Wahome v Republic (Criminal Appeal 84 of 2018)
[2024] KECA 1850 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1850 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 84 OF 2018

MA WARSAME, JM MATIVO & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

JOHN NDIRANGU WAHOME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Odero, J.) dated 28th May, 2018 in H.C.CR.A No. 33 of 2016))

JUDGMENT

1. Before us is a first appeal against the appellant's conviction and sentence for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. As such, we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinise the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See Okeno vs. R [1972] EA 32 and Kiilu & Another vs. R [2005] KLR 174.

2. The particulars of the charge were that the appellant on 7th May 2006 at Kamkunji in Nyandarua District within the then Central Province, murdered Cecilia Wangeci Wambui. From what we can discern from the record, the matter proceeded before Koome, J. (as she was then) who rendered a guilty verdict on 31st October, 2008. However, for reasons not reflected in the record, the Court of Appeal ordered that the matter begin de novo, and so it did, on 25th January 2014 where it was initially heard by Lady Justice Wendoh and subsequently by Lady Justice Odero who took over the matter upon the former's transfer to a different Court.

3. The prosecution's case with regard to the said offence was that on the material day the deceased and her brother Joseph Kinuthia (PW1) were in the care of their grandmother (PW2 Cecilia Wangeci) when

the appellant, John Ndirangu, who was a distant relative, arrived at her house at about 6.00 p.m looking for one Francis Mwangi who had allegedly taken his hat. Upon being informed that Francis had gone to "Ngari's house", the appellant requested that the deceased accompany him in order to point out the said house.

4. The Grandmother acceded to the request on condition that both her grandchildren accompany the appellant. Unfortunately, that was the last time she saw her granddaughter alive. She testified that around 7.00 p.m. Kinuthia came home alone.

5. According to Kinuthia, they never made it to their destination.

   The appellant told him to wait by a path while he and the deceased went to get the alleged hat. He stayed there for over half an hour until the sought after Francis Mwangi found him, and took him back to his grandmother's house. This prompted the search for the missing child.

6. PW2 mobilised her neighbours and a search began for the duo.

   The appellant was later found in a nearby maize plantation and was coaxed through beatings to show them where the minor was. He took them on a wild goose chase, and was eventually taken by police to Oljoro Orok Police Station upon the discovery of the deceased innerwear.

7. On the second day of the search, the clothes the deceased was wearing when she left with the appellant were discovered hidden

   in a bush in the maize plantation. A little while later in a nearby pyrethrum farm, PW3 Rachel Wanjiru, a neighbour who was part of the search team, came across a horrific scene: the deceased lying naked on her back between pyrethrum flowers with soil in her mouth and her private parts covered in blood.

8. The police took the body to the morgue and a postmortem was conducted on the deceased's body. PW9, Dr. Joseph Karimi, who submitted the autopsy report, submitted that the cause of death was cardiopulmonary failure due to asphyxia and defilement.

9. Thereafter, the appellant was arrested, arraigned and charged at the High Court with the murder. He denied committing the offence in his defence and alleged that on the material day, at around 9 a.m he went to PW2's house and she asked him to take the deceased and PW1 to church. He went to the home of King'ori to get his hat from Francis Mwangi and left the children there. He then proceeded to the trading centre with his friend Kimondo where they drunk until 7.30 P.M. On his way home he met a mob that beat him unconscious. He woke up in the police station faced with the stated charges against him.

10. The trial court (Odero, J.) in a judgment dated 28th May, 2018 found the appellant guilty and sentenced him to 30 years.

11. It is that decision which is the subject of this appeal wherein the appellant has appealed against his conviction and sentence and complains that the learned Judge erred in failing to appreciate that-

    i. Essential witnesses were not summoned to prove the allegation of murder beyond reasonable doubt

    ii. The learned Judge erred in law and fact in holding that the prosecution proved its case beyond a reasonable doubt against the appellant while deciding the case against the weight of the evidence.

    iii. Some of the exhibits mentioned during the hearing were not produced in court to ascertain the prosecution's case contrary to the *Evidence Act*

iv. The learned Judge erred both in facts and in law by relying on evidence and exhibits produced and relied upon in proceedings which were nullified and a retrial ordered.

v. The appellant's defence was rejected without cogent reasons.

vi. That the learned judge failed to take into account the period when the appellant was in custody when computing his sentence contrary to Section 333(2) of the Criminal Procedure Code.

12. When the matter came up for hearing, learned Counsel Mr.

Matoke, appeared for the appellant, while Mr. Omutelema

appeared for the respondent. Both parties relied on the written submissions on record. Mr. Matoke, learned Counsel for the appellant condensed the issues into three as follows:

a. Whether the prosecution proved its case beyond reasonable doubt

b. Whether a trial court can use proceedings and exhibits used in proceedings before a retrial was ordered.

c. Whether sentencing the accused without considering the period he was in custody offends Section 333(2) of the Criminal Procedure Code.

