



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME J.J.A)

CRIMINAL APPEAL NO. 55 OF 2016

BETWEEN

KALUME FONDO GONA..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Malindi, (Meoli, J.) dated 12th March, 2015

in

H.C.CR.C.No. 24 of 2013)

JUDGMENT OF THE COURT

1. Ngumbao Nyanje Mwavuo (deceased) died in unclear circumstances and in a most gruesome manner. While at home with his wife on the morning of 2nd July, 2013, the deceased was visited by a stranger who wished to enlist his services as a traditional medicine man and tend to the stranger's ailing friend who was at a different location. The deceased agreed to accompany the stranger to offer the services to the sick person. That was the last time the deceased was seen alive because by a strange cloak and dagger mystery, the deceased was later found at a nearby forest, butchered to death in the most grotesque manner.

2. Kalume Fondo Gona, (appellant) being the last person that was seen with the deceased, was charged alongside John Ngala Mwavuluo (John) with the offence of murder. Upon trial, he was convicted and sentenced to serve 25 years imprisonment, while his co accused was acquitted. The circumstantial evidence against which the charge of murder was preferred against the appellant as well as the propriety of his subsequent conviction and sentence is what takes centre stage in this appeal. We will revisit albeit in summary, the salient matters so as to place this appeal in perspective.

3. According to the court record, the appellant and his co- accused were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. In the Information sheet, the particulars of the charge are stated as follows

'KALUME FONDO GONA AND JOHN NGALA MWAVUO ALIAS CHARO: On the 5th day of July, 2013 at Midodoni village, Magarini, within Kilifi County jointly murdered NGUMBAO NYANJE MWAVUO'

4. They both denied the charge and Meoli J., heard evidence from 7 prosecution witnesses who testified in support of the charge. Upon considering the prosecution's evidence, the learned Judge found each of the appellants with a case to answer and on being placed on their defence, they each gave unsworn statements denying the offence without calling any witness.

5. As foresaid, the appellant's conviction and sentence has spawned the instant appeal. This being a first appeal, we are required to re-analyse and re-evaluate the evidence adduced before the trial court and come up with our own conclusions while at the same time bearing in mind that we did not have the advantage of seeing the witnesses testify. This role is in line with the well-known and established principle of law that has been cited with approval in numerous cases. (See **Okeno v. R., [1972] EA 32 at p. 36**), where the predecessor of this Court stated:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R., [1957] EA 336) and to the appellant court's own decision on the evidence. The first appellate court

must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R., [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must take its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS V. SUNDAY POST [1958] EA 424".

6. The prosecution case was that on 2nd July, 2013, the deceased was with his wife Nyevu Musanzu (PW3) at their matrimonial home in Midondoni village. At around 1pm, a man came seeking to procure the services of the deceased for his ailing friend. The deceased, who was a traditional medicine man acquiesced to the request and accompanied the stranger to an undisclosed location to tend to the ailing friend. Even though PW 3 did not know the stranger by name, she recognized him in court as the appellant, a person who had been to their home on previous occasions. Unfortunately, the deceased was never seen alive again.

7. On 5th July, 2013, Purity Fondo (PW 5) who was a secondary school student and neighbor to the deceased, had gone to fetch firewood for her local church at a nearby forest. She was accompanied by three other students. Inside the forest, they came upon a body lying on the ground and upon closer inspection; PW 5 recognized the body as that of the deceased, who appeared to have met a violent death, given the cuts on his head and body. They ran back to the church and alerted their pastor of their gruesome discovery. In turn, the pastor informed the village elder, one Ravasco Kenga Mweni (PW 4), who together with the area Chief, proceeded to the scene where the body was.

8. PW 4 stated that thereafter, the deceased's family members told him that they suspected the appellant and the deceased's son John to be behind the death. According to PW 4, there was bad blood between the deceased and his son John, stemming from a land dispute and quarrels over dowry money. It was his testimony that John had demanded for dowry money from his late father and that the deceased had given him Kshs 17,000 towards this end. With regard to the land dispute, PW 4 stated that John and his brother Harrison had also demanded for land from the deceased, saying they wanted to sell the same so as to have funds to enable them settle at a place known as Witu. That demand was outrightly rejected by the deceased, thus giving rise to the land dispute.

9. With regard to the appellant, PW 4 attested to having known him as a friend to John, adding that the appellant had abandoned his home and was living with John within the deceased's homestead. He however stated that aside from John, the deceased had some running quarrels with some other neighbors, namely **Justin Katana Kazungu** and **Matole Kambi** over the same piece of land and that earlier on, PW 3 had even reported threats that were issued to her late husband. Consequently, that even though the appellant and his co accused had been apprehended, the two other neighbours remained suspects and were still at large.

10. A similar account was rendered by Zawadi Ngumbao Nyanje (PW 6) who was a daughter to the deceased and who stated that while at home on the material date, a passerby came along and informed them that the body of a dead man had been discovered in the bush; only for her to go there and discover that the deceased was in fact her father. She stated that two weeks prior, she had received information that there was an attempt on the deceased's life by a person known as Matole, over a land dispute. Upon further enquiry about the matter from the deceased, he informed her that Matole and his brother Mwalimu wanted to kill him over his land. The witness reiterated that the appellant had sour relations with the deceased, particularly on instances when the appellant was drunk.

11. Thereafter, police were called in; they collected the body and took it to a mortuary in Malindi, where a post mortem was carried out. As per the post mortem form produced in court by Dr. Mumin (PW 1), death was deduced to have occurred on 5th July, 2013 while the cause of death was stated as being cardiorespiratory arrest secondary to excessive haemorrhage from multiple cut wounds and severe head injury. PC No. 62627; Fanuel Aduda (PW 7) as the officer handling the case, having taken over the same from IP Gichungu who had since been transferred, reiterated that the relationship between the appellant and the deceased was bad owing to a land dispute. However, in his testimony, he admitted that he never met any of the suspects. On cross examination, he also admitted being aware of witness statements recorded by his predecessor IP Gichungu, in which one Mjomba and one Matole Kambi were adversely mentioned as suspects. He stated that the duo had gone underground following the death of the deceased. That notwithstanding, he had made no further inquiries about them.

12. As stated earlier, the two accused persons elected to make unsworn statements in their defence, without calling any witnesses. The appellant's case was that on 5th July, 2013, he went to his co accused (John's) house to complain about John's failure to build him a house, despite the appellant having paid him to perform the task. On arrival, the appellant demanded they go to the *shamba* and fetch some sticks for the project but John refused. The appellant then left John, who was in the company of the deceased at the time and went to fetch his own building sticks. When he finished his task, he proceeded home and it was on his way there that he heard that the deceased had been killed. He too, went to where the body was and saw John there. He then proceeded home and it was not until 27 days later that the police came and arrested him, accusing him of a murder he had nothing to do with.

13. On the other hand, John's account was that he lived with the deceased and on the material date, he was at home when his friend the appellant, came calling. The appellant asked John about a job he had given him, of building his house. John responded saying that he would finish it in due course. According to John, both he and the appellant then left the deceased's home albeit on different missions. While John headed to Gongoni to complete the building of the appellant's house, the appellant went a separate way. John claimed he returned later to news of his father's death. Upon enquiring from his stepmother (PW 3) as to what had transpired, she informed him that the deceased had left in the company of a stranger who said he needed the deceased's help. John added that his step mother also informed him of a land dispute between the deceased and some neighbours namely Matole and Mwalimu Kambi. After all was said and done, the deceased was buried and thereafter, John went about his daily life working at a local salt mine. After 29 days, the police came for him, accusing him of killing his father and arraigning in court as aforementioned.

14. Upon the close of the defence case, the learned Judge was convinced that the prosecution had failed to prove its case against the appellant's co accused, and proceeded to acquit him of the charge. However, with regard to the appellant, it was held the case against him was proved beyond reasonable doubt and he was convicted as charged and sentenced to 25 years imprisonment. Dissatisfied with that conviction and sentence, the appellant lodged this appeal, contending that the learned judge erred; in convicting him on the basis of insufficient evidence; convicting him on the basis of contradictory evidence contrary to section 163 (1) (c) of the Evidence Act; failing to find that the evidence was based on mere suspicion given that there was no eye witness in the case and; by rejecting the *alibi* defence raised

by the appellant which was plausible.

15. Not only was the state opposed to the appeal against conviction, but with regard to sentence, a notice of enhancement of sentence dated 1st December, 2017 was filed, urging this court to reverse the sentence of 25 years imprisonment which had been meted out and *in lieu* thereof, to impose the sentence of death as by law provided.

16. Appearing for the appellant at the hearing of the appeal was learned counsel **Mr. Gicharu**, who confirmed having consulted the appellant and advising him of the possibility of an enhanced sentence; but the appellant, opted to proceed with the appeal nonetheless. Arguing all the grounds of appeal together, counsel submitted that there was no eye witness in this case and the conviction was solely based on the circumstantial evidence of PW 3. That being the case, the trial Judge ought to have warned herself of the dangers of relying on the evidence of a sole witness. He argued that since PW 3 did not know the appellant, her identification of the appellant was unreliable, more so since her account of what transpired pertains to 2nd July, 2013; yet from the evidence of the other witnesses, the deceased died on 5th July, 2013.

17. Counsel also pointed out the testimonies of PW 4 and PW 3 was contradictory because as per PW 4, the appellant was living within the deceased's homestead, yet as per PW 3, the appellant was a stranger and at the very most, a mere visitor or perhaps customer to the deceased. The other inconsistency he said, was with regard to allegations of bad blood between the deceased and his son John. That while most witnesses attested to bad relations between the two, PW 3 had denied it. On the other hand, counsel contended, the appellant's evidence was consistent that he only went to the deceased's home to consult John about the stalled construction. Counsel also submitted that no ill motive was established against the appellant, neither was his *alibi* disproved. In conclusion, that other suspects availed yet were ignored and the appellant was not among the list of suspects. He therefore urged this court to allow the appeal and set aside the conviction and sentence.

Opposing the appeal was the Senior Assistant Director of Public Prosecutions **Mr. Monda**, who was of the view that the trial Judge had properly addressed herself to the issues and the law and had arrived at the proper conclusion. He submitted that the discrepancy on dates by PW 3 was not material to the outcome of the case, as it is clear that the death occurred on the same day. Further, that by the appellant's own admission, he was in the deceased's homestead on the material date and as such, he had placed himself at the scene. Counsel added that there was a dispute between the appellant and the deceased over land and that the defence tendered was far from consistent. He reiterated that PW 3 had seen the appellant leave with the deceased and that therefore, the conviction was safe. He urged the Court to dismiss the appeal and instead enhance the sentence imposed to that of death.

19. Having considered the grounds of appeal as well as the submissions of counsel, the issues that arise for determination in this appeal are three:

- a) Whether the evidence was sufficient to support a conviction
- b) Whether the appellant's defence of alibi was considered and
- c) What sentence was appropriate in the circumstances?

20. On the first issue, the appellant has contended firstly, that the conviction was unsafe given that it was solely dependent on the circumstantial evidence of a single witness, namely PW 3; hers was circumstantial evidence in the sense that the only connection she could draw between the appellant and the murder was to state that he was the last person seen with the deceased.

More often than not, the conviction of an accused person based solely on the evidence of a single identifying witness poses some uncertainty.

In **Maitanyi v. Republic [1986] KLR 198**, this Court had this to say regarding the testimony of a single witness:

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

21. The appellant has faulted the Judge's reliance on circumstantial evidence, arguing that she failed to warn herself of the dangers of such reliance; and more so, given that the said testimony in this case was fraught with contradictions.

Indeed, while all the other witnesses stated that the death had occurred on 5th July, 2013, PW 3 asserted that the deceased's disappearance and death had occurred on the same day; that was on 2nd July, 2014. She stated as follows:

'On 2/7/13 I was at Midondoni in my house at 1pm. I was in my house. I was making some flour. Then a man came. His name- I didn't know it....My husband left soon with the visitor. He never returned.... Later, some students who had gone to search firewood (sic) came to me and reported seeing body of deceased in forest.... The students came at 2pm'

22. Another contradiction cited was with regard to the relationship between the deceased and his son John. While PW 3 painted a cordial picture, all the other witnesses attested to sour relations between the two. Another contradiction was said to be regarding the appellant's living arrangements; that while PW 3 stated that the appellant was a mere stranger who visited the deceased on occasion, to PW 4, he was John's friend who had even at some point abandoned his home and moved into John's house within the deceased's property.

23. According to **Mr. Monda**, these discrepancies were immaterial and of little impact in view of the strong case put forward by other prosecution witnesses.

24. Circumstantial evidence can safely support a conviction as it has been held to be capable of proving a case 'with the accuracy of mathematics' (see **Musili Tulo v. Republic, CR. APP. NO. 30 OF 2013**). However, while that is so, the court must warn itself of the dangers of relying on such evidence, as was stated in the **Maitanyi case (supra)**. Additionally, even if the court is so satisfied, the evidence in question must satisfy some conditions. In **Abanga Alias Onyango v. Republic, CR. APP. NO 32 OF 1990** this Court tabulated the conditions as follows:

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

25. Nothing should weaken the chain of events pertaining to the circumstantial evidence tendered. Rather, that evidence must only lead to the only reasonable hypothesis being that of the accused's guilt. Consequently and contrary to Mr. Monda's submission, any doubts cast as to the credibility of PW 3's testimony had to be resolved by the trial court prior to arriving at a conclusion. With regard to the appellant's case, the discrepancy as to when the deceased left home and the discrepancy as to the appellant's living arrangements at the homestead of the deceased in our view were material.

26. This is because, if PW 3's assertion that the deceased left home on 2nd July, 2013 was credible, then the time frame within which the deceased could have interacted with other people (aside from the appellant) prior to his death is enlarged considerably, thereby creating a window for other people who could have killed the deceased. Also, if PW 3's evidence that the appellant was a mere stranger is true, that too impacts on her ability to correctly identify the appellant which in our view was a mere dock identification whose credibility was made worse by her failing eyesight. PW 3 is seen to have stated as follows:

‘...The visitor who left with my husband never returned. I did not know where the visitor lived. But he frequently come (sic) to our home. I don't know his real mission. Maybe he was a customer of my husband who is a medicine man. We did not discuss his visits....’

Asked whether she could identify the culprit in court, PW 3 stated:

‘I cannot recognize him from a distance because my eyesight is weak (walks to the dock). This is the man I referred to as visitor I cannot touch him because of taboo. He is young. The visitor is the accused (identified)’

27. All these are facts that had a bearing on the veracity of PW 3's evidence of identification of the appellant. It bears repeating that when it comes to circumstantial evidence, there should be no other plausible version of the chain of events that it was the appellant and none other that committed the offence. That is why circumstantial evidence is said to have a reliability of mathematical precision, however when the chain is broken, room is created for doubts. The identification of a culprit must be positive and free of error.

In this case, not only was the identification doubtful, but the unexplored pool of suspects lent credence to the possibility that the murder might well have been by persons other than the two accused.

28. The testimonies of all the prosecution witnesses consistently indicated that there were other persons, namely Mwalimu, Matole and Mjomba who had a bone to pick with the deceased immediately prior to his death. PW 7 even blatantly admitted that as the investigating officer, those witnesses had been brought to his attention and that their suspected involvement in the murder went uninvestigated. Coupled with the contradictions earlier discussed, these are aspects that undeniably weaken the chain of events regarding the circumstantial evidence tendered by all the witnesses.

29. Before we allow this appeal as we are bound to we will also address the second issue, an *alibi* defence that was raised by the appellant to the effect that at the material time, he was fetching building sticks for putting up the house that John had neglected to build. An *alibi* is essentially a plea by an accused person that he was not present at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged. Whenever an *alibi* is raised, the accused assumes no duty to prove the *alibi*. Rather, the duty lies with the prosecution to disprove it. Equally important, is that the court has the task of comparing the *alibi* defence with the prosecution evidence.

30. Even if the *alibi* is raised for the first time in an unsworn statement at the trial, the prosecution or police ought to test the *alibi* (See **Wang'ombe v. Republic [1976-80] KLR 1683**). They may do so under **section 212** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which empowers them as follows:

‘If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.’

31. In this case, no rebuttal of that alibi was ever tendered. On the other hand, the court while addressing the appellant's defence seemed to place the burden of proving the *alibi* upon the appellant. This can be discerned from the statement by the learned judge that:

'The first accused's defence that he left the deceased at home in the company of the 2nd accused was not put to PW 3 during cross examination'

With the above in mind, the court then went on to discount the appellant's defence by stating that the testimonies of PW 3 and PW 4 seemed to give a more plausible version of events. However, this was a misdirection because there was no evidence on record that contradicted the *alibi* raised. Taking the totality of the whole evidence including the earlier contradictions and failure by the police to conduct thorough investigations in regard to other suspects, the *alibi* raised by the appellant posed an equally plausible narrative of events. Failure to dislodge it was a matter to be resolved in the appellant's favour.

32. Accordingly, the appeal is allowed, the conviction is quashed and the 25 years sentenced meted against the appellant is set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 22nd day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR