



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJA)

CRIMINAL APPEAL NO 21 OF 2017

BETWEEN

NGALA CHIRONGO MWAMEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muya J.,) delivered on 3rd November, 2015 *in H. C. CR. Case No. 36 of 2012.*)

JUDGMENT OF THE COURT

[1] This is an appeal by **Ngala Chirongo Mwamee** (appellant), against the conviction and sentence for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. This is a first appeal from the judgement of the High Court. By dint of **Section 379** of the Criminal Procedure Code and in accordance with the decisions such as *Okeno v. R [1972] EA 32*, we are expected to subject the entire evidence to a fresh examination. To do this effectively we must summarize the events leading to the trial of the appellant.

[2] The facts of this appeal reveal a tale as old as time of a love triangle gone sour with deadly and regrettable consequences. By a cloak and dagger mystery the body of **Ngale Chirongo**, (deceased) a resident of Egu village, Taru Location in Kwale County was discovered with a cut wound on the forehead. The deceased was last seen alive on the 6th June, 2012 by his younger brother Kaingu Mwabeyu (PW2), Gabriel Ngala Mwabela (PW4) and Beja Mwadenye (PW6). They were together resting at the deceased's home, when the deceased excused himself to go and search for his three goats that had gone missing.

[3] The deceased was never seen again alive as he did not return, nonetheless, the goats in the evening returned by themselves. The same evening, the deceased's wife Umazi Kombo (PW3) inquired from PW1 the whereabouts of the deceased. That is when PW2 in the company of his older brother, PW4, PW6 and other villagers decided to comb the thicket in search of the deceased the whole night. Towards the following morning, they found the deceased lying dead with a cut wound on the forehead. They also recovered a wooden plank that they suspected was used as the murder weapon which was produced in court as an exhibit.

[4] On finding the body of the deceased, the matter was reported to the police who came and collected the body, it would appear from the evidence it was taken to the Coast General Hospital mortuary. The police were led by Chief Inspector John Mururu (PW9). He narrated to court how he found the body of the deceased lying facing downwards and the head was smashed. He recovered from the scene a huge wooden plank that he suspected was used as the murder weapon and produced it as an exhibit. The body was taken to the mortuary and a postmortem was conducted by Dr. Wahome on the 8th June, 2012. Incidentally, the doctor found that the body of the deceased was badly decomposed; there were maggots crawling in the head and she was not able to tell the exact time of death or to examine other systems of the body except she was able to form an opinion from the fracture in the head that the cause of death was trauma due to head injury.

[5] Apparently, after the burial of the deceased, it was PW3 who revealed to the village elders that the deceased was murdered by the appellant. The same information was relayed to the police who interrogated PW3, recorded statements, apprehended the appellant and charged him as aforesaid. The appellant was convicted on the basis of the evidence of PW3 which struck the learned trial Judge as truthful. PW3 told the court that the appellant was related to her husband; she was involved in an illicit love affair with the appellant and on the material time the deceased caught them red handed (*in flagrante delicto*) having sexual intercourse in the bushes. Because this may sound like an afro cinema scene it is necessary to quote the evidence of PW3 verbatim;-

“I am 33 years old. I have six children. The first one is 15 years old. My husband is called Ngale. He is the deceased. I know the accused. He is a grandson and also lover since last year but one. We used to hide our relationship but it came to be known. On 6.6.2012 we went for milking. I returned and found my husband seated with his brothers. I went to the bushes where I was preparing charcoal I found the accused who seduced me and we had sexual intercourse before we could finish my husband came. I rose up (sic) and after my husband fighting with the accused. The accused cut my husband on the head and also stabbed him with a knife. He also hit him on the head. I left for home but the accused told me that he would kill me if I talked about the matter. It is the accused who killed my husband. He made the threats the same day. My husband was armed with a panga. The accused did use the panga in cutting my husband (sic) he left with the panga. We had committed adultery before with the accused I do not remember the dates. The wooden plunk is the one before the court (mfi, one). The accused used it to hit the deceased on the rear of the head. After the incident I did not report the matter immediately as I was afraid due to the threats on me. I later informed mzee Kangu of what had taken place and he also informed mzee Ndegwa. We went and reported the matter to police. The accused is the man at the dock.”

[6] In the end, as we have stated, the appellant was found to have a case to answer. On being placed on his defence he testified on oath and did not call any witness. He denied having killed his uncle but admitted that in the year 2010 he had a love affair with the deceased's wife (PW3). The matter was nonetheless settled amicably before the elders who fined him Ksh.20,000 for the offence. He however denied meeting PW3 on the material day; or having been at the *locus in quo*. However when he got information that the deceased had been murdered by unknown people, he got scared and did not attend the burial but he received a letter on 12th July, 2012 instructing him to go to the police. When he reported to the police, he was arrested and charged with the offence he said he did not commit.

[7] After weighing the evidence the trial Judge was satisfied that although PW3 did not report the incident immediately after it happened, there were plausible reasons for not reporting, stemming from the fact that the appellant threatened her with death. In end the Judge concluded as follows;

“I am satisfied that the last person to be seen with the deceased was the accused and this was after inflicting injuries on him. This was in the evening. The following day the lifeless body of the deceased was recovered in the bushes where the attack took place. The prosecution has proved its case beyond reasonable doubt. The accused is found guilty as charged of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicted under section 322 of the Criminal Procedure Code.”

Upon conviction of the appellant his counsel pleaded for leniency in mitigation but he was sentenced to death.

[8] This conclusion triggered the instant appeal that is predicated on the grounds that the trial Judge failed to direct his mind on the law relating to circumstantial evidence; that the prosecution did not prove its case against the appellant beyond reasonable doubt; failing to analyse and re-evaluate the evidence that had glaring contradictions and discrepancies in the prosecution's evidence; rejecting the defence that was plausible and for imposing a maximum death sentence.

[9] At the plenary hearing of this appeal, Mr Odera, learned counsel for the appellant elaborated on the above grounds, he submitted that conviction of the appellant based on the sole evidence of PW3 was not safe to sustain a conviction bearing in mind she was an accomplice to the offence. That the evidence adduced before the trial court fell short of proving whether PW3 actually saw the appellant kill the deceased; moreover, the testimonies of the deceased's brothers was full of contradictions. Each one of them placed the deceased at three different places; that is, the deceased was milking cows, sitting at home with his brothers and at a place called Beja at the same time. These contradictions were never resolved. As regards PW3, she herself said she had come from milking the cows then went to a place where she was burning charcoal and met the appellant who seduced her into having sex; while PW2 said that she was at home the same evening when she enquired from him of the deceased's whereabouts. This coupled with the fact that PW3 was also a suspect for the same offence, her evidence needed corroboration. No one witnessed the murder of the deceased, even if the appellant had committed adultery with the deceased's wife that constituted mere suspicion. Counsel also relied on a list of authorities that contains decisions of this Court on the application of circumstantial evidence in criminal matters.

[10] On the part of the State, Mr Yamina, learned Principal Prosecuting counsel opposed the appeal; he submitted that the evidence of PW3 to the effect that appellant attacked the deceased with a wooden plunk was corroborated by the doctor who found the injury on the deceased was inflicted by a blunt object. Counsel urged us to consider PW3's evidence that she was threatened by the appellant with death if she reported what she witnessed which explained her hesitation and delay in making the report. Counsel for the State urged us to disregard the ground of appeal introducing new issues such as *alibi* as an afterthought as it was not raised before the trial court either in cross examination or in defence.

[11] We have duly considered the record of appeal, the judgment of the High Court, the memoranda of appeal by the appellant and submissions by the respective learned counsel, and the authorities that they cited. This is in line with the principles enunciated in the *Okeno case (supra)*:-

“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] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 make 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] E.A. 424.”

[12] We are nonetheless free to draw our own conclusion on the evidence without overlooking the conclusions of the trial Judge who had the advantage of seeing and observing the demeanour of the witnesses as they testified. In this regard, it is discernible that the appellant's appeal is predicated on two issues; whether PW3 who was caught by her husband, the deceased making love to the appellant and alleges to have

witnessed the appellant kill the deceased but kept this information and revealed it after two weeks was an accomplice; if so, whether her evidence was safe to sustain a conviction. Also related to this is whether the prosecution proved the case against the appellant beyond reasonable doubt.

[13] It is common ground that the conviction of the appellant was grounded on the evidence of PW3; if this evidence was removed from record, none of the other witnesses witnessed the murder and what they told the court is what they were told by PW3. We do not agree with the submissions by Mr. Yamina that PW3's evidence was collaborated by that of the doctor. As a matter of fact, when one looks at the doctor's evidence, there is doubt whether the body of the deceased that was collected from the scene on the 7th June, 2012 and a post mortem was carried the following day on the 8th June, 2012 was the same one. We agree with counsel for the appellant that the evidence of the doctor needed more analysis at least to establish when the deceased died which was crucial in the circumstances of this case that rested with the evidence of PW3. Also for the court to find out whether a body of a person who died the previous day could undergo such rapid decomposition as described in the doctor's own words:-

“On 8. 6. 2012 I conducted a postmortem on Ngale Mwabeyu. The body was identified by Gerald and Crispus Ngale. It was dressed in faded blue jeans. African male adult. This was a decomposing body. Head was crawling with maggots I was not able to tell the exact time of death I was not able to examine rest of the systems because of decomposition but I could see a fracture (sic) skull. The spinal colum were decomposed. My opinion was cause of death was trauma due to head injury. I signed the document dated it and wish to produce it as exhibit No.2.”

[14] Was PW3 an accomplice to the offence of murder? The Court of Appeal in the case of Antony Kinyanjui Kimani -vs- Republic (2011) KLR (Criminal Appeal 15/2007) grappled with this question, wherein it stated *inter alia*:

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, *inter alia*, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

‘On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’ ”

[15] In this case we would describe PW3 more or less as a person who abetted in the commission of the crime. This is because she said when the deceased caught her red handed committing adultery with the appellant, a fight ensued; she did not raise an alarm; the question arises when exactly was she threatened; she kept mum for two weeks until she was interrogated by PW2 who reported the matter to a village elder. Thereafter, she recorded a statement with the police; at what stage was she threatened and when did she stop fearing for her life? Unfortunately, her evidence is bereft of those critical details that would also confirm that she failed to report due to genuine fear for her life. In the case of Kamau v Republic (1965) EA 581 where the main witness to murder was the mother of the appellant who had failed to report the incident to the police and it was contended that her evidence was accomplice evidence, the predecessor of this Court held:

“(iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person's evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon;”

[16] Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, we think the uncorroborated evidence of PW3 coupled with the poor investigations that were carried out in this matter, her evidence alone was not safe to sustain a conviction. Bearing in mind the circumstances of this matter, we think it was imperative for the trial Judge to have warned himself of the dangers of convicting the appellant based on the sole evidence of PW3. There are good reasons for this; first, it is apparent the investigations were slovenly done; they did not identify where the body of the deceased was found *vis-a vis* his home. This was necessary because of the evidence given by other witnesses. Secondly, the investigations needed to clarify whether the body was found at the same scene described by PW3 where the fighting occurred or it was found 6 kms away from home as testified by PW2. Looking at the whole evidence, coupled with the post mortem report that raised an issue of the time of death, by indicating that the body was **“badly decomposed”**, we think the evidence of PW3 needed clearer corroboration.

[17] In the case of Karanja & Another v Republic, Criminal Appeal No 92 of 1990, this Court appreciated that accomplice evidence generally requires corroboration and set out the reasons as follows:-

“a) H/she is likely to swear falsely in order to shift the guilt from self;

b) As a participant in the crime, he is an immoral person who is likely to disregard the sanctity of the oath;

c) S/ he gives evidence either under a promise of a pardon of in expectation of an implied promise of pardon and is therefore liable to favour the prosecution."

The corroboration which was required of PW3's evidence given her conduct was in the nature of some independent additional evidence rendering it probable that her story was true and that it is reasonably safe to act upon. The corroboration evidence must have connected the appellant with the crime, confirming in some material particular not only the evidence that the crime was committed but also that the appellant committed it. Since this did not occur, and the trial Judge did not warn himself of the dangers attendant to relying on uncorroborated evidence of an accomplice to the crime, the appellant is entitled to benefit from those lapses.

[18] We think from the above analysis we have said enough to demonstrate the evidence against the appellant was not safe to sustain a conviction. Accordingly, the appeal is allowed, 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 26th day July, 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