



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M’INOTI, JJ.A)

CRIMINAL APPEAL NO. 24 OF 2016

BETWEEN

JOHN MWAZO MACHALAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (Muya, J.) delivered on 15th February, 2016

in

HC. CR. C. NO. 1 OF 2013)

JUDGMENT OF THE COURT

The deceased, a girl aged 5 years old was playing with other children near the hotel where she lived with her parents and also where the appellant was employed. When She disappeared suddenly and was later that evening found dead in a room in the hotel in which the appellant allegedly lived. There was evidence that she had been raped before being killed. The appellant was therefore the obvious suspect because, according to the prosecution, a part from the fact that the body was found in the room allegedly reserved for him, the following facts also pointed to him. He was the only person in the hotel at the time the deceased disappeared; that in the course of searching for the deceased, neighbours were forced to break into the appellant’s room for it was alleged that he had refused to open the door; that when the door was forced open, the appellant attempted to run away but was restrained; and that when the bag he was carrying was searched, clothes belonging to the deceased were found. For these reasons, the appellant was arrested and subsequently charged with murder contrary to **section 203** as read with **section 204** of the Penal Code.

Before the trial court, (Muya, J.) the appellant denied the charge arguing that the hotel was accessible to many people, including two other workers, fruit vendors who stored their goods there and even the daughter of the owner of the hotel; that, although on the day under review, he was on duty, he left the hotel to purchase food stuff for the hotel; and that when he returned he was accosted by a group of people who beat him up alleging that he had committed murder. He denied the allegation.

The learned Judge considered the entire evidence before him, found, correctly that the case rested on circumstantial evidence, concluded that that evidence irresistibly pointed to the appellant as the perpetrator of the heinous crime, and further that there were no co-existing factors that would weaken the inference of his guilt. Upon convicting the appellant and rejecting his *alibi* defence, the learned Judge sentenced him to death.

That determination aggrieved the appellant who now brings this appeal on 14 grounds. Those grounds were condensed into 4 and argued as follows by Mr. Muganda, learned counsel for the appellant.

- i. That the offence of murder was not proved
- ii. That the court erroneously relied on circumstantial evidence which was not corroborated
- iii. That the appellant's *alibi* defence was ignored
- iv. That the learned Judge relied on contradictory evidence.

Counsel, in those circumstances urged us to overturn the decision of the trial court because in his view, the learned trial Judge ought to have found on the facts that there was no evidence, direct or circumstantial linking the appellant with the murder of the deceased; that the appellant was not at the scene of crime when the body was found; that there were three other workers in the hotel; that the prosecution had the opportunity to call evidence in rebuttal of the *alibi* defence but failed to seize it; and that it was not established at what time the deceased was murdered.

Ms. Ogwen, learned Principal Prosecution Counsel urged us to dismiss the appeal for, in her opinion there was overwhelming evidence that squarely placed the appellant at the scene of crime; that his conduct of refusing to open the door and attempting to flee when the door was finally broken were a demonstration of a guilty person; that he was the only person who had the opportunity to commit the crime; and that the DNA tests linked him to the crime.

Being the first appeal to this Court, the appellant is entitled to expect of us to subject to fresh scrutiny and re-evaluation the evidence presented during the trial in order for us to draw our own independent conclusion of facts in deciding whether or not the judgment of the trial court should be upheld. See **Okeno V R** (1972)EA 32.

With respect, we agree with the learned trial Judge that the case against the appellant was purely circumstantial in the sense that none of the witnesses who testified before him could tell how the deceased met her death, and more specifically none saw the appellant commit the offence. There was medical evidence, however that the deceased was defiled and that the cause of her death was asphyxiation.

We reiterate the dictum in **Musili Tulo V R** Cr. Appeal No.30 Of 2013 that;

“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics”.

It is also settled law that when a case rests entirely on circumstantial evidence, three conditions must be satisfied, one, the circumstances from which an inference of guilt is sought to be drawn, must be cogently established, two, those circumstances should be of definite tendency pointing to the guilt of the suspect and three, the circumstances taken together should form a complete chain that can only lead to the conclusion that the crime was committed by the suspect and no one else. See **Abanga alias Onyango V R** CR. Appeal No.32 of 1990. But the celebrated case that laid down these principles over 40 years before the decision in **Abanga** (supra) was **R V Kipkering arap Koske** (1949)16 EACA 135. In 1958 in the case of **Simoni Musoke V R** (1958) EA 715 an additional consideration was introduced to the effect that before relying on circumstantial evidence to convict, the court must ensure that there are no co-existing factors that may destroy or weaken the inference of the suspect's guilt. We, however, contrary to the argument by learned counsel for the appellant, are not aware of any requirement of law that

circumstantial evidence needs to be corroborated. See **Mohamed Shiraz Hussein V R**, Cr. Appeal No.70 of 1990(UR).

In the matter before us, the prosecution relied on a set of circumstances to prove that only the appellant had the opportunity to commit the offence. The deceased was last seen at about 5 pm playing near the hotel where the appellant worked as a cashier/chef; that at about 8pm the deceased's lifeless and naked body with blood in her private parts was found in a room that was in the use of the appellant; that the appellant who was in the room at the time refused to open the door as the search for the deceased was on-going and the door had to be broken; that the appellant tried to escape from the scene; that in the bag he was carrying, were bloodstained clothes of the deceased; and that the DNA tests further linked the appellant with the deceased as the clothes found in the bag he was carrying were bloodstained with human blood that matched the deceased's blood group; that although there were other workers in the hotel, on the day in question, however the appellant was all alone on duty; and that the daughter of the proprietor of the hotel similarly did not go to the hotel on that day. There was no claim that there were other people in the appellant's room where the body of the deceased was found. It was therefore proved beyond any doubt that the appellant caused the death of the deceased.

According to the medical evidence there were signs that the deceased was sexually assaulted before her death. She suffered bruises in her private parts and there was penetration that damaged her uterus, fallopian tube and ovaries. It is apparent that in the course of defilement and in a bid to stop the deceased from making noise, the appellant suffocated her. That act alone, bearing in mind that the deceased was only 5 years old, was sufficient to draw an inference that the appellant intended to either cause the death of the deceased or occasion grievous harm to her.

Bearing these circumstances in mind, we do not think we can fault the trial court's conclusion that the circumstantial evidence irresistibly pointed to the involvement of the appellant in the death of the deceased and that he intended to cause her death. The factors that the appellant relied on to advance the argument that there were co-existing circumstances that made the inference of his guilt unattainable, were considered and properly rejected by the learned Judge as they did not exist in the first place.

On the whole, we are satisfied that there was overwhelming evidence linking the appellant with the grisly defilement and murder of the deceased. Accordingly, this appeal fails and is dismissed.

Dated and delivered at Mombasa this 17th day of February, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR