



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**CRIMINAL APPEAL NO. 149 OF 2011**

**(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)**

**BETWEEN**

**JOHN KIMANI NGECHU ..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Nakuru (Koome, J) dated on 1<sup>st</sup> day of August, 2010*

**in**

**H.C.CR.C. No. 28 OF 2007)**

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**JUDGMENT OF THE COURT**

The appellant **JOHN KIMANI NGECHU** was charged, tried, convicted and sentenced to death by the High Court at Nakuru Koome J., (as she then was) over the murder of **PETER GITAU NGECHU** (Gitau) which occurred on unknown date between May and August 2006 at Ndoroto Village in Naivasha District. Gitau was the appellant's younger brother.

Evidence was led by the prosecution that the appellant and Gitau used to live in the same two-roomed house on their family farm. The appellant in fact confirmed that he allowed Gitau to live in his (the appellant's) house. The rest of the family were living elsewhere. Notably, their widowed mother, 63-year old **MARY NJERI** (PW7) moved to Eldoret to live with another son called Chege. According to her, the house in which the appellant lived with the deceased had been allocated to the siblings by their late father before his death in December 2003.

The relationship between the appellant and Gitau was not cordial as there was a simmering disagreement over land. PW7 testified that Gitau had called her on the phone to say that the appellant wanted to sell the family land but Gitau was resisting it and, in fact, turning away potential buyers.

In April 2006, PW7 received a telephone call from her sister who told her that Gitau had been missing for

about 3 months. **ESTHER WANJIKU** (PW2), the said sister, had heard from villagers that they had not seen Gitau for some time. PW2 asked the appellant about the whereabouts of Gitau and got the answer that Gitau had gone to Eldoret hence the call to PW7. Gitau was not at Eldoret, of course, and PW7 set off for Naivasha. On arrival, the appellant told PW7 that Gitau had gone to work at Gilgil. PW7 proceeded to Sagem in Gilgil and was told that no such person had been employed there. She went on a desperate search for Gitau at their relatives' homes in Limuru and Gatundu, yielding nothing.

Returning to Naivasha, PW7 found that the appellant had looked for a buyer and a surveyor and had sold half an acre of the land. He did yet another sale in August; the pieces he was selling not being his but his siblings' including his brother Chege's. When PW7 asked why he was selling land to, among others, one Jane Wanjiru, the appellant threatened to harm PW7. He was armed with a panga. PW7 reported the threat at Naivasha Police Station on 14<sup>th</sup> August, 2006 with the result that **P.C EDWARD KIAMBATI MUYAMBI** (PW9) in the company of his colleagues **MUSYOKI** and **MBOYA** went to the house shared by the appellant and Gitau and arrested the appellant. He was then charged with the offence of creating a disturbance.

While the appellant was in custody awaiting trial for that offence, the search for Gitau continued. Other than the report to the police, an announcement was placed and carried on Inooro radio about his disappearance as confirmed by **ZIPPORAH NYAMBURA CHEGE** (PW1) and **ESTHER WANJIKU** (PW2) who are the sister-in-law and aunt of the appellant, respectively, besides PW7.

The police gave PW7 a letter apparently requesting the aid of all persons in authority in the search for Gitau and she gave it to **JOSEPH HINGA HURE** (PW3) a village elder at Kinangop. He immediately started looking for Gitau, dead or alive. The Chief of Naivasha East Location **MICHAEL WAINAINA KIRATU** (PW8) advised PW7 to get people and carry out a search all over the farm in case Gitau was buried there and also granted permission to break into the house where her two sons were living so that she could fetch some of her household goods that the appellant had kept there.

PW3 is one of those who broke into the house. As he searched in the house, he poked the floor under the bed where there was a crack with a piece of metal he was carrying. The earth beneath gave way to reveal the decomposed corpse of a male buried in a shallow grave. The search party screamed attracting many more of the Ndoroto villagers including **FRANCIS KIMANI WAINAINA** (PW4) and **JOHN NDEGWA GICHUKI** (PW5) who braved the horror and the overpowering stench of the macabre find to remove the body that was without question Gitau's.

The police also came and asked the villagers to guard the body until the next day when they would return as it was late and they needed the presence of Public Health Officials. The police officers, who included Sergeant **HASSAN DAHIR** (PW11), **P.C SAMSOM TOO** (PW10) of the Rift Valley Crime Scene Support Service and Inspector **CALISTUS MARINGU** (PW13) who was the DCIO returned to the scene the next day on 21<sup>st</sup> February 2007.

They were in the company of **LUCY WAWERU**, a Public Health Officer who disinfected the area and provided gloves and other protective gear to those who were excavating the grave. The body was photographed by PW10, taken and placed in a polythene bag then ferried to the mortuary. On that 21<sup>st</sup> February 2007, the appellant was released from custody and was present under escort when Gitau's body was retrieved from the grave in the house. A post-mortem was conducted as was a DNA test which showed quite conclusively that the body was Gitau's. The investigating officer (PW13) decided to arrest and charge the appellant with the murder of his brother Gitau.

When placed on his defence, the appellant elected to give sworn testimony which essentially and materially confirmed the evidence tendered by the prosecution. He was arrested on 9<sup>th</sup> January 2007 on account of creating a disturbance. On 21<sup>st</sup> February 2007 he was removed from the cells and taken to the family farm at Ndoroto. He found his house being demolished and he saw the body of Gitau being retrieved from a hole in the floor. He denied, however, that Gitau had disappeared in May 2006, and went on to say that Gitau had visited him in custody on 14<sup>th</sup> January 2007 and taken to him clothes to wear. He

then digressed and stated that his own father had been murdered by poisoning and blamed his mother (PW7) for the disagreements in the family over land and for claiming that Gitau wanted to rape her. He denied having anything to do with Gitau's death.

We have gone into all the facts in obedience to our duty as a first appellate Court to conduct a thorough and exhaustive re-appraisal and re-evaluation of the evidence and to draw our own independent inferences of fact and draw appropriate conclusions thereon. See **OKENO VS. REPUBLIC [1972] EA 32; PANDYA VS. REPUBLIC [1957] EA**. We undertake the task cognizant that we are wholly dependent on the record and have not had the advantage of the trial court in seeing and hearing the live witnesses as they testify. We therefore make due allowance for that, seldom dislodging and interfering with the findings of fact unless they are based on no evidence; are based on a misapprehension of the evidence or are demonstrably shown to be perverse. See **CHEMANGONG VS. REPUBLIC [1984] KLR 611**.

The appellant in his self-authored Memorandum of Appeal has raised several grievances with the judgment of the learned Judge. At the hearing of the appeal, his learned counsel Mr. Ombati relied on the same, and focused on two main themes on which this appeal hinges, namely:

- ***that the circumstantial evidence tendered was not sufficient to sustain a conviction.***
- ***that the post-mortem report was improperly produced by the investigating officer and not the maker contrary to Section 77 of the Evidence Act***

On circumstantial evidence, it was counsel's contention that as at the time Gitau's body was discovered the appellant had been in custody over a different offence and was not present when Gitau disappeared, which he put at early 2006. He added that it was not possible to determine the date of death, contending that Gitau must have died after the appellant's arrest. Counsel submitted that whereas there was strong suspicion that the appellant was responsible for Gitau's death, suspicion was not enough. He added that one of the bases for suspicion, the alleged sale of family land by the appellant was unsupported as none of the alleged buyers was called to testify. He criticized the learned Judge for failing to give consideration to the appellant's sworn testimony that Gitau was alive as at the time of the appellant's arrest.

On the post-mortem report, Mr. Ombati pressed that it should only have been produced by its maker in obedience to **Section 77** of the **Evidence Act** and not by the investigating officer. We can dispose of this ground right away. As was pointed out by **Miss Rugut**, learned Senior Prosecution Counsel, **Section 77** of the **Evidence Act** is permissive of such production. The provision is in the following terms;

***"(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***

***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."***

It is quite clear that the post-mortem report prepared by a Government pathologist was admissible in evidence in the first instance with its authenticity being ringed in by an evidentiary presumption. The need to call the maker would only have arisen at the trial court's discretion and for good cause upon application. No such application was made by the defense. The complaint about the production of the post-mortem report in which **Dr. J. R. Ndung'u** formed the opinion that the cause of death was "*suspected strangulation but definitive cause unascertained due to decomposition*" was devoid of merit.

Turning now to the gravamen of this appeal, namely whether the circumstantial evidence established the appellant's guilt, it is common ground that there was no direct evidence linking the appellant to Gitau's murder, for murder it was, given the ligature around the neck of the decomposing body and the ingenious, if morbid, attempt to conceal the body by burying it in a dwelling house, under the bed.

The law on circumstantial evidence has long been settled on our jurisdiction. In the oft-cited case of **R VS. KIPKERING ARAP KOSKE & ANOTHER**, [1949] EACA 135 the predecessor of this Court put it thus;

***“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.***

More recently, in **SAWE VS. REPUBLIC** [2003] KLR 364, this Court restated the applicable principles at p 365 as;

***“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.***

***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***

***3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts on the accused.***

***7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

Now the relevant circumstances in this case as we have already recounted them herein include the following;

- ***The appellant and Gitau were living in the same house.***
- ***The appellant was unhappy with Gitau because he was questioning and thwarting the appellant's attempt to dispose of family land.***
- ***Sometime in or about May 2006 Gitau disappeared never to be seen.***
- ***The appellant never informed anybody about the disappearance of Gitau, his brother and house mate.***
- ***Shortly after Gitau's disappearance the appellant disposed of half an acre of land to one Jane Wanjiru.***
- ***When asked about Gitau's whereabouts by PW1, the appellant told an obvious lie that Gitau had gone to Eldoret.***
- ***He later told yet another obvious lie to PW7, his own mother that Gitau had gone to work at Sagem in Gilgil, setting her on a wild and futile search.***
- ***He told an obvious lie that Gitau visited him at the police cells in January 2007 by which time Gitau was long dead given the degree of decomposition when his body was found but a month later.***
- ***Gitau's body was found in a shallow grave in the appellant's house with a ligature round his neck.***

There was no suggestion that any other person may have had access to the appellant's house and had the temerity to dig a grave under the bed and bury Gitau's body. Indeed, had such a thing happened, the appellant would definitely have noticed it. That possibility of it having been done by anybody else is so

remote and so improbable that it cannot amount to a reasonable hypothesis that could weaken or dislodge the irresistible conclusion that the appellant was responsible for Gitau's murder. At any rate, Gitau's disappearance and the subsequent discovery of his body under the appellant's bed is a fact specially, nay peculiarly, within the appellant's knowledge that there is a legal burden on him to explain it recognized by **Section 111** of the **Evidence Act**. The appellant offered no reasonable or plausible explanation.

Considering his conduct and the obvious lies told by the appellant, the conclusion is inescapable that he knew all along that Gitau was never returning. The obvious lies could not avail too long however since, as Geoffrey Chaucer famously and proverbially stated back in the 1300's in the '*The Nun's Priest's Tale*', one of the *The Canterbury Tales*, "murder will out." And Gitau's murder did out, literally reaching out from under the appellant's bed, hidden no more. His conduct was wholly inconsistent with innocence.

We are satisfied that the learned Judge properly directed her mind to the fact and the law on circumstantial evidence, which, on our own analysis, leads irresistibly to the guilt of the appellant.

It is worth restating what was said nearly a century ago in **R. VS. TAYLOR WEAVER AND DONOVAN** [1928] 21 Cr. App. R. 20.

*"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial"*

See also **JOHN NDUNDA MWANIKI VS. REPUBLIC** [2014] eKLR.

The upshot of our consideration of this appeal is that it is devoid of merit the evidence against the appellant having been iron-clad and his guilt established thereby beyond reasonable doubt. The appeal is accordingly dismissed.

*Dated and delivered at Nakuru this 27<sup>th</sup> day of April, 2016.*

**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**