13. In his submissions, the appellant admitted that even though he was the last person to be seen with the deceased, there was doubt whether it was him who killed the deceased. Citing the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, it was submitted that the circumstantial evidence relied upon was not cogent enough to point to the appellant as the one who murdered the minor for the following reasons: first, the appellant was not found with the deceased's clothes or her body; second, the body of the deceased was allegedly recovered a day after the appellant's arrest and 10 meters from where the appellant was arrested which indicates that someone else might have placed the body at the scene of the crime and lastly PW2's testimony that she was informed that Joseph Mureithi and the deceased had left Ngari's house with someone called Joseph Mureithi-and not the appellant, was not interrogated by the court.

14. On the second issue, the appellant submitted that the exhibits produced by the prosecution in the original trial were not produced and that the said omission weakened the circumstantial evidence relied upon by the prosecution to convict the appellant.

15. Lastly, it was submitted that the court did not consider the six year duration that the appellant was in remand before sentencing him to thirty years. It was contended that the appellant was remanded on 24th May 2006 and when the retrial commenced, that the appellant was admitted to bail on 23rd May 2012.

16. On the part of the State, Mr. Omulatema, supported the conviction and sentence by the High Court, he submitted that there was more than sufficient evidence to support the charge of murder. The appellant was the last person to be seen with the deceased, the evidence of PW 1, PW2 and the neighbours who testified, placed the appellant at the scene of murder; thus, all the evidence pointed to the appellant and the trial court was correct in its conclusion that all the exculpatory facts were incompatible with the innocence of the appellant and were incapable of any other explanation than that it was the appellant and none other that caused the death of the deceased.

17. As for the failure to produce the deceased's clothes as exhibits, the respondent submitted that the learned judge correctly observed that the exhibits had been properly produced before the court but could not be traced when the retrial commenced and consequently found that the trial could proceed

without the exhibits. The finding of the court was reasonable and did not prejudice the appellant in any way.

18. We have considered the record, submissions by counsel and the law. From the testimony of the doctor who produced the postmortem report, there can be no doubt that the deceased's death was caused by someone who intended to inflict grievous harm. The report states that she was bleeding through her vagina which was lacerated, her mouth was filled with soil, she

had bruises on the front and side of her neck, her hymen was torn, she had lacerations on her uterus, mouth, gums, tongue and palette.

19. It is common ground that there was no eye witness to the murder and the conviction of the appellant was based entirely on circumstantial evidence.

20. The criteria for a conviction to be based on circumstantial evidence was laid out by this court in Musili Tulo v Republic [2014] KECA 412 (KLR).The guiding principles include:

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

    e. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

    f. 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.

21. Did the circumstantial evidence adduced by the prosecution meet the above criteria? In our view, the inculpatory facts

implicating the appellants that emerge from the evidence briefly include the following:

    i. the appellant went to PW2's house and requested that the deceased takes him to Ngari's house to get his hat from Francis Mwangi.

    ii. Pw2 conceded on condition that the appellant takes both the deceased and her brother to look for the hat

    iii. The deceased was last seen alive at about 6.00 p.m leaving her grandmother's house with the appellant and PW1

    iv. The trio never arrived at their destination, PW1's testimony was that he was told to remain on the path so that the deceased and the appellant could get the hat.

    v. PW7, Francis Mwangi testified that he went to see his friend Albert King'ori and departed at 7.30 p.m. He found PW1 along the way and took him home.

    vi. PW2 states that PW1 informed her that he saw the appellant and the deceased entering a maize plantation

    vii. The appellant is found sleeping in the maize plantation belonging to John Wandai

    viii. The deceased's clothes are found in the maize plantation by the search party near where the appellant was sleeping.

    ix. The deceased's body is found in the neighbouring pyrethrum plantation.

22. In our view, the above facts reveal the appellant's intention to isolate the deceased and to harm her. In any event, the appellant failed to explain the whereabouts of the deceased who was last seen alive in his company.

23. His defence that he took the children to church is untrue because PW3, Rachel Wanjiru who was her Sunday school teacher, testified that the deceased did not attend church on the fateful day. Again the allegation that he left the children at the homestead of King'ori is also untrue because PW7 who had gone to visit the said Albert King'ori left the homestead at 7.30 without seeing the deceased in the said homestead and found PW1 along the way.

24. In the end we find the conclusion inescapable that it is the appellant that violently killed the deceased. He had the opportunity to carry out the crime and knowledge as to what

had happened to the deceased, hence his reluctance to participate in the search for the deceased and his determination to derail the search by sending the search party on a wild goose chase. The recovery of the deceased's clothes near where he was sleeping and the recovery of the deceased's body close to where he was found is telling. In our view these facts confirmed that the appellant's conduct was inconsistent with any other explanation other than complicity in the disappearance and death of the deceased.

25. The facts point irresistibly to the conclusion that the appellant was the person who brutally defiled and killed the deceased and hid her body in a pyrethrum farm. We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited.

26. With regards to the ground of appeal that the appellant was sentenced without considering the period he was in custody, we have reviewed the ruling on sentence delivered on 18th October 2018.The Learned judge clearly addressed the issue as follows:

> "Consequently, in my view, a fit sentence that properly balances the mitigating circumstances with the aggravating circumstances, is a sentence of thirty years imprisonment and I, accordingly sentence the accused person to that period. In coming up with this sentence, I have already taken into consideration that the accused person was in custody from 2006 to 2012."

2. The appeal before us therefore lacks merit and it is accordingly dismissed.

DATED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

J.MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR