



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 34 OF 2013

BETWEEN

CLINTON KIIO NZAMBU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Mombasa*

*(Odero, J.) dated 31<sup>st</sup> March 2014*

*in*

*H.C.CR.C. No. 21 of 2009)*

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**JUDGMENT OF THE COURT**

The appellant, **Clinton Kiiro Nzambu**, has preferred this first appeal against the judgment of the High Court at Mombasa (**Odero, J.**) dated 24<sup>th</sup> June 2013 by which the learned judge convicted him of the offence of murder and sentenced him to 50 years imprisonment. The information before the High Court charged the appellant with murder contrary to **section 203** as read with **section 204** of the Penal Code, the particulars of the offence being that on 21<sup>st</sup> May 2009 at Mikindani Staff Estate, Mombasa, he murdered **Ruth Muthini Waita (the deceased)**.

The prosecution case against the appellant, it is common ground, was purely circumstantial, there having been no eyewitness to the murder of the deceased by the appellant. That circumstantial case was built around the evidence of 13 prosecution witnesses, and in outline is as follows. Before her death, the deceased lived with **Bernice Mwikali (PW1)** at House No. 23, Mikindani Staff Estate in Mombasa. Although most of the prosecution witnesses described the deceased as the appellant's girlfriend, he claimed that she was his wife. For his part, the appellant was living with a cousin of his, **Stephen Mulwa Nzungulu (PW4)** at Kongowea in Mombasa, and was a frequent visitor to PW1's Mikindani house. The couple was not in the best of terms and was frequently quarreling, with PW1 having to intervene on several occasions.

On 21<sup>st</sup> May 2009, the deceased left the house at about 11 a.m., telling PW1 that she was going to meet

her cousin in town. At 2.00 p.m. PW1 in turn left the house for work, closed the door and left the keys with **Festus Mutuku Musyoki (PW2)**, a kiosk attendant based at the entrance of the Estate. However, according to PW2, it was the deceased who left the key with him at about 11.00 a.m. Be that as it may, at about 3.30 p.m. the appellant, who was known to PW2 and was wearing a “yellowish cap”, went to the Kiosk and collected the keys to PW1’s house as he had regularly done.

Shortly thereafter, the deceased arrived at the Kiosk and asked for the keys. PW2 informed her that the appellant had already collected them and she proceeded to the house. That was the last time that PW2 saw the deceased alive.

**Caroline Otieno (PW8)** was the tenant in House No. 24, next to that of PW1. Her evidence was that on the material day at about 7.00 p.m. she returned to her house and while watching television, she heard two screams and went out to check what it was. Finding nothing unusual, she went back to her house. Approximately two minutes later, she heard the door to house No. 23 being opened. On looking out she saw the appellant, who was a frequent visitor to the house and against whom she had previously had occasion to complain to the caretaker regarding his taste for loud music, leaving the house. He was dressed in a red T-shirt and blue jeans and he was not wearing any shoes.

At approximately 8.00 p.m., **Sammy Kioko Nzamali (PW5)**, accompanied by **Geoffrey Munyoki (PW3)** went to PW1’s house, intending to collect his mobile phone from the deceased. The lights were on and the door was closed. After knocking and getting no reply, PW5 opened the door, which was not locked and encountered a grisly sight. On the floor lay the dead and bloody body of the deceased with a lasso tied round the neck and next to it a bloody knife. PW3 saw also a pair of “bluish men shoes” near the body. **Corporal J. Oluoch (PW11)**, and **Nzanu Nzimbi, (PW6)**, the caretaker of the estate, both of whom visited the scene of crime before the body of the deceased was removed, mentioned in their evidence having seen a pair of men’s shoes and a yellowish cap near the body, which they identified in court. PW6 also mentioned seeing the appellant’s bicycle at the corridor. Thereupon PW5 telephoned PW1 and asked her to come to her house, after which the police were called. After the scene of crime personnel took photographs of the scene, the body of the deceased was removed to the mortuary for postmortem.

**Dr. K. N. Mandalia (PW7)**, a pathologist of over 25 years standing carried out the autopsy on the deceased four days after her death. He noted a deep cut, 18 cm long, to the neck and extending to the spine; a 8 cm long cut to the mandible; completely severed trachea, esophagus, vocal cords and all neck vessels; and fracture of the cervical spine. PW7 formed the opinion that the cause of death of the deceased was hemorrhagic shock due to cut wounds on the neck, inflicted by a sharp object.

The appellant was arrested three days later, on 25<sup>th</sup> May 2009 at Kibwezi. According to **PC James Nkarichia (PW12)**, on that day at about 2.00 p.m., the appellant appeared at Kibwezi Police Station and reported that he had assaulted his girl friend, whose name he gave as that of the deceased, at a house in Mikindani, Mombasa. He was arrested and booked for the offence of assault and subsequently transferred to Bamburi Police Station. Ultimately the appellant was charged on 4<sup>th</sup> June 2009 with the murder of the deceased.

When he was placed on his defence, the appellant gave a sworn statement and stated that the deceased was his wife. On the material day at 9.00 a.m. he had succeeded in securing employment as a driver on casual basis and was obliged to drive a lorry from Mombasa at 4.00 p.m. the same day. Deciding to leave his bicycle at PW1’s house in Mikindani, he proceeded to PW2’s Kiosk and collected the keys to the house. In the house, he found no one in, had a bath, a change of clothes, and ate some food. He left the house at about 3.45 pm and returned the keys to the kiosk. He then proceeded with his journey in the lorry, spending the night at Mariakani due to congestion at the Weighbridge. The next day the lorry broke down at Kibwezi forcing him to sleep at a petrol station. On 23<sup>rd</sup> May 2009 he telephoned PW1 to find out how they were doing. That’s when he learnt from PW1 that the deceased was killed on 21<sup>st</sup> May 2009 and that he was a suspect. Hence he decided to surrender himself at Kibwezi Police Station where he was arrested and eventually taken to Mombasa and charged with the murder he knew nothing about.

On two separate occasions before the hearing of his appeal, the appellant was warned that the sentence of

50 years imposed upon him by the trial court after conviction for the offence of murder was illegal and that if his appeal did not succeed, this Court would be obliged to impose the lawful sentence, that of death. On both occasions, the appellant elected to pursue the appeal, which impugned the judgment of the High Court on two grounds, namely failure by the High Court to properly evaluate the evidence and failure by the prosecution to prove the charge against him beyond reasonable doubt.

Regarding the first ground of appeal, **Mr. Ole Kina**, the appellant's learned counsel submitted that the prosecution evidence was riddled with contradictions, which the High Court failed to address or resolve. The contradictions highlighted by counsel were that the prosecution did not establish who between PW1 and the deceased left the keys at the Kiosk and at what time; that the appellant could not have been at Kongowea at 7.00 p.m. on 21<sup>st</sup> May 2009 according to the evidence of PW4 and at Mikindani at exactly the same time according that of PW8; and that only PW6 testified to having seen the appellant's bicycle at Mikindani.

On whether the charge was proved beyond reasonable doubt, it was submitted that **Rhoda Wanjiku Wambugu**, the Government Analyst (**PW13**) did not find the appellant's blood group on the exhibit recovered at the scene; that as such the benefit of any doubt should be given to the appellant; that the evidence of PW8 was not reliable because she had a grudge against the appellant for playing loud music; that it was not conceivable that only PW8 saw the appellant leaving the scene; that the trial court had erred by shifting burden of proof, including of the alibi, to the appellant; and that evidence recovered from information given by the appellant amounted to a confession and was illegally admitted in violation of the Constitution and **section 125** of the **Evidence Act**. If the misdirection by the trial court was taken into account and the illegally admitted evidence excluded, it was submitted, the charge against the appellant was not proved beyond reasonable doubt.

**Mr. Monda**, learned Assistant Director of Public Prosecutions opposed the appeal contending that the High Court had properly analyzed the evidence before it and correctly came to the conclusion that it was the appellant who murdered the deceased. Counsel submitted that by his own sworn defence, the appellant placed himself at the locus; that on his own volition, without prompting or inducement the appellant went to Kibwezi Police Station and volunteered the information that he had assaulted the deceased; that malice aforethought could be inferred from the nature and severity of the injuries inflicted upon the deceased; that PW8 had properly and positively identified the appellant leaving the scene; that the trial judge had properly addressed the question of identification and was satisfied that it was positive and safe; that the learned judge considered the appellant's defence and properly rejected it; and that on the whole there was evidence beyond reasonable doubt that it was the appellant who murdered the deceased.

Granted this is a first appeal, we are obliged to submit that evidence as a whole to afresh and exhaustive examination and to weigh conflicting evidence and come to our own conclusion. In so doing, we must give due allowance to the fact that the trial court had the singular advantage, which we do not have, of seeing and hearing the witnesses as they testified. Accordingly, on matters touching on credibility or trustworthiness of witnesses, we shall defer to the findings of the trial court, unless we are satisfied that on the basis of the evidence on record, no reasonable tribunal would have come to the conclusion reached by the trial court. (See **Joseph Kariuki Ndungu v Republic Cr. App. Nos. 183 & 186 of 2006**).

From the outset, we do not see any basis for the claim that the trial court failed to evaluate the evidence. The learned judge identified three ingredients of the offence of murder which the prosecution was obliged to prove beyond reasonable doubt, namely the fact of death of the deceased; that the death was caused by the unlawful act of the appellant; and that the appellant had caused the death with malice aforethought. Subsequently the learned judge evaluated the evidence meticulously to find out whether the three ingredients were proved to the required standard, before concluding that they indeed were. The court specifically considered the appellant's defence and rejected it. It also took into account the fact that the appellant had by his own evidence admitted having been at PW1's house on the material day. The Court considered and accepted the evidence of PW8 who testified to having seen the appellant leaving PW1's house at about 7.00 pm. The court also considered and rejected the appellant's contention that PW1 had framed him because she was unhappy with his habit of playing loud music.

As regards the alleged contradictions in the prosecution evidence, we do not find them to be material to warrant a different conclusion from that reached by the trial court. It is true that there was a discrepancy between PW1 and PW2 regarding who left the keys at the Kiosk and at what time. There was however no dispute that the keys to PW1's house were left at the Kiosk, from where the appellant collected them. Soon thereafter the deceased came to collect the same keys and was advised that the appellant had already taken them, after which she proceeded to the house.

As regards the contention that the appellant could not have been at Kongowea market at 7.00 p.m. per the evidence of PW4 and at Mikindani at exactly the same time per the evidence of PW8, the appellant is merely capitalizing on a typographical error in the typed proceedings. We called for the original handwritten record and it is perfectly clear that the evidence of PW4 was that the appellant went to meet him at Kongowea market on the material day **at 7.00 a.m.** PW4 offered him some tea but he declined, saying he was going to buy vegetables to go and cook with the deceased at Mikindani. It was also the evidence of this witness that the appellant left on his bicycle. In addition, it is also clear to us that the trial court opted to believe the evidence of PW8. Her estimate of time was very reliable as she was clear that shortly before she saw the appellant leaving PW1's house, she was watching the evening news on television. There is no substance too in the claim that it was only PW6 who saw the appellant's bicycle at the scene. In his own defence, the appellant stated that he had proceeded to PW1's house to leave his bicycle there before proceeding with his journey in the lorry. According to PW4, the appellant left Kongowea market for Mikindani on his bicycle.

As we stated earlier, the prosecution case against the appellant was exclusively circumstantial. As this Court has however stated time and again, subject to satisfying some well known conditions intended to eliminate unreliability, circumstantial evidence can prove a case with mathematical accuracy or precision. (See ***Musili Tulo v. Republic, Cr. App. No. 30 of 2013***). The conditions that must be satisfied before circumstantial evidence may be relied upon are that the circumstantial evidence 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 that there must be no other existing circumstances, which would weaken the chain of circumstances. (See ***Sawe v. Republic, [2003] KLR 364***, and ***Dhalay Singh v. Republic, Cr. App. No. 10 of 1997***).

The trial court accepted PW8's evidence that she saw the appellant leaving PW1's house at about 7.00 pm wearing a red T-shirt, blue jeans and without shoes. This is was the court's impression of PW8:

***“As I have stated earlier, I found PW8 to have given clear, direct and concise evidence. She remained unshaken under cross-examination. In his defence the accused claims that the evidence of PW8 was tainted due to the fact that she held a grudge against him as she often objected to the loud music he played. I am not persuaded that this would be sufficient enough reason for PW8 to tender false evidence in a court of law. Further I was able to observe the demeanour of PW8 as she testified in court. In my view she was an honest and truthful witness. I am satisfied that she did in fact see the accused leaving the deceased's house on the night in question. I am mindful of the fact that this is evidence of a single eyewitness, and I do warn myself accordingly. However, the evidence of PW8 when taken with other evidence (which shall be laid bare soon) in my view squarely places the accused at the scene on the day/evening in question.”***

PW8 saw the appellant leaving the house from which the deceased's body was discovered about one hour later by PW5 and PW3. Near the body of the deceased was a yellowish cap similar to that PW2 had seen the appellant wearing when he went to collect the keys from the Kiosk. PW8's evidence that the appellant had left the house without any shoes was collaborated by the fact that a pair of men's shoes were found next to the body of the deceased. There was no evidence of any other person having entered PW1's house other than the appellant, before the body of the deceased was discovered.

We are therefore satisfied that there was overwhelming circumstantial evidence that it was the appellant who murdered the deceased. We do not see any other existing circumstances that would weaken the chain of circumstances in this case. So strong is the circumstantial evidence that even if we discount the

evidence that led to the recovery of the appellant's bloodied clothes and the evidence of the Government chemists, the circumstantial evidence would still be enough to sustain the appellant's conviction.

The two errors committed by the trial court relate firstly to the comments that it made to the effect that the appellant had neither adduced any evidence to prove that he had secured employment nor had he given the details of his alleged employer and the vehicle he was employed to drive. It cannot be gainsaid that the burden of proof was on the prosecution to prove its case and not for the appellant to prove his innocence. Secondly, regarding the appellant's alibi that he was in Kibwezi at the material time, the court stated:

***“...the accused claims that he and other lorry operators spent the night at Kibwezi; he has not bothered to call any witness to confirm this. I therefore reject this defence as a pure fabrication.”***

Again, it is trite that by setting up an alibi defence, the appellant does not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. (***SENTALE V. UGANDA [1968] EA 365***). The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution (***WANG'OMBE V. REPUBLIC [1976-80] 1 KLR 1683***).

The two misdirections notwithstanding, we are satisfied that the appellant's conviction for murder was proper and safe. Accordingly we dismiss the appeal against conviction. As we stated earlier, the appellant was duly warned that the sentence of 50 years imprisonment imposed upon him by the trial court for the offence of murder was illegal and that should his appeal fail, this Court would be obliged to impose the lawful sentence. In the circumstances, we set aside the sentence of 50 years imprisonment and substitute therefor a sentence of death as by law provided. It is so ordered.

**Dated and delivered at Malindi this 29<sup>th</sup> day of July, 2016**

**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**