



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 180 OF 2016 (R)

BETWEEN

GEORGE KAMAU WAMBUI ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Milimani, (Hon. Lesiit, J ) dated 29<sup>th</sup> October, 2015 in HC. CR. CASE NO. 66 OF 2012)*

JUDGMENT OF THE COURT

The appellant, **GEORGE KAMAU WAMBUI** was charged before the High Court of Kenya at Nairobi with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that “on the night of 12<sup>th</sup> August, 2012 at Ngecha village, Kiambu County, he murdered **JOYCE MUTHONI MURIU**” The appellant denied the information and his trial ensued in earnest.

The prosecution called a total of 11 witnesses. The brief facts of the prosecution case as gathered from the evidence of the said witnesses is that at 9 a.m. on the 13<sup>th</sup> august, 2012, Senior Sergeant Simon Rono, (PW6) Administration Police Officer then attached to Ngecha A.P Camp received a call from a member of the public who informed him that a person had been seen pushing a wheel barrow with items suspected to have been stolen. He and his colleagues including APC Godfrey Mworira, (PW1), proceeded to Ngecha market to investigate. They spotted the appellant pushing a wheel barrow which had empty sacks, some with blood stains, a jerry can and charcoal. The appellant led them behind a shop where he showed them a half sack of potatoes, 3 jerry cans, a brick plate, tool box, metal box and big sufuria. The appellant was then arrested, the exhibits seized for further investigations. They took the appellant to the AP Camp, Ngecha and upon closer scrutiny of the recovered items, blood stains were noted on the jerry can and the sack. The appellant was searched further and of the 2 jackets that he wore, one was found to have blood stains.

PW1 and 6 then contacted the Area Chief, Kangethe, who circulated a report of recovered items suspected to be stolen and asked the public to proceed to the camp to identify them. At 3 p.m. on the same day, Jacqueline Njeri, (PW7) a daughter of the deceased identified some items as her mother’s properties. When she proceeded to her mother’s house she found her dead. She was lying on a sofa set with blood oozing from the mouth. P.C. Patrick Onyanso, (PW11), the investigating officer, visited the scene and recovered a sufuria covered with blood stains, outside the kitchen in the deceased home. He took all the exhibits and submitted them together with the blood sample from the deceased to the Government Analyst. A post mortem was subsequently conducted on the body of the deceased by Dr. Peter Muriuki Ndegwa, (PW10) which revealed that the deceased had a laceration behind the left ear, and internally a depressed fracture on left temporal skull with intracranial hemorrhage and signs of increased intracranial pressure. The cause of death was established to be head injury due to blunt force trauma.

**Dr. Lawrence Kinya Muthuri**, (PW4) the Government Chemist received blood samples of the appellant and the deceased, bundle of white sacks, plastic jerry cans, jacket and sufuria. After DNA profiling of the blood samples and blood stains received, he concluded that the DNA profiling generated from blood stains from the jerry can and bundle of sacks all matched the DNA profile generated from the blood of the deceased. The jacket had blood of the appellant.

Put on his defence, the appellant elected to give a sworn defence in which he stated that as far as he knew, the deceased was still alive. He claimed that he used to work for the deceased on casual basis. On 8<sup>th</sup> August, 2012, he went to Ngecha shopping centre and after having a meal at Chungwa Hotel, the deceased called him and requested him to deliver a sack of charcoal to a customer. He did so and returned the wheel barrow to her. He thereafter secured a casual job from one, Njoroge on the same day and worked for him between 11<sup>th</sup> and 12<sup>th</sup> August, 2012. That at about 4 P.m. on 11<sup>th</sup> August, 2012 as he was working on a ladder, it broke causing him to fall and injure his eyes. He wiped his eyes with the jacket he was wearing and that is how his blood was found on his shirt. He finished work at 6 p.m. on 12<sup>th</sup> August and proceeded to Ngecha shopping centre with the wheelbarrow which he left at Web Bar. On 13<sup>th</sup> August, 2012 he collected the wheel

barrow and on his way PW6 called him and asked him if the wheel barrow was his and he answered in the affirmative. He was then told to take it to the A.P Camp where upon arrival he was locked up. When the police saw some blood on the collar of the shirt, they took away his clothes. It was then that he was charged with the offence of murder.

Having carefully considered the entire evidence adduced by the prosecution and the defence as well as submissions made by both sides, the High Court, (Lesiit, J.) was satisfied that the appellant had committed the crime. She accordingly convicted him and sentenced him to death.

Aggrieved by the conviction and sentence, the appellant lodged this appeal on three main grounds; that the learned Judge erred in convicting him based on weak circumstantial evidence; relying on inadmissible evidence and shifting the burden of proof to him. The appeal was argued on behalf of the appellant by **Dr.Simeon P. Sungi**, learned counsel whereas **Ms Wang'ele**, learned Senior Principal Prosecution Counsel appeared for the State.

On circumstantial evidence, counsel for the appellant conceded that it can be relied upon to find a conviction. However, such evidence should point irresistibly to the commission of the offence by the appellant and nobody else. Counsel submitted that nobody saw the appellant commit the offence nor was motive established that would have led the appellant to commit the offence. It was further submitted that the trial court did not interrogate the blood stains found on some items in the possession of the appellant. Counsel maintained that there was no DNA profiling conducted in order to connect the appellant with the crime. Lastly, counsel submitted that the burden of proof was shifted to the appellant when the court required him to explain how the deceased's blood came to be found on the items he had possession of.

**Ms Wang'ele**, in opposing the appeal submitted that the circumstantial evidence led by the prosecution was sufficient and met the necessary threshold to found a conviction. The appellant was found in possession of items belonging to the deceased which had blood stains. That DNA profiling conducted on some of the items matched the deceased's blood. Counsel submitted that the only way the blood stains could have been found on those items was because the appellant must have been in close proximity and contact with the deceased. Further the appellant never explained how he had come by the items. Finally, counsel submitted that the ingredients for the offence of murder were proved by evidence. Accordingly the conviction of the appellant was safe and urged us not to interfere.

We have analyzed and evaluated afresh the evidence that was tendered before the trial court, as expected of us as a court of first appeal. We are also alive to the fact that we neither saw nor heard witnesses and therefore we should give due allowance. This is in line with holding in **Gabriel Kamau Njoroge V Republic (1982 – 88) I KAR 1134.**

We entirely agree with the submissions of counsel for the appellant that his conviction turned solely on circumstantial evidence. While considering how to test circumstantial evidence, this court in the case of **Republic V Kipkering Arap Koskei & Another 16 EACA 135** stated *“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt..”*

Further in the case of **Simoni Musoke V Republic (1958) E.A. 715**, the court held that *“.. in a case depending exclusively upon circumstantial evidence the court must before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt”*. See also **Joan Chebichii Sawe V Republic (2003) eKLR.**

What are the pieces of circumstantial evidence in this case that the trial court relied on? The appellant was found in possession of some household and farm items belonging to the deceased. That was on the same day that the body of the deceased was discovered by her daughter in her house. Some of the items had blood stains which on analysis by a Government analyst were found to belong to the deceased. Some of the clothes the appellant was wearing on the day of arrest had blood stains too. When the said clothes were subjected to analysis again by the Government analyst, the blood was found to belong to the deceased. Further, the appellant could not offer an explanation as to how the deceased's blood found its way on to the items as well as his clothes. It was within the appellant's knowledge how that blood came to be on the items he was ferrying, and which he claimed to be his. Section 111(1) of the Evidence Act provides interalia;

***111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.***

The section therefore creates a rebuttable presumption. In this case the rebuttable presumption is that since the appellant had with him property which had the deceased's blood thereon, he had to explain how that blood found its way on to the said items as well as his clothes. Dealing with an almost similar issue, this Court in the case of **Ernest Abanga alias Onyango V Republic, Criminal Appeal No. 32 of 1990** observed:

***“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:***

***The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of***

explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

***This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence”.***

Based on this authority, we would agree with the trial court’s observation that where an accused person attempts no explanation of facts which he may reasonably be expected to be able and interested to explain, that has the effect of augmenting the force of the suspicious circumstances adduced against him and serve as corroboration to other independent available evidence. The only way these items and clothes of the appellant could have had the blood of the deceased is because he came into contact with the deceased while she was bleeding after the vicious and fatal attack that led to her death. Indeed the items were positively identified by the deceased’s daughter as belonging to the deceased. This was on the same day that the deceased was killed. Further the appellant did not claim ownership of the items.

From all these pieces of circumstantial evidence, we are satisfied just like the trial court that the facts adduced in this case are incapable of any other explanation upon any other hypothesis except that of the appellant’s guilt. They point irresistibly to the appellant as the person who inflicted the injuries that led to the death of the deceased. His defence, which could pass for alibi fades away given the strong circumstantial evidence led by the prosecution. The complaint by the appellant that he was convicted on weak circumstantial evidence cannot in the light of the foregoing really stand.

Turning to the question of inadmissible evidence, the appellant laments that the trial court relied on the evidence of blood stains on the items in his possession to convict him. To the appellant this evidence should have been expunged since it did not pass legal muster. That there is nothing in the proceedings showing that DNA testing satisfied the requirements of the Criminal Law (Amendment) Act, 2003. **Section 122 A(1)** thereof provides that a Senior Police Officer of above the rank of Inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure. Our simple answer to this lamentation is that the section is not couched in mandatory terms. It is permissive. Further that requirement; might also be open to challenge as it runs counter to the doctrine self-incrimination. In any event we do not see any prejudice suffered by the appellant when he was not subjected to the process. Further he never even raised the issue with the trial court. For him to raise it now can only be termed as an afterthought. The trial court was perfectly entitled to proceed with the DNA profiling and testing availed to it by the prosecution to enable it reach its conclusions and findings. No basis was in any event laid by the defence for its inadmissibility. We accordingly reject this ground of appeal as well.

We now turn to the last ground of appeal which is that the trial court shifted the burden of proof to the appellant to prove his innocence. We appreciate that the standard of proof in criminal cases is premised on the prosecution bearing this burden. This burden never shifts to an accused person to prove his innocence. According to the appellant, by the trial court invoking section 111(1) of the Evidence Act and stating in para 22 of its Judgment that “*the explanation by the accused does not explain (sic) how the deceased blood came to be on the items he was found with...*” the trial court was thereby shifting the burden of proof to the appellant to explain his innocence. Nothing can be further from the truth. Section 111(1) of the Evidence Act is a provision of law which courts are allowed to invoke. We do not see nor appreciate how its invocation could be said to have shifted the burden of proof to the appellant. Indeed the section gives the circumstances under which it can be invoked. The circumstances obtaining in this case fitted very well with the requirements set out in **section 111(1) of the Evidence Act** aforesaid. Accordingly, the trial court cannot be faulted or blamed for invoking it.

We are also aware that in this case what the appellant was required was to provide plausible explanation as to how he had come by the deceased’s items. The explanation given by the appellant as to how he had come by the items weighed against the evidence tendered by the prosecution was found to be fickle by the trial court and we agree. However, the big elephant in the house and which cried out for an explanation by the appellant was how the deceased’s blood found itself on the items in his possession.

From what we have stated so far, it is clear that this appeal is bereft of merit.

Accordingly, it is dismissed in its entirety.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPTY REGISTRAR**