



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox JA, Chesoni & Platt Ag JJA)

CRIMINAL APPEAL NO. 65 OF 1983

BETWEEN

KARANJA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was found guilty and convicted by the High Court at Nakuru upon an information which charged him with murdering Paul Ngumba on February 6, 1981 at Munanda Farm, Subukia, contrary to sections 203 and 204 of the Penal Code (as read together), and was duly sentenced to death. The assessors supported the judge's finding, the third one adding that the appellant had the intention of inheriting the deceased's property.

The appellant who, it appears from the evidence, was a stranger in the immediate vicinity, visited the second prosecution witness, Joel Kimara, during the afternoon of the February 6, 1981, asking for the loan of a saw, saying that he was, in effect, a nephew of the deceased, that the deceased had gone to Kikuyu for the purpose of looking after his tea, and that he would return in April or May of that year. He added that he was going to sell one of the deceased's cattle, to whose purchase he had contributed Kshs 300. At 7.00 pm the same day, the appellant returned the saw and attempted to further discuss the matter of the cow.

Joel was uneasy about the matter, he having seen the deceased, who was a deaf-mute and who lived alone, a day earlier, on February 5; by the morning of the February 7, he had decided to report the matter, which he did to CPL Kabiro, and also sent Peter Wambugu (PW 5) to report to Subukia Police Station. Meanwhile Joel and Sospeter, (PW 4), went to what must have been the deceased's home where they found the appellant taking potatoes. Sospeter pretended to be interested in purchasing the cow for Kshs 1,200, and to go and search for the money. Further discussions about renting the deceased's land took place between Joel and the appellant. All three witnesses then returned, with Samuel Mwangi, to the house, the hue and cry was raised and the deceased's remains found in a pit latrine near the house. Fresh grass and soil were seen covering the latrine. At that time the appellant was wearing the deceased's gumboots, which were identified as such by several witnesses, and which he changed for shoes before being taken to the police station. He had been wearing these gumboots, together with a hat, trousers and jacket, which were also identified as belonging to the deceased, when he initially approached Joel.

The appellant made only a cryptic reply when charged by the police with the murder, saying that he did not kill the deceased and was arrested for nothing. In his defence he said that on February 7 he left his

home at Edgewood Farm, Subukia, (there was no evidence as to how far this was from Munanda Farm) to go to the shops, but was stopped by three persons who asked for his identity card and who took him to an unknown destination, where he was "shocked" to find himself in the home of the deceased. A search was made, the deceased's body discovered and he was then wrongly accused of the murder. The case thus rested, as the learned judge correctly appreciated, fairly and squarely on circumstantial evidence, the deceased having been alive at about 6.15 pm on February 5 and his body, which had been subjected to violent attack as the post mortem reveals, found concealed near his home little more than 36 hours later. Moreover the appellant, who claimed to have escorted the deceased to Kikuyu on the morning of the 6th, was wearing clothing properly identified as that of the deceased, and was arrogating to himself various matters relating to the deceased's property, such as the sale of a cow and the leasing of the land. Furthermore, he is said to have made an admission to Nelson Kamando, PW 7, (said by Mr Odero, representing the appellant, as chairman of the local KANU Youth Wing, to have been a person in authority) that the deceased was inside the pit latrine, and that he had been assisted by one Mwangi, against whom there was no other evidence, and who was discharged at the conclusion of the preliminary inquiry.

Mr Odero, combining his general and imprecise petition of appeal with the appellant's own more detailed grounds, attacked the conviction under two main heads. First he said that there were discrepancies between parts of Joel's evidence, for instance as to whether he was or was not present when Sospeter agreed to buy the cow for Kshs 1,200, but we have examined this part of the evidence and we are unable to detect any significant inconsistency. Similarly, there was no contradiction as to whether the appellant was wearing the gum boots on arrest or whether they were merely found in the house, for Peter Wambugu, PW 5, clearly said that the appellant had removed the gum boots before his arrest. As regards the hat, the appellant was seen wearing it by Joel on the evening of February 6, and he was again seen wearing it by other witnesses on February 7 when I/P Makokha took possession of it.

Mr Odero further submitted that the totality of the evidence did not inevitably point to the appellant's guilt and that, in view of the time that had elapsed between February 5 and 7, which admitted of a third party being involved, and that the appellant and the deceased had never been seen together, the judge and assessors had wrongly assumed that the appellant had murdered the deceased. He complained that the form of the direction on circumstantial evidence had been such as to transpose the burden of proof (this was the basis of his second main ground of appeal) and, finally, that the prosecution and defence cases had been treated in isolation, contrary to the direction of this court's predecessor in *Okethi Okale v Republic* [1965] EA 555 at p 559, with the result that that which Mr Odero described as the appellant's alibi had not been satisfactorily proved to be false, as in *Ssentale v Uganda* [1968] EA 365 at p 368, per Sir Udo Udoma CJ.

There was, of course, a distinction between *Ssentale's* case and the present because, as the learned Chief Justice said, the appellant had raised the alibi at the first available opportunity, so that the police had an opportunity, of which they did not take advantage, to check and test it. But Mr Chunga, the assistant deputy public prosecutor, on behalf of the Republic, submitted that no alibi had been advanced in the instant case, either by way of cross examination of the material witnesses, to whose evidence regarding the events of February 7 he drew our attention, or by the appellant's police statement, or by his unsworn statement in court. Moreover, Mr Chunga said, if the appellant was innocent, for instance if he had come upon the body in the latrine, why not report the matter to the police? He accepted the standard of proof in the citation put forward by Mr Odero from *R v Kipkering arap Koske* (1949) 16 EACA 135 at p 136, reiterated in *Bassan & Wathobia v Reginam* [1961] EA 521 at p 531, and recently, in *Republic v Tyson*, High Court (Mombasa), Criminal Case 20 of 1983.

As we said, Mr Chunga did not accept that the appellant's defence constituted an alibi. The word "alibi" is a Latin adverb, meaning "elsewhere" or "at another place". Thus if an accused person alleged that he was not present at a place at the time an offence was committed, and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi. The appellant said in this case that he left Edgewood Farm at Subukia on February 7, that is the day of the discovery of the body, and the day after that stated in the information as the date of the offence. He did not in terms say that he was at Edgewood Farm on February 6, but Mr Odero submitted, the implication

was that the appellant was saying that he could not have done the act charged because he was elsewhere at the material time. After consideration the judge rejected the appellant's account of how he was arrested on February 7, that is to say on the following day. We do not accept that the appellant's story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the appellant did not put forward this story, but contented himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in *R v Ahmed Bin Abdul Hafid* (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in *R v Little boy*, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought. This, indeed, is the object of the statutory amendments in 1982.

We have examined the directions of the learned judge to which Mr Odera drew our attention, namely:

“The rule about circumstantial evidence is that it must be such as to be explainable only upon the hypothesis of the accused's guilt and incompatible with any other innocent explanation.”

We do not think that this direction merits the criticism which Mr Odera levelled at it, namely that it was such as to transpose the burden of proof. It is true that it is better to comply as nearly as possible with the direction laid down in *R v Kipkering arap Koske*, (supra), but the judge clearly had this direction in mind, and moreover, had only a moment before completed a summary of the prosecution case and had set out the appellant's defence before him in considerable detail. It is not, in our view, possible to say that he did not have well in mind that the burden of proving the falsity of the defence lay wholly on the prosecution, and the standard to which he had to be satisfied before reaching a finding of guilty.

We have considered Mr Odera's submission that the judge might, on one interpretation, appear to have accepted the prosecution case and that he then went on to find the appellant's story unconvincing. We do not think that he did this. There was no misdirection such as occurred in *Okethi Okale v Republic* (supra), where the trial judge talked of displacing the case built by the prosecution. As Goddard LJ said in *Mahon v Osborne* [1939] 1 All ER 535 at page 556:

“Has there ever been, I wonder, a summing up of a long and difficult cause, by ever one of the greatest masters of our law which does not contain some sentence, which, taken by itself, is open to criticism? The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side”.

We would have derived more assistance if the learned judge's notes of his summing up the assessors had been clearer and they should in any case, have formed part of the record. However, we are satisfied that, taken as a whole, the directions which the judge administered, both to himself and to the assessors, showed that he considered and then rejected the defence case, and that he was satisfied of the appellant's guilt beyond all reasonable doubt. We consider that the conviction was just and safe in all the circumstances, and we accordingly dismiss the appeal against the conviction of murder, and the mandatory sentence of death which followed.

Dated and Delivered at Kisumu this 4th day of November 1983.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG.JUDGE OF APPEAL

H.G.PLATT

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AG.JUDGE OF APPEAL

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

DEPUTY REGISTRAR