Mutinda v Republic (Criminal Appeal 14 of 2013)
[2024] KECA 149 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KECA 149 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 14 OF 2013

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 16, 2024

BETWEEN

PETER MWANGANGI MUTINDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru, (R.P.V. Wendoh, J.) dated 14th March 2013inH.C.CR.C. No. 108 of 2010)

JUDGMENT

1. The appellant, Peter Mwangangi Mutinda, and his two co- accused were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the charge were that, on 15th May 2010 at Shamata area in Nyandarua North District, in the then Central Province, the appellant and his co-accused jointly murdered Geoffrey Gachago Muriuki.

3. The appellant denied the charges and soon thereafter, a trial ensued. The prosecution called 13 witnesses.

4. PW1 was the first person to notice that the deceased was missing. He informed the court that the deceased had on 14th May 2010 requested him to assist him in getting the cows and goats out of the shed because his worker, the appellant, had left. On 15th May 2010, he went to the deceased's home at 6:15 am where he found milk spilled outside the house. At the entrance to the goats' shed, he found the deceased's green jacket which was muddy. He called out to the deceased but there was no response. He then went to inform the deceased's mother and together with their neighbours, they started to look for the deceased.

5. PW2 was the deceased's mother. During her testimony, she explained that she had entered the deceased's home, opened the veranda door, and taken the keys to the bedroom before entering. She found some documents on the bed. The deceased's hat and walking stick were on the floor and she knew that the deceased had not gone far. However, they reported the matter to the police.

6. She told the court that the deceased's dog kept on moving between the deceased's boots which were near the milk and the borehole hence the people around decided to check the borehole. The deceased's body was found in the borehole with blood oozing from the nose. She knew the appellant. She said that he had worked for the deceased for about a month.

7. PW3 was the deceased's neighbour, and their homes were opposite each other. He informed the court that on 15th May 2010, he was awoken at about 5:45 am with a scream from the deceased's compound. When he went to open the gate, he saw someone deliver the deceased's milk to the milk van. He then heard the boot of the car being closed. He was working on his farm when he learned that the deceased was missing. He joined PW1, PW2, and others in the search for the deceased. He reported to Shamata patrol base. He also called the turnboy of the milk van who confirmed that the deceased's milk had been collected.

8. PW4 was the turnboy of the milk van. He told the court that when they arrived at the deceased's gate at 5:00 am, there was no milk at the gate as was the norm. They hooted three times and the worker whom he had been collecting milk from, for about a month, brought the milk. He knew the worker as Mwangangi, the appellant.

9. PW5 told the court that when he went to his home on 15th May 2010 at about 7:00 pm, he found the appellant with his wife. The wife informed him that the appellant was looking for a job. The appellant had with him a suitcase and a small paper bag. The appellant remained in his home for 9 days. The appellant was planning to leave the home early on the 10th day, but the police arrived at 5:30 am and arrested him together with the appellant.

10. PW6 was the deceased's sister. She told the court that the appellant had come to her home in Embu looking for a job and since the deceased was looking for someone, she sent the appellant to Shamata on 24th April 2010. The deceased called her on 14th May 2010 and told her that the appellant was rude and he would therefore send him away. On 15th May 2010, she was informed of the deceased's death. On 16th May 2010, the appellant called and told her that he had left and gone back home to Ukambani. She gave the number to the police and they contacted the appellant.

11. PW7 and PW8 were the deceased's sons. They identified the deceased's body for post-mortem. PW8 received information on the whereabouts of the appellant and led the police to PW5's home. They found the deceased's Nokia phone and Sonitec radio in the appellant's room at PW5's home. On interrogation, the appellant named his two co-accused as accomplices.

12. PW9 was the doctor who produced the post-mortem report by Dr. Kamau, who conducted the post-mortem. The doctor had concluded that the cause of death was subdural and intracerebral haematoma due to trauma. The deceased had suffered haematoma on the scalp, occipital region, subdural and intracranial.

13. PW10 was a Resident Magistrate at Nyahururu Law Courts. She produced the appellant's confessionary statement which she recorded on 4th June 2010.

14. PW11 received a report from PW3 that the deceased was missing. He went to the deceased's home where he found that the bedroom was disturbed, and milk was spilled in the kitchen and outside. There was suspicion that the body could be in the borehole, and upon checking, the body was retrieved from

the borehole by members of the public. There was a swelling on the deceased's neck and blood was oozing from the mouth. He took the deceased's green jacket which was found near the goat's shed and a stick.

15. PW12 was among those who arrested the appellant and PW5. He recovered the deceased's mobile phone and radio from the appellant. He also arrested the appellant's accomplices.

16. PW13 assisted PW12 with investigations. He received receipts in respect of the deceased's mobile phone and the bank deposit slip for a land sale between the deceased and one of the appellant's co-accused. He went to Safaricom and obtained an MPESA statement for the deceased's phone. It showed that the funds had been transferred from the deceased's phone to the appellant's phone on 15th May 2010. He also produced a statement and certificate from Safaricom confirming the authenticity of the statements.

17. When put to his defence, the appellant in his sworn statement stated that he was with PW5 at his home on 15th May 2010. He had gone there to look for a job. PW5 got him a job in a hotel in Nyahururu town where he was working until his arrest on 26th May 2010. He told the court that he went to work for the deceased on 23 April 2009, and he had worked there for 9 months. He denied committing the murder. He also denied recording a confession before a Magistrate.

18. The learned Judge determined that the evidence before the court was circumstantial. No one had witnessed the deceased's murder. Citing the case of Peter Moate Obero & Another v Republic, Criminal Appeal No. 177 of 2008, the learned Judge considered whether or not there was sufficient circumstantial evidence on record to sustain a conviction.

19. Firstly, the learned Judge determined that there was no evidence other than that of the appellant in his statement to the police and the magistrate that linked his accomplices to the murder. It was held that the appellant's accomplice's evidence was not corroborated.

20. When it came to the appellant, the learned Judge held that there was overwhelming circumstantial evidence linking him to the death of the deceased. The learned Judge held that the appellant had worked for the deceased briefly as reflected in the evidence of PW1, PW2, PW4, PW6 and PW8. In effect, despite the appellant alleging that he had worked for about 8 months, all the other evidence was inconsistent with his said assertion. It was the further finding of the trial court that when the appellant left, he was not on good terms with the deceased.

21. The learned Judge also determined that PW4 was able to see the appellant properly on 15th May 2010 when he collected milk in the morning and that he was able to identify him as the person who had delivered milk to him, having seen him continuously for two weeks.

22. The appellant did not deny that he was found in possession of the deceased's phone and radio. He also did not explain how the items were found in the house where he was residing. The learned Judge held that the appellant was in recent possession of the said items and that all the ingredients required to prove recent possession, as was held in the case of Isaac Nganga Kahiga alias Peter Njenga Nganga Kahiga v Republic, Criminal Appeal No. 272 of 2005, were established.

23. The learned Judge further determined that the appellant was not only in possession of the deceased's phone but that he transacted on the deceased's MPESA account on the morning the deceased was found murdered. The learned Judge found that this evidence corroborated the evidence of PW4 that the appellant was at the deceased's home on the morning of 15th May 2010, and that of PW8 and PW12 who arrested the appellant while in possession of the items.

24. The learned Judge held that the appellant did not explain how he came to have the mobile phone or why he transacted on the said phone. It was the finding of the learned Judge that this also showed that the appellant was the last person to be in contact with the deceased. In the said circumstances, the appellant was under obligation, as provided for under Section 111 of the *Evidence Act*, to give a plausible explanation, which did not shift the burden of proof from the prosecution.

25. It was the finding of the learned Judge that the appellant murdered the deceased on the night of 14th May 2010 and 15th May 2010. The inculpatory facts were incompatible with the innocence of the appellant and were incapable of any other explanation upon any other reasonable hypothesis than the appellant's guilt.

26. Consequently, the appellant was convicted of murder. Upon consideration of the appellant's mitigation that he was a first offender, remorseful, and a young man with a young family; and the circumstances of the case, the appellant was sentenced to life imprisonment.

27. Aggrieved by the judgment, the appellant filed the present appeal in which he raised 10 grounds of appeal to wit that, the learned Judge erred by:

> " a) Convicting in the absence of mens rea and actus reus.
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> b. Convicting without proof of identification.
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> c. Convicting based on hearsay evidence.
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> d. Relying on contradictory evidence by prosecution witnesses.
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> e. Failing to consider that the appellant was initially charged with the offence of robbery with violence.
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> f. Failing to note that the appellant was tortured into confessing contrary to Section 49(1)(d) of *the Constitution*.
>
> g. Denying the appellant his fundamental right to information of the evidence to be relied upon by the prosecution.
>
> h. Shifting the burden of proof contrary to Sections 107 and 108 of the *Evidence Act*.
>
> i. Convicting in the absence of sufficient evidence.
>
> j. Convicting on the strength of the cell phone of the deceased which was not in the appellant's possession."

1. When the appeal came up for hearing on 1st November 2023, Ms.Odhiambo, learned counsel was present for the appellant while Ms. Torosi learned Principal Prosecution Counsel appeared for the respondent. Counsel relied on their respective written submissions.

29. The appellant submitted that the respondent had failed to prove its case beyond reasonable doubt. He argued that malice aforethought under Section 206 of the Penal Code was not proved; because none of the prosecution witnesses saw the appellant murder the deceased and there was no direct evidence linking him to the death of the deceased. He faulted the learned Judge for relying on suspicion to convict.

30. Relying on the cases of *Ahamad Abolfadhi Mohammed & Another v Republic* [2018] eKLR, *Abanga alias Onyango v Republic*, Criminal Appeal No. 32 of 1990 (UR), and *Sawe Republic* [2003] KLR 364,

the appellant submitted that the prosecution evidence was so weak, such as to be incapable to sustain a conviction.

31. The appellant submitted that the confession recorded by PW10 failed to meet the threshold provided for by Sections 25 and 26 of the *Evidence Act*. It was taken by a resident magistrate who was unqualified to handle a murder case hence the purported confession was inadmissible.

32. The appellant submitted that the sentence imposed was excessive and harsh. He prayed for a reduction in sentence and for the number of years he spent in prison to be considered. Citing the case of *Francis Muruatetu & Another v Republic* [2017] eKLR, the appellant urged us to exercise the court's discretion and set aside the death sentence.

33. The respondent relied on the provisions of Section 203 of the *Penal Code* and the case of Republic v Mohammed Dadi Kokane & 7 Others [2014] eKLR to submit that there was death, as was evidenced by the evidence of PW1, PW2, PW3, PW7, PW8, and PW9 who produced a post-mortem report which showed that the deceased died as a result of subdural and intracerebral haematoma.

34. The respondent submitted that the death of the deceased was unlawful, as in every homicide, it is presumed to be unlawful unless the circumstances make it excusable. PW1, PW2, and PW3 testified that the deceased was retrieved from a borehole and the evidence by the doctor revealed that the death of the deceased was not attributable to natural causes.

35. The respondent submitted that the doctrine of recent possession had been established as the appellant was found in possession of the deceased's phone and radio 10 days after the deceased was killed, and the appellant did not explain why he was in possession of the same. The respondent relied on the case of Isaac Nganga Kahiga alias Peter Njenga Nganga Kahiga v Republic, (supra), to buttress this submission.

36. The respondent relied on the case of *Peter Maote Obero & Another v Republic*, Criminal Appeal No. 177 of 2008 in submitting that nobody witnessed the deceased's murder. However, it was beyond doubt that the appellant murdered the deceased. He was at the deceased's home on the morning of 15th May 2010 delivering milk yet he had been dismissed on 14th May 2010. He was later found with the deceased's property. The respondent was of the view that this circumstantial evidence pointed at the appellant as the person who participated in causing the death of the deceased.

37. Further relying on the case of Republic v Mohammed Dadi Kokane & 7 Others, (supra), the respondent submitted that the appellant had worked for the deceased and that they had some disagreements before the appellant was relieved of his duties. The appellant left on 14th May 2010 while not in good terms with the deceased and yet on the morning of 15th May 2010 he was seen at the deceased's home. The appellant's co-accused informed the court that he had solved a payment dispute between the appellant and the deceased.

38. The respondent was of the view that the circumstances under which the deceased was found, in a borehole, indicated that the appellant knew that his actions would cause death to the deceased. Furthermore, the appellant was found with the deceased's phone, he transferred money to his account from the deceased's phone, and he even called PW6 a day after the murder and lied that he was in Ukambani.

39. The respondent submitted that no hearsay evidence was led by the prosecution.

40. The respondent also submitted that there were no contradictions or inconsistencies in the evidence by the prosecution witnesses.

41. The respondent argued that there was no proof of the allegation that the appellant was tortured to confess. In any event, the appellant never raised the issue during cross-examination.

42. The respondent submitted that when the appellant asked for statements, the said statements, including the confession were served upon the appellant's counsel who cross-examined PW10 on the same.

43. The respondent concluded by stating that there was overwhelming evidence by the prosecution which proved the offence beyond any reasonable doubt.

44. This is a first appeal. We are mandated to re-evaluate and re- analyze the evidence before the trial court, bearing in mind that we did not have the occasion to see the witnesses. In the case of *Chiragu & Another v Republic* [2021] KECA 342 (KLR), the court stated as follows:

> " 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 must of necessity go over the evidence presented before trial court albeit in summary."

45. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issues for determination are; whether or not murder was proved beyond reasonable doubt as is closely intertwined with whether or not the circumstantial evidence was sufficient to sustain a conviction, and whether or not the sentence meted was excessive.

46. Section 203 of the *Penal Code* under which the appellant was charged provides that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

47. To sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.

48. It is common ground that the deceased died. The prosecution witnesses testified that the body of the deceased was found in a borehole. The post-mortem report showed that indeed the deceased had died as a result of haematoma.

49. Therefore, the questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellant, and was there malice aforethought?

50. It is common ground that none of the prosecution witnesses saw the deceased being killed. He was found dead in a borehole on the morning of 15th May 2010. It follows, therefore, that there was no direct evidence linking the appellant to the death of the deceased. The prosecution case was therefore

based on circumstantial evidence. In Ahamad *Abolfathi Mohammed and Another v Republic*, (supra), the court stated that:

> " 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."

51. The conditions for the application of circumstantial evidence were laid down in the case of Abanga alias Onyango v Republic, (supra), where the court held that:

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

52. Similarly, the court in Sawe v Republic, (supra), stated 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."

53. The circumstantial evidence linking the appellant to the death of the deceased is that the appellant worked for the deceased and from the evidence of PW6 and the appellant's co-accused, the employer-employee relationship between the appellant and the deceased had run its course and the deceased had relieved the appellant from his duties on 14th May 2010. According to the appellant's co-accused, the appellant was not happy with the pay the deceased had given him, and the co-accused had intervened in the matter.

54. The appellant was also seen at the deceased's home on the morning of 15th May 2010 by PW4 who testified that he had collected milk from the appellant. The appellant did not explain what he was doing at the deceased's home that morning since he had been relieved of his duties the previous day. This was

made clear by the evidence of PW1 who stated that the deceased had asked him to go help with the cows that morning, and when he got there, he couldn't find the deceased. It follows therefore that the appellant was the last person to be in contact with the deceased.

55. In the Nigerian case of *Moses Jua v The State* [2007] LPELR- CA/IL/42/2006, the court held that:

> " 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."

56. Similarly, in *Stephen Haruna v The Attorney-General of The Federation* [2010] 1 iLAW/CA/A/86/C/2009, the court stated that:

> " 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."

57. This evidence shows that after leaving the deceased's home on 15th May 2010, the appellant went to Nyahururu where he stayed with PW5. However, the appellant felt the need to lie about his whereabouts as on 16th May 2010; he called PW6 and told her he was in Ukambani.

58. Also, upon arrest, the appellant implicated his co-accused as accomplices, resulting in their respective arrests. Additionally, he was found in possession of the deceased's phone and radio. He had given PW5 the deceased's phone to use as though it was his. The appellant had also made MPESA transfers from the deceased's phone to his phone on the morning of 15th May 2010.

59. The evidence adduced by the prosecution in this instance was such that the chain of events was never broken. From the moment the appellant disagreed with the deceased and he was sent away, to the appellant's mysterious reappearance at the deceased's home on the morning the deceased was found dead, to the lies about his whereabouts, and to being found in possession of the deceased's phone and radio, the inference of the appellant's guilt, and the inculpatory facts were incompatible with his innocence.

60. These facts were incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt. We have found no other co-existing circumstances that could weaken the chain of circumstances relied upon by the prosecution. In this regard, we find that the respondent proved beyond reasonable doubt that the appellant committed the unlawful act leading to the death of the deceased.

61. As regards malice aforethought, Section 206 of the *Penal Code* provides:

> " 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.

d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony."

62. In the case *Republic v Tubere s/o Ochen* [1945] 12 EACA 63, the court established the following elements on malice aforethought:

> "The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during and after the incident."

63. From the evidence of PW1, PW2, and PW3, the deceased was found dead in a borehole in his homestead. The post-mortem report indicated that he had sustained head injuries. The appellant had been dismissed from work, he was also not satisfied with the pay the deceased gave him, this prompted the appellant to take the deceased's phone and transfer the funds to his phone. The appellant must have been very angry, and he must have had the intention to take the money he felt was owed to him.

64. The appellant assaulted the deceased, causing him to sustain head injuries. The injuries were so severe that they resulted in the death of the deceased. Whether the appellant only wanted to injure the deceased or even if he did not care whether or not the injuries he inflicted could cause the death of the deceased, the provisions of Section 206 of the Penal Code, deems the conduct of the appellant as a manifest demonstration of his malice aforethought.

65. We are therefore satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt.

66. Lastly, the appellant was sentenced to life imprisonment. He found this sentence to be manifestly excessive. The trial court considered the appellant's mitigation that he was a first offender with a young family, and he asked for leniency.

67. In view of the Supreme Court decision in *Francis Muruatetu & Another v Republic,* (supra) which held that:

> "Consequently, we find that section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty...It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ..."

68. We note that the Supreme Court did not outlaw the death sentence. In any event, the appellant was sentenced to life imprisonment. However, taking into account the relevant circumstances of this case, the appellant's mitigation, and the fact that he had been in custody for the past 13 years, we find that this is a case that warrants the exercise of our discretion to interfere with the sentence.

69. We consequently find that the appellant's conviction for the offence of murder was safe, and uphold the said conviction. However, we set aside the life imprisonment sentence and substitute the same with 30 years' imprisonment.

70. By dint of Section 333(2) of the *Criminal Procedure Code*, the imprisonment term of 30 years shall be computed to begin running from the date when the appellant was convicted.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR