



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), M'INOTI & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 81 OF 2016

BETWEEN

FRANCIS MWANGI WANJOHI.....1ST APPELLANT

PAUL KIMANI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (F. N. Muchemi, J.) dated 28th August, 2013

in

H.C.CR.C No. 11 OF 2010)

JUDGMENT OF THE COURT

The appellants, who were jointly charged with and tried for the murder of Peter Nduati Kinyanjui, contrary to **section 203** as read with **204** of the Penal Code, were, upon conviction, sentenced to death by the High Court (F. N. Muchemi, J.), who, relying on circumstantial evidence presented by the prosecution came to the conclusion that:

“...The only persons who could tell what happened to the deceased are those who were found in possession of his motorbike while his body lay just a few meters away. When PW2 heard the screams from the road, it would appear that that was the moment the deceased was attacked. I find no other co-existing circumstances which could point the guilt to another person other than the two accused persons.

...

The accused persons have not explained their presence at the scene of crime. Their presence gave them the opportunity to commit the offence. The body of the deceased was found in the same vicinity where PW2 heard a scream; motorbike found where accused persons were arrested picking the bike..... The chain of evidence from the time the screams were heard; and when accused persons were first seen and body recovered was not broken. The fingers point at the accused persons and in regard to the death of the deceased to no other person in the absence of any reasonable explanation.”

The following is the evidence that led the learned Judge to that determination. On the night of his murder, the deceased, who was a motorcycle *boda boda* operator at Roysambu, worked up to around 9.00 p.m and left for his home at Mirema Drive within Kasarani area. Unfortunately, he did not arrive home that night. Instead, his motorcycle was recovered at around 10.00 p.m in a maize plantation within a farm belonging to one Kinuthia. Later that night his body was also recovered in the same vicinity. According to the prosecution's star witness, Gladys Njeri Macharia, it was a rainy night when she heard some noises outside the compound of her employer's farm. Her colleagues, John Waweru and George Maritim who were watchmen in the farm went out and are said to have come by an abandoned motorcycle. The two are said to have laid an ambush and arrested the appellants who came to take the motorcycle and even claimed it belonged to them. The two watchmen asked Njeri to call the police. The police came at around 11.30 p.m and re-arrested the appellants. They also collected the motorcycle. Two and half hours later, at around 2.00 a.m, the body of the deceased was discovered within the farm around 29 meters from where the motorcycle had been found. The body had a rubber cord tied around the neck. It had also been tied with

barbed wire. The police were called back to the scene to collect the body. The appellants were later charged with the murder of the deceased.

The appellants in their defence, denied the charges. The 1st appellant stated that on the material night he was walking home to Roysambu after carrying out his hawking business which he had closed at 7.30 pm; that, since it had been raining, he decided to take shelter from the rain for a while, after it subsided, he continued to walk home; that at around 8.00 p.m, he met a group of people who were complaining about thuggery in the area; that the group took away the items that he was hawking and beat him up; that as he was being assaulted, he could hear another group of people assaulting another person nearby, asking the victim similar questions; that the victim was the 2nd appellant; that he was then bundled up with the 2nd appellant and the two of them were later re-arrested by the police and charged.

The 2nd appellant similarly denied the offence insisting that he was framed. It was his evidence that he worked on a construction site and left to go home through Mirema drive at around 9.30 p.m; that while walking home, he met a group of members of the public who dragged him to a place with a gate where he found the 1st appellant being assaulted; that he was also beaten up until the police from Kasarani Police Station came for them.

It was upon that evidence that the learned Judge was persuaded that the appellants were implicated in the murder of the deceased.

Aggrieved by their conviction and death sentence, the appellants have proffered separate appeals which were consolidated into this appeal. The combined effect of their complaint is that: there was no proper identification parade carried out by the prosecution to identify them; they were convicted on inconclusive evidence; the evidence of PW1 to PW9 was unsafe and could not be the basis of a conviction on circumstantial evidence; the learned Judge failed to warn herself of the dangers of convicting the appellants on the basis of such circumstantial evidence and; the exhibits produced in support of the prosecution's case were tampered with.

Arguing these grounds, Mr. Ratemo, learned counsel for the appellants conceded that the evidence against his clients was purely circumstantial since there were no eye witnesses to explain how the deceased met his death; that the appellants were arrested with nothing to link them with the death of the deceased; that the appellants were not in possession of any weapon or even the ignition key to the motorcycle; that the report which was the basis of the arrest of the appellants was made by the two watchmen, Waweru and Maritim and another worker Peter Mwangi who did not testify as to the circumstances under which they found the motorcycle and the appellants; that there was no explanation how the body of the deceased that was not at the scene when the police collected the motorcycle and the appellants came to be found a few meters from the same spot where the motorcycle had been found. Counsel explained that there was a gap of about 3 hours between the time the appellants were arrested allegedly with the motorcycle and the time the body of the deceased was found, which indicates a break in the chain of events; and that there was evidence of a threat against *boda boda* operators by a *Mungiki* group. Lastly, it was contended that, based on Francis Karioko Muruatetu & another vs. Republic (2017) eKLR the learned Judge erred in imposing the death sentence.

Opposing the appeal, Ms. Ngalyuka learned counsel for the respondent submitted that the circumstantial evidence pointed irresistibly to the guilt of the appellants; that the appellants were found near the gate having been arrested by the watchmen; that they were found in possession of the deceased's motorcycle; that upon arrest, the appellants claimed ownership of the motorcycle but had no ignition key and the number plate of the motorcycle had been concealed; that at this point, the body of the deceased had not been recovered; that it was only recovered some hours later and the cause of death was determined to be strangulation/asphyxia. Counsel maintained that the defence proffered by the appellants was not plausible and that they did not explain how they came to be in possession of the motorcycle or their presence in the compound. Finally, counsel submitted that the fact that the watchmen were not called did not substantially affect the prosecution evidence.

We start by reminding ourselves that we are sitting as a first appellate court in this appeal, in which case, we are expected to evaluate the evidence afresh in order to arrive at our own independent conclusion. In doing so, we make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. See: Kiilu & Another vs. Republic (2005)1 KLR 174.

This appeal is predicated on the question, whether the prosecution proved its case against the appellants beyond reasonable doubt.

It is common ground that there was no eye witness to the murder of the deceased. The appellants were convicted purely on circumstantial evidence. The weight to be attached to circumstantial evidence was considered many years ago by Lord Heward CJ in R vs. Taylor Weaver & Donovan (1928) 21 Criminal App. R 20 where he stated that:

“It has been said that the evidence against applicant is circumstantial so it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which the intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Closer home, the two leading authorities in this area of the law are Rex vs. Kipkering Arap Koske & Anor (1949) 16 EACA 135 and Simoni Musoke vs. R (1958) EA 715, which in effect laid down the rule that a conviction will be based on circumstantial evidence if that evidence unerringly and irresistibly points towards the guilt of the accused person and no one else; that before drawing the inference of the accused person's guilt from circumstantial evidence, the court must be sure there are no other co-existing circumstances or factors which would weaken or destroy that inference.

The circumstantial evidence presented to the trial court include the fact that when the two watchmen and another workmate responded to the noises near the farm entrance, they found an abandoned motorcycle and lay in ambush; that shortly thereafter, the appellants appeared and one proceeded to sit on the motorcycle; that they claimed it belonged them even though they did not have the ignition key; and that a few hours after the appellants were arrested, the body of the deceased was discovered not far from where the motorcycle was found. The fundamental question is; who saw all these things as they occurred? According to Gladys Njeri, who we have earlier on described as the prosecution's star witness, it was the two watchmen, Waweru and Maritim and another worker, Peter Mwangi, who witnessed the recovery of the motorcycle and arrested the appellants. In other words, what she told the trial court is what she was told by the above three co-workers. She was clear that;

“I heard as if people were talking at the gate as if they were fighting. I did not check through the window. I never got out. Waweru and George heard the noise when they were at the tap near the main house. George went to the gate saw a motorbike and came back running and told Waweru and Peter. It is George and Waweru who told me how they arrested the two after the two accused had been taken away by the police. I never got out until the police came... We went to the police station that night we came back at about 1:30 pm (sic)... George John and Peter escorted neighbours. On their way back they saw the body. I never got out. I saw the body when the police came. The body was about 4 m from the motorbike... The body was first seen by Waweru at two 2 am but I’m not sure. He was with George escorting neighbours” (Our own emphasis).

From her own testimony, Gladys Njeri confirmed that she did not witness the recovery of the motorcycle and or the arrest of the appellants by her three workmates. Indeed, the arresting officer was clear that when he got to the scene, Gladys Njeri, who was well known to him was not among those he found with the appellants who had been arrested. The key witnesses were John Waweru and George Maritim as well as Peter Mwangi. They discovered the motorcycle and later the deceased person’s body. As curious and strange as this may sound, the prosecution called all the witnesses but did not call the three, John Waweru, George Maritim and Peter Mwangi, the only people who linked the appellants to the crime. In law, what Gladys Njeri was permitted by the trial court to state is called hearsay. This was explained by the High Court in **Khalif Haret vs. Republic** [1979] eKLR in the following words;

“Hearsay evidence is evidence of a fact spoken to by someone who did not himself perceive it with one of his own senses, but proved by him to have been said by someone else. In other words, what a person not called as a witness has said cannot be received to prove the truth of the facts stated. Of course, if it is not the truth of what was said that is sought to be proved but only that it was said, the evidence would be admissible”.

Subsequently, this Court in **Kinyatti vs. Republic** [1984] eKLR enunciated the rules on the admissibility of hearsay evidence thus;

“4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.

5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

.....

7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made”.

Accordingly, the evidence presented to the court about what John Waweru, George Maritim and Peter Mwangi told Gladys Njeri regarding the motorcycle and the arrest of the appellants was inadmissible as hearsay evidence and ought to have been rejected by the trial court. That evidence was highly prejudicial to the appellants. As we will demonstrate shortly, without it, there was no other evidence, direct or circumstantial upon which the court below could have founded a conviction. Gladys only appeared after the police arrived at the scene when the motorcycle was found and the appellants arrested. She also did not witness the discovery of the deceased person’s body.

Whereas by **section 143** of Evidence Act no particular number of witnesses are required to prove a fact, it is equally essential that the prosecution must make available all witnesses necessary to establish the truth even if their evidence turns out to be inconsistent with the charge. After all, the purpose of a criminal trial is to ensure that an individual accused of a crime receives a fair and impartial evaluation by an impartial arbiter of the evidence in order to determine if he is guilty or not. That is why, the trial court has the power and the duty to call witnesses whose evidence appears essential to the just decision of the case. But where the evidence called by the prosecution is barely adequate, the court may infer that if the evidence of uncalled witnesses was tendered, it would have been adverse to the prosecution. See **Bukenya & Others vs. Uganda** [1972] EA 549.

There were three alleged eye witnesses as we have repeatedly said. Even one of them would have been sufficient. But to fail to call all of them, without any explanation whatsoever, ought to have led the learned Judge to conclude that either they did not exist or their evidence would have been adverse to the prosecution’s case.

The foregoing apart, the next question is whether there was any other incriminating evidence against the appellants. We find none. If anything, there were numerous factors that destroyed any inference of guilt of the appellants. Starting with their respective statements in defence, that they were walking home when they were arrested and recalling that the farm where the motorcycle was abandoned and the body found was not secured by any form of a fence, it was bushy and also had lots of maize plants, any person, would have committed the act.

The second weakening aspect is the fact that, there was evidence that the area was crime prone; that the outlawed *Mungiki* was terrorizing the residents; and that three days before the incident in question, there was an attempted robbery on this very farm. A *boda boda* operator, Johana Mwangi who worked with the deceased, narrated how two members of *Mungiki*, Dan and Lay had threatened the operators who failed to pay them; and that on one day, when the operators stopped paying, he (Johana Mwangi) was beaten senselessly by Dan and a group of *Mungiki* members. No one linked the appellants with the *Mungiki* group.

Thirdly the farm in question was near a public road. There was no gate to the farm, as it was not fenced. It would appear, therefore from the evidence that the farm measuring about 2 acres was actually a thoroughfare. It abutted a public road, Mirema drive, which is clearly marked in the sketch plan produced before the trial court.

The fourth puzzle is how, almost three hours after the discovery of motorcycle and the arrest of the appellants by the police, the deceased person's body was found close to where the police had just collected the motorcycle and the appellants. Was the body transferred to the scene from elsewhere or was it a case of the police not exercising due diligence and keen attention to the surrounding area? Again, it was the same watchmen who found the body in the wee hours of the night when they were purported to have been escorting some neighbours.

Finally, it was common ground that the appellants did not even have the ignition key for the motorcycle.

All these constituted intervening factors that weakened and indeed destroyed any inference of guilt on the appellants. An accused person is presumed innocent unless the prosecution has proved his guilt beyond all reasonable doubt. The threshold was not met in this case. With respect, the learned Judge misapprehended the prosecution's case, which was built on mere suspicion, and did not properly evaluate the evidence in totality, with the result that she ultimately arrived at a wrong conclusion.

We, accordingly, allow the appeal, quash the conviction and set aside the death sentence on the appellants. The appellants will be set free forthwith unless they are otherwise lawfully held.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR