



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 44 OF 2017

BETWEEN

ABDUBA GUYO WADA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muya J.) dated 5th October, 2015

in

H.C.Cr Case No. 7 of 2013)

JUDGMENT OF THE COURT

[1] The facts in this appeal revolves around a tale as old as time of a love triangle gone sour with deadly and regrettable consequences. Milga Abdulahi (*deceased*) a young police woman, had caught the eye of many a suitor, among them was Abduba Guyo Wada (*the appellant*). However, unlike the case with the other men, the appellant seems to have found greater favour in the eyes of the deceased, as she went on to accept his marriage proposal. Sadly, that marriage was never to be, for that relationship was fraught with issues of infidelity as well as unmet financial expectations by the deceased in regard to the appellants 'ability to cater for her needs. Matters came to a bitter end on the morning of 30th January, 2013 when the deceased lifeless body was found strangled in a house, she used to occupy within Kisauni Dog Section Police Quarters.

[2] No one witnessed the murder but one conclusion was certain that that there was foul play. The appellant being the last person seen with the deceased was strongly suspected as the perpetrator. The appellant was therefore arrested and arraigned before the High court at Mombasa, where he was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. According to information presented before court, the particulars of the offence were given as follows:

'ABDUBA GUYO WADA: On the 29th day of January 2013 at Kisauni Dog Section Police Quarters within Coast Region, murdered MILGA ABDULAH'

He denied the charge and hearing began, with the prosecution relying on a total of 9 witnesses. According to the prosecution, the deceased was a police woman attached to Makupa police station and was at the material time staying at the Dog Section staff quarters, while the appellant was a Chef working in South Sudan but previously based in Mombasa. The two were in a romantic relationship albeit against the wishes of the deceased's family.

[3] As per the deceased's mother, Muslima Galiso (PW 1) sometime in October, 2012, while going about her business in Wajir, a stranger called her; asking for her daughter's hand in marriage. He identified himself as Abdul Guyo (appellant). She informed him that the issue had to be discussed at the family level before a decision was made. This she said, did not appear to please the caller, as he threatened to kill himself if he was not allowed to marry the deceased. After about a fortnight, the deceased also called PW 1 and said that the man had once again threatened to kill himself. According to PW 1, all she knew of the man was that he was of Borana extraction and was having a relationship with the deceased. On the other hand, she testified that the deceased had another marriage proposal on the table, by a man known as Kassim, a soldier who came from Garissa. Although the said Kassim had even met PW 1, the deceased was not keen on accepting his marriage proposal and had informed PW 1 as much.

[4] Little else seems to have transpired until the evening of 29th January, 2013 when PW 1 once again heard from the deceased, this time via a distress call to the effect that she was in mortal danger from her lover. Before PW 1 could speak with the man or get further details from the deceased, the line went dead. Efforts to reach the deceased thereafter proved futile; only for PW 1 to receive a call the following morning from one of her daughters, informing her of the deceased's tragic demise. Meanwhile back in Mombasa, police sergeant William Kiprop (PW 4) who was the officer in charge of the police lines and the armory, had noticed that the deceased had not turned up for duty on the morning of 30th January, 2013. Since his duties entailed receiving officers reporting on duty, he began making enquiries as to the deceased's whereabouts and to this end, he contacted police sergeant Jacob Kipkorir (PW 6) who went to deceased's living quarters. On arrival, he found the door unlocked and he proceeded into the living room, where he found the deceased lying on her sofa facing upwards. He could tell all was not well with her, for she was not breathing and appeared to stare blankly into space. He promptly informed PW 4 as well as senior sergeant Julius Musili Munyinyi (PW 3) of the shocking discovery.

[5] PW 3 visited the crime scene and on arrival, found other officers who were trying to come to terms with the tragedy. The scene of crime personnel swiftly moved in with sergeant Michael Oduor (PW8) capturing it on camera, he took photographs, which he produced in court. Thereafter, the deceased body was taken to the Coast General Hospital Mortuary, where Dr. Ngali Mbuko (PW 7) performed an autopsy. According to his testimony and the post mortem report he produced, dated 21st February, 2013, the deceased died from loss of oxygen in the lungs due to strangulation. The body was later identified by PW 1 and the deceased's aunt, one Fatuma Mamo Kasha who testified as (PW 2). She told the court that though the deceased's family was yet to meet the appellant, they were nonetheless uneasy with the romantic relationship between the two on account of his being a Borana from Isiolo. According to PW 2, nothing good could come of a relationship between a Borana from Isiolo and one from Marsabit. She said a similar marriage involving one of their relatives had quickly gone sour on this account.

[6] Investigations of the murder of the deceased were undertaken by superintendent Shadrack Juma (PW 9); he was able to establish that the slain officer had cohabited with the appellant immediately prior to her murder; that soon after her demise, the appellant was nowhere to be found though he was last spotted leaving the house of the deceased on 29th January, 2013. Attempts to reach him on phone were unsuccessful, prompting PW 9 to enlist the help of the In charge, Crime Investigation unit as well as the services of telecommunications service provider Safaricom to trace the appellant's location through his mobile number 0724 440 774.

[7] Eventually PW 9 received a report from the Isiolo DCIO, to the effect that the appellant had surrendered himself to the Isiolo police. In the course of his testimony, PW 9 told the court that he was also aware that on 29th January, 2013, the appellant had made a report at the Nyali police, vide OB No. 68; in which he accused the deceased of assaulting him with a knife. Further, that though some officers were dispatched to accompany the appellant to the deceased's house to investigate his complaint, they were recalled back to their station mid way through their journey and the appellant's complaint went uninvestigated. The witness also acknowledged that there was no eye witness to the murder; that he was aware that the deceased had other boyfriends; that one of them, was known as Hamisi while the other was Mohammed who worked at a bank; and that though he never ascertained the whereabouts of the two on that fateful night, he nonetheless ruled them out as suspects and charged the appellant given the strained relationship he had with the deceased.

[8] At the close of the prosecution case, the learned Judge found that the appellant had a case to answer and placed him on his defense. The appellant elected to give a sworn statement in defence without calling any witnesses. He stated that he and the deceased were engaged to be married; that on 29th January, 2013, he was at the deceased's house when she came home at 7.30pm and requested to talk to him before he left for South Sudan regarding their upcoming wedding. She then proceeded to inform him that the only money she had was Kshs. 2,000/- but she could borrow money from a boyfriend. This provoked a quarrel, which culminated in the appellant being stabbed with a knife by the deceased. He ran off and reported the assault at the Nyali Police vide OB No. 68 and officers were dispatched to accompany him back to the house to investigate the matter.

[9] On the way to the house upon reaching a place known as Kengeleni (lights), the police vehicle was however abruptly ordered by the OCS to be driven back; these instructions came through a phone call received by one of the officers who was informed by the OCS that the deceased was well and there was therefore no need for any investigations. Thereafter, the appellant was taken to his sister's house where he spent the night and the following morning, he departed for Nairobi. Owing to low battery power on his phone, he was unreachable on phone for the duration of the trip. It was only when he got to Nairobi that he got wind that he was a wanted man. He went to Isiolo police station and surrendered himself, at which point he also learnt of the death of his fiancé'. He once again denied killing the deceased and stated that the deceased had been sharing living quarters and amenities with two other officers; namely PC Fauzia and another corporal and that contrary to what the prosecution witnesses had alleged, PW 1 had no problem with their engagement.

[10] By a judgment delivered on 5th October, 2015 the learned Judge found the prosecution had established its case beyond reasonable doubt. The appellant was thus convicted and sentenced to suffer death. It is against that conviction and sentence, that the appellant has preferred this appeal. On the main, the grounds of appeal impugn the judgment on the basis that the circumstantial evidence was incapable of sustaining a conviction. In particular, the appellant contends that the learned Judge erred by; finding the report of assault made by the appellant suspect and blaming him for not having been issued with a P3 form by the police; failing to consider the possibility that other suitors may have had a motive to harm the deceased and lastly, in the alternative; that the learned Judge failed to consider the defence of provocation availed to the appellant in the circumstances.

[11] Arguing the appeal, learned Counsel for the appellant **Mr. Magolo** submitted the circumstantial evidence did not lead to one conclusion; that it was the appellant and none other who murdered the deceased; and that he was the last person seen with the deceased. Despite the fact that the appellant had reported having been attacked by the deceased and some police officers were dispatched to investigate the matter, they aborted the mission; thus the Judge erred by drawing a negative inference against the appellant and finding that he had failed to pursue his case.

[12] Furthermore there were other persons who had access to the crime scene; in this case there were no investigations carried out to eliminate all other possibilities of what could have transpired between 7pm of the material night when the appellant left the deceased's house until 10am the following day when the deceased's body was discovered. Counsel added that the door to the house was also found unlocked and there was no evidence to seal all the gaps and rule out a possibility of someone else coming in after the appellant's departure at

7pm. He added that this was particularly crucial given that; the post mortem report did not disclose the time of death; the appellant had spent the fateful night at his sister's residence; and the deceased had other suitors, who could also have had a hand in the demise of the deceased.

[13] Counsel for the appellant went on to submit that the appellant also surrendered himself to the police and that the allegations he had switched off his phone were unsubstantiated. In addition, that the number said to have been used by the police to trace the appellant was wrong and did not belong to him. To the contrary, the appellant had explained that his phone had run low on battery while travelling from Mombasa to Nairobi, which explanation was ignored. Lastly, on the sentence, it was counsel's view that the sentence imposed was too harsh; in the alternative, he implored this Court to deem the sentence of 3 years already served as sufficient and order that the appellant be set at liberty.

[14] **Mr. Jami**, learned Principal Prosecution Counsel for the state, conceded the appeal. He submitted that the circumstances in which the inference of guilt was drawn were not safe to sustain a conviction. Referring to the testimony of PW 1, counsel submitted that the identity of the person who was in the house with the deceased on that fateful night when she had a conversation with her mother remained unclear. Further, that the Judge misdirected himself when he placed the burden upon the appellant to explain himself; failure by the prosecution to place the appellant at the scene of crime was also termed as fatal, as it weakened the hypothesis of the prosecution's case that it was only the appellant who had an opportunity to kill the deceased. In addition, even PW 6 who was the first officer at the scene could not rule out a possibility of another person entering the house of the deceased and committing the same crime; more so considering that the door was found locked from the outside. In conclusion, counsel stated that the only reasonable hypothesis in this case is the version of events given by the appellant.

[15] **The state conceded the appeal but that notwithstanding, it is still this court's duty to consider and determine whether the said concession is merited (See Mwanguo Gwede Mwarua vs Republic [2015] eKLR and also Norman Ambich Miero & Another v. Republic, Nyeri Cr. App. No. 279 of 2005). While so doing, the court is also mindful that its role as a first appellate court is to re analyze and re evaluate the evidence tendered before the trial court and come up with its own independent findings. All while making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see. Peters v. Sunday Post, [1958] E.A. 424 and also Okeno v R [1972] EA 32)**

[16] That said, this is a case which was premised entirely on circumstantial evidence. The main issue for determination is whether, that evidence was sufficient to support the conviction and sentence. The principles governing the use of circumstantial evidence were well laid out in the oft' cited case of **Abanga Alias Onyango v. Rep Cr. A No.32 Of 1990 (UR)**; as thus:

"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."

[17] On our part we have noted from the narration of events given by the prosecution witnesses, several critical and unexplained gaps emerged. Key among them is the fact that the deceased's house was accessible to anybody between 7pm on 29th January, 2013 when the appellant is said to have left, till 9.30 am the following day when the deceased's body was discovered. The deceased was living with other colleagues who were never interviewed. PW 6 was the first person at the scene and he was unable to tell the court how long the door had been unlocked. This is compounded by the *alibi* defence by the appellant that following a scuffle with the deceased, he reported the matter at the Nyali Police station, he was given police officers who were to investigate the matter but along the way, the police officers said they were ordered by the OCS to turn back as the deceased had cooled down. It was the police officers who drove the appellant to his sister's house where he spent the night and the following morning he left for Nairobi.

[18] It is trite law that where an *alibi* defence has been raised, the duty lies with the prosecution to dislodge that *alibi* (see. **Ssentale v. Uganda [1968] E.A. 365.**). In this case, nothing was led to prove that the appellant was anywhere near the crime scene during at 7pm on 29th January, 2013 to 10 am the following morning when the body of the deceased was discovered; nor was any evidence led to disprove his *alibi*. More importantly the likelihood of any other person coming into the house was never ruled out; it was also confirmed by PW 9 that the appellant had gone to Nyali police station where he made a report of assault and that police officers who were dispatched to accompany him were recalled on the basis that the OCS had received confirmation that the deceased was well.

[19] It was also confirmed by PW 9, that the deceased had several known boyfriends, whose whereabouts at the material time was never investigated. Their possible culpability could thus not be ruled out. Also PW 1, who was the only other person who claimed to have spoken with the deceased, could not conclusively say in her evidence that the person that was threatening the deceased was the appellant. In her conversation with the deceased she said the person who was threatening her was her lover. This too, was material considering the fact that she had several boyfriends. It readily provokes a suspicion that any one of the lovers could have killed the deceased. On the whole, the above circumstances were open to a different and more compelling interpretation which left some doubts lingering on whether it was the appellant or another that murdered the deceased. This was a case dependent on circumstantial evidence which must leave no other inference as was stated in **Nzivo v Republic [2005] 1 KLR 699**

"In a case dependent on circumstantial evidence in order to justify the inference of guilt to the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."

The burden of proving facts which justify the drawing of this inference and the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused (See **Sawe v Republic [2003] KLR 364**). The prosecution failed to discharge its burden of proof in this case. Too many alternate and equally believable hypotheses obtain in this

case. The appellant's guilt was never established beyond reasonable doubt.

[20] In conclusion we find the evidence before the learned Judge was incapable of sustaining a safe inference of guilt against the appellant. The conviction cannot be allowed to stand just as it was rightly conceded by counsel for the prosecution, we accordingly allow the appeal with the result that the conviction is quashed and the death sentence meted against the appellant is set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 22nd day of March, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR