



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 294 of 2007**

JOSEPHAT WANJOHI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Nairobi (Apondi, J) dated 5th June, 2007

In

H. C. Cr. C. No. 42 of 2005)

JUDGMENT OF THE COURT

Josephat Wanjohi Mwangi, the appellant herein, was tried before Mr. Justice Muga Apondi sitting with assessors on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the information on which the appellant was tried were that on the night of 15th/16th February, 2005 at the Tea Room Guest House along River Road in Nairobi, the appellant murdered Catherine Wambui Njuguna, “the deceased” hereinafter. At the end of the prosecution’s case and after the appellant had made his sworn statement, the learned trial Judge summed-up the whole case to the three assessors and each of them returned a unanimous opinion that the appellant was guilty of the offence of murder. In a subsequent reserved judgment, the trial Judge also found the appellant guilty of murder, convicted him of that offence and duly sentenced him to death. The appellant now appeals to the Court against the conviction and the sentence.

It was agreed before the learned trial Judge and the assessors that the prosecution’s case against the appellant was wholly circumstantial. In the morning of 16th February, 2005, the body of the deceased was found lying on the floor in Room 6A at the Tea Room Guest House. There was a towel tied around the neck of the deceased and Dr. Moses Njue Gachoki (P.W 10) who performed the postmortem on the body was of the clear opinion that the cause of death was ligature strangulation that must have been done using a wire, a piece of cloth or a tie.

Several witnesses were brought by the prosecution to connect the appellant with the death of the deceased. We start with Joseph (sic) Ngina Komu (PW4). On the 15th February 2005 at 9.00 p.m. she saw the appellant come in with a woman. They sat in front of her but she left the Tea Room at around 10.00 p.m., apparently leaving the appellant and the woman still in the Tea Room. She subsequently learned that the woman she had seen with the appellant had been killed. She had not seen the woman and the appellant before.

Next there was the evidence of Monica Wanjiru Kimani (P.W5). She arrived at the Tea Room at around 9.30 p.m. She saw the appellant apparently alone, enter the Tea Room and sat at an adjacent table. The appellant ordered for a beer and as the appellant drank the beer, he was apparently casting amorous glances at some women who were seated at a different table. In the end, the appellant called one of the women whose name Monica gave as “Wagishanga.” It is not clear from the evidence if that woman was the same person as the deceased. But of one thing, Monica was certain; when cross-examined, Monica stated as follows:-

“I was familiar with the six women who were seated on one table. From his demeanour, I knew that the accused wanted a woman. -----”

From the evidence of Monica, it appears that the woman Wagishanga joined the appellant at his table. Monica left the Tea Room after that and later learned that the woman she had seen with the appellant had been killed.

We note at this stage that while Joseph (P.W 4) says the appellant came into the Tea Room in the company of the deceased, Monica (P.W 5) saw the appellant come in alone and cast glances at the table where six women were seated. The learned trial Judge did not point out this discrepancy to the assessors and he did not deal with it in his final judgment. The important thing however, is that these two witnesses left the Tea Room before the appellant and the deceased.

The more important evidence was that of the watchman at the Tea Room, Charles Orina Ongondo (P.W1). His evidence was that at around 12.00 midnight,

“--- a man came with a woman and they told me that they wanted to hire a room. I told them to pay Kshs.250/- for a single room. I gave the keys to room No. 6(A) to that man after he paid. They then went to sleep. At around 6.00 a.m. I opened the main gate for visitors to leave. -----”

However, the name which Charles recorded in his book and in which a receipt was issued was Peter Kingari. It appears the witnesses were saying they knew or were familiar with the appellant as he used to operate a taxi or a vehicle for hire within the vicinity of the Tea Room. But no efforts were made to trace the appellant after the body of the deceased was discovered in Room 6 (A). It was not until one month later in the month of March, 2005 that the appellant was arrested when he went to the same Tea Room. The appellant himself swore that he had left the Tea Room at about 10.00 p.m. Charles who said he sold Room 6A to the appellant did not say how the appellant could have left the building that night. There was no evidence of any other exit(s) from the premises and Charles stated in his evidence that he did not leave his place at the entrance until he opened the gate for the visitors to leave. In the meantime the husband or former husband of the deceased was arrested and was only released after the appellant had been arrested.

The law regarding circumstantial evidence is clear and well settled. The inculpatory facts relied on by the prosecution must be incompatible with the innocence of the accused and can only be explained on the basis that the accused person is guilty. There must also be no other factors or circumstances that would weaken the chain of evidence being relied upon. Even assuming that the appellant was the last person to be seen with the deceased – and we are not quite satisfied on this – the fact that no attempt at all was made to trace the appellant and arrest him and that another person was arrested and was not released until the arrest of the appellant are factors which can only go to weaken the chain of evidence upon which the prosecution relied. On our own reconsideration and re-evaluation of the recorded evidence we think the circumstantial evidence could not be said to be incompatible with the innocence of the appellant and explainable only on the basis of his guilt.

That being the view which we take of the matter we must give to the appellant the benefit of the doubt with the result that we allow the appeal, quash the conviction entered against him and set aside the sentence of death. The appellant shall be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 9th day of October, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.