



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: GATEMBU, SICHALE & KANTAL, J.J.A)

CRIMINAL APPEAL NO. 38 OF 2016

BETWEEN

JOSEPH NGUGI MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh, J.) dated 13<sup>th</sup> July, 2012*

*in*

*H.C.Cr. C No. 26 of 2010)*

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**JUDGMENT OF THE COURT**

In an information dated 31<sup>st</sup> March, 2010 the appellant was charged with the offence of murder. The particulars of the information were that on the night of 10<sup>th</sup> March, 2010 at Pipe Line Estate of the then Nakuru District the appellant murdered **William Gachingiri Ngugi**.

On 7<sup>th</sup> April, 2010 the appellant pleaded not guilty to the charge. On 4<sup>th</sup> November, 2010 his trial commenced in earnest before **Wendoh, J.** The prosecution called a total of 13 witnesses. Upon conclusion of the prosecution evidence, the appellant was put on his defence. The appellant opted to give a sworn statement of defence and called one witness. In a judgment rendered on 13<sup>th</sup> July 2012, the appellant was found guilty of the offence of murder and sentenced to life imprisonment. The appellant was dissatisfied with the outcome of his trial and hence this appeal. In a memorandum of appeal dated 20<sup>th</sup> August, 2018 the appellant listed 9 grounds of appeal. These can be summarized as follows:

1. Lack of positive identification.
2. Absence of an identification parade.
3. The conviction was based on dock identification.
4. Lack of proof beyond reasonable doubt
5. Failure to consider the appellant's defence of alibi.

On 30<sup>th</sup> August, 2018 the appeal came before us for plenary hearing. **Mr. Maragia** learned counsel appeared for the appellant and **Mr. Chigiti**, the Assistant Director of Public Prosecutions appeared for the State. In urging the appeal, **Mr. Maragia** contended that PW3, the main witness did not know the appellant before the date he alleged to have seen him with the deceased; that the time of the commission of the offence was about 7 pm and hence the circumstances of identification were difficult and finally, that the appellant's defence of alibi was not considered.

In opposing the appeal, **Mr. Chigiti** contended that the defence of alibi came too late in the day (during defence hearing); that there were no material contradictions in the prosecution evidence and that the identification of the appellant by PW3 was proper.

The appeal before us is a first appeal. In the case of **OKENO V. R [1972] EA 32**, at page 36, the predecessor to this Court stated:

**“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] EA 336) and to the appellate courts 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] EA 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 courts’ 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] EA 424.”**

As a first appellate Court, our task is to re-evaluate and re-analyse the evidence and come to our own independent conclusions. In so doing however, we shall give due regard that unlike the trial court we did not have the advantage of hearing and seeing the witnesses.

The facts of the case as narrated in the trial court are fairly simple and straightforward. The deceased and the appellant were friends. On 7<sup>th</sup> March, 2010 a cow belonging to PW1 **Nancy Nduta** (the deceased’s mother) died. On 8<sup>th</sup> March, 2010 the deceased and **“Sammy”** (as this is how PW1 referred to the appellant) took some of the meat to sell. The duo, took some more meat for sale on 9<sup>th</sup> March, 2010. This was repeated on 10<sup>th</sup> March, 2010, although this time round the deceased did not come back home. On 11<sup>th</sup> March, 2010 at about 1 pm **“Sammy”** went to PW1’s home and inquired about his friend, the deceased. PW1 informed **“Sammy”** that the deceased had not been seen since the two left home the previous day. Shortly thereafter, one Rose, an aunt to the deceased, arrived and broke the sad news of the deceased’s death. According to PW1, on hearing of the death, **“Sammy”** took off from her home.

**Lucy Nduta** (PW2) recalled that on 10<sup>th</sup> March, 2010 at about 4 pm, the appellant and the deceased were at her place and the two drunk **“busaa”**, a local traditional brew. The deceased paid for the alcohol. According to her **“they drank till 8 pm and left”** and as they left each had a bicycle. It was her evidence in cross examination that **“where the body was found, it was not very safe and people do not pass there”**.

On the same day (10<sup>th</sup> March, 2010) at about 7 pm **Julius Mwaniki Maina** (PW3) was on his way to visit his brother at the IDP camp. He encountered two people quarreling. Each one had a bicycle. He passed them and shortly thereafter he heard screams from behind. He thought the two were fighting. He was able to hear that the duo were arguing about money and that the appellant threatened to kill his colleague. He however did not bother and he proceeded with his journey. On the following day, he learnt that there was a person who had been killed the previous day. He later narrated his encounters on 10<sup>th</sup> March, 2010 to **Joseph Wachira Gathemi** (PW4).

One of the persons who took meat on credit from the appellant on 8<sup>th</sup> March, 2010 was **Dickson K. Mbugua** (PW5). The appellant was then in company of another person whom he did not know. On 10<sup>th</sup> March, 2010 the appellant collected the money for the meat. Even on this day, the appellant was accompanied by this other person whom PW5 did not know.

**Harrison Mwaniki Ngugi** (PW7), the brother of the deceased identified the deceased’s body for purposes of post mortem.

**Sgt. Joseph Mutemi** (PW8) and APC **Yaah Kombe** (PW9) received the report of the death of the deceased on 14<sup>th</sup> March, 2010, (must be 11.3.2010). PW8 told the trial court that the **“suspects were Joseph Ngugi Mwangi and another name was Githinji.”** In cross examination he maintained **“Githinji was mentioned. Nobody else was suspected. The person we arrested then said he saw the 3 of them drinking in IDP Camp.”** On 17<sup>th</sup> March 2010, they arrested the appellant at the deceased’s funeral, as he was a suspect. The appellant was handed over to **P.C. Laban Solo** (PW10).

**P.C. Frankline Gitonga** (PW11) an investigating officer visited the scene of crime. His testimony was that the appellant was arrested as **Julius Mwaniki** (PW3) saw the appellant and the deceased arguing over something while on the road and it is where the deceased’s body was found.

PW 12 was **Dr. Titus Ngulungu** who produced a post mortem report for post mortem held on 10<sup>th</sup> March 2010 by his colleague, **Dr. Ombogo**. The cause of death was **“severe haemorrhage due to several stab wounds into the chest and abdominal cavity”**. The last witness, **P.C Githae Mutunga**, (PW13), from the scenes of crime produced as exhibits pictures of the deceased’s body at the scene.

In his sworn statement of defence, the appellant told the trial court that prior to 10<sup>th</sup> November 2010, he had helped the deceased sell meat for his mother, PW1. On 10<sup>th</sup> November 2010 he went to the deceased’s home and he and the deceased were asked by PW1 to go buy potatoes. They left for this assignment and also to collect money for the unpaid meat. He parted company with the deceased at about 4 pm on the fateful day and went home with **Mbugua** (DW 2) who had joined them at about 4 pm. On the following day (11<sup>th</sup> October 2010) he went to deceased’s home. It was whilst there that he got information that the deceased had been found murdered near the IDP Camp. PW1 sent him to go and get some more information about the deceased. He did. He returned to the deceased’s home and spent the day there. On the following day he was asked to fix the tent in preparation for the burial. On 17<sup>th</sup> March 2010, he was at the mortuary and removed the deceased’s body and took it home for burial. It was his testimony that he spent his days at the deceased’s home mourning his friend until the date of burial. It was his further testimony that the deceased’s burial programme indicated that the deceased was killed by thugs.

**David Mbugua Wainana** (DW2), told the trial court that he was with the appellant on 10<sup>th</sup> March, 2010, having met him with the deceased at about 4 pm. The appellant and the deceased had previously (in 2009) worked for him. He then asked the appellant to accompany him as he had some masonry work to be done. The deceased left to go to a place called Barnabas. The time then was about 4.10 pm. After showing

the appellant the work, he alleged that he went to the appellant's house where he remained until 8 pm.

From the above, it is clear that there was no eye witness and the conviction of the appellant was based on circumstantial evidence. The key witness was PW3 who said he met two people on a road quarreling. PW3 did not know the appellant before and neither did he pick him out at an identification parade as no parade was carried out. Suffice to state that this was a case of dock identification. It is also on record that there may have been other suspects other than the appellant as PW8 told the trial court that there was another suspect, one "Githinji".

The evidence of PW1 was that on 10<sup>th</sup> March 2010, her son, the deceased left with the appellant to go and sell meat. They had done this on the two previous days. On this 3<sup>rd</sup> day, the appellant did not return home. The news of her son's death was broken to her by one **Rose** in the presence of the appellant. According to her on hearing of the news the appellant fled from her home. It was however, the appellant's version that on hearing the news of the death from Rose, PW1 asked him to go and find out more information. He said he did that and returned to PW1's home where he remained and mourned his friend for 7 days. He undertook errands in preparation for the burial including pitching a tent. He was arrested from the burial place having been pointed out by the deceased's brother, (PW7).

Further, PW2 told the court that the deceased together with the appellant left her home where they had been drinking **busaa** until about 8 pm. The duo were allegedly found by PW3 on a path at about 7 pm. However, be that as it may, it is not known what time the deceased met his death. It would appear that his body was discovered on 11<sup>th</sup> March 2010. There was no evidence of the person who first saw the deceased's body and there was no evidence tendered to indicate the time and place where the deceased's body was retrieved from. If indeed DW2 who says that he met the appellant and the deceased at about 4 pm and that he (DW2), and the appellant left together the deceased having opted to go to a place called Barnabas, the lingering question is, who killed the deceased? What time did the death occur? When PW3 was recalled on 28<sup>th</sup> June 2011, it was his evidence then that "**There were 2 bicycles at the scene each had a bicycle. I do not know where the deceased bicycle was found.**" So if the deceased's bicycle was recovered, who recovered the bicycle and where was it recovered from?

PW8 Sgt. **Joseph Mutemi** stated that "**On 14<sup>th</sup> March, 2010 I was at the camp with Ap. Cpl. when a lady came to inform us that somebody had been murdered. The body was in the field**". Who is this lady who reported to PW8? How far was the field from where PW3 had seen two people quarreling? And where did the deceased meet his death? Was it at the place where PW3 said he saw the two people quarreling or was he killed elsewhere as the body was retrieved from the field as stated by PW8? It is these lingering questions that weaken the inference that the appellant caused for the death of the deceased.

In **NZIVO VS REPUBLIC [2005] 1 KLR 699** this Court stated:

**"In a case dependent on circumstantial evidence in order to justify the inference of guilt 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 (Sarkar on Evidence - 10<sup>th</sup> Edition P.31). 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 – Teper v. the Queen [1952] AC 480 at page 489." – see James Mwangi v. R. [1983] KLR 327 at pg 33."**

In our view, the circumstances surrounding the deceased's death do not provide a full proof "...**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**" as was stated in **ABANGA ALIAS ONYANYO V. R CRIMINAL APPEAL No. 32 of 199 (ur)**. It is not disputed that the appellant was heavily involved in the burial arrangements of the deceased. At the time he was arrested, he was standing by the grave site. In our view, it is highly unlikely for a person to murder another and then spend time with the deceased's family members mourning the deceased and taking part in the burial preparations. It is for this reason that we find that the appellant's behavior was inconsistent with his guilt.

As regards identification PW3 stated that he passed two people on the road on 10<sup>th</sup> March 2010. The time was about 7.00 pm. He said each of them was pushing a bicycle. He said "**I did not know the people**" It was his further testimony that "**After passing them for 10 meters I met a person who asked if the people wanted to fight and he said are they not drunk...**". Who were these two people who were quarreling? Was it the deceased and the appellant?

As earlier observed, no identification parade was carried out. When PW3 passed the two people, the time was about 7 pm. It is also on record that PW2 said the duo left her house at about 8 pm. Whether it was 7 pm or 8 pm darkness may have been setting in and hence the circumstances of identification may have been difficult.

In the case of **DAVID MWITA WANJA & OTHERS VS REPUBLIC [2007] eKLR** this Court, as regards identification stated:

**"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.**

**A conviction resting entirely on identity invariably causes a degree of uneasiness... .**

**That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification".**

The learned trial Judge appreciated the absence of an eye witness. In her judgment, she stated:-

***“Nobody witnessed the murder of the deceased. The best evidence we have as to what may (emphasis added) happened on that fateful day is that of PW3...PW3 was not present when the accused was arrested but in court he identified the accused as the person he saw quarreling with the deceased. The investigating officer did not explain why no identification parade was conducted considering the fact that the accused was not arrested immediately after the offence. What we have is dock identification....the circumstances under which PW3 allegedly saw the two men who were quarreling were not favourable to identification because it was about 7.00 pm and must have been dark. There was need for other independent evidence whether direct or circumstantial to corroborate PW3’s evidence”.***

Having appreciated the circumstances of the alleged identification and noting the need for corroboration, the learned trial Judge found corroboration in the evidence of PW2. She stated:

***“PW2 told the court that on 10<sup>th</sup> March, 2010 the accused and the deceased were at her house drinking “busaa” from 4 pm till about 6 pm when they left together with their bicycles. PW3 also told the court that the people he saw along the road looked drunk and had bicycles. PW2 knew both accused whom she knew as “Jose” and deceased as they were her customers. I am satisfied that PW2’s evidence does corroborate PW3’s evidence in material particulars. ...I am satisfied that the prosecution demonstrated that the accused was with the deceased till late in the evening of 10<sup>th</sup> March, 2010”***

With all due respect, the evidence of PW2 was that the deceased was with the appellant at her drinking den. The two left together. It is possible that these are the two people that PW3 saw along the road on the fateful day at about 7 pm. It is also possible that it was the deceased and another person or two different people altogether. But even assuming that it was the deceased and the appellant we do not know the time the deceased met his death, as PW3 did not witness the murder of the deceased. It is true as the learned Judge found that the best evidence of what “may” have happened was that of PW3. However, the evidence of PW3 did not establish beyond reasonable doubt that the appellant killed the deceased but merely provided a possibility of what may have happened.

In reference to dock identification, the learned Judge appreciated that it is not always that it is all worthless. She cited this Court's decision of **MUIRURI & 2 OTHERS VS. R. [2002] IKLR 274** – where it was held:

***“It cannot be said that all dock identification is worthless. The court might have a conviction on such evidence if satisfied that on the facts and circumstances of the case, the evidence must be true and prior thereto the court duly warns itself of the probable danger of mistaken identification”.***

In our view, the circumstances obtaining herein, having in mind that darkness was setting in and having in mind that PW3 said he witnessed a quarrel and not knowing where and when the deceased met his death, we cannot say for sure that it is the appellant who murdered the deceased.

On alibi, the appellant called one witness (DW2) who corroborated his alibi defence. DW2 told the trial court that he met the deceased and the appellant on the material day at about 4 pm. He recalled that he thereafter left with the appellant and the deceased left for a place called Barnabas. In **KIARIE V. R CRIMINAL APPEAL No. 93 of 1983 (ur)**, this court held that:-

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable.”***

In our view, the appellant's defence of alibi which was corroborated by DW2 was not unreasonable.

We find that the evidence tendered falls far too short of the required standard of proof beyond reasonable doubt. It is in view of this finding that we have come to the conclusion that the conviction was not safe. Accordingly, we allow the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered at Nakuru this 22nd day of November, 2018.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**