



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: WAKI, NAMBUYE & KIAGE , JJA)
CRIMINAL APPEAL NO.42 OF 2016

BETWEEN

PETER MUGAMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeals from the Judgment of the High Court at Meru (Lesit, J) Dated 3rd July, 2014

in

H.CC.R.C NO. 17 of 2011)

JUDGMENT OF THE COURT

The appellant, **Peter Mugambi**, was arraigned before the High Court at Meru for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, in that on the 22nd day of March, 2011 at Kirindara sub-location, Ntunene Location, Igembe District within Eastern province (as it was then known) he murdered **Ibrahim Mutembe Kubai** (the deceased). The appellant denied the charge, prompting a trial in which the prosecution tendered six (6) witnesses in support of the case, while the appellant who gave sworn testimony was the sole witness in defence.

The brief background to the appeal is that PW3; **Joseph Gitonga Kubai (Joseph)** had employed PW1 **Andrew Kirimi (Andrew)** to guard his *miraa* farm at Atuamboi. The appellant and the deceased guarded the farm at Atheru. On the 18th day of March, 2011, the deceased handed over gate keys to the Atheru farm to **Andrew**, citing threats to his life by the appellant. On the same date, 18th day of March, 2011, at around 7.30pm, PW2, **Rose Ino Kobia (Rose)**, who was about 3 meters from where the appellant was standing with two others, heard the appellant threaten to kill the deceased if he met him. On the 19th March, 2011 at a round 4.00pm, the appellant confessed to PW4, **Ntuanina Karimi (Ntuanina)** in her house that he had cut someone the previous night (the 18th) but did not know whether the victim had died or not. On the 19th March, 2011; the 20th March, 2011 and the 21st day of March, 2011, the appellant variously represented to **Joseph** that the *miraa* on the Atheru farm was ready for plucking when he knew that the *miraa* was not yet ready for plucking; and that he was guarding

only half the *shamba* at Atheru without giving reason. He also variously represented to **Andrew** and **Joseph** that the deceased had mentioned to him (appellant) about threats to his life (deceased's life) by **Joseph** and **Kahiga**. Lastly that he (appellant) had met the deceased at Kamiriru where he (appellant) had gone to buy goats on the 21st of March, 2011.

On the 22nd day of March, 2011, the decomposed body of the deceased was found on the Atheru farm only twenty (20) meters from the shelter or house in which the deceased and appellant resided as employees in the farm. The matter was reported to the area police station and booked in the OB by **P. C. Sebastian Saji (Sebastian)**, who later visited the scene in the company of the OCS, caused the body to be removed to the mortuary, where a post mortem was performed by **Dr. Musoba**, and a report tendered in evidence through **Dr. Koome Guantai**. The findings were that the body was rotten with no flesh on the face; that there were visible deep cuts on the neck and multiple cuts on the left arm, left hypocondrium, upto the left ilium region, with protruding intestines. Internally there was injury to the jugular and carotoid vessels, leading to severe blood loss. The cause of death was determined as severe injury to the neck (jugular and carotoid vessels)

When put to his defence, the appellant gave sworn testimony raising an *alibi* that he was never on duty at Atheru farm from the 18th March 2011 until the 22nd day of March, when **Joseph** sent for him from his house.

At the conclusion of the trial, and in the impugned judgment dated the 3rd day of July, 2014 the learned trial Judge found the prosecution case proved beyond reasonable doubt, dismissed the appellant's *alibi* defence, found him guilty as charged, convicted him and sentenced him death.

The appellant is now before us on a first appeal. He had initially raised nine grounds of appeal. Learned counsel **Mr. Mutegi Mugambi** abandoned the rest leaving only ground one (1) for our interrogation namely that:

“the learned trial Judge erred in both law and facts in failing to make a finding that the circumstantial evidence tendered did not point irresistibly towards the guilt of the appellant”.

Counsel submitted that the prosecution case rested on circumstantial evidence; that the prosecution called a total of six (6) witnesses but none of them saw the appellant injure the deceased; that the deceased being an employee of **Joseph**, he had access to the farm where his body was found; that the appellant had no exclusive access to the said farm; that **Joseph** never investigated the threats to the deceased's life after the appellant had brought these to his notice. Further, counsel contended, the police never investigated the murder and just arrested the appellant because he worked with the deceased; that the evidence on the record did not point to the appellant as the culprit ; that the possibility of the deceased having been murdered elsewhere and then his body dumped on the Atheru farm was never investigated; and lastly, that the evidence of PW4 ought to have been discounted as she never reported to any authority what the appellant had allegedly confessed to her.

To buttress his submission, **Mr. Mugambi** cited the case of **Joan Chebichi Sawe versus Republic [2003] eKLR** for the principles that guide the Court on circumstantial evidence. Three tests were set in the case of **Erick Odhiambo Okumu versus Republic [2015] eKLR**, as follows:-

- (i) *The circumstances from which an inference of guilt is sought to be drawn, must be congenitly and firmly established;*
- (ii) *Those circumstances should be of a definite tendency un erringly pointing towards the 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 comitted by the accused and none else.”*

See also **Abanga alias Onyango versus Republic CR. APPL. NO. 32 OF 1990.**

Lastly, **Mr. Mugambi** relied on the case of **Dhalay Singh versus Republic CR. APP. No. 10 of 1997** for the proposition that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt.

In response to **Mr. Mugambi's**, submission, the learned Senior Prosecution Counsel, **Mr. Moses Kahiga Mungai**, submitted that the evidence tendered on the record was consistent and correctly analyzed; that it was not disputed that the appellant and the deceased were the only watchmen who guarded the Atheru farm where the deceased's body was found decomposed; that the appellant knew what had happened to the deceased and that is why he told **Joseph** that he was only guarding half the *shamba* and even invited **Joseph** to come and pluck the *miraa* knowing that it was not yet ready for plucking; that the failure of **Joseph** to investigate the alleged threats to the deceased by **Josphat** and **Kahiga**, and the failure of the police to investigate the murder was not fatal to the prosecution case as the appellant was simply trying to exonerate himself from the murder of the deceased.

It was **Mr. Mungai's**, further contention that the appellant had an opportunity to commit the murder of the deceased as the two were the only watchmen guarding the Atheru farm at night. He was also on duty throughout and there is no way he could have failed to either spot the deceased's body where it was discovered or detected the foul smell of the decomposing body before it was discovered. **Mr. Mungai** also invited us to take note of the appellant's behavior of pestering **Joseph** to visit the Atheru farm which in his (**Mr. Mugambi's**) view, was a pointer to the appellant's knowledge of the murder of the deceased and, in his view, the sole reason for pestering **Joseph** to visit the farm before the *miraa* was ready for plucking was for **Joseph** to discover the body of the deceased on the said farm and take action.

To buttress his submission, **Mr. Mungai** cited the case of **Dorcas Jebet Ketter & Another versus Republic [2013] eKLR** in which the Court approved the principle in the case of **Kipkering Arap Koske versus Republic [1949] 16 EACA 135** in which the predecessor of the Court set the threshold for the court's acceptance and acting on circumstantial evidence as a basis for founding a conviction against an accused person; and, the case of **Simon Musoke versus Republic [1958] EA 915**, where the Court reiterated the same principle as follows:-

“before drawing the inference of the accused's guilt from circumstantial evidence the court should ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

Further counsel invoked **Section 111(1)** of the Evidence Act to shift the burden of proof to the appellant to disprove matters especially within his knowledge. In his view, the appellant as the only other guard on the Atheru farm besides the deceased, knew who murdered the deceased, and that person was the appellant himself.

In reply to **Mr. Mungai's** submissions, **Mr. Mugambi** reiterated his earlier submission that the appellant could not have been guarding the *shamba* between 18th and 22nd as **Andrew** he had handed over the gate keys to the deceased; that there was doubt as to whether the appellant was the last person to be seen with the deceased alive; that since there was no mention of any struggle at the scene where the deceased's body was found, the possibility of the deceased having been killed elsewhere and then his body ferried and dumped on the Atheru farm was not ruled out by the prosecution evidence. The Appellant was therefore a suspect which suspicion was not sufficient to warrant a conviction.

This being a first appeal, our mandate under rule 29(1) of the Court's Rules is to re-appraise the evidence on the record before us and draw inferences of fact on the guilt or otherwise of the appellant. See the case of **Kariuki Karanja versus Republic [1986] KLR190** wherein it was held *inter alia* that:

“ On a first appeal from a conviction by a Judge or a Magistrate, the appellant is entitled to have the Appellate Courts' own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to re-hear the case and reconsider the materials before

the Judge or Magistrate with such materials as it may have been decided to admit.”

The learned Judge evaluated, analyzed and assessed the record before her and arrived at the conclusion that the prosecution case rested on circumstantial evidence only. She then identified the relevant case law on circumstantial evidence which we shall revert to later in this judgment.

The learned Judge then proceeded to make findings on the evidence tendered by the prosecution, *inter alia*, that; **Andrew, Rose, Joseph and Ntuanina** were all Independent witnesses of what they testified on as already highlighted in the background to the appeal. Drawing inspiration from the case of **Choge versus Republic [1985] KLR 1**, the learned judge made observations that the circumstances under which **Rose** heard the appellant threaten harm to the deceased were conducive to positive visual and voice identification of the appellant as the person who made the utterances. The Court further found that, the appellant's conduct when taken cumulatively with the totality of the evidence on the record and especially **Joseph's** evidence that the appellant had been on duty at the Atheru farm continuously from 18th when the deceased was last seen alive by **Andrew**, and the 22nd when his decomposed body was found, only 20 meters from the shelter where appellant and the deceased resided formed a chain so complete that there was no escape from the only logical conclusion that the appellant committed the murder of the deceased on the 18th. The appellant's conduct of pestering **Joseph** to go to the Atheru farm to pluck *miraa*, knowing that it was not ready for plucking; his assertion that he was only guarding half the Atheru farm, on the one hand and the information that he had met the deceased on the 21st on his way from Kimiru, the Court found, were all meant to make **Joseph** to go to the Atheru farm to discover the body of the deceased. This chain when also taken cumulatively with the totality of the other evidence on the record according to the learned judge, also pointed irresistibly to the fact that it was merely an attempt by the appellant to try and exonerate himself from any blame for the murder of the deceased.

The learned judge went on further to hold that the circumstances displayed above satisfied the application of **section 111(1) and 119** of the Evidence Act both of which make provision for a rebuttable presumption which if demonstrated by the evidence on the record operate to shift the burden on the appellant to explain how the deceased met his death, considering that his body was found only 20 meters from the house where he lived in with the appellant, in a compound to which both appellant and the deceased each had a key to, and which had not been broken into. The learned Judge rejected the appellant's allegation that after he told **Joseph** that the *miraa* on the Atheru farm was ready for plucking he did not go back there. In the learned Judge's view, the appellant as an employee, could not have absented himself from duty without permission. In this regard, the learned judge made findings that the appellant had not discharged the evidential burden under **sections 111 (1) and 119** of the Evidence Act.

On account of the totality, of the above, the learned Judge rendered herself as follows:-

“65. I have carefully considered the evidence adduced by the prosecution and the defence. I find that the circumstantial evidence adduced against the accused was strong, and that it was the circumstances of a definite tendency un erringly pointing towards the guilt of the accused; and that the circumstances taken cumulatively 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.

66. I find the accused's defence did not create any doubt in the prosecution case. I reject the accused (sic) defence.

67. I find the accused guilty of the offence charged of murder contrary to section 203 of the penal code and do convict him under section 322 of the Criminal Procedure Code.”

We have given due consideration to the totality of the above in the light of the rival submissions and principles of case law relied upon. In our view, only one issue falls for our determination namely,

(1) Whether the circumstantial evidence relied upon by the learned Judge to found a conviction against the appellant met the threshold of proof beyond reasonable doubt.

The undisputed circumstantial evidence on the basis of which the learned judge based the appellant's conviction was as already assessed above which we adopt for purposes of the determination of the only issue the appellant has raised before us in the appeal under review and which we have also identified as the only issue that falls for our determination.

In the case of **R. versus Taylor Weaver and Donovan [1928] 21 CR.APP. 20** which has been cited with approval severally the principle laid down is that circumstantial evidence is often the best evidence of surrounding circumstances. The parameters for considering such evidence were set out in the locus classicus case of **Kipkering Arap Koske versus R. [1949] 16 EACA 135**, thus:

- (a) *The incupatory facts must be incompatible with the innocence of the accused.*
- (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

See also **Dorcias Jebet Ketter & Another versus Republic** (supra).

Even where the court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. See **Teper versus R. [1952] AC 480,489** as approved in **Simon Musoke versus Republic [1958] EA 715** that before drawing the inference of the accused's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

In addition to the above caution, the Court is also supposed to apply specific tests set out in the **Abanga case** (supra).

We have on our own applied the same tests and principles of law highlighted above to the record in totality. It is our finding that the learned judge correctly analyzed the circumstantial evidence before her and did not misapprehend any aspect of that evidence. She also correctly applied both the requisite tests and principles of law that guide the Court in accepting and acting on circumstantial evidence as a basis for founding a conviction against an accused person. In our view, the learned judge arrived at the correct conclusion that the circumstantial evidence on the record when taken cumulatively met the threshold of pointing irresistibly to the guilt of the appellant as the person who murdered the deceased and could not be explained on any other hypothesis.

Turning to the acceptance and application of **sections 111 (1) and 119** of the Evidence Act. These provide:-

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the accused person shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”

In **Douglas Thiongo Kibocha versus Republic [2009] eKLR** the Court while construing section 111 (1) of the Evidence Act had this to say:

“When parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact.”

Applying the above principle to the totality of the record before us, we find no fault in the learned Judges’ finding that the circumstantial evidence on the record when taken cumulatively shifted the evidential burden to the appellant to explain how the deceased met his death, in circumstances where it had been demonstrated that the appellant had been on duty throughout for the period the deceased was last seen alive by **Andrew** on the 18th day of March, 2011 and when his body was discovered on the same farm only 20 meters away from the shelter the deceased shared with the appellant while on duty at Atheru farm on the 22nd day of March, 2011. It is also our view, that a body found decomposed on the 22nd could not have been that of a person whom the appellant claimed to have met alive at Kamiriru on the previous day of 21st March, 2011. The appellant definitely lied to both **Andrew** and **Joseph** when he told them that he had met the deceased on the 21st March, 2011 at Kamiriru. As found by the learned Judge, the appellant raised no issue with that evidence that he did not claim to have been framed by the two on the said evidence. We agree with the learned judge that the appellant coined the story. It was simply to try and exonerate himself from the responsibility of the murder of the deceased, as correctly found by the learned Judge. We find the circumstantial evidence pointing irresistibly to the appellant’s guilt and which evidence was incapable of being explained on any other hypothesis was overwhelming. He had to face the consequences of his action.

The upshot of the above assessment and reasoning is that we find no merit in this appeal. The same is dismissed in its entirety

Dated and delivered at Meru this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR