



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPL NO. NAI. 243 OF 97

NAHASHON ISAAC NJENGA NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Simpson, J.) dated
10th September, 1969**

In

Criminal Case No. 47 of 1969)

Transcript of Proceedings

JUDGMENT OF COURT

NEWBOLD, P.

The appellant was convicted of the murder, on the 5th July, 1969, of Mr Thomas Joseph Mboya. Mr. Mboya, according to the evidence, was shot at about 1.15. in the afternoon on the 5th July just outside a shop on Government Road, near to the junction with Queensway. Two bullets were recovered from his body and the evidence was - and it not disputed - that the wounds caused by the bullets caused the death of Mr Mboya. There can be no doubt that whoever shot Mr Mboya committed murder and, indeed, this is not in dispute. The sole question which has been urged by Mr Waruhiu in a very fair address to us is whether it was the appellant who shot Mr Mboya. Mr Waruhiu has urged another procedural matter, but he has accepted that if there was any irregularity the irregularity did not, in fact, prejudice the appellant.

As the basis of the appeal is whether the trial judge was correct in coming to the conclusion on the evidence which he accepted that that evidence proved beyond reasonable doubt the guilt of the appellant, it is necessary for us, in considering the points raised by Mr Waruhiu to set out briefly the general purport and effect of the evidence accepted by the trial judge. He accepted that within a period of about an hour before the shooting, and an hour after the shooting, the appellant was seen in the vicinity of the crime. The actual moment of the shooting is placed by very strong evidence within a very short limit, and that we have already said was at 1.15. in the afternoon. There was no witness who identified the appellant as the person who did the shooting. One witness stated that she saw a person, of the general description of the appellant and carrying a brief-case with a metal strip in his left-hand, fire a revolver twice in the

direction of the position in which, according to other evidence, Mr Mboya must have been at the time that he was killed. This witness then said that the person that she was fire the revolver ran towards Queensway. A number of other witnesses stated that after hearing shots they saw a man of the general description of the appellant running, or moving hurriedly, in the direction of Queensway and that this person was carrying a briefcase, with a metal stripe, in the left-hand. All these witnesses subsequently identified the brief-case which was put in as an exhibit at the trial as similar to that which they saw this man carrying as he was hurrying away from the scene.

On the 9th July the Police searched the appellant's house and in the course of that search a revolver, wrapped in a handkerchief, together with several rounds of ammunition, was found. This revolver, by the evidence accepted by the trial judge, was proved to be the revolver which fired the bullets which caused the death of Mr Mboya. The ammunition found in the house of the appellant was of a similar type to that of the two bullets found in the body of Mr Mboya. A fingerprint of the appellant was found on the revolver in a place where it could not have been placed unless the cylinder had been opened. Fibres were found on the handkerchief in which the revolver was discovered and these fibres were of two types; the one type similar to the fibres which had come from the brief-case and the other similar to the fibres of the jacket worn by the appellant at the time of his arrest. On the 10th July, that is the day following, another search of the appellant's house was carried out and a brief-case was found in the house. It is this brief-case which all the witnesses who witnessed the shooting said was similar to the brief-case they had seen the person hurrying from the scene carrying in his left hand. Inside that brief-case was found an impression similar to that which could have been made by a revolver of the type which had been found the day before and which had been proved by other evidence as being the revolver used to shoot Mr Mboya. This brief-case the appellant has always admitted was his.

These were the facts accepted by the trial judge and placed before him by the prosecution as pointing towards the guilt of the appellant. Before coming to a conclusion as to whether those facts were such as to leave him in no reasonable doubt of the guilt of the appellant, the judge naturally had to, and he did, consider any explanations which the appellant might put forward to account for any of these incriminatory facts. The explanations given by the appellant fall into two categories: the first category dealing with his explanation of the finding in his house of the gun and the second category dealing with the explanation of the finding of the brief-case, admittedly his, but carrying traces which showed its connection with the revolver used for the crime. As regards the explanation relating to the gun, these were four in number. The first was given immediately after the gun was found and was to the effect that the appellant had purchased the gun from an unnamed Kisii tribesman on Sunday, 6th July, that was the day following the murder. The second was to the same general effect and it was given on the afternoon of the 9th July to Mr Bell. It was that the appellant had purchased the revolver from a Kisii tribesman named Jimmy on the 6th July; that at the time of purchase it was wrapped in a handkerchief; and that he had never unwrapped it. The third explanation was given in writing on the 17th July and was different in nature. This written explanation of the 17th July fell into two parts: it contained an account of the movements of the appellant at the relevant time on the 5th July and it also provided an explanation for the possession of the revolver. The explanation relating to the possession of the revolver was that on the 6th July, that is on the day following the murder, an acquaintance called Kahuha had asked him to keep the gun and he had agreed to do so and that the gun was handed to him in his brief-case which he had previously, on the 2nd July, loaned to other acquaintances; that on returning to his home he had opened the brief-case and seen inside the gun wrapped in a handkerchief; and that he had taken out the gun in order to check it, the inference being that it was at this time that the fingerprint on the cylinder was placed thereon. The fourth and final explanation - as far as the appellant was concerned - of his possession of the gun was given in his unsworn statement at the trial. This to all intent and purposes was the same explanation as was given in his written statement on the 17th July. The person whom the appellant said he had received the gun from, that is Kahuha, was at the time in detention and he was called as a witness by the prosecution, but the judge stated that he could place no reliance one way or the other on the evidence of Kahuha. These were the four separate explanations given by the appellant for his possession after the murder of the weapon which was undoubtedly used in the murder. As regards his explanation about the brief-case, which on the evidence accepted by the trial judge was the brief-case which had been used to carry or transport the gun, the appellant, as we have already said, stated that he had loaned it to some

friends on the 2nd July and received it back with the gun inside on the 9th July.

As regards his presence at the scene, the appellant set up what is known as an alibi, which is nothing other than that he tried to show that he was somewhere else at the time the murder was committed. His first statement as to his movements at the relevant time was contained in the written statement which he gave on the 17th July. In that he said he went in his brother-in-law's car, in Ndungu's car, to Gatundu at about 11.30. in the morning and that between 1.30. and 2.0. in the afternoon he left Gatundu and returned to Nairobi where he then went to the Silver Bar. If this explanation is true, then obviously he could not have been in Government Road at 1.15 when the shooting took place. The brother-in-law - Ndungu - was called as a witness by the prosecution and his evidence was accepted by the trial judge. His evidence was that he had driven the appellant in the direction of Gatundu with the object of going there that morning but they never, in fact, reached there and for various reasons he returned to Nairobi with the appellant before a time which, at the outside, was 12.15. that morning. In his unsworn statement at the trial the appellant gave a somewhat different account of his movements. He accepted the statement and evidence of the brother-in-law that he had returned to Nairobi before the time at which Mr Mboya was shot, but he said that he went first to a hotel and then to the Silver Bar and that he was in the Silver Bar drinking during the entire relevant time. In support of that he called a police witness. This police witness said - as, indeed, other prosecution witnesses had said - that he saw the appellant in the Silver Bar at various times round about the time the murder was committed. Nowhere did this police witness give evidence which would clearly place the appellant in the Silver Bar at the time that the shot was fired. In any event, for reasons given by the trial judge and which appeared to us to be cogent, the trial judge did not accept the evidence of the police witness as being truthful.

Mr Waruhiu in his submissions here today has urged upon us the fact that the evidence which we have set out was not evidence sufficient to satisfy the trial judge beyond reasonable doubt of the guilt of the appellant. He has urged that this murder must have been planned and that the accepted movements of the appellant show that to some extent the meeting with Mr Mboya must have been accidental and that if this is so then it could not be the appellant who had done the shooting. He has also urged that it is likely that a person who had just shot Mr Mboya would stay in the vicinity knowing that the place would be swarming with policemen and knowing that, for one reason or another, he might be apprehended. There is, of course, a great deal in that, but as Mr Potter has pointed out, a person who would have the audacity to carry out a murder in the circumstances in which this murder was carried out, would be a very calm, cool and collected person and that, this being so, there is nothing strange in the appellant remaining not too far from the scene of the crime for a period after the crime. Mr Potter has also urged, in reply to Mr Waruhiu, that one cannot speculate on the reason for this murder, that it may have been, who knows, a planned murder, but if that is so then there may have been other means of informing the appellant where Mr Mboya was at the particular moment. Possibly also it may not have been planned, in the sense of a murder to take place at that particular time in that particular place, but merely planned in the sense that there was an intention to commit the crime as and when an opportunity occurred.

Mr Waruhiu has also attacked the judgment of the trial judge in his reference to the evidence as to description and opportunity. His submissions are possibly a little unfair to the trial judge, because at no time in his judgment did the trial judge say that because evidence was given that the appellant was in the vicinity at the material time and because the description of the man who fired given by the witnesses who saw and heard the shooting was of the general type of the appellant, it was therefore the appellant who committed the crime. That was not what the trial judge did. What he did was to refer to the opportunity available to the appellant and to the general description of the murderer in order to ascertain whether the circumstances were such that the appellant would not fit that description or would not have had the opportunity. For example, if the description of the person who committed the crime was a pygmy, the obviously a person of the general size and build of the appellant would be ruled out. Similarly, if the judge had been satisfied that the appellant could not possibly have been in the area so as to enable him to fire the shot, then equally he would have come to conclusion that the evidence given by the prosecution would not have sufficed to enable him to say he was satisfied as to the guilt of the appellant. The judge, in considering this evidence, did so purely in order to satisfy himself that the time and place and the description of the assailant was such that if there was other evidence it would show that the appellant could have committed the shooting and was of the general description of the person seen to commit the

crime.

Now what was that other evidence? It was possession of the gun, a possession four days after the shooting, at least known to exist four days after the shooting, and, as we have already said, possession of the brief-case which showed signs of being used to carry a gun. Mr Waruhiu referred to the case of Obonyo (1) where

(1) Obonyo 1962 E.A.542

Where possession of stolen property six days after the offence was not considered by the Court as sufficient to exclude any reasonable hypothesis pointing towards the innocence of the appellant. It is quite true that possession of property, which might have been stolen property, six days afterwards was not in that case considered sufficient, but Mr Waruhiu did not continue his quotation from the judgment giving the reason why it was not in that case considered sufficient. The property in that case found in the possession of the then appellant was property which might easily have passed from hand to hand very shortly after the crime and the court therefore said this: "Unlike the case against the second appellant, there is no other evidence connecting them with the raid and the nature of the stolen property does point so strongly to their being the thieves." In this case the property found in possession of the appellant four days afterwards was the actual gun used for the murder. Unlike the property in the Obonyo case it is doubtful whether a gun, on the day following the murder of Mr Mboya, would have found a ready market in Nairobi and passed from hand to hand. The trial judge referred to this unlikelihood.

Mr Waruhiu has now presented to the Court another hypothesis consistent with the innocence of the appellant on the count on which he was charged and on which he was convicted, even though it may point to his guilt on a different charge. He has submitted that the different explanations given by the appellant as to his possession of the gun may be due to the desire of the appellant to shield the true culprit, whether by reason of the fact that the true culprit was a member of the appellant's family, for whom the appellant would have a tender regard, or by reason of the fact that the true culprit was a person in a very powerful position in society. He has urged this Court to consider this hypothesis, notwithstanding the fact that it was not presented to the trial judge and notwithstanding the fact that the trial judge did not consider it. It is, as he has pointed out, always open to counsel appearing for an appellant to urge, whether for one reason or another, that the evidence does not meet the requirements of the law in order to enable a court to convict an accused person. In the course of making his submission on that point he can, of course, present to a court of appeal another hypothesis which would meet the facts. He is unlikely to obtain a ready acceptance of that hypothesis if it is one which the appellant does not choose to put forward and which is not put forward until the accused comes to appeal, but it is nevertheless open to an advocate for the appellant to put forward in support of the general submission that the evidence was not such as should have resulted in the conviction of the accused person.

When dealing with circumstantial evidence, and that is the nature of the evidence upon which the trial judge convicted in this case, it is the duty of the trial judge, and indeed of this Court, to make sure that the evidence places beyond reasonable doubt the guilt of the accused person. It is normally said, when dealing with circumstantial evidence, that the incriminatory facts must point conclusively to the guilt of the appellant and be incompatible with any reasonable hypothesis of his innocence. In this respect possibly the trial judge has not used the normal words, which are the words set out in the judgment in the Musoke case (2)

(2) Musoke 1958 E.A.715

to which Mr Waruhiu referred. What the judge said was this;

"On the whole of the foregoing evidence bearing in mind the dependence of the prosecution case upon circumstantial evidence and the standard of proof required in consequence I am satisfied beyond reasonable doubt of the guilt of the accused.

None of the explanations given by the accused for possession of the murder weapon I consider

might reasonably be true. None of his statements, including his unsworn statement in court, raised the slightest doubt in my mind."

In his address to the assessors the trial judge referred specifically to the Musoke case ⁽²⁾ in which appears the normal phrase used by a trial judge when considering a case based on circumstantial evidence.

Mr Waruhiu has submitted that the falsity and the contradictions of the explanations given by the appellant are not sufficient, and should not suffice, to result in his guilt. Of that there is not the slightest doubt. A person cannot be convicted by reason of either his failing to give any explanation or his giving a series of explanations none of which are believed. Before a person can be convicted the evidence for the prosecution, the evidence pointing to the guilt of the appellant must be such as to leave no reasonable doubt in the mind of the trial judge, and must be such that he is completely sure of the guilt of the accused person, and must be such that it points irresistibly to that guilt. Of course, nothing in this life on this earth is absolutely certain, nothing can be known by man to be absolutely certain. There is always a possibility, however far-fetched it may be, of something else being the true position. But dealing as we are with the realities of life, the facts which the prosecution has to prove are those which we have set out, that is evidence which points irresistibly to the guilt of the appellant and is such as to leave no reasonable doubt in the mind of the trial judge.

Now in this case there was the evidence which we have already set out. That evidence, and particularly the evidence of the possession of the murder weapon so shortly after the event and the circumstances of its possession, pointed in the mind of the trial judge irresistibly to the guilt of the appellant. It was incompatible that his innocence taken by itself. It is possible that some explanation might then have been given by the appellant which, while the trial judge did not necessarily believe it, may nevertheless have raised some doubt in his mind. If that was so, then of course it was the duty of the trial judge to have acquitted the appellant and if the trial judge did not do so it would be the duty of this Court to allow the appeal. But in the absence of any explanation which could have raised some doubt in the mind of the trial judge, we are satisfied that the evidence pointed to the guilt of the appellant and was such as to leave it beyond reasonable doubt as to his guilt. Such explanation as was given by the appellant was not accepted by the trial judge. In one respect has been abandoned by the appellant as being false. The second explanation, that is that the gun was handed to him by a friend, was also not accepted as being reasonably and possibly true. As has been said in the case to which Mr Waruhiu referred, that is the Bassan case: ⁽³⁾

(3) Bassan 1960 E.A.854 at P. 861.

"It is, of course, correct to say that these circumstances – the failure to give evidence or the giving of false evidence – may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight".

In this case the other evidence, that is the evidence of possession so shortly after the shooting of the gun used for the murder, was such as in the circumstances to leave no doubt in the mind of the trial judge of the guilt of the appellant. The explanations given by the appellant were so contradictory, in one respect admittedly false and in the other not accepted by the trial judge, that these contradictory explanations cannot but have had the effect of confirming the irresistible impression created by the evidence of the prosecution. We are satisfied, therefore, that in all the circumstances the trial judge was correct in coming to the conclusion that the evidence showed beyond reasonable doubt the guilt of the appellant and that none of his explanations raised any reasonable hypothesis which would shake in any way whatsoever this certainty, this sureness, in the mind of the trial judge of the guilt of the appellant.

There remains only to deal with the procedural matter referred to by Mr Waruhiu. We are satisfied that the learned judge was wrong in giving the reasons for the admission of the evidence, the admissibility of which he did consider in the trial within a trial, in the presence of the assessors. As, however, the evidence was in fact admitted no possible prejudice was caused to the appellant and in accordance with the powers contained in section 382 of the Criminal Procedure Act we are satisfied that this irregularity occasioned no failure of justice. It is, of course, a practice which should not be adopted generally by

judges.

For these reasons we see no reason whatsoever to interfere with the conviction of the appellant and his appeal is dismissed. I think we should add that we are very grateful indeed both to Mr Waruhiu and to Mr Potter for the clear and concise arguments which they have presented to the Court today.

Dated at Nairobi this 13th day of October, 1969.

C.D. NEWBOLD

.....
PRESIDENT

W.A.H. DUFFUS

.....
VICE-PRESIDENT

J.F. SPRY

.....
JUSTICE OF APPEAL

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

DEPUTY REGISTRAR