



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE, OKWENGU, J.J.A)

CRIMINAL APPEAL NO. 110 OF 2015

BETWEEN

JAMES OCHIENG OTIENO.....1ST APPELLANT

HENRY OOKO OTIENO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction of the High Court of Kenya at Migori (D.S. Majanja, J.) dated 15th July, 2014 in CRI. CASE NO. 110 OF 2015)

JUDGMENT OF THE COURT

On the evening of 25th March, 2014, the body of **Joseph Nyauo Ochier (deceased)** was found lying dead on a footpath near a sugar plantation at Akoko village, Tim Jope sub-location of Migori County. It had multiple cut wounds on the face, head, neck, left hand, back and left thigh. The cause of death was massive hemorrhage due to the multiple wounds. No one witnessed the killing. But two young people, the appellants before us, ended up in the dock. How did they end up there?

The evidence that led to their conviction by the High Court (**Majanja J.**) was purely circumstantial and our duty in this first appeal is to re-evaluate the evidence on record and satisfy ourselves that the prosecution case was proved 'with the accuracy of mathematics' despite the incriminating evidence being circumstantial. See Republic vs. Taylor Weaver and Donovan (1928) 21 CR. APP. R. 20.

Nine witnesses testified for the prosecution on the events of that evening. The originator of the information about death appears to have been **Paul Onyango Abongo (PW4)**. He owned the sugar plantation near which the body of the deceased was found and his homestead was about 1.5 kilometers away. At about 9pm, he was asleep when he heard some noises and went outside. He joined other villagers who were also wondering about the noise but then received a call from the mother of the appellants, **Hellen Akinyi Otiemo (DW 3)**, who, according to him, had leased out the sugarcane plantation from him. She told him that her children had found a thief stealing sugarcane from the shamba and they had killed him. He headed to the scene and found several other villagers as well as the two appellants. He asked the two appellants what happened and they told him that they found the deceased cutting the cane and he started fighting them. That is when they raised the alarm to alert the villagers.

According to PW4, he was the first to arrive at the scene and recollects seeing the 1st appellant carrying a panga which was blood-stained. The 2nd appellant was not carrying any.

Among the other villagers at the scene were the wife of the deceased, **Belisi Moraha Nyauo (PW3)**; and the deceased's two brothers: **Elias Okello Ochier (PW2)** and **Samuel Okombo Ochier (PW7)**. It was PW4 who called PW2 at 8.30 pm to break the news that his brother had been cut. He called him without identifying where he was. Before he received the call, PW2 had heard noise from what appeared to be drunkards. He headed to the home of the deceased about two hundred meters away from his residence, found PW3 and her children having dinner and passed the same sad news. They proceeded to PW7's house and told him what they had heard and they all headed to the scene. PW4 also called **Jennifer Atieno Deya (PW6)** who was the deceased's sister-in-law and informed her about the death. She accompanied the other relatives to the scene.

On arrival at the scene at about 8.35pm, it is the recollection of PW2 that he found DW3, the two appellants and PW4. The two appellants were just standing next to the body of the deceased holding pangas, but DW3 and PW4 had none. None of the pangas was blood stained. He

had a torch and was also able to see the cuts on the deceased's body. In the same breath PW2 said he did not see PW4 at the scene although he is the one who had earlier given him the information.

The recollection of PW3 was that on arrival at the scene, she found DW3, the two appellants and PW4. She saw the pangas but did not think much about them because it is usual for men to walk at night with pangas. The pangas she saw with each of the appellants had no blood stains.

The other brother had a different story on what he saw at the scene. He saw only four people: DW3, the two appellants and PW4. He had a torch and could see three pangas dripping with blood, which were held by each appellant and PW4. He is the one who called the Assistant Chief at 8.51 pm to come to the scene. For her part, PW6 testified that there were more than 50 people at the scene, PW4 was not there, and there were no pangas.

The Assistant Chief, **Joshua Otieno Ojenge (PW1)** confirms that he was called by PW7 at 8.51pm from the scene informing him that the deceased had been killed by someone called "Ochieng Mango." PW7 also gave him the information that his brother was alleged to have been stealing sugarcane and that is why he was killed. PW1 informed his seniors and called the police who arrived at the scene and took away the body. The following day PW1 called another Assistant Chief related to DW3; he also called DW3, PW4, and some two elders. DW3 is said to have said in that meeting that her sugar cane was being stolen and she had sent her sons to find out. They had confirmed finding the thief and killing him. She was asked to tell the sons to go to the DC's office, which they did, but they were handed over to **AP Gedion Musila (PW5)** who escorted them to Migori Police station.

Neither the other Assistant Chief nor the elders who were present at that conversation were called to testify.

The investigating officer was **PC Vincent Muswagi (PW9)**. He and other officers went to the scene at 2am the following morning and found villagers surrounding the body on a footpath near a sugarcane plantation. The sugarcane in the farm had all been cut awaiting collection. There were many villagers at the scene but they were reluctant to give any information. The only information available was the one filed by PW1 that the deceased was found by the two appellants stealing sugar cane and was killed. He arrested five suspects and locked them up after some enquiries: that is, DW3, the two appellants, PW4 and one Frederick Oduor Otieno. PW4 was released to be used as a prosecution witness, while the two appellants were charged with the offence of murder. DW3 and Frederick Otieno were released without charges.

No further investigation was conducted in respect of the pangas allegedly carried by the appellants, the clothing they wore at the time or the allegation that sugarcane was stolen. The body was subjected to a postmortem by Dr. Ganda whose report was produced in evidence by **Dr. Vitalis Owuor Ogutu (PW8)** confirming the cause of death.

The two appellants denied any involvement in the offence. They said they were at home with their mother on the material evening when they were told by the Assistant Chief, PW1, that a dead body had been found at their shamba. Like other villagers they went to the scene. After sometime they went back home but the following day they were told to go and write a statement since the sugarcane was theirs. They went but were instead arrested and taken to Migori police station. Their mother, DW3 also denied the version of events as narrated by PW4. She went further and denied that she had leased the sugarcane farm from PW4 as he had alleged. In her sworn testimony, she stated that it was PW4 who called her on the evening of 25th March, 2014 and told her a thief was being killed near her home. She called her sons who were in their 'simba' house and sent them to go and check what was happening. She followed behind and found many people at the scene including PW4. They were surrounding the body of the deceased whom she knew.

After evaluating the evidence, the trial court found, correctly in our view, that the deceased died and that the cause of death was massive hemorrhage due to multiple wounds inflicted by a sharp object. The court also found, again correctly so in our view, that the nature of the injuries answer to malice aforethought as defined in **section 206(b)** of the **Penal Code**. Finally the court made the correct finding that there was no direct evidence on the person or persons involved in the death; and that therefore, the case rested on circumstantial evidence.

The court then reminded itself on the general principle of the law on circumstantial evidence from ***R vs. Kipkering Arap Koske & Another [1949] 16 EACA 135***, that 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, and that the burden of proving the facts which justify the drawing of that inference, always remains with the prosecution. Applying that principle, the court considered and relied wholly on the evidence of PW4, for the finding that he was informed by DW3 that it was the appellants who had killed the deceased; that it was not PW4 who called DW3 to inform her about the death of the deceased; that DW3 had leased a sugarcane shamba from PW4 and that the sugarcane belonged to DW3; that the appellants had confessed to the killing of the deceased to PW4; and that PW4 had no motive to implicate the appellants in the offence.

The court reasoned and concluded as follows:

"I find that the totality of the evidence including that of the accused is that they were at the scene where the deceased died. They had the means to inflict the injuries as they were seen with pangas at the scene so soon after the death of the deceased and the testimony of PW 1 and PW 4 about what DW 3 told them and also what the accused told PW 4 points to the motive, opportunity and circumstances in which they killed the deceased. The prosecution evidence also excludes the possibility that any other person would have committed the offence. The only other person suggested as the perpetrator, PW 4, could not have killed the deceased. It is also clear that the accused's defence that they merely visited the scene of the incident like other villagers responding to alarm lacks merits and is dismissed. Likewise there is no evidence that the accused could have been framed by PW 4 or any of the witnesses who testified or any other person".

It is those findings and conclusions that the appellants attack in a memorandum of appeal listing four grounds: firstly, that there was no proof of *mens rea* on the part of the appellants; secondly, that there was no proper or any evaluation of the evidence on record; thirdly, that the defence evidence was not critically considered; and finally, that the death sentence was not mandatory but was imposed on the appellants. In written submissions which were very briefly highlighted, learned counsel for both appellants, **Mr.E.O. Ojuro**, submitted on the first ground that the burden was on the prosecution to prove *mens rea* which traditionally in murder cases, is referred to as malice aforethought. It

connotes an existence of culpability or moral blameworthiness on the part of an accused. In his view, there was no evidence to show that any of the appellants inflicted the injuries on the deceased, and if they did, that they had formed the necessary common intention to cause death or grievous harm. The only evidence was that the appellants were seen at the scene.

Secondly, urged counsel, the killer weapon was not produced in evidence. The only evidence is that the appellants were seen holding pangas, which according to the prosecution, was not unusual in the area, especially when an alarm is raised. It was also erroneous, he observed, to find that the appellants were the first to be found at the scene when there was evidence that there was a crowd of people at the scene. As for the defence case, counsel submitted that it was not properly considered although the 1st appellant and DW3 testified on oath. Counsel faulted the trial court for simply accepting the prosecution case which had been seriously questioned in the defence. Lastly, on the authority of the Supreme Court decision in **Francis Karioki Muruatetu & another vs. Republic & 5 others [2016] eKLR**, counsel reminded us that the death sentence is not mandatory.

In response to those submissions, learned Principal Prosecution Counsel (PPC), **Mr.L.K. Sirtuy** filed written submissions which were not highlighted. Counsel supported the finding of the trial court that the appellants were easily recognized since they were known villagers. They were also seen carrying the weapons used to kill the deceased. According to counsel, there was no credible evidence from the appellants to extricate themselves from the offence. There was proof beyond reasonable doubt.

We have carried out our duty as a first appellate Court, not **merely scrutinizing the evidence to see if there was some evidence to support the trial court's findings and conclusions, but making our own findings and drawing our own conclusions after re-evaluating the evidence. In the process, we have been mindful that the trial court had the advantage of hearing and seeing the witnesses testify and have made allowance for that fact. See Okeno vs. Republic [1972] EA.32.**

As stated earlier, the case wholly rests on circumstantial evidence. And the applicable principles are now old hat as they have been reiterated by this Court times without number. We remind ourselves from the case of **PON vs. Republic [2019] eKLR** where the Court stated:-

"To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex vs. Kipkerring (supra) the court explained that;

"In order to justify a conviction on circumstantial evidence 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

Simoni Musoke vs. R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera vs. R Criminal Appeal No. 56 of 1998, the Court stated that;

"It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilty is 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"

These dicta find their origin from an old decision of the House of Lords in Teper V. R. [1952] AC 480." [Emphasis added].

See also **Judith Achieng' Ochieng' vs. Republic [2009] eKLR.**

The main reason why the appellants were connected with the offence was because they were placed at the scene of the crime and there was no mistaken identity since they were known in the village. This is what the trial court stated:

"The prosecution evidence is that the accused were seen where the deceased body was at the village path near the sugar plantation at Akoko Village by villagers who responded to the alarm or who were called to come to the scene. The principal witnesses recall that the accused and their mother, DW 3, were present when they arrived. PW 2 met DW 3 there with the accused who were holding pangas. When PW 3 arrived there she also met the accused holding pangas. PW 4 who also went to the scene found the accused holding pangas. PW 6 saw the 1st accused while PW 7 also found DW 3 and the accused at the scene."

With respect, those findings are not entirely based on the correct appreciation of the evidence on record. The impression created is that the appellants were found at the scene of the crime holding the killer weapons and therefore the irresistible inference that they were responsible

for the deceased's death. But that is not our reading of the evidence. As seen from the summary of the evidence above, the originator of the information on the deceased's death was PW4. He was informing the brother (PW2), wife of the deceased (PW3) and the deceased's sister in law (PW6) about it by 8.30pm. How he came to know about it at that time is not disclosed. He did not disclose where he was calling from either. By 9pm, he came up with the storyline that was latched on by the Assistant chief (PW1) and the investigating officer (PW9), that DW3 confessed that it was her children, the appellants, who had killed the deceased when they found him stealing DW3's sugarcane. That storyline was, of course, denied by DW3 and the appellants and was therefore a crucial fact for the prosecution to prove with clarity.

But it gets murkier. When the relatives of the deceased arrived at the scene, some of them say they found PW4 there, others say they did not see him. We know it was about 9pm because that is when PW7 called the assistant chief (PW1). The assistant chief said he received the call at 8.51 pm to be exact. It is not just the appellants who were at the scene at that time but a crowd of villagers. PW6 put the number at 50 while PW1 simply said "*many people were there*". Like everyone else, the appellants said they were answering the alarm when they went to the scene. Furthermore, those who say they saw the appellants and PW4 do not agree on what they saw.

PW2 had this to say:

"When we reached we found a woman, two young men and an old man. I knew them. The woman was Akinyi, the old man was Onyango and one of the young men was Ochieng. I did not know their full names, I knew them as fellow villagers, they did not come from far. The two young men had pangas. Akinyi and Onyango had nothing. I knew both of them. I only knew Ochieng by name. I used to see both of them at Akoko village. They were just standing with pangas. This was about 8.35p.m.since it took me only five minutes. I had a torch so I could see them. I saw Nyauo's body. It had been cut. The deceased was cut on the back of the neck, the forehead. He had also been cut on the hand and legs near the knees. The body was near the sugar plantation near the footpath." [Emphasis added]

In cross-examination, he stated thus:

"At the scene of the incident I met Akinyi, Onyango Abongo, Ochieng and his brother whose name I did not know. They were four people. I did not find Peter Onyango at the scene. He is the one who called me about the incident. He does not stay far from me.

It is also near the scene of the incident. I do not know whether he could have seen what happened. I am aware that Onyango has not written a statement. I do not know the accused's full names. Both the accused were holding pangas. They left with pangas. I do not know the kind of pangas they were holding. The pangas are the kind used to cut sugar cane. I have not seen pangas here in court. I did not see blood on the pangas." [Emphasis added]

PW3 had this to say:

"When I arrived at the scene, even the people we met there were shocked. The place was near the sugarcane plantation. It is normal for men to walk with pangas at night. I saw my husband's body, it had injuries. There was a lot of blood on his coat. I do not recall seeing blood on the panga. My thoughts were not on the pangas. I am sure I saw the two accused each carrying a panga. I did not see blood. I saw four people at the scene. I did not see any of them with blood." [Emphasis added]

On his part, PW7 stated as follows, and he maintained his evidence in cross examination:

"While I was still there, the three of them had pangas. James Ochieng, Paul Onyango and Moses Otieno. As I had a phone torch, I saw them with pangas with blood. I called Joshua Ojenge, the Assistant Chief. All the pangas had blood. The assistant chief came later after about half an hour. He found me there. I do not know what he did when he came. When I arrived at the scene. I met Paul Onyango Abonyo (P.W.4) I saw him with a panga. All three people had pangas. The pangas had blood. I am surprised that P.W.4 testified that he did not have a panga. I am sure that all the three people had pangas with blood on them. The shamba where the deceased was found belonged to P.W.4 but he had leased it to Hellen Akinyi. I was not a witness to the agreement between Paul and Hellen." [Emphasis added].

So that, if those prosecution witnesses are to be believed, PW4 had the same connection with the death of the deceased as the appellants. He was the first at the scene and was holding a bloody panga. His evidence is rather confounding:

"I saw Joseph Ochieng carrying a panga. I saw the panga. It had blood. I recorded a statement with the police. On 26th March, 2014 we came with the assistant chief Migori Police Station to record statements. I can identify the two boys who I saw on that night. They are the accused in court. The first accused is James, the second accused is Henry. Very many people from the village came that night to the scene. I knew some of them, Otieno Olwal, John Owili and others who I can't recall. The deceased was my age mate....The shamba was mine but the sugar cane belonged to Hellen Otieno. The deceased died on my shamba. I have the document of our agreement. I do not have it in court. The assistant chief has a copy. Hellen called me on that night. I do not recall her telephone number but it is on my phone. I have my own shamba. I did not carry my title deed. My title number is plot 337. I saw one of the accused with a panga. I have not seen the panga in court. When I left my house that night I carried a fimbo which is a small walking stick. Where I live it's a sugar cane growing area. It is a dangerous place at night. I was not aware that the two accused were guarding the shamba before. The sugar cane there had already been cut but not collected by the owner."....I came with other people who had responded to the alarm. I was the first to reach the scene. I found James Ochieng and Henry Otieno with the deceased who was lying down. The people who had raised alarm were not there. It was James and Henry raising alarm. They were screaming, "thief, thief..." I did not witness the accused assault the deceased. The deceased was lying down when I arrived. He had injuries." [Emphasis added].

Indeed, PW4 was arrested as one of the suspects but was released to testify for the prosecution. If he was an accomplice, then the law requires that his evidence be corroborated. And yet, that was the star witness believed unquestionably by the trial court as he distanced himself from the sugarcane plantation by stating without any proof for it, that he had leased it to DW3. He said he had the written documents which he had given to the Assistant chief but, for some reason, he did not produce them in court. The trial court instead improperly took judicial notice that sugarcane farms are leased out in that area. PW4 was not able to connect the deceased with the stealing of sugarcane which was the motive he had led everyone else to believe was the cause of his death.

To make matters worse, the investigation of the crime was to say the least shabby. All the investigating officer (PW9) did was to rely on what he was told by the assistant chief who in turn relied on what he was told by PW4. We may listen to the investigating officer.

“We began to interrogate the members of public including the assistant chief. The members of public were reluctant to give us information. We relied on the assistant chief. The information I gathered from the assistant chief is that the two accused were sent by their mother, Hellen Atieno Ochieng to guard their mother’s sugar cane farm. At the time they met the deceased where they fought and in the process, the deceased died. He was killed using a panga. We retrieved the body, marked the scene and took the body to Migori Level 4 Hospital Mortuary. There were five suspects, Hellen Akinyi Otieno, Paul Onyango Abongo, Henry Ooko Otieno, Fredrick Oduor Otieno and James Ochieng Otieno. I did not recover any object connecting the accused to the murder. I did not find anything with blood stains.” [Emphasis added].

He was also told by the assistant chief that the pangas allegedly used to kill the deceased had been thrown away and he never bothered to look for them; he believed the agreement for lease of the shamba was oral and that is why he did not ask for proof; he did nothing to test the theory that the deceased was stealing sugarcane; he did nothing to eliminate the possibility that the deceased may have met his death as he went through what PW4 testified was ‘a dangerous place at night’. When these issues were raised before the trial court, the court put forward an explanatory theory as follows:

“None of the witnesses who testified gave evidence of the state of the accused’s clothing. This is understandable because, it was at night and the witnesses were more concerned about the deceased. Furthermore, by the time they were arrested on the next day, they could have changed clothes. They could also have disposed of the pangas they had and in all likelihood even if their pangas were found they would probably have been cleaned or interfered with. I do not put much weight on the lack of this physical evidence given the other available evidence particularly with the tight circumstantial evidence implicating the accused.”

That theory is, in our view, unsupportable as there was evidence from the witnesses that they had torches and were able to see blood on pangas and PW3 said she did not see blood on their clothes. As to what the appellants may have done with the incriminating evidence, that is all speculation. There was no attempt by the investigating officer to eliminate these investigative flaws and it was not for the court to find excuses for the flaws.

The bottom line is that the principle that requires the elimination of co-existing circumstances or factors which would weaken or destroy the inference of guilt, was not met.

As stated earlier, the burden of proof never shifts to an accused person and the conviction should always rest on the strength of the prosecution case rather than the weakness of the defence case. **Section 111 (1)** of the **Evidence Act** demands:

“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.”

It seems to us, with respect, that the trial court in this matter expected the appellants to prove their innocence following the suspicious circumstances surrounding their presence at the scene. We reiterate what this Court has said so many times before that no amount of evidence based on suspicion, no matter how strong, may be a basis for a conviction. See: *Sawe vs. Republic [2003] KLR 364*. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not.

For those reasons we find that there were reasonable doubts discernible from the evidence on record, and we would extend the benefit of the doubts to the appellants.

We allow the appeal, quash the conviction of each of the appellants and set aside the sentences of death imposed on each of them. Each of them shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 7th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR