



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 58 OF 2017

BETWEEN

RASHID SIYOI CHESHOLEI.....1ST APPELLANT

EMMANUEL CHEBASKWONY CHEPSIKOR.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against a Judgment from the High Court of Kenya

at Bungoma, (Ali-Aroni, J.) dated 2nd October, 2015

in

HCCRC. NO. 1 of 2009)

JUDGMENT OF THE COURT

[1] The two appellants were convicted by the High Court sitting at Bungoma for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death. They now appeal against the conviction and sentence.

[2] The particulars alleged in part that on the nights of 5th and 6th December, 2008 at **Grandma Hotel, Konduyi**, the two appellants jointly with others not before the court murdered **Peter Naibei Chebaskwony (deceased)**.

[2.1] The prosecution case was briefly as follows:

The deceased was the son of **Chebaskwony** who died in 2008. The 1st appellant lived in a farm in Sabot near Kitale town which was near the farm where the deceased was living. The 2nd appellant is a step-brother of the deceased and lived in a farm in Saboti.

On Friday, 5th December, 2008 at about 9 pm, two young men went to Grandma Hotel Kanduyi Bungoma and found **Kennedy Zacharia Adala (Kennedy) (PW2)** a supervisor at the reception. They told Kennedy that they worked with an NGO handling agricultural matters and were looking for their boss and wanted accommodation. Kennedy identified the 1st appellant at the trial as one of the two young men. The two men said that they did not have enough money and would share a room. The 1st appellant wanted a room downstairs but it was not available. They instead were allocated a room upstairs. The two men said they wanted to wash clothes and went upstairs. They came down again and ordered for food and tea. They ate supper at about 10 pm and then went outside the hotel. Kennedy went to sleep. On 6th December, 2008, a cleaner told Kennedy that she could not get the keys for the room. The room remained closed for two days. Kennedy in consultation with the owner of the hotel opened the room using a carpenter. He found a dead body lying on the bed.

[2.2] The matter was reported at Bungoma Police Station on 7th December, at about 7 pm. **CPL Patrick Ndombi (PW8)** went to the hotel in the company of other police officers. He found blood coming out of the room under the door. There a dead body of a human lying on the bed with deep cut wounds on the forehead and on the left side of the head. The throat was cut and the small finger on the right hand had been chopped off. A blood stained panga was placed between the mattress and the bed (*exhibit 3*). A small black bag was found which CPL

Patrick Ndombi opened. He found an identity card in the name of Peter Naibei Chebaskwony a voter registration card of the deceased and a Christmas card addressed to **Claire Mungou**. There was a note inside the black bag with the writing –

“Peter M. Songwoyo killed my wife and so pay. MAFIA”

The note was produced as exhibit 4. The body was taken to Bungoma Hospital mortuary.

[2.3] The body was identified by **Joseph Otiei Kemboi (PW5) (Kemboi)**; **Robin Chemengo Otiei (PW4)** and **Samwel Ndiema Chepsikor (PW5) (Ndiema)** as that of the deceased.

A post-mortem performed on the body of the deceased on 15th December, 2008 showed that the deceased sustained multiple head injuries, small finger of the right hand had been severed, several cuts on the scalp bilateral of both arteries on the neck, penetrations on the skull that went to the brain and an injury on the spine. The cause of death was identified as cardio respiratory arrest due to excessive bleeding.

[2.4] On 10th December, 2008, Chemengo – a cousin of deceased; Ndiema – a brother of deceased and the 2nd appellant went to Bungoma Police Station and then to the mortuary where they identified the body of the deceased. On their way back to Kitale, the 2nd appellant gave his phone to Chemengo after it rang. The 1st appellant who was calling asked Chemengo “*who killed the deceased?*” Chemengo told him that he did not know. On arrival at Kitale, the three, Chemengo, Ndiema and 2nd appellant sat at a table. The 1st appellant joined them. The 2nd appellant told the 1st appellant that the deceased had been killed. The 1st appellant said that he did not know. The 2nd appellant said he was with the deceased on 3rd December, 2008 but did not see him again. On 11th December, 2008, the family of the deceased held a family meeting at Kitale town for funeral arrangements. The 2nd appellant did not attend. Chemengo went to look for him. He saw the 1st and 2nd appellants outside **Trans-Mattresses Supermarket** greet each other. There was a police vehicle parked nearby and he went to the vehicle. He found the driver **John Kibet** and told him to help arrest the 1st appellant for the reason that he had killed someone.

The 1st appellant was arrested. As the 1st appellant was handing over his mobile phone to the 2nd appellant, John Kibet snatched it. The 1st appellant was taken to Kitale Police Station.

[2.5] On 12th December, 2008, a woman called **Millie** called **Rael Cheruto (PW9) (Cheruto)** who was a neighbour and told her that her husband Rashid (1st appellant) had been arrested on suspicion of murder; that she should pick the keys to her house from a neighbour, open the house, remove some items which were on the bed and hide them. Cheruto on consulting her husband reported to police who went to the house and collected some documents on 13th December, 2008.

[2.6] **PC Justus Nderitu (PW11)** of Bungoma CID interviewed the 1st appellant at Kitale Police Station. The 1st appellant took the police to his house at Saboti about five kilometres from Kitale Police Station which was searched and some documents recovered. The documents included a National identity Card of Peter Naibei; Electoral Card of Peter Naibei; a Ministry of Tourism and Wildlife Card in the name of John C. Ndiema; Family Bank cash withdrawal slip for Shs. 25,000/= from deceased’s account, Post Bank withdrawal slip dated 7th December, 2008 from account of deceased, cash receipt for purchase of a mobile phone of Kshs. 10,700/= dated 7th December, 2008.

The mobile phone of the 1st appellant was also handed over at Kitale Police Station to PC Justus Nderitu. The 1st appellant was given plain papers to write similar writing as the note exhibit 4 recovered in the small black bag. The 1st appellant’s hand writing and the note were taken to the documents examiner. The report was produced as exhibit 18. The blood samples from the 1st appellant; the panga (*exhibit 3*), blood stained shirt of the deceased were examined by the Government Chemist and a report produced (*Exhibit 21*). An identification parade was also held where Kennedy identified the 1st appellant as the person who accompanied the deceased to the hotel.

After investigations, PC Justus Nderitu concluded that the 2nd appellant wanted to kill the deceased so that he could take over the property left by the deceased’s father and arrested the 2nd appellant at Bungoma when he attended the post-mortem of the body of the deceased.

[3] The 1st appellant gave lengthy testimony at the trial. He testified, among other evidence, that, the deceased had been his friend for two years; that on 5th December, 2008, as he was arranging to go to **Mbale, Uganda** to represent his father in a land dispute, the deceased called him on phone and asked him to accompany him to Bungoma to meet his girlfriend; that at Kitale, the deceased bought some goods after which they left for Bungoma; that they arrived at Grandma Hotel but the deceased’s girlfriend was not there; that the deceased decided to book a room at the hotel; after taking tea, he left for Mbale at 8 pm leaving the deceased at the hotel; on 7th December, 2008 he left Mbale for Kitale and arrived at Kitale in the evening; on 10th December, 2008, Chemengo (PW4) informed him that deceased was dead and wanted to meet the 1st appellant; he met Chemengo at Kitale town who told him that an emergency family meeting had been arranged; that he attended the meeting and informed the deceased’s family members how he left the deceased; on 12th December, 2008 a family meeting was held where some members implicated him while others exonerated him but he was arrested; police officers from Kitale took him to his house which was searched and receipts of a phone which he had bought at Mbale on 7th December, 2008 was recovered. He denied that he murdered the deceased.

[4] The 2nd appellant testified that he was informed of the death of the deceased by **Kemboi (PW3)** on 7th December, 2008 and on the following day, he accompanied Kemboi, Chemengo and Ndiema to Bungoma; that they agreed to hold a meeting on the following day at Kitale and that he was arrested on 15th December, 2008 when he attended the post-mortem of the deceased. In his evidence in cross-examination, he testified that he did not have any difference with the deceased; that he did not threaten to kill the deceased; that he and the deceased cultivated different portions of the land; that there was no family meeting at a hotel in Kitale and that he did not meet the 1st appellant near Trans-Mattresses.

[5] The trial judge appreciated that the case against both appellants was dependent on circumstantial evidence. Nevertheless, the learned Judge found the circumstantial evidence sufficient to connect the appellants with the murder of the deceased. In respect of the 1st appellant, the trial judge made findings of fact that the 1st appellant was the last person seen with the deceased; that items belonging to the deceased were found in his house including banking slips of withdrawal of cash after the deceased's death; that the 1st appellant did not give a proper account of his whereabouts between the night of 5th December, 2008 and 7th December, 2008 when the body of the deceased was found; that the 1st appellant asked his wife to remove incriminating documents from their house; and that Rael Cheruto and PC Justus Nderitu were truthful and dependant witnesses.

As regards to the 2nd appellant, the learned judge concluded after analysing the evidence thus:

“I am satisfied by the evidence of PW3, 4 and 5 who were related to the deceased and 2nd accused. Indeed PW3, PW4 and PW5 had no reason to frame the 2nd accused. I therefore believe their evidence and in particular that of PW5 that there was bad blood between the deceased and 2nd accused over maize harvest from land in Sabot. Further it is clear from the evidence of PW3 and 4 that while the family would be having family meeting the 2nd accused was either on phone or meeting with the 1st accused.”

[6] **Mr. Okara** for the appellant relied on three grounds in support of the appeal, that is, that, there was no eye-witness; that the circumstantial evidence was not watertight and that there were serious contradictions in the prosecution evidence.

It is Okara's submissions that witnesses did not see the two persons who had booked a room in the hotel come back after they left; the panga was never dusted to find out who used it; the witnesses did not mention the 2nd appellant; the land dispute was never reported to the police; that the 2nd appellant fully participated in the burial of the deceased and that the conviction of the appellant was based on speculation and suspicion.

Mr. Omwega for the respondent conceded the appeal of both appellants on the grounds that the 2nd appellant was arrested on suspicion and on the ground that the 1st appellant was convicted because he accompanied the deceased to the hotel and further that the documents were recovered in his absence.

[7] We have a duty as the first appellate court to re-evaluate the evidence and reach our own independent findings of fact while giving allowance for the fact that the trial judge had the advantage of hearing and seeing the witnesses.

As the trial judge appreciated, the prosecution case against the appellants was dependent on circumstantial evidence. It is a settled principle of law that before a court can base conviction on circumstantial evidence such evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt and further that there must be no co-existing circumstances which would destroy or weaken the inference of guilt.

[8] The evidence of Kennedy was that two young men one of them being the 1st appellant booked a room at Grandma Hotel on 5th December, 2008. He gave detailed evidence of his communication with the two men and what happened thereafter. In particular, he testified that the two men said that they were brothers, that they were looking for their boss who worked with an NGO; that the two men said that they did not have enough money for two rooms and would share one room; that the 1st appellant preferred a room downstairs but it was not available that he gave them the keys and they went to the room; that the two men came from the room at about 10 pm and had dinner and then left together.

From the circumstances and the evidence, one of the two young men was the deceased. His body was found in the room with fatal injuries. The identity card of the deceased was found in the bag which was also found in the room.

[9] The admission by the 1st appellant that he accompanied the deceased to Grandma Hotel and that the deceased booked a room shows that the entire evidence of Kennedy was truthful. The room was found still locked on the following day. The key could not be found. The room remained locked until two days later when the door was broken open and the dead body of the deceased found on the bed.

According to Kennedy, nobody had opened the room since 5th December, 2008. The defence of the 1st appellant that he did not sleep in the room and left for Mbale, Uganda at about 8 pm should be considered together with the evidence of Kennedy.

The evidence of Kennedy shows that the 1st appellant actively participated in the booking of the room; indicated his preferred location of the room, entered into the room in the company of the other person (*the deceased*) and both washed clothes; both had meals together and left the hotel at about 10 pm. The 1st appellant did not proffer any credible reason why he had to travel to Mbale at night having agreed to accompany the deceased from Kitale to Bungoma which their counsel at the trial submitted was a distance of 150 kilometres. The 1st appellant stated that he arrived in Kitale on 7th December, 2008. According to the evidence of the 1st appellant, it was Chemengo (*PW4*) who called him to inform him about the murder of the deceased. Before then he had not inquired of the whereabouts of the deceased, his neighbour and friend whom he claimed to have left at Bungoma. The evidence of Kennedy discredits the 1st appellant evidence that he had accompanied the deceased to Bungoma to meet the deceased's girlfriend.

In the circumstances, the finding of the trial judge that the 1st appellant was the last person seen with the deceased on the night of 5th December, 2008 was reasonable. The defence of the 1st appellant that he left for Mbale on the same night was incredible and properly rejected. The circumstance under which the deceased died were especially within the knowledge of the 1st appellant. He did not discharge the

burden imposed by **section 111(1)** of the Evidence Act.

This piece of circumstantial evidence was cogent and on its own proved beyond reasonable doubt that the 1st appellant caused the death of the deceased.

[10] There was also the evidence of Justus Nderitu that he visited the house of the 1st appellant on 13th December, 2008 at Saboti and recovered documents including bank documents showing withdrawal of cash from the account of the deceased on 7th and 8th December, 2008 and a cash receipt for the purchase of a mobile phone.

The 1st appellant admitted that the police searched his house in his presence and recovered a receipt for a mobile phone and its box. The evidence as to whether or not the deceased's identity card and electoral card were recovered from the appellant's house or even from the house of Millie, his wife was contradictory.

The more credible evidence was from CPL Patrick Ndombi that the two documents were found inside the small black bag recovered at Grandma Hotel. **[11]** The trial judge believed the evidence that bank documents were recovered from the 1st appellant's house showing that monies were withdrawn from the account of the deceased at Family Bank and Post Bank from 7th December, 2008. There were also documents recovered from the 1st appellant's house indicating that he purchased a mobile phone on 7th December, 2008 for Shs. 10,700/=. The 1st appellant admitted recovery of receipts for the mobile phone. The learned Judge had the advantage of examining the documents and made a finding that the 1st appellant withdrew money from the deceased's account on 7th and 8th December, 2008.

The learned Judge also considered the evidence of the examiner of documents which showed that the specimen handwriting of the 1st appellant and the handwriting in the note exhibit 4 found were made by the same hand. The opinion of Mr Omwenga is not binding on the court. Upon evaluation of the totality of the circumstantial evidence against the 1st appellant, we are satisfied that he was properly convicted.

[12] The conviction of the 2nd appellant was based on his relation with the deceased; the threat to kill the deceased and his conduct after the death of the deceased. The conclusion of the investigating officer was that the 2nd appellant hired the 1st appellant to kill the deceased so that he could take over the property left by their deceased father.

By **section 20** of the Penal Code, the 2nd appellant could be liable for murder although he did not take part in committing the offence if he did or omitted to do an act for the purpose of enabling or aiding the 1st appellant to commit the offence; if he aided or abetted the 1st appellant in committing the offence or if he counselled or procured the 1st appellant to commit the offence.

There was no evidence that the 2nd appellant was at Bungoma when the offence of murder was committed. There was also no evidence that after the offence was committed, he did any act from which it can be inferred that he aided, abetted or procured the 1st appellant to commit the offence. There may have been bad blood between him and the deceased arising from the dispute about the properties left by their deceased father but that alone cannot make him a principle offender.

The evidence of Ndiema, the brother of the deceased that the deceased had told him on 3rd November, 2008 that the appellant wanted to kill him is not a dying declaration as the deceased was alive up to about 5th December, 2008. That is not a statement by the deceased about the cause of his death or of circumstances resulting in his death within the meaning of **section 33 (a)** of the Evidence Act.

Although the 2nd appellant associated and communicated with the 1st appellant after the death of deceased, that is not strange as they were friends and neighbours. There was no evidence that their association or communication revealed the involvement of the 2nd appellant with the murder. There was no evidence that the 2nd appellant was an assessor after the fact of murder.

It is clear that there was no circumstantial evidence against the 2nd appellant. There was only suspicion that he procured others to kill the deceased. With respect, that suspicion was not a proper basis for his conviction.

[13] As regards the sentence, although the sentence of death is not mandatory, this was a ghastly murder for which a sentence of death is deserved.

[14] For the foregoing reasons, the appeal of the 1st appellant is dismissed in its entirety. The appeal of the second appellant is allowed.

The conviction of the 2nd appellant is quashed and the sentence of death set aside. The 2nd appellant shall be released forthwith unless otherwise lawfully held.

Dated and Delivered at Eldoret this 7th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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.

DEPUTY REGISTRAR