



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 183 of 2012

JAMES KIWANUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence Chief Magistrate's court at Milimani in Cr. Case No. 176 of 2011 delivered by Hon. L. W. Gicheha, SPM on 25th June 2012).

JUDGMENT

Background

James Kiwanuka, the Appellant herein was charged with two counts of robbery with violence. The particulars of count I were that on 17th January, 2011, at South B Estate within Nairobi County, while armed with offensive weapons, namely a kitchen knife and metallic rods, robbed Winfred Wanja of an electoral card S/No. 00209917432, 2 mobile phones being a Nokia 1680 and Samsung plus various assorted clothes all valued at Kshs. 57,000/- and immediately before or immediately after the time of such robbery the Appellant stabbed and killed the said Winfred Wanja.

The particulars of count II were that on 17th January, 2011, at South B Estate within Nairobi county, while armed with dangerous weapons, namely a kitchen knife and metallic rods, robbed David Ngige Karanja of a 14" Aftron television set S/No. 200208150681, a Sony radio system S/No. 3125830, an LG microwave S/No. 805GH00175, a Quartz wall clock S/No. 227524240, a CFC Stanbic Bank cheque leaf S/No. 000125 dated 17th January, 2011 bearing an amount of Kshs. 15,000/-, a Samsung mobile phone S/No. 356830031667520 and a Toyota Platz vehicle registration number KBF 574R all valued at Kshs. 630,000/- and immediately before or immediately after the time of the robbery stabbed and wounded the said David Ngige Karanja.

The Appellant was found guilty in count I and sentenced to death as provided by the law. He was dissatisfied with both the conviction and sentence as a result of which he filed the instant appeal. He filed amended grounds of appeal on 19th July, 2017 which in summary were that the prosecution did not prove their case against him beyond a reasonable grounds, that the prosecution failed to call a crucial witness, that he was never found in possession of stolen goods, that the prosecution's evidence was materially contradictory, that he was not properly identified and that his defence was not considered.

Submissions

The Appellant filed written submissions while the Respondent through learned State Counsel, Ms. Sigei canvassed the appeal by way of oral submissions. The Appellant submitted that the prosecution did not discharge its burden of proving the case beyond a reasonable doubt as required by Section 107 of the Evidence Act. Instead, the trial court shifted the burden of proof by requiring him to explain how he was found in possession of suspected stolen goods. According to the Appellant, this offended the fundamental legal requirement that the prosecution must prove their case beyond a reasonable doubt. He then pointed out contradictions in the prosecution's case relating to the recovery of the stolen goods. This was with respect to the allegation that he admitted to having stolen the good yet the purported admission/confession was not adduced in accordance with the Evidence Act. He cited the case of **Ramkrishna Denkra Padya v. R[1957] EA 102** to buttress this submission.

The Appellant then faulted the failure by the prosecution to call a crucial witness, namely the lady from Uganda from whom the stolen goods were recovered. This, according to him, raised doubts on where the goods were recovered from her at all. He added that this was vindicated by the evidence of PW2 that indeed the microwave was in the house after the robbery. Thus, the failure to call crucial evidence gave an inference that the evidence of the witnesses would have been adverse to the prosecution's case. The Appellant urged the court to look at the cases of **Jason Akumu Yongo v. Republic[1983] eKLR**, **Isaac Omambia v. Republic[1995] eKLR** and **David Gathu Kangethe v. Republic[2015] eKLR** in allowing the appeal.

Ms. Sigei submitted that the evidence proved the offence charged. She submitted that the Appellant did not dislodge the prosecution case that he gave the police the keys to the vehicle that was stolen during the robbery and also took them to the scene where he helped them recover a knife used during in the robbery. In addition, he also gave information that led to the recovery of the stolen goods. Miss Sigei submitted that the Appellant was additionally linked to the robbery by a bite mark he sustained on one of his fingers during the robbery. She said that he was bitten by PW1, a fact that was confirmed by PW10, Dr. Kamau, after he examined him. Further, the knife that was recovered from the scene was taken for DNA testing and the blood on it matched that of the Appellant. The Appellant's blood was also found on the cheque recovered from him, which cheque he forced PW1 to write for him. She submitted that a photograph seized from the Appellant was used to locate his girlfriend who was found in possession of the items stolen during the robbery which the Appellant left at her house. Further that PW9 testified that the Appellant sold to him a microwave that was part of the goods identified by PW1. She submitted that PW1 identified the Appellant as one of the robbers and that he remembered his face and complexion. He also recalled the Appellant's foreign accent when they conversed.

According to Miss Sigei, the Appellant's defence with the assertion that PW1 and the deceased were fighting was an afterthought. She asserted that there was no truth in his assertion that he got injured during the robbery and not by a bite from PW1. It was her case that the appeal lacked merit and urged that the same be dismissed.

Evidence

The prosecution called a total of 16 witnesses. According to **PW1, David Ngige Karanja** he was in his house in South B in Nairobi with his deceased wife on 17th January, 2011 at about 7.a.m. His wife was preparing to go to work but he was in the bed. His wife went to the bedroom and informed him that there were people in the house. He jumped off the bed while his wife went to the sitting room. Suddenly, a man entered the bedroom welding a knife. The stranger was the Appellant. He attempted to stab him and although he defended himself the man stabbed him on the back. The attacker then rushed to the sitting room and returned to the bedroom when he demanded for money. PW1 told him that he did not have any money. There was a cheque book in the bed side drawer. The attacker demanded he writes a cheque for him. He obliged and drew a cheque for Ksh. 15,000/= from CFC/Stanbic Bank in the name of Kiwanuka James, the Appellant. The account was owned by Kind David Investments. Before the robber left he tied PW1's hands to the window grills. Before he fell unconscious he gave him some tablets to swallow. The robber had demanded car keys and loaded the stolen goods into the vehicle. When he came to he tried to call out for his wife who did not respond. It was about two hours down the line. He got the impression that his wife must have been abducted by the robbers. He managed to untie himself, went to a window

and called out for help. Neighbours came and rescued him. They also assisted him with a mobile phone which he used to call his friend, PW5 who took him to Nairobi Hospital where he was admitted. A surgery was done on 19th January, 2011 for removal of an object that stuck on his back. He was discharged on 12th February, 2011. It was while in hospital that he was informed that his wife's body had been recovered under a sofa set seat in the sitting room. Incidentally, she was buried in his absence. He went and reported the matter at Industrial Area Police Station and recorded a statement. He was also issued with a medical examination report (P3) Form.

It was PW1's evidence that although he did not take part in an identification parade he was able to identify his attacker by physical appearance, body size and complexion. He recalled that he spoke in English but with a foreign accent. Furthermore, the robber took about one hour in the house and that it was daylight and the electric lights in the bedroom were on. He also recalled biting one of the Appellant's fingers. He noted that the music system, television and microwave were amongst the stolen items but other items in the sitting room were intact including the seats which were not moved. In cross examination PW1 stated that he was of the impression that the attackers were three. He also stated that he saw the attacker hitting his wife. He denied that he had invited the Appellant to the house and that the Appellant fled after he tried to sodomize him. He could not explain how the robber accessed his house.

PW2 Geoffrey Kiwingi Mwamba together with his wife had visited PW1 and his deceased wife on the night before the incident, 16th January, 2011. They left the couple in good spirit at around 8.00 p.m. only to receive a call on 17th January, 2011 at about 9.57 a.m. from their friend John Thiongo that PW1 had been attacked by robbers. He was also informed that the police were on site. He called a friend one John Mwangi to escort him to the scene. They found the gate and the door to the main house open. On entering the house, the sitting room was in disarray with curtains hanging. The television and the music system were missing. There were blood stains all over the house. The bed sheets were soaked with blood. He also saw a knife handle in the sitting room. He recalled seeing a microwave oven, and other utensils.

PW2 visited PW1 in hospital on learning that PW1 could not trace his wife, he tried to look for her in vain. On the following day, he was informed that the stolen vehicle had been recovered. His further testimony was that on 24th January, 2011, he was informed by PW1's brother that the deceased's body had been recovered under a sofa set in his house. It had been mutilated. A post mortem was conducted by **PW16, Doctor Oduor** a pathologist in the presence of his colleague Doctors Njue and Kalsi. He formed an opinion that the cause of the death of the deceased was stab wounds to the neck and chest.

PW4 George Mungai Waweru a friend to the deceased's family was informed about the incident on 17th January, 2011 by PW2. He also visited the scene and his evidence entirely corroborated that of PW2. He recalled that the bedroom and the sitting room were totally disorganized. Papers were strewn all over the bedroom and there were blood stains on the bed sheets. There was a broken knife handle on the bed. He visited PW1 in hospital and he noted that he had wounds on the left hand, back and head. On 25th January, 2011, he was informed by the deceased's father that the deceased body had been , **Patrick Msugambi Mwamba** testified that the deceased was his niece. He was informed about the incident by his brother. It was reported to him as a case of kidnap from her house. Later in the day, PW4 informed him that he had visited the house and amongst some of the stole items were a television and a microwave. When he visited PW1 in hospital he informed him that he and his wife had been attacked by three men. Further that his wife was held hostage by one of them and that two went to the bed room where they attacked him and drugged him. PW1 also told PW12 that his wife had left the house in the stolen motor vehicle. He learnt about the death of the deceased from OCS Langata, Police Station who informed him that the body had been retrieved from the house under a sofa set while wrapped in a curtain.

Incidentally, PW1 had hired the stolen motor vehicle registration number KBF 574 R from **PW11, Joseph Kawe** from the month of December 2010. He learnt the vehicle had been stolen on the fateful January, 2011 from one Thiongo. He called PW1 who confirmed the incident and that PW1 had reported the matter at Industrial Area Police Station. The vehicle was recovered abandoned on the following day. Its radio had been vandalized.

PW5, Josiah Lagat who PW1 called for help recalled that he found PW1 still seated on the bed with an injury to his back. The bed sheets were soaked with blood. He took him to hospital. PW1 also told him that he had been forced to write a cheque to the robber. He learnt about the death of the deceased seven days later after PW1's landlord informed him that there was a foul smell coming from the house. Thereafter the body was recovered under the sofa set.

Sometime on 19th January, 2011, Police officers including **PW15 PC Julius Kiama** of CID Industrial Area got information that somebody was using PW1's mobile phone. The phone was tracked to one Crispin Onyango who had used it on 17th January, 2011 and 1st February, 2011. The suspect was arrested and he informed the police that he had been given the mobile phone by his friend who was travelling to Busia by LOL Express Buses. The police managed to track the Appellant who was Onyango's friend through the bus conductor of the bus in which he travelled to Busia. Apparently, the Appellant had not fully paid the fare to Busia and had therefore left behind at the bus stage offices a black box. Immediately he arrived in Busia he was arrested by police in Busia. He then gave information about where some of the stolen goods were including Uganda.

PW3, Paul Waweru Kangethe, a government analyst conducted DNA analysis from some bed sheets, a cheque leaf, cheque book and a knife which were stained with blood. He was to profile them against the blood samples of the deceased, PW1 and the Appellant. In his analysis, the blood of the deceased did not generate any profile. DNA profiles generated from the items matched the profile of the Appellant. Based on these positive results, the Appellant was charged accordingly.

PW6, 7 and 8 were all police officers from Jinja Police Station in Uganda. **PW6, CLP. Bakibisymu Hudson** was requested to help with the investigations jointly together with the Kenyan police officers. Together with his colleagues he was shown a photograph of a lady one Apoloti Rose in whose house it was believed that the stolen goods were being hidden. She was said to be the girlfriend of the Appellant. Incidentally, PW6 was physically known to the said Apoloti. They went to her house and she confirmed that the Appellant had kept some of the loot in her house. The police officers recovered a 14 Inch Aftron Television Set, radio, briefcase, electric kettle and clothes belonging to a man, a woman and a child. **PW7, Detective Ogwenyi** and **PW8, Detective CPL. Sivuna Wilson** entirely corroborated the evidence of PW6. After the recovery, a certificate of search was prepared and signed by amongst others, Apoloti Rose and the village chairman.

According to the Ugandan Police officers Apoloti Rose informed them that a microwave which had been taken to her house by the Appellant had been sold to one Alex Tsubua at the central market. Police went to the central market where Rose identified the suspect who was arrested and a microwave recovered. The said **Tsubua Alex testified as PW9**. He confirmed that he came from Jinja, Uganda and owned an electrical shop in the Central Market, Jinja. He also confirmed that sometime in January, 2011, the Appellant sold to him the recovered microwave at a cost of Ugandan Sh. 60,000/=.

PW15 testified that the Appellant gave him the car keys. Inside the bag he had left behind at the bus stage, offices were recovered the deceased's voter card and the cheque of 15,000/= drawn by PW1 in the Appellant's name. All other items were recovered in Uganda after the Appellant gave lead to the Kenyan police on where they were. PW15 also testified about receiving a report of a foul smell from the deceased's house. Together with other police officers they recovered the body wrapped in curtain under a seat.

PW13, Sergeant Peter Mwangi of the scene of crime was called to scene on 24th February, 2011 and took necessary photographs. **PW 14, PC Eric Liprano** of DCIO's office in Busia helped in the arrest of the Appellant. He confirmed that the Appellant was confirmed to be in possession of an ID card of one David Mwangi Irungu, an Elector's card of the deceased and a car key belonging to the stolen motor vehicle. He was later handed over to the police in Nairobi.

PW10, Doctor Zephania Kamau of police Surgery examined PW1 on 15th March, 2011 and filled his P3 Form. He confirmed that PW1 had a surgical scar on the back with a CT scan showing a compressed spinal cord. He confirmed the injuries had been caused by a sharp object. His further testimony was that

on 10th of February, 2011 he examined the Appellant who had a single heamolone blood clot below the nail of his finger. The same finger had a small scar and deduced that the injuries were caused by a sharp object.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence.

DW1, Appellant, in his sworn defence stated that he was a mechanic who had previously worked at BAT Uganda, Excel Communications and Kinyala Sugar Works. That in the year 2009 he had started a business and moved to Busia, Kenya. That in February of that year he met David Ngige, PW1, who used to give him various jobs. He met him again in November, 2010 and again in January, 2011 when he enquired about money PW1 owed him. He came to Nairobi where PW1 hosted him in his house where he met the wife. At around 0400hrs he heard a knock on the door. It was PW1 who was knocking. He told him that he could not sleep and they started discussing issues relating to their work relationship. PW1 then started touching him which made him uncomfortable. They disagreed as the Appellant did not want to be touched. PW1 left the room and came back with a cheque which he gave him as an inducement not to disclose what had transpired them. PW1's wife was following him trying to find out what had occurred. The Appellant informed her what had transpired and showed her the cheque. The wife was shocked and the two started fighting. It was around 5.00 a.m. He decided to leave for the countryside. On 30th January, 2011 when he switched on his phone there was a call from Nairobi seeking his presence. When he opened his workshop later that day CID officers arrested him. In cross examination, he stated that PW1 tried to sodomize him but he refused after which he travelled to Busia.

Determination

I have accordingly considered the evidence and the respective submissions. This is a case in which the Appellant was convicted purely based on circumstantial evidence. The case law on principles governing a conviction based on circumstantial evidence is rich. In **R v. Taylor, Weaver & Donovan [1928] 21 Cr. App. CA 21** it was held that:

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.

In **The Queen v. Baden-Clay[2016] HCA 35** the court delivered itself thus:

“...in considering a circumstantial case, all the circumstances established by the evidence are to be considered and weighted in deciding whether there is an inference consistent with innocence reasonably open on the evidence”(emphasis added). The trial is not to be looked at in a piecemeal fashion, at a trial or on appeal.”

And in **Mohammed & 3 others v. Republic [2005] 1 KLR 722** Osiemo J. held that:

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there should be a chain of evidence so far complete as to any reasonable ground for the conclusion consistent with the innocence of the accused and it must be such as to show that within human probability the act must have been done by the accused.”

I rightly concur with the trial court that there was no direct evidence linking the Appellant to the offence; direct in the sense that although PW1 said he identified the Appellant under a conducive environment, he did not properly describe him to the police when he made his first report. The evidence of identification was therefore of a single witness and could not be reliable for that reason. There was also the submission by the Respondent that the Appellant sustained a bite mark on one of his fingers as PW1 fought him off.

This was one of the reasons he (PW1) said aided him in identifying the Appellant. PW10, Dr. Kamau did in fact confirm that the Appellant had an injury on one of his fingers. He however fell short of confirming specifically what caused the injury. All he stated was that the injury was caused by a sharp object. From an expert point of view nothing was easier than indicating that the injury was a bite mark. I am therefore, respectively, unable to uphold the submission that the Appellant could have been identified through a bite mark sustained by PW1 and by which PW1 had described him with.

All the same, this court entirely agrees with the trial magistrate that other evidence placed the Appellant at the scene. The knife that was recovered at the scene that was suspected to be the fatal weapon was subjected to DNA analysis. The blood of the Appellant was found on it. It was established by the Pathologist who conducted the post-mortem on the body of the deceased that the deceased died from stab wounds. There is no doubt that the fatal weapon could only be the knife that was recovered from the deceased house.

In addition, the Appellant's blood was found on the cheque leaf issued from PW1's cheque book that was recovered from the black bag found in the stolen motor vehicle. The cheque leaf bore the name of the Appellant as the payee. As narrated by PW1, he demanded for money from him culminating into the cheque being written in his name. Further, the black bag had a voter's card belonging to the deceased. Other stolen items were recovered from Uganda and were positively identified by PW1. Although there was uncertainty as to whether or not a microwave was stolen, PW9 did testify that he bought the microwave identified by PW1 from the Appellant's girlfriend. Although the girlfriend did not testify, a clear link was established that she received the recovered goods from the Appellant.

All the above facts squarely placed the Appellant at the scene of crime. He cannot claim innocence. His defence that he was in the house of PW1 at the family's invitation and that he left after PW1 and the deceased started fighting does not add up.

What raises eye brows though is the manner in which the deceased died. She was stabbed severally and thereafter her body was found under a sofa seat. There was clear indication that she was meant to die. It appears she was attacked in a manner, as the Pathologist testified, that did not give her a chance to defend herself. Her body was thereafter wrapped in a cloth and thrown under a seat only to be discovered days later after a foul smell started emanating from the house. Questions arise on whether this was the work of one person. In my view, the police ought to have explored the role of other persons and including PW1.

My view that PW1 should have been investigated is vindicated by several factors, the most crucial being his inconsistency in the manner he gave an account of what transpired on the fateful day. He initially testified that they had been attacked by three persons but later tactfully retreated from this position indicating that this was just but an impression he had in his mind. Further, in his initial report to the Police he stated that both he and his wife were attacked while they were in bed. In contrast, in his testimony, he stated that his wife (deceased) was preparing in another room when she rushed to the bedroom to tell him that they were under attack. He also did not indicate in the initial report that he was forced to write the name of the Appellant on the cheque contrary to what he testified. Further, PW2 and PW4 were categorical that when they visited the house immediately they were informed of the incident, they found the house, especially the sitting room in disarray with most items scattered all over. PW1 on the other hand testified that when he went to the sitting room after being informed of the presence of a robber by the deceased, he found the sitting room well-arranged and undisturbed. It is also not clear if PW1's family had two microwaves. According to PW2, a friend to the family, he testified that he saw a microwave on the morning he visited the house yet PW1 identified the recovered microwave as the one stolen from the house. The inconsistencies with PW1's account of events depart from the behavior of an innocent person. In the alternative, it raises an eye brow that he was trying to cover up for what he knew would happen or had happened.

That aside, for the foretasted reasons, I have no doubt in my mind that the Appellant participated in the robbery. All the elements of the offence of robbery with violence were also adequately established. Although the robber was one in number, actual violence was used against the victims; one died and the other sustained bodily injuries. In addition, property belonging to both victims was stolen. As adeptly

found by the learned trial magistrate, the Appellant did not mount a strong defence. It fell short of ousting the strong prosecution case. I also dismiss it.

In sum, I find that the prosecution proved its case beyond a reasonable doubt. I find the appeal as unmeritorious and I uphold both the conviction and sentence. It is so ordered.

Dated and Delivered at Nairobi This 18th Day of October, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person.*
- 2. M/s Akunja for the Respondent.*