



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: AKIWUMI, TUNOI & SHAH, J.J.A.)
CRIMINAL APPEAL NO. 98 OF 1990

BETWEEN

PETER NDETO KIMEU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Machakos (Mr. Justice Torgbor) dated 21st July, 1990

in

H.C.CR.CASE NO. 10 OF 1988)

JUDGMENT OF THE COURT

The appellant PETER NDETO KIMEU, and two others who were acquitted after trial, were charged with the murder of a lady known as Monicah Kabuta Mulinge on the night of 26th - 27th August, 1986 at Kathekani Village in Mtito Andei, Machakos District. The appellant was in the event convicted as charged and was sentenced to death.

The prosecution's case is that on 26th August, 1986 at about 4.00 p.m. the appellant went to the deceased's house and inquired about her. As she was not at home the appellant went away and returned later carrying a panga. The deceased had then arrived and was in her house. The appellant called her out so as to go and inspect a common boundary between their pieces of land. The deceased never returned home. Her body was found next day lying dead beside the railway line that passes through Kathekani Station. The appellant, however, had returned to the deceased's house at about 7.00 p.m. after the boundary inspection to collect pepper prepared for him by the deceased.

The Police Officers, Sgt. Muthoka (PW 5) and P.C. Mtoto (PW 6), who led the police search team found the deceased's body lying about a meter and half from the railway line with injuries consistent with panga and axe cuts. These Police Officers were least convinced that the body had been run over by a passing train. A blood stained pullover lay five meters from the body and a trail of blood led into a nearby thicket where the trail got lost. It also appeared that a wheelbarrow had been driven along the bloodstained route. A further search revealed more blood stains at the boundary where the deceased and the appellant had gone to inspect before the fateful evening. Blood samples were collected for further investigation. Outside the appellant's house the officers found a home-made wheelbarrow and inside the house they recovered rubber tyre sandals. The analyst's report on the blood samples as far as the appellant's case is concerned was negative. A post mortem was performed on 11th September, 1986 by

Dr. Njogu who saw, on external examination, deep cuts on the right mandible and on the right temporal region near the right eye. On internal examination he saw that the 4th - 7th ribs on both sides were double fractured and had caused a puncture in the chest cavity causing internal haemorrhage. Death was due to cardio-respiratory arrest due to multiple injuries to the ribs. It was apparent that the cuts were occasioned by a sharp object.

The appellant made a long sworn statement in his defence, denying the charge, and was not seriously cross-examined. In his statement, he described his association with the deceased during the fateful evening. He admitted accompanying the deceased to the common boundary to see a latrine that had been dug up by her son, Jeremiah. He insisted that thereafter the two separated and he went his own way and did not know what befell the deceased later.

The case against the appellant was purely circumstantial, and the learned judge correctly directed himself on the relevant law. To found a conviction exclusively upon circumstantial evidence the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than of guilt. This was stated so by the predecessor of this court in *SIMONI MUSOKE v REPUBLIC* [1958] E.A. 715, or, as said in *Teper v Republic* (1952) AC 480;-

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances, which would weaken or destroy the inference."

The learned judge, in convicting the appellant, laid stress on the evidence that the appellant who was armed with a panga had called out the deceased to go and check or inspect their common boundary after which the deceased was never seen alive again. It would appear also that the learned judge was adversely influenced by the fact that at or near the common boundary the police search team found blood stains belonging to group "O" matching that of the deceased. He held that the deceased never parted alive from the appellant who had the opportunity to inflict the fatal injuries upon her.

The three grounds of appeal preferred by the appellant are based on the learned judge's findings being challenged on the ground that he erred in finding that the appellant was the one who murdered the deceased and yet there were other co-existing circumstances which weakened the inference of the appellant's guilt.

This case has indeed caused us great concern, and we hesitate to differ from the learned judge's carefully reasoned judgment. But, however, after long and anxious consideration we have come to the conclusion that the conviction in this case cannot safely be allowed to stand. There is no suggestion that the visit to the common boundary was nothing but cordial. Moreover, the police did not even apparently look for the appellant's panga nor cause it, his tyre sandals and wheelbarrow to be examined for bloodstains and matching them with that of the deceased. Whatever bloodstains were analysed had no bearing on the appellant although those found at the boundary matched the deceased's blood group. These amongst many others are glaring gaps in the chain link.

A nexus between the appellant and the fatal injuries on the deceased could not be established. There is positive and unrebutted evidence, however, that the appellant returned to the deceased's house at 7.00 p.m. to collect pepper as prearranged after which he joined his co-accused on a drinking spree. But on the available evidence it was not possible to establish where the deceased went and at what time she met her death. The injuries to which she succumbed may have been occasioned her by other persons and not necessarily the appellant.

In the circumstances we find it impossible to say that there were no other co-existing circumstances in this case which weaken or destroy the inference that the appellant was responsible for the death of the deceased. Other unknown persons may have been the effective cause of her death. In our view, the inculpatory facts against the appellant are not incompatible with his innocence in the matter of Monica's death; and they are capable of explanation on a hypothesis other than his guilt.

We accordingly allow the appeal of the appellant, quash the conviction and set aside the sentence passed on him and direct that he be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 3rd day of August, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR