



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 19 OF 2017

BETWEEN

BENJAMIN WANYIRI MAINAAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.) delivered on 12th August, 2014 in High Court Criminal Case No. 28 of 2011)

JUDGMENT OF THE COURT

[1] This appeal, just like the whole trial before the High court revolves around unraveling the mystery surrounding the brutal and ruthless murder of Peter Nduati Kakuiru (deceased), and whether or not his unfortunate demise can be attributed to Benjamin Wanyiri Maina (appellant), based on one highly circumstantial piece of evidence. A brief background information is that the appellant, a former salesman dealing with distribution of mobile phone scratch cards to retailers, was employed as such by Mobicom (K) limited in Mombasa, alongside one Peter Nduati (*the deceased*). The two were also friends; in the fullness of time however, the appellant was dismissed from employment; nonetheless, he kept in touch with the deceased. On or about 25th August, 2011, in his usual course of business, the deceased intimated to his supervisor that he had received an order for supply of scratch cards. In order to meet the order, he was issued with cards of various denominations, cumulatively valued at Kshs.14,400.

[2] As at 26th August, 2011 however, the deceased was yet to remit the proceeds from the sale of the cards. When asked about it, he indicated that the retailer to whom he had sold the cards, had promised to pay him on 27th August, 2011. Sadly, that was never to be; for the deceased's lifeless body was on the material date found in a bush in Changamwe, with signs of strangulation. Upon investigation, the police were convinced that the perpetrator of the heinous crime was none other than the appellant; whom they arrested and was arraigned before the High court in Mombasa where he was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. As per the Information presented before court, the particulars of the offence were stated as follows:-

“BENJAMIN WANYIRI MAINA: On the night of 26th and 27th day of August, 2011 at Wayani area Changamwe in Mombasa District within the Coast Province, jointly with others not before court, murdered PETER NDUATI KAKUIRU”

[3] The appellant denied the charge and hearing began in earnest, with the prosecution calling a total of 11 witnesses. In a nutshell, the prosecution case was that shortly prior to his death, the deceased had been giving the appellant accommodation at his sleeping quarters in Likoni, at a shop owned by the deceased's sister, Dorcas Mweru (PW 2). On 25th August, 2011, the deceased reported to work at Mobicom and collected some mobile phone scratch cards which he intended to supply to some retailers. The cards, valued at Kshs.14,400, were duly issued to him by his supervisor, one Stephen Githiora (PW 4). However, on 26th August, 2011, it came to the attention of the Mobicom manager, one Bernard Mwangi Maina (PW 1), that the deceased was yet to remit the proceeds paid to him in respect of the scratch cards.

[4] Upon enquiry, the deceased reportedly informed both PW 1 and PW 4 that he was yet to receive payment and that the customer to whom he had supplied the cards had promised to settle the debt by the following day, being 27th August, 2011. Meanwhile, all seemed well for the rest of the day until that evening at around 9 p.m., when the deceased's family attempted to reach him on phone but they were unable to raise him. According to PW 2, though she last saw the deceased at 4 p.m. on 26th August, 2011, efforts to reach him by phone that evening were unsuccessful. At around 8 p.m., she was approached by the appellant, whom she had met through the deceased. She stated that the appellant informed her that he had been sent by the deceased to collect the keys to the shop from her. Suspicious, she asked him why the deceased's phone was off, to which the appellant allegedly said to his knowledge, the deceased's phone had run out of battery power. This surprised

PW 2, as she had personally charged her brother's phone earlier that day. Nonetheless, she handed the appellant the keys to the shop where he had intended to sleep.

[5] Thereafter, she proceeded to her sister's (Rebecca Njeri Karauri - PW 3's) house where she normally slept. Upon arrival, PW 3 and her husband (PW 4) were also disconcerted with the fact that they could not reach their brother on phone and his whereabouts were not known. Feeling that it was nonetheless improper to leave a stranger to sleep at their brother's house in his absence, PW 3 summoned her employee, one Peter Mulenga, whom she dispatched together with PW 2 with instructions to go and fetch the appellant, so that he could sleep in Mulenga's quarters instead. Upon return from their errand, the duo informed PW 3 that the appellant had declined to accompany them as requested and had instead opted to attend some overnight prayers in Mtongwe. On their part, they had their evening meal and went to sleep.

[6] On 27th August, 2011, PC No. 52076, Andrew Songwa (PW 7) was on duty at Changamwe Police station, when he received a report that a dead body had been sighted within Woyani area. He proceeded to the scene together with another police corporal and on arrival, they found the body of a man lying in the bush, with bruises on the face and what appeared to be ligature marks on his neck. A search of the man's clothing did not reveal any identification documents. However, the officers came upon a piece of paper bearing the contacts of a lady in Nyeri; who when contacted turned out to also be a former employee of Mobicom limited. She connected the police with the company's representatives, through whom the news of the death of the deceased eventually reached his family.

[7] Scenes of crimes officer, Sergeant Michael Owuor (PW 8) was dispatched to the scene and thereafter, a post mortem conducted by Dr. Ngali Mbuliko (PW 10) who officially gave the cause of death as asphyxia due to strangulation. The matter was then taken over by PC No. 67265 Edward Kipserson (PW 11) for further investigation. According to PW 11's investigation, the scratch cards supplied to the deceased had turned up at a shop owned by Maina Gakori Kuria (PW 6). He stated that further interrogations revealed that following the death of the deceased, the appellant had approached PW 6; a person he knew from his days as a salesman, as he used to sell to him scratch cards. This was in October, 2011, approximately two months after the deceased's demise. According to PW 6, shortly after delivering the cards, the appellant however later came back and sought to repossess the same under the pretext that they had been reported stolen and subsequently blocked; but when PW 6 demanded to see the appellant's identity card, it turned out that he had none. This made PW 6 suspicious, prompting him to confiscate the cards.

[8] By sheer coincidence, PW 6 had also been sold 10 other scratch cards on that very day, by a saleslady known as Zamzam Nkirote; who also worked at Mobicom. When he saw her later on, he enquired about the blocked cards and Zamzam allegedly informed him that the appellant was being sought by the police over the murder of the deceased. He also stated that he turned over the controversial cards to Zamzam, since she also worked for Mobicom. Armed with this information, PW 11 concluded that the appellant, a person well known to the deceased had murdered him and stolen Kshs.14,400 worth of scratch cards from him, which he then purported to sell. On that premise, PW 11 arrested and charged the appellant as aforesaid.

[9] At the close of the prosecution case, the learned Judge was satisfied that the appellant had a case to answer and put him on his defence. He elected to make a sworn statement in defence and opted not to call any witness. According to the appellant, on 27th August, 2011, he was at Likoni and had nothing to do with the deceased's death. He admitted having slept over at the deceased's shop from the 24th August, 2011 up until the date the deceased died. He expressed shock at learning of the deceased's death and denied having sold any scratch cards to PW 6 after the deceased's demise or having gone back to repossess the cards from PW 6. To the contrary, he said, the cards he had last supplied to PW 6 were so supplied whilst in the company of the deceased.

[10] In a reserved judgment delivered on 12th August, 2014, the learned trial Judge (**Odero J.**) found the appellant guilty as charged and sentenced him to serve a 30 year prison term. Dissatisfied with that decision, the appellant mounted this appeal; which is predicated on the grounds that the learned Judge erred by; convicting him on the basis of a defective charge sheet; failing to hold that the prosecution had failed to prove its case beyond reasonable doubt; failing to consider **Section 150** of the **Criminal Procedure Code**; failing to consider the appellant's defence; advancing fanciful theories to support the prosecution's case; relying on circumstantial evidence that failed to meet the legal threshold to support a conviction; failing to consider that the co-existing facts weakened the chain of events and did not support an inference of guilt on the appellant's part; shifting the burden of proof and placing it on the appellant and finally, for finding that the appellant was in possession of the scratch cards, despite there being no evidence in support of such a finding.

[11] At the hearing of the appeal, learned counsel for the appellant **Mr. Wamotsa** submitted that the conviction was solely based on the circumstantial evidence tendered by PW 6 and that there was no direct evidence linking the appellant to the murder. He added that though the testimonies of PW 1 and PW 6 introduced the presence of a third party known as Zamzam, the learned Judge wholly ignored this aspect; yet Zamzam was the first person to ever raise the issue of the blocked scratch cards. Counsel contended that though Zamzam was a material witness, she was never called to testify and as such, the only inference to be drawn in the circumstances is that Zamzam's testimony would have been adverse to the prosecution's case.

[12] Counsel went on to submit that even though PW 2 claimed that the appellant collected the deceased's keys, there was no evidence to show that the appellant was with the deceased on the material date of the murder or even the last time he was seen alive. He stated that in the circumstances, the trial court should have inferred that the deceased interacted with many people on the material date and anyone could have committed the offence. Counsel also submitted that there was doubt as to how the scratch cards were collected from PW 6 and that it would appear the cards' recovery was actually done while the appellant was in police custody. Counsel pointed out that the appellant's conduct was inconsistent with the mind of a guilty person; that he even cooperated with the police throughout his arrest and that the last person to be seen with the deceased was actually PW 5, not the appellant.

[13] In addition, that even upon learning of the deceased's demise, the appellant went to condole with the family of the deceased. Counsel concluded by stating that the appellant stated in his defence, that he was always in Likoni at all material times and was nowhere in the vicinity of where the appellant's body was found. It was incumbent upon the prosecution's evidence to place the appellant at the scene or vicinity thereto so as to link him with the murder of the deceased and in concluding the matter the way it did, the trial court unlawfully shifted the burden of proof upon the appellant. On that note, this Court was urged to allow the appeal, quash the conviction and set aside the sentence.

[14] Opposing the appeal was learned Principal Prosecution Counsel **Ms. Ogweni**, who stated that PW 6 confirmed having bought the scratch cards from the appellant and that the serial numbers on the said cards matched those that had been issued to the deceased. She added that even though Zamzam had also sold cards to PW 6 on the same day as the appellant, PW 6 had categorically stated that he kept the two sets of cards separately and was able to distinguish those supplied by the appellant. Counsel for the State also submitted that on the material date, the deceased had left home at 4 p.m. and was in the company of the appellant and that the *alibi* tendered by the appellant did not dent the watertight case presented by the prosecution. In conclusion, it was her view that the deceased and the appellant were acquainted; coupled with their recent interaction and the damning scratch cards supplied by the appellant and recovered from PW 6, all pointed to the appellant's guilt over the murder, consequently, the conviction and sentence should not be interfered with.

[15] It is trite that as a first appellate court, this Court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See ***Okeno vs. R [1972] EA. 32, Mohamed Rama Alfani & 2 Others vs. Republic, Criminal Appeal No. 223 of 2002***. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the trial court, and in many instances does warrant interference by this Court.

[16] That said, the key issue for our determination is whether the prosecution proved its case to the required threshold of proof beyond reasonable doubt that it was the appellant and none other who caused the death of the deceased. It is without doubt that the conviction herein is hinged on the circumstantial evidence tendered by PW 6. It is equally without doubt that the only evidence upon which the conviction was based was the allegation by PW 6 that the appellant had sold to him some scratch cards which had been issued to the deceased for sale but proceeds thereto never surrendered to the deceased. This theory that the appellant must have killed the deceased to steal the scratch cards was acknowledged by the learned trial Judge when she stated that:-

“The aspect of evidence which links the accused to the deceased is the fact that the accused was said to have been in possession of a series of scratch cards issued to the deceased after the body of the deceased was recovered”

What is crucial in this appeal; and upon which the conviction turns, is whether or not that single piece of circumstantial evidence was reliable and unshakable by any other hypothesis. In other words, that it was only the appellant and none other, that had the opportunity and indeed murdered the deceased.

[17] Owing to the indirect nature of circumstantial evidence, and the attendant possibility of erroneous inferences/conclusions, sole reliance on circumstantial evidence is a delicate affair. Consequently, when relying solely on circumstantial evidence, the court must always warn itself accordingly and must always be satisfied that the circumstantial evidence in question lends no other possible conclusion other than the guilt of the accused. For circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that it accurately points to the accused person, and to no other person, as the perpetrator of the offence. In ***Abanga Alias Onyango vs. 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.” (Emphasis added)

(See also ***Sawe vs. Republic [2003] KLR 364*** and ***GMI vs. Republic, Cr. App. No. 308 of 2011 (Nyeri)***).

[18] In this case, PW 6 was adamant that the scratch cards in question were supplied to him by the appellant; an allegation that the appellant vehemently denied. At that point, it is a case of one man's word against the other. However, the testimony of both PW 1 and PW 5 ought to have aided the trial court in resolving this impasse. This is because, both PW 1 and PW 5 were unanimous that the deceased himself had confirmed to them that he supplied the cards to a customer and was awaiting payment on 27th August, 2011. Further, the witnesses indicated that the deceased had stated that the customer undertook to pay for the cards on the said date. This aligns with the appellant's contention that the deceased took part in supplying the cards to PW 6.

[19] In fact, save for the allegations by PW 6, there is nothing in the evidence adduced by the prosecution that shows the cards were reported stolen by the deceased prior to his death. To the contrary, evidence abounds that the deceased had indicated to his superiors that he had already supplied the cards and was simply awaiting payment. As at the time of his death on 27th August, 2011, it would thus appear that the deceased was not in possession of the cards at all. This in turn impacts on PW 6's evidence on the cards and dents his credibility as a witness. If the deceased did not have the cards with him even prior to his death, how could the appellant steal and sell the same cards two months later? All this should automatically have raised doubt in the mind of the learned trial Judge as to the veracity of PW 6's testimony. This is not to mention that the circumstances, under which the deceased was killed, remained unclear. This in turn opens up a can of worms as to who the culprit could be. Given the missing wallet, was it a case of a mugging gone wrong or was it a pre meditated murder and by who? is it only the appellant who had an opportunity?

[20] On the other hand, the whereabouts of the appellant until the evening of 26th August, 2011 when he is said to have gone for overnight prayers remains unchallenged. PW 2 confirmed having interacted with him that evening in Likoni. Whether the deceased was already dead at the time is still a mystery; as is the manner in which his body was found in Changamwe. In fact, the time of death is equally unclear; which is material, particularly in light of the appellant's unrefuted *alibi*. All these doubts should have been resolved in the appellant's favour. The burden to disprove the *alibi* and prove the appellant's guilt lay throughout on the prosecution. In the present case, though the appellant maintained he was in Likoni at all material times. Nothing was ever brought forth to show that he was at Changamwe where the deceased's body was found or even to disprove that he was at Likoni.

[21] On the appellant's defence, the learned Judge stated that the appellant's claim that he accompanied the deceased to sell the cards to PW 6 was untrue and an afterthought. The Judge went on to state that:

“This version has only come up in defence. It is clearly an afterthought. Secondly, if the accused claims the questioned cards were sold to PW 6 in August, 2011, it is highly unlikely that they would still be in his shop two months later. Scratch cards are fast moving items and I would expect that cards of 100/- would fly off the shelves quite quickly. It is inconceivable that two months after buying the cards PW6 would still have them in stock in his shop. Thirdly there is no logical reason for PW 6 to insist that sold him the cards on 7th October, 2011 if infact he purchased them on 26th August, 2011. PW 6 was merely a shopkeeper. He had no stake in and no knowledge of how or where scratch cards were issued by the supplier Mobicom....”

As rightly submitted by the appellant’s counsel, these were issues that never came up at trial. Whether or not scratch cards were fast moving goods in that locality were issues of fact which were never canvassed at trial. In basing her conclusion on such a theory, the learned Judge with respect, fell in error by raising extraneous and unproven matters.

[22] As stated earlier, when dealing with circumstantial evidence, if a reasonable hypothesis exists, which tends to cast doubt on the accused’s guilt, the accused must always be accorded the benefit of that doubt. In this case, the testimony of PW 1 and PW 5 was sufficient to cast doubt as to the whereabouts of the cards even prior to the deceased’s death. As stated before, the prosecution’s case rested purely on the presumption that the appellant killed the deceased in order to rob him of the cards; which he then purported to sell to PW 6. It was the prosecution’s case that he stole the cards after killing the deceased and sold them two months after the deceased’s death. That theory was fundamentally shaken by the testimony of PW 1 and PW 5 who by all indications, stated that the cards were sold by the deceased, and not by the appellant. As long as that doubt prevailed, the appellant should have been acquitted.

[23] We do not in any way belittle the heinousness of the crime that took place. Nonetheless at the same time, this Court is not satisfied that in the circumstances, the finger of blame pointed solely and unerringly towards the appellant. On the whole therefore, we find merit in this appeal which we hereby allow with the result that the conviction against the appellant is quashed, sentence of 30 years set aside and the appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 11th day of October, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. 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