



REPUBLIC OF KENYA



KENYA LAW
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**Godana v Republic (Criminal Appeal 1 of 2020)
[2022] KECA 16 (KLR) (21 January 2022) (Judgment)**

Neutral citation: [2022] KECA 16 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 1 OF 2020
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JANUARY 21, 2022**

BETWEEN

MOHAMED JIRO GODANA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (J. Kamau, J.) dated 16th March 2017 in High Court Criminal Case No. 1 of 2014)

JUDGMENT

1. Mohamed Jiro Godana, the appellant, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 20th June 2013 at Maungu trading centre within Taita Taveta County he murdered Mambo Kiloki Musale (deceased). He was tried before the High Court at Voi. In convicting him for that offence, the High Court (J. Kamau, J.), in a judgment delivered on 16th March 2017, found that although “although there was no direct evidence implicating” the appellant, the prosecution had proved its case to the required standard. In that regard, the learned Judge expressed that:

“There was no doubt in the mind of this court that the circumstances that were placed before it were of a definite tendency unerringly pointing towards the accused person’s guilt.

Taken cumulatively, the circumstances established by the prosecution formed a chain so complete that there were (sic) no escape from the conclusion that within all human probability the crime was committed by the accused password (person) and no one else.”

2. Aggrieved, the appellant has in this appeal challenged the conviction primarily on the ground that the Judge erred by relying on circumstantial evidence that did not meet the requisite legal threshold. In accordance with Rule 29(1)(a) of the *Court of Appeal Rules*, it is therefore incumbent upon us as the



first appellate court, to re-appraise the evidence and draw our own conclusions. See *Okeno vs. Republic* [1972] EA 32.

3. The essence of the prosecution case was that the appellant was the last person to be seen with the deceased, a motorcycle (boda boda) operator. According to the father of the deceased, Masale Kishalia (PW1), the deceased, who was aged about 20 years, had completed primary school education, and was waiting for his examination results. In the meanwhile, he was employed as a boda boda operator. On 20th June 2013, the deceased was on duty at Maungu stage as were his colleagues, boda boda operators Ayub Mwavule Mwangalo (PW2) and Omari Juma Mwambani (PW5). At about 8.00 p.m. on that day, the appellant approached each one of them with a request to be transported “to Boma” or “Camel Camp.” PW2 apparently declined to do so as he “had closed for the day.” On his part, PW5 stated that he spoke to the appellant “for some time while haggling over payment” and that he declined to transport him because “I did not know him”. Having been turned down by PW2 and PW5, the appellant went to the deceased who agreed to take him. PW2 stated that they (boda boda operators) then waited for the deceased to return to the stage, but he did not return and they decided to go home. The following morning, at about 7.30 a.m., they got information that the deceased had been found dead near a Kenya Power and Lighting power line. They went and saw the body of the deceased lying on the ground. Police arrived at the scene later and took the body.
4. An uncle to the deceased, Clayton Muliwa Ali (PW3) was at home when he received a call informing him that his nephew had been found dead. He went to the scene and found the police already there taking photographs and taking measurements. The body of the deceased had blood in the eyes and mouth, and some blood had trickled to the ground. He, and one Elijah Musinga, later identified the body of the deceased at the mortuary for purposes of postmortem.
5. The postmortem was performed by Dr. Eunice Ouma whose report of 22nd June 2013 was produced before the trial court on her behalf by Dr. Nashat Fadhlool (PW6) of Moi County Referral Hospital, Voi. Based on that report, the body of the deceased had dried blood all over the face; there was a cut wound on the right ear; a deep cut above right eyebrow; deep cut wound on the occipital region; and a depressed skull fracture on the right frontal area. The cause of death was stated to be cardiorespiratory arrest secondary to severe head injury following an assault.
6. Sergeant David Chege (PW4) of the scene of crimes unit of the Criminal Investigation Department, in the company of Police Constable Kofa of Voi Police Station, documented the crime scene at Maungu on 21st June 2013 at about 10.30 a.m. He took photographs of the general view of the scene; the body of the deceased showing where the body lay and the injuries; and the deceased’s motorcycle which was also at the scene. The photographs were produced as exhibits.
7. Sergeant David Makhakha (PW8) was the officer in charge at Maungu Police at the time. On the morning of 21st June 2013, he received a call from Madam Trussila Ngela, the area Assistant Chief of Maungu sub-location informing him that somebody had been murdered along the power lines, approximately two kilometres from Maungu Police Station. Accompanied by another officer, he went to the scene where they found members of the public, and the body of the deceased beside a motorcycle. They secured the scene. Shortly thereafter “the OCS and photographers” arrived and the body of the deceased was then taken to the mortuary.
8. Before leaving the scene, PW8 requested members of the public with any information to provide it. The following day, boda boda operators, amongst them, Omar Mwambuni (PW5) and Ayub Mwafula (PW3), reported at the station with information that they “suspected a Somali man to have been involved in the deceased’s murder because he was the last person who went with the deceased” and that the deceased never returned to the stage. A search for the suspect ensued leading to his arrest. According



- to PW8, at Maungu Police Post, he tried to interrogate the appellant “but he was using signs.” He subsequently charged the appellant with the offence “as he was identified by the deceased’s colleagues and he was the last person to be seen with the deceased.”
9. Corporal Douglas Mwakarambu Mwangima (PW7) was stationed at Maungu Administration Police Post in June 2013. On 23rd June 2013, at about 6.30 a.m., on instructions by his superior, he accompanied Corporal Lelemowet and Administration Police Constable Vitalis Mila in looking for the suspect of a murder that had been reported to the office as having occurred on 20th June 2013. They were directed to Sanghanyi checkpoint where, based on a description that had been given, found the appellant, who identified himself as Mohamed. After identifying themselves to him, searching him and interrogating him, they asked him to accompany them to the Administration Police Post where about ten boda boda operators identified the appellant as the person who was ferried by the deceased on the fateful day.
 10. Based on the prosecution evidence, the trial court found that the appellant had a case to answer. In his sworn testimony in defence, the appellant gave a lengthy and detailed account of his movement from 2.30 p.m. on 20th June 2013 until his arrest days later. He stated that he was a resident of Maungu since 1998; that he was not only an elder of the Somali community with an oversight role over herding of animals but was himself a herder of cattle, goats, and camels; that prior to his arrest in connection with this case, he was well known to the Chief of Maungu and to the Senator of the County of Taita Taveta and was a point man in the Somali community.
 11. The appellant stated that on 20th June 2013 at about 2.10 p.m., using his Safaricom line, he telephoned the deceased and requested for transport to a place near Ngutuni Lodge to attend to a complaint by Kenya Wildlife Service (KWS) that there were far too many animals being taken for watering at the water tank; that the deceased, whom he described as “the boda boda driver who normally used to ferry [him]” dropped him off at 3.00 p.m. and left, leaving the appellant meeting with KWS officers; that at about 3.30 p.m., the deceased telephoned him and informed him that he had arrived in Maungu and needed to borrow some money; that the appellant referred the deceased to one Abdullahi at Al-Shukrani Shop with instructions that the said Abdullahi should give the deceased Kshs.5,000.00; that the deceased acknowledged the appellant’s help in that regard with a thank you text message; and that the appellant requested the deceased to be on standby to pick him up at about 5.00 p.m.
 12. It is not clear whether the deceased picked him up but the appellant’s testimony was that he (the appellant) got to Maungu at 5.30 p.m. and at 7.30 p.m., the deceased called him from Msendo Hotel where he joined him and waited for him until 8.00 p.m.; that they then set off together on the appellant’s motorcycle for a place known as Ndara where they arrived at 8.45 p.m; that at Ndara, they found Ibrahim Farah, Abdullahi Roble Abdi Hassan Guld and the appellant requested Roble to milk the camel so that the deceased could take away some milk for his family; that the appellant gave the deceased 5 litres of milk, bid him farewell and cautioned him to be wary of elephants and donkeys that could harm him on the way; that he asked the deceased not to switch off his phone as he (the appellant) required his service the next morning to transport him to the water tank; and that the deceased left leaving the appellant at the camel Boma at Ndara where they “ate miraa until morning”.
 13. It was the appellant’s further testimony that at about 6.00 a.m. the following morning, as they were milking camels, one Haji Hassan Farah, who the appellant described as his boss arrived and informed him of the arrest of other herders; that the appellant put Farah in touch with a police officer by the name Mugo at Voi Police Station for purposes of securing the release of the herders who had been arrested; that the appellant remained at the camel Boma at Ndara; that between 7.00 a.m. and 9.00 a.m. that morning, the appellant tried to call the deceased on his phone but his calls went unanswered; that having failed to get the deceased, he got a lift from a KWS vehicle which took him to the water tank;



that he thereafter returned to Maungu from where he was summoned to the Chiefs office; that at the Chief's office, six boda boda operators pointed at him and went away after which, "all of a sudden, a mob of people gathered armed with rungas and pangas"; that a man amid the mob shouted that he wanted to see the "Somali who had killed his brother"; that the appellant was then handcuffed and driven to Voi Police Station and charged with the offence of which he said he knew nothing about.

14. As already stated, the learned Judge of the High Court was satisfied that the circumstantial evidence presented by the prosecution had established its case against the appellant to the required standard before convicting him and sentencing him to death on the basis that the evidence irresistibly pointed to the appellant as the perpetrator as he was the last person seen with the deceased.
15. Before us, it was submitted for the appellant, and the respondent conceded, that the conviction was not safe. The question for determination in this appeal is whether the evidence met the threshold for circumstantial evidence. In *Musili Tulo vs. Republic* [2014] eKLR, this Court discussed the criteria that should be met in order for a conviction to be rightly based on circumstantial evidence as follows:

"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements: -

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

16. Earlier in *Simon Musoke vs. Republic* [1958] EA 715 the predecessor of this Court had cautioned that:

"The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference." [Emphasis added].

17. The burden lay with the prosecution to prove that the chain of events relied on pointed to the appellant's guilt. See *Rex vs. Kipkerring Arap Koske & 2 Others* [1949] EACA 135. As already indicated, the crux of the prosecution case was that the appellant was the last person to be seen with the deceased.

The prosecution witnesses stated, and the appellant readily agreed, that the deceased rode off with the appellant as his passenger from Maungu stage at about 8.00 p.m. on 20th June 2013. The body of the deceased was discovered the following morning as it lay along the road next to his motorcycle. In the post-mortem report dated 22nd June 2013, it was indicated that "rigor mortis present". There was no assessment of time of death. Between the time appellant and the deceased were last seen together and the time the body of the deceased was discovered the following morning, there was considerable lapse of time.

18. In rebutting the presumption, that as the last person seen with the deceased, he was not responsible for his death, the appellant was not required to prove his innocence. All he needed to do, which in



our view he did, was to create a doubt in the mind of the court as to his guilt, and that doubt would be resolved to his benefit. In *Cecilia Wangechi Kanyuira vs. Republic* [2006] eKLR, a case where the appellant therein, was convicted on the basis that she was the last person to be seen with the deceased, the Court stated:

“In this appeal, as we have said, the only person who could give a reasonable explanation as to where the appellant left the deceased and with whom is herself. What she says in that respect however, does not need to prove her innocence beyond reasonable doubt. All she needed was to make a statement such as would create a doubt in the mind of the court as to her guilt, and that doubt would be resolved to her benefit.”

19. The appellant’s account of his movement after leaving Maungu stage with the deceased until the following morning is one the investigating officer, with proper investigations, would have been able to verify. The reference by the appellant in his testimony of exchange of phone calls and text messages between himself and the deceased could have easily been verified by investigation officer with the service provider. The investigating officer could have easily obtained records of the appellant’s call history over the relevant period.
20. In our view, the detailed account given by the appellant of his movement from the time from the time he was last seen with the deceased to the time the body of the deceased was discovered, complete as it was, with names of persons he met and interacted with, places he went, and calls he made and messages he exchanged presented a reasonable hypothesis that was incompatible with his guilt. If, as already stated, the prosecution wanted to discount that hypothesis, it was incumbent on them to investigate the appellant’s account. That was not done and there was no basis for rejecting it outright. See *Godfrey Okumu Opapa vs. Republic* [2005] eKLR.
21. The learned trial Judge discredited the appellant’s testimony on the basis that his testimony that he had known the deceased since 2004 was not credible. In that regard, the Judge expressed:

“In this particular case, the accused person herein was the last person to have been seen with the deceased. He did not have an alibi. His evidence that the deceased was a boda boda rider in 2004 was contradicted by the evidence of the PW1, PW 3 and PW5 that the deceased had been a Boda Boda rider for less than a year. In view of the foregoing, this court found itself in agreement with the prosecution had cogently and firmly established the circumstances from which an inference of the accused person’s guilt was sought to be drawn.”
22. With respect, the learned trial Judge placed undue weight to the statement by the appellant as to the year when he (the appellant) may have begun interacting with and using the services of the deceased as a boda boda operator. The appellant did not at all contest that on the evening of 20th June 2013, he left Maungu stage with the deceased. In our judgment, the prosecution evidence on record fell far short of meeting the criteria on circumstantial evidence as set out above. On the contrary we find that the co-existing facts and circumstances weakened, if not destroyed the inference of guilt. All that there was against the appellant was mere suspicion which could not be a basis for his conviction. See *Sawe vs. Republic* [2003] KLR 364.
23. Consequently, we are satisfied that the respondent properly conceded this appeal. The appeal succeeds and is hereby allowed. We quash the conviction and set aside the sentence. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.



S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

