IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 10 OF 2013

BETWEEN

PETER LOKA KISAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J). dated 17th December, 2012

in

(HC.CR. C. NO.26 OF 2009)

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JUDGMENT OF THE COURT

1. **Peter Loko Kisaka** (the appellant) was arraigned before the High Court at Mombasa (Odero, J.) to answer a charge of murder contrary to **section 203** as read with **section 204** of the penal code in that on 27th day of June 2009, at around 9.00 p.m. at Chumvini Irrigation Farm in Taveta District of the then Coast Province, he murdered **MICHAEL OSUI** (the deceased). He denied the charge and the matter proceeded to hearing.

2. Although the appellant was presented to court for plea on 13th July, 2009, we note that it was not until 7th September, 2011 that the first witness Nzioka Meja Mukungu (PW1) was called to the witness box. This witness told the court that he was working in his farm on the date in question at around 9.00 p.m. when he heard shouts of someone shouting "*ameua*" "*ameua*" (he has killed. He has killed!). He rushed to the direction where the shouts were coming from. His evidence was that somewhere on the road, he found the appellant and one Simon Nzomo Misoi (PW6) struggling. In his evidence in chief, he said that he helped PW6 and they both overpowered the appellant who they then tied up with a rope. The deceased was lying at the scene with a stab wound in his chest.

3. After tying up the deceased, Nzioka and Nzomo phoned the village elder as other people also rushed to the scene to see what was happening. The police were also called but they did not get to the scene until the following morning. Nzioka did not see the appellant stab the deceased and just relied on what he was told by Nzomo who was apparently the first person to arrive at the scene.

4. According to Nzomo (PW6) he was in his farm when he heard some noise from a distance. He did not say what kind of noise he heard but he went to the scene and found the deceased lying on the road bleeding from a chest wound. He said the appellant was there searching for something. It was Nzomo's evidence that on enquiring what the appellant was looking for, he said that he was searching for his knife and that he was the one who had stabbed the deceased. It was at that point that Nzomo shouted for help and PW1 rushed to the scene. According to PW6, he had a rope with him and it was the same rope that they used to restrain the appellant.

5. On cross examination however, the witness said that he had run back to his home to collect the rope. This would mean that he left the appellant at the scene to go and fetch the rope and came back and found the appellant still at the scene, and with the help of PW1 who arrived later, they tied up the appellant. The most important point in this witness's evidence is the allegation that the appellant confessed to him that he was the one who had stabbed the deceased. He testified further that the appellant had told him that he was looking for the knife he had used.

6. They looked for the knife that night but they did not find it. In cross examination, the witness added that he saw blood on the appellant's

hands and on his shirt. The same witness stated that he was the one who had recovered the knife the following morning and handed it over to the police. The knife was produced in court as exhibit by the police officer.

7. The deceased was removed from the scene and taken to Taveta District Hospital where a post mortem was later performed on the body. The cause of death was found to be haemorrhage from both lung and heart wounds following the cut wounds on the chest.

8. The appellant was consequently charged with the offence of murder. When placed onto his defence, he testified on oath and called no witnesses. He denied having committed the offence. He, like the other witnesses said he heard the screams while in his house, coming from the home of one Mama Chanze Mkungi. He ran there and found the deceased lying on his back. He found other villagers at the scene. After seeing what was happening he decided to leave and go back to his house. It was then that the witnesses and others chased him, caught him and started saying they suspected he was responsible for the killing. He denied having a knife and also maintained he had no blood on his clothes. He denied having had the sword sheath on his waist as claimed byPW3 and the police officer. He said the deceased was his in-law, there was no bad blood between them and that he had no reason to kill him.

9. The learned Judge considered all this evidence. She appreciated the fact that the cause of death was not disputed. She also found that there had been no eye witness, and the only evidence that had linked the appellant to the offence was that of Nzomo (PW6). The learned Judge found the evidence against the appellant was circumstantial. She proceeded to apply the test that the evidence before the court needed to pass for a conviction to be sustained. This test was elucidated by this court in the case of **Omar Mzungu Chimera vs Republic CR. APP NO. 56 OF 1998** where the court set the following as the requirements to be established: -

> ***The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and lastly that 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.***

10. So what were these incriminating circumstances? According to the learned Judge, the appellant was found "literally standing over the dead body of the deceased." He was the only one at the scene when Nzomo got there; the appellant was found looking for his sword, and he still had the sheath around his waist. According to the learned Judge, the only conclusion one could draw from these circumstances was that it was the appellant, and nobody else who could have stabbed and killed the deceased. She therefore found him guilty as charged and convicted him of the offence of murder and sentenced him to serve 30 years imprisonment.

11. Being dissatisfied with the said conviction and sentence, the appellant filed this appeal originally relying on some 4 homemade grounds of appeal. His counsel on record Mr. Adalla later filed supplementary grounds of appeal which he relied on and which he urged before us. The gist of the 1st and 2nd grounds is that the circumstantial evidence adduced was not sufficient to prove the charge against the appellant; and that the sentence meted out was too harsh. In his oral submissions before us, learned counsel expounded on the insufficiency of the circumstantial evidence relied upon to convict the appellant. He stated that the appellant though said to have admitted having stabbed the deceased remained at the scene even as PW6 said he had to run back to his home and come back with the rope which they used to tie the appellant. He also pointed out that only PW3 claimed to have seen the dagger sheath around the appellant's waist. PW6 and PW1 had not mentioned it. He urged us to allow the appeal.

12. Although counsel's submissions were not very elaborate as to the insufficiency of the circumstantial evidence, and he just glossed over the evidence without even citing a single legal authority, the law enjoins us as a first appellate court to re-analyse and re-appraise the entire evidence and to draw our own independent conclusion one way or another. See **Okeno vs Republic 1972 E.A 32**.

13. Opposing the appeal, Mr. Isaboke Senior Prosecution Counsel, submitted that the appellant had been found at the scene "looking for his knife." He had the knife holster; and that he had admitted to PW6 that he had killed the deceased. He urged us to dismiss the appeal both on conviction and sentence. As stated above, it is our duty to critically re-evaluate this evidence in entirety and subject it to the required test to see if it is sufficient to support the conviction.

14. To start with, we must say that the allegation that the appellant admitted to PW6 to having killed the deceased is not admissible. We are surprised that counsel for the appellant did not object to that submission by counsel for the state. We say so because the said "confession" was to the wrong person under the wrong circumstances and does not pass muster. It cannot be said to be a confession as envisaged under **section 25 A** of the Evidence Act. In our view, it was just a statement by PW6, and its veracity was not even tested. Although the veracity of PW6's evidence was not challenged, from the evidence on record the same left glaring gaps that were not sealed. The learned Judge stated that one of the aspects of the circumstantial evidence that she considered was that PW6 said he found the appellant literally standing over the body. We note however from the record that the same witness said that the appellant was looking for his knife in the nearby surroundings. He could not have been "literally standing" over the body and at the same time searching for his knife. The witness said the following in his evidence in chief:-

> ***"…I found Peter Kisaka (accused) there. I asked what he was searching for. Accused told me he was searching for a knife. Accused told me that it was he who stabbed Michael."***

Infact, we cannot see in PW6's evidence the statement that appellant was literally standing over the dead body. We also note that although this witness was the first one to arrive at the scene, and was the one who tied him with the rope, he said nothing about a sheath. On the other hand, he was the only witness who said he saw blood on the appellant's hands and shirt. We pause here and ask, if indeed the appellant's shirt had blood on it, why was it not taken as exhibit?

15. We need to critically re- look this evidence and draw our conclusion as to whether it was sufficient to convict. The test on circumstantial evidence has not changed since the early days when the predecessor of this Court in the *locus classica* cases of **R v Kipkering Arap Koskei [1949] EACA 135** and **Musoke vs R [1958] E.A. 715** pronounced itself on the issue. As it has been constantly pointed out, in order for a

conviction to be founded on such evidence, it must point irresistibly to the accused person to the exclusion of any other person. At the same time, there must be no co-existing factors or circumstances which may weaken or destroy the inference of guilt of the accused. Further, to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of his guilt. This principle has been applied time without number in cases where circumstantial evidence is called into play. We must now apply this principle to the circumstances of this case.

16. According to the prosecution evidence, the appellant was the main suspect because he was the one found at the scene when PW6 arrived. It should be noted that PW6 had heard noises at a distance while in his farm and rushed to the scene. Is there possibility that somebody else could have been at the scene and committed the crime and fled before the appellant arrived? In his statement of defence which was tendered on oath, the appellant stated he also rushed to the scene upon hearing the screams. According to the learned Judge the appellant was found literally standing over the body, yet the same witness said that he was looking for his knife in the bushes? A logical question that one would want to posit is, if indeed the appellant was the one who had stabbed the deceased, how did he lose his knife so that he would start looking for it blindly with no idea where it was. If he was the one who threw it into the bushes from where it was said to have been recovered the following day, why was he looking for it at a different spot?

17. According to PW6, he left the appellant at the scene alone and went back home to collect the rope which they used to tie him up. Why didn't the appellant seize that moment to escape if he was the one who had committed the offence? There were too many questions in the testimony of PW6 that were not interrogated and which in our view cast serious aspersions as to the credibility of his evidence. We appreciate that unlike us, the trial court had the opportunity to see and hear the witnesses as they testified and we should therefore treat that evidence with some level of deference, but on the other hand, as a first appellate court, our role is to interrogate that evidence and not to accept it line, hook and sinker. In this case, the court mainly relied on the evidence of PW6 to convict. In that case it should have been tested to ascertain its credibility and veracity, particularly in view of the appellant's sworn defence.

18. We are not persuaded that the circumstantial evidence in this case was watertight. The circumstances did not irresistibly point at the appellant's guilt. The circumstances did not also rule out the possibility of somebody else having stabbed the deceased and escaping from the scene before the arrival of PW6 and the other witnesses.

19. Having re-evaluated the evidence as above, our conclusion is that the circumstantial evidence before the court did not meet the required standard to sustain a conviction. In the circumstances, we find this appeal meritorious and allow the same, with the result that the appellant is set to liberty unless he is 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR