1 to identify the appellants. That indeed the trial court warned itself of the dangers of relying on the evidence of PW1, a single witness to find a conviction. That the alibi defences advanced by the appellants were duly considered and found wanting. That the sentence imposed was legal and well deserved in the circumstances and should not therefore be disturbed. She thus urged us to dismiss the appeal.

20. We have carefully considered the record of appeal, submissions by counsel and the law. The grounds of appeal set out elsewhere in this judgment can actually be collapsed into two thematic areas; whether the prosecution proved its case against the appellants beyond reasonable doubt and secondly, whether the death sentence imposed on the appellant was warranted.

21. The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act.

22. As to the death of the deceased, we agree with the trial court's finding that there was no dispute that the deceased was murdered. There was sufficient evidence to that effect. All witnesses save PW7 attested to the death of the deceased which was corroborated by the production of the postmortem by PW6. Indeed, even the appellants themselves confirmed the death of the deceased.

23. The big question however is, whether the appellants were responsible for the death of the deceased? Alternatively did the prosecution prove beyond reasonable doubt that it was the appellants and nobody else who committed the unlawful act that led to the death of the deceased? From the evidence tendered before court it is clear that none of the prosecution witnesses actually saw or witnessed the appellants or indeed any other person kill the deceased. Thus, there was no direct evidence linking the appellants to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR*, this Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR)* in which this court held 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; (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."

And in *Sawe Vs. Republic [2003] KLR 364*, the Court of Appeal amplified on the above thus:

> " 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."

24. The only circumstantial evidence tending to link the appellants to the crime was that of PW1, a minor who attested to the fact that it was the appellants and the third persons whom she last saw leaving with the deceased. The other strand of circumstantial evidence is that sometimes after the deceased had left, the stranger came back and took the money and cell phones belonging to the deceased. Other than PW1 seeing the appellants and a stranger leave with the deceased in intervals there is nothing else that shows that the deceased died under the hands of the appellants. To boost their case against the appellants however, the prosecution invoked the criminal law doctrine of "last seen with". That as the appellants were the last people to be seen with the deceased and the deceased was later found dead then they must have had a hand in her death. Regarding the doctrine of "last seen with" we will revert to Nigerian case of *Moses Jua V. The State (2007) LPELR*-CA/IL/42/2006. The court, while considering the 'last seen alive with' doctrine held:

> "Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

In yet another Nigerian case considering the same doctrine, in *Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009* the court opined thus:

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death.
>
> Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of *Ramreddy Rajeshkhanna Reddy & Another V. State of Andhra Pradesh, JT 2006 (4) SC 16* for instance the court held:

> " That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

25. Locally, this doctrine has been invoked in the case of *Republic v EEK [2018] eKLR*. The prosecution adduced evidence on this aspect through PW1. She confirmed that indeed the deceased was last seen alive in the company of the appellants. Her evidence was not corroborated at all by any other witness (ess), as required being a minor. This requirement is statutorily underpinned by section 124 of the *Evidence Act*. The appellants contested that evidence by stating that in fact, at the particular time they were asleep in their houses. This being the case, it was absolutely necessary for the trial court to look for corroboration or other evidence implicating the appellants. No such attempt was made by the trial court. We are persuaded by the holding in Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is desirable to exercise caution and look for some other corroborative evidence. The trial court having failed do so in the circumstances of this case, it erred.

26. Again given the circumstances of this case, the doctrine may well not suffice as the deceased did not leave with the appellants at ago as already stated. It is also instructive to note that after everybody left, only the stranger came back in the absence of the appellants and took the deceased's money and the cell phones. Could this stranger have been the last person left by the appellants with the deceased as opposed to the appellants? How does one explain the fact that when he came back to the house alone he knew exactly where the money and cell phones were kept.

27. The record does not show the duration of time taken between when the last lot left and when the stranger came back. The deceased's body was found some days later in a thicket near her house. There was no evidence from PW6 as to when the deceased could have been murdered. Is it possible that the murder could have been committed not necessarily on that night or any other day thereafter? Is it also not possible that the murder could have been committed by any other people given the credible alibi defence mounted by the appellants and which our view was not discounted by the prosecution. Given that she murdered near her house, how come nobody heard of any skirmish, struggle or noise as the offence was being committed. The date and time of death was critical to link the death of the deceased to the appellants. It is instructive that the deceased's body was discovered in a thicket near her house three days after. Is it possible that she was killed by any other person and not necessarily the appellants? That is why it was necessary to establish at what time or date that she was killed. This issue leaves doubts in our minds that perhaps the appellants could not have been with the deceased shortly before her death contrary to the findings of the trial court. Given the manner and style in which the appellants left the deceased's house, could the court trial have rightly inferred common intention to commit the crime. We entertain our doubts!

28. We note also that the aforesaid circumstantial evidence linking the appellants to the crime was that of a single witness who was at the same time a minor. Much as the trial court warned itself of the dangers of relying on such evidence contrary to the submissions of the appellants, it goes without saying that such evidence once again required corroboration.

29. Our intense examination of the record does not disclose any attempt to corroborate the evidence of PW1. In the absence of any corroboration her evidence was of little probative value and proved nothing thus watering down yet again the circumstantial evidence relied on by the prosecution.

30. The record also shows that the appellants were subjected to an identification parade. The appellants allege that it was not conducted properly as it violated the police force standing orders with regard to the conduct of police identification parades. All we can say is that the identification parade was wholly unnecessary, worthless and of no evidential value. This is because the identifying witness (PW1) by her own account knew the appellants very well and had interacted with them in the past. The appellants too conceded to that fact. PW1 having known them there was no need for an identification parade.

The trial court ought therefore to have rejected or placed no premium at all to that evidence but which it did which was an error on its part.

31. On the whole we are satisfied that the circumstantial evidence relied upon by the prosecution was so weak and tenuous as to be unsafe to find a conviction. As correctly submitted by the appellants there were so many gaps, missing and broken links as well as break in the chain of events as not to make such evidence unerringly point to the guilt of the appellants.

32. Having so found we do not think it is necessary to consider the other grounds of appeal. The upshot then is that, we allow the appeal, quash the conviction and set aside the death sentence imposed on the appellants. They shall be set free forthwith unless they are otherwise lawfully held. We so order.

33. It is so ordered accordingly.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR