



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 92 OF 2016

BETWEEN

**IBRAHIM ALI.....APPELLANT**

AND

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 21<sup>st</sup> June 2013*

*in*

*H.C.CR.C. No. 22 of 2010)*

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**JUDGMENT OF THE COURT**

Upon being convicted and sentenced to life imprisonment by the High Court at Malindi (**Meoli, J.**) for the offence of murder, the appellant brings this first appeal challenging both his conviction and sentence. He contends, in the main, that the learned judge erred by relying on circumstantial evidence that did not exclusively point to him as the perpetrator of the offence, by relying on unsafe evidence of identification, and by convicting him on the basis of a postmortem report for one **Justin Kambi Balosi** instead of that of the person he was alleged to have murdered, **Isaiah Mwangangi Mulelya (the deceased)**.

It is common ground that the evidence led by the prosecution against the appellant was purely circumstantial. None of the prosecution witnesses saw the appellant inflict the injuries from which the deceased died. The gist of the prosecution evidence was as follows. The appellant and the deceased were brothers-in-law and their relationship was fairly cordial. On 28<sup>th</sup> June 2007, the two, in the company of **Katana Charo Karisa (PW6)**, were drinking alcohol at a *mangwe* (a shed where local brew is sold), in Kizuliani village, Tana River County from about 5 pm. The appellant was wearing a green NARC Kenya T-shirt. The appellant and the deceased left the *mangwe* for their respective homes at about 8.30 pm. According to PW6, they were very drunk. There was however no hostility or quarrel between them.

The trial court relied heavily on the evidence of **Habona Emmanuel (PW5)**, a neighbour of the appellant and the deceased. Her evidence was that at about 8.00 pm the same night, she was roused from sleep by voices of people quarreling. Her house is about 10 meters from the road where the noises emanated. She peeped and with the aid of moonlight saw the appellant and the deceased. She also claimed to have been

able to identify them by their voices. According to the witness, she heard uttered in Kiswahili the words: “*Wewe ni Mjinga*” and “*Kwani ni kuuwana?*” She did not say who uttered the first words, but she attributed the last words to the deceased. After that she did not see or hear anything else until the next morning when the deceased was discovered dead by the roadside.

**Samuel Mbugua (PW1), Alex Mshangi (PW2), Buya Huko (PW3), and Luwalu Ngonyo Hinzano (PW4)**, who were neighbours of the appellant and the deceased, all testified to having found the body of the deceased on 29<sup>th</sup> June 2007 along the ***Kisuliani-Mkono Moja*** road as early as 6.00 am, where it lay until the next day, apparently due to lack of transport. The deceased had stab wounds on the upper chest below the neck. According to PW5 and ***Inspector Mowio Shabala (PW7)***, next to the body of the deceased were a jerry can, a knife and a blood stained green NARC-Kenya T-shirt. It was PW6’s evidence that the T-Shirt was similar to the one that the appellant was wearing the previous day. The T-shirt and the knife were produced as prosecution exhibits.

**Dr. Wobenja** is said to have performed the postmortem examination of the deceased on 12<sup>th</sup> February 2007 at 12.20 pm, which would be a whole four months *before* the death of the deceased. The trial court did not address or resolve the discrepancy, even as a matter of typographical error. During the trial, Dr. Wobenja was on study leave and his colleague, ***Dr. Allen Makokha (PW8)***, who was familiar with his handwriting, produced the postmortem report on his behalf. He testified that the deceased, a 50-year-old African man, had suffered a penetrating chest injury measuring 4 cm in diameter into the pleural cavity. Internally the respiratory system bore a penetrative wound and putrefaction of the lungs. According to the witness, the death of the deceased was caused by a penetrative chest and neck injury. The postmortem report was produced as prosecution Exhibit No 1.

What was in fact produced as an exhibit and relied upon by the trial judge to convict the appellant was a postmortem report for one Justine Kambi Balosi. That report was signed by ***Dr. Tayari*** and showed that the body he examined was that of an African male aged 32 years. The body was found at ***Kavin yalalo*** on 4<sup>th</sup> April 2010 at 4.00 pm and the postmortem was conducted on 5<sup>th</sup> April 2010 at 2.pm, which would be almost a whole 3 years from the date of the death of the deceased. Once again the trial judge did not address the sediscrepancies. The injuries detailed in the postmortem report were quite different from those that the deceased was said to have suffered, and included deep cut from posterior to anterior of the neck, complete severing of the cervical vertebra, both carotic vessels, and the esophagus and trachea, leaving intact only a part of the anterior neck skin. The cause of the death was stated to be massive hemorrhage and transection of the neck. The learned judge concluded that the injuries in the postmortem for Justine Kambi Balosi were the injuries to which the deceased succumbed.

When the appellant was put on his defence, he gave an unsworn statement but did not call any witness. He confirmed having been drinking with the deceased at the *mangwe* on the material day. He did not know what happened until about 6.00 am the next day when he found himself at a neighbour’s *shamba*. He traced his way home but shortly thereafter neighbours came to his house and accused him of having murdered the deceased. For his own safety he returned to the *shamba* where he had found himself until 2 pm when he was arrested by a mob that threatened to kill him. He denied having murdered the deceased.

It is apt to point out that ***Omondi, J.*** heard six of the prosecution witnesses before being transferred to a different Station. Meoli, J. took over the conduct of the trial and after complying with ***section 200*** of the ***Criminal Procedure Code***, and with the concurrence of the prosecution and defence, proceeded from where Omondi, J. had stopped. She heard three more prosecution witnesses, the appellant’s defence and wrote the judgment. As intimated earlier, the learned judge held that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted and sentenced him as aforesaid.

In his succinct appeal, prosecuted by his learned counsel ***Mr. Kimani***, the appellant submitted that whilst he was charged with the murder of the deceased, the postmortem report that was produced as an exhibit related to an entirely different person, Justin Kambi Balosi. In these circumstances, the appellant submitted, the prosecution had failed to prove beyond reasonable doubt the death of the deceased and its cause. He faulted the trial court for holding that the deceased died from injuries, which in fact were suffered by a totally different person and for finding that the appellant had malice aforethought based on

the severity of those injuries. Relying on the judgment of this Court in **Chengo Nickson Kalama v Republic, Cr. App No. 33 of 2013**, the appellant submitted that it was mandatory for the prosecution to prove the death of the deceased beyond reasonable doubt.

Next the appellant submitted that it was only PW5 who identified him as the assailant. He urged that the identification was unsafe because it was under difficult circumstances at night with the aid of moonlight from a distance of about 10 meters. Regarding the voice identification, the appellant urged us to find that it was not safe and that it was possible for voices of drunken persons to be distorted. He also contended that PW5 did not attribute to the appellant any of the words that she allegedly heard, raising the question how she could then have identified him by his voice.

Lastly the appellant submitted that the circumstantial evidence adduced by the prosecution did not point to him as the perpetrator of the offence because the green T-Shirt and the knife found next to the body of the deceased were never proved to belong to him.

**Ms. Miriam David**, learned counsel for the respondent, opposed the appeal, submitting that the conviction of the appellant was proper and should be upheld. She submitted that PW5, a neighbour of the appellant and the deceased, knew them very well and was able to safely identify them from a distance of 10 meters with the aid of moonlight and their voices, which she was familiar with. From the words exchanged, counsel argued, it was evident that there was a quarrel between the appellant and the deceased and that the learned judge had not erred in concluding that it was the appellant who murdered the deceased after the quarrel.

We have anxiously considered the record, the judgment of the High Court, the appellant's grounds of appeal and the submissions by learned counsel. In a first appeal like this, we are obliged to submit the evidence adduced before the trial court to a fresh and exhaustive evaluation, weigh any conflicting evidence and draw our own conclusion, but always remembering that we do not have the advantage enjoyed by the trial court of hearing and seeing the witnesses as they testified, which is critical in determining the credibility of witnesses and what evidence to believe or disbelieve. For that very reason, even though the first appellate court is entitled to arrive at its own independent conclusions, it will not readily interfere with the findings of the trial court unless it is satisfied that no reasonable tribunal could have made such findings on the basis of the evidence on record. (See **Okeno v. Republic (1972) EA 32**).

As we have already pointed out, the prosecution case against the appellant was purely circumstantial. That evidence shows the appellant and the deceased together leaving the *mangweat* Kizuliani where they had been drinking since around 5 pm. At the *mangwe* the appellant was wearing a green NARC Kenya T-Shirt. Subsequently PW5 heard two people quarreling from the road, who she testified were the appellant and the deceased. She maintained that she could identify them with the aid of moonlight from a distance of about 10 meters as well as their voices, which she was familiar with. She gave the words, which were uttered, in Kiswahili. The next morning the deceased was found dead by the roadside and next to him was a green NARC Kenya T-Shirt similar to that which the appellant was wearing the previous day, and a knife.

It cannot be gainsaid that a conviction can be properly founded on circumstantial evidence, namely evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. (See **Makau & Another v. Republic [2010] 2 EA 283**). Indeed, in appropriate cases, it is said that circumstantial evidence can prove a case with the accuracy of mathematics. (See **Musili Tulo v. Republic, Cr. App. No 30 of 2014**). However, to form the basis of a conviction, the circumstantial evidence must satisfy several conditions. It must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken or destroy the inference of guilt. (See **Sawe v. Republic, [2003] KLR 364, Dhalay Singh v. Republic, Cr. App. No. 10 of 1997**) and **Simoni Musoke v Regina [1958] EA 715**).

Having carefully evaluated the evidence, we agree with the appellant that the circumstantial evidence that was adduced against him was of the weakest kind. First, it was readily conceded by prosecution witnesses

that many people in the locality were wearing green NARC Kenya T-shirts. This is not surprising granted that it was in July 2007 and the general elections were due in a few months time. Secondly, there was no evidence to link the appellant to the T-shirt and the knife that were found next to the deceased. The evidence on record does not, in our view, exclusively point to the appellant as the only person who could have murdered the deceased. In addition, for the very same reasons, there clearly are other existing circumstances, which weaken or destroy the inference of guilt.

PW5 was the prosecution's star witness. She did not see the appellant inflicting the fatal injuries on the deceased. All she heard is what she considered to be a quarrel. Although she claims to have identified the appellant and the deceased from their voices, she only gave the words that she attributed to the deceased and did not give any that were spoken by the appellant. Even the words that the witness attributed to the deceased, namely "*Kwani ni kuuwana?*" cannot lead to the conclusion that it was the appellant, and the appellant only, who murdered the deceased. We would add that if indeed PW5 heard a quarrel between the appellant and the deceased, she would also have been expected to hear at least screams from the deceased after he was stabbed. However, other than the quarrel, PW5 never heard any other noise.

Evidence of voice identification, just like any other evidence of identification must be admitted with great circumspection. In *Dishon Litwaka Limbambula v. Republic* [2003] KLR, 683 this Court stated thus regarding voice identification:

***Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.*** (Emphasis added).

To the extent that PW5 could not give the words that were uttered by the appellant to enable her conclude that the voice that she had heard was his, we find that the voice identification in this case was not safe. We also find that the evidence of visual identification of the appellant by PW5 is unsafe granted that she had just awoken from sleep; it was at night; the identification was with the aid of nothing else but moonlight; and the distance from her house to the road where the appellant and the deceased were allegedly quarreling was by no means short.

But what has caused us more concern is the fact that the appellant's conviction was based on a postmortem report of a person other than the deceased. We called for the original record and confirmed that the postmortem report that was produced and marked as an exhibit indeed belonged to Justin Kambi Balosi rather than the deceased. The injuries that the learned judge attributed to the deceased and the cause of his death were the injuries and the cause of death of Justin Kambi Balosi. This is how the learned judge expressed herself:

***"The evidence in this case in my considered opinion points consistently at the accused as the sole person who had opportunity at the given time to stab the deceased in the midst of their night quarrel. The injuries were severe: stabs to the ribs and severed neck...The deceased not only sustained stab wounds in the chest, his neck was literally truncated."***

In our view, even if we take it that there was no serious dispute that the deceased was indeed dead, the prosecution did not prove beyond reasonable doubt what caused his death. In *Ndungu v. Republic* [1985] KLR 487, this Court emphasized the importance of proof of the cause of death in the following terms:

***"Of course there are cases, for example where the deceased was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of death in the circumstances relied on by the prosecution."***

There was, in the circumstances, no basis for convicting the appellant for the offence of murder on the evidence adduced before the trial court. Accordingly, we find considerable merit in this appeal, which we hereby allow. Having come to that conclusion, we do not deem it necessary to say anything on the illegal sentence of life imprisonment that was imposed on the appellant. We therefore quash the appellant's conviction, set aside the sentence and direct that he shall be set at liberty forthwith, unless he is otherwise lawfully held. It is so ordered.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of May, 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**