



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 57 OF 2015

BETWEEN

HARO HASSAN JIRA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (Meoli, J.) dated 5th February, 2015 in H.C.CR.C No. 25 of 2013)

JUDGMENT OF THE COURT

1. Before us is a first appeal against **Haro Hassan Jira's** (the appellant) conviction and sentence for the offence of murder. As such, we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See ***Kiilu & Another vs. R [2005] KLR 174***.

2. On the morning of 22nd August, 2013 Margaret Njeni Chilango (PW1) went to her sister's house, Catherine Mbuhe Chillango (deceased) in the company of Lucy Luvuno Kiti (PW2) to assist her with house chores. The deceased informed them that she was going to collect her son's birth certificate from her estranged husband who happened to be the appellant. She was accompanied by a village elder, Boniface Tsuma (PW3) to the appellant's shop. The appellant refused to give her the birth certificate in question and became aggressive. Both the deceased and Boniface left his shop and headed to the Assistant Chief's office, Rehmat Tsuma Kola (PW5). Rehmat then gave the deceased a letter directing the appellant to hand over the birth certificate.

3. On that very day she returned to the appellant's house this time around unaccompanied. What happened thereafter no one knows. Meanwhile, Margaret and Lucy began getting worried when she had not returned by 6:00p.m and they could not reach her on her mobile phone. Margaret decided to look for her at the appellant's shop. The appellant informed her that she had left at around 1:00 p.m. after collecting the birth certificate. The deceased's family continued with their search until two days later when her lifeless body was discovered in a bush near the appellant's house.

4. According to Dr. Hashim Suleiman (PW4), the cause of her death was severe head injury. It was PC Lazarus Omanga's (PW7) evidence that the deceased's mobile phone and a black strip of rubber were recovered near her body. In addition, there were fresh motorcycle tracks at the scene. Apparently, Moses Munga (PW3) who operated his motorcycle as a 'boda boda' had lent it on the material day to one Mwamunye who was the appellant's friend. The following day Moses noticed that a black strip of rubber which he used for securing passengers luggage was missing from the motorcycle. Upon inquiring from Mwamunye he promised to replace it. It appears that the said Mwamunye did not have a cordial relationship with the deceased. At one point an altercation between them culminated in Mwamunye being charged with offensive conduct against the deceased at Kilifi law courts.

5. After the discovery of the deceased's body the appellant's shop and house were searched. PC Lazarus testified that the child's birth certificate was found at the shop while metal bars suspected to have been used as murder weapons were found in his house. Based on the foregoing, the appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars were that on 22nd August, 2013 at Mwembeswere Village within Kilifi County the appellant jointly with others not before the Court murdered the deceased.

6. In his unsworn testimony the appellant denied committing the offence. He however, admitted that the on the material day the deceased had gone to his shop twice to collect their son's birth certificate. He eventually gave her the certificate when she served him with the Assistant Chief's letter. At that time he was in the company of Mwamunye. The deceased left after receiving the birth certificate and he had not seen her since.

7. The trial Judge (Meoli, J.) was convinced that the circumstantial evidence relating to the acrimonious relationship between the appellant and the deceased coupled with the fact that the appellant was one of the persons who last saw the deceased alive irresistibly pointed towards his guilt. In a judgment dated 5th February, 2015 she convicted the appellant and sentenced him to 25 years imprisonment.

8. Aggrieved with that decision the appellant filed this first appeal predicated on the grounds that the learned Judge erred by-

i. Failing to direct his mind properly on the law relating to circumstantial evidence.

ii. Convicting the appellant yet the prosecution had failed to prove its case beyond reasonable doubt.

iii. Rejecting the appellant's defence.

9. Mr. Odera, learned counsel for the appellant, submitted that the circumstantial evidence did not irresistibly point towards the appellant's guilt. Rather, he appellant gave uncontroverted evidence that the deceased left his shop after collecting the birth certificate. It was quite probable that she was killed by someone else. He added that it was not in dispute that Mwamunye fled after the incident. The learned Judge was also faulted for not taking into account the glaring contradiction in the prosecution's evidence. In Mr. Odera's view, the evidence was not safe to justify the appellant's conviction. He urged us to allow the appeal.

10. Opposing the appeal, Mr. Wangila, Senior Prosecution Counsel, contended that there was no doubt regarding the bad blood between the appellant and the deceased. The birth certificate the appellant alleged to have given to the deceased was discovered in his shop. Further, the deceased's body was recovered near his house. The chain events left no doubt that the appellant was involved in the death of the deceased.

11. We have considered the record, submissions by counsel and the law. From the post-mortem report, there can be no doubt that the deceased's death was caused by someone who intended it or intended grievous harm to her. However, no one witnessed the murder hence the prosecution relied on circumstantial evidence to connect the appellant to the murder.

12. For a conviction to be rightly based on circumstantial evidence such evidence must meet certain criteria. This Court in Musili Tulo vs. R [2014] eKLR, while discussing the criteria observed:-

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

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.”

13. The predecessor of this Court also set out an additional criterion in Simon Musoke vs. R [1958] EA 71 as follows:

***“The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”* Emphasis added.**

14. Did the circumstantial evidence adduced by the prosecution meet the above criteria? We find that the learned Judge was right in disregarding the evidence relating to recovery of the birth certificate because as she put it :-

“But the chain of recovery and handing over is marred by uncertainty. PW1 did not state this important fact in her statement to police.(sic) further neither the village elder (PW6) not the assistant chief (PW5) who were together with PW1 at the scene referred to such recovery. (sic) This puts to doubt the investigating officer’s (PW8) assertion that the certificate was handed to him by the assistant chief (PW5).”

15. The fact that the appellant was probably one of the last persons who saw the deceased alive together with the fact that their marriage was faced with the difficulties alluded to, in our view, did not irresistibly point towards the appellant’s guilt. We say so because there was also evidence of the existence of a discordant relationship between the so called Mwamunye and the deceased. He was also one of the last people to see the deceased alive. Furthermore, he was in possession of a motorcycle on the material day. Therefore, the possibility that the deceased was killed by Mwamunye could not be ruled out.

16. The burden lay with the prosecution to prove that the chain of events relied on pointed to the appellant’s guilt. This much was restated by the predecessor of this Court in Rex vs. Kipkerring Arap Koske & 2 Others [1949] EACA 135 thus,

“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.”

17. We find that the prosecution failed to prove its case to the required standard. All that there was against the appellant was mere suspicion which could not be the basis for his conviction. See Sawe vs. R

[2003] KLR 364.

18. In the result, we find merit in the appeal and allow it. We hereby quash the appellant's conviction and set aside the sentence meted to him. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR