



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KOOME & AZANGALALA, JJ.A)

CRIMINAL APPEAL NO. 232 OF 2005

BETWEEN

JULIUS SUVI NDAMBU..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Wendoh, J.) dated 19th September, 2005

in

H. C. CR. C. No. 28 of 2003)

JUDGMENT OF THE COURT

1. Before us is a first appeal against the appellant's conviction and sentence for the offence of murder. As such we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See ***Okeno vs. Republic [1972] EA 32*** and ***Kiilu & Another vs. Republic [2005] KLR 174***.

2. The appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge were that on the 17th June, 2002 at Kavole Village in Kitui District within the then Eastern Province, the appellant murdered Teresia Suvi (the deceased). The appellant entered a plea of not guilty and the matter proceeded for trial.

3. The appellant and deceased were husband and wife. According to the prosecution, their union was marred with disagreements and physical abuse culminating with the deceased leaving her matrimonial home on more than six occasions. Sometime in the year 2001, the deceased left her matrimonial home with her two children and went to stay with her father, Anthony Malombe (PW5). The appellant went to his father in law's house on several occasions with the intention of reconciling with the deceased. On one such occasion, that is, on the 16th June, 2002 Anthony advised the appellant to come back with his parents on the 18th June, 2002. However, the said meeting never materialized because on the 17th June,

2002 at around 2:00 p.m. the deceased's lifeless body was discovered floating on Mavoko River by Musyoka Mwenda (PW1). The Post mortem report revealed the cause of her death as severe blunt injury to the head with sub-dural haematoma.

4. Apparently, the appellant was the last person to be seen with the deceased while she was alive. In that regard, Mulwa Mwitwa (PW3) testified that on the material day at around 9:00 a.m. he had met the deceased in the company of the appellant at the river. Consequently, the appellant was arrested, arraigned and charged in court for the offence of murder.

5. In his defence, the appellant painted a picture of a perfect marriage between himself and deceased. He testified that it was the deceased's father who had forcefully taken her out of her matrimonial home on the ground that he needed to pay more dowry. Despite the separation he and the deceased maintained a good relationship and visited each other regularly. The appellant denied being with the deceased on the material day or killing her. He stated that on the fateful day he was busy herding his cattle.

6. Faced with the foregoing evidence, the trial judge in her own words expressed thus-

“I am satisfied that even though nobody saw the deceased inflict injury to the deceased, yet the fact that accused was with the deceased on the material day at the spot she was found dead a few hours later and lack of explanation by the accused as to what happened to the deceased or when they parted, the accused must have inflicted the head injury and pushed her into the river. Injury to the head implies malice aforethought. Accused's motive must have been deceased's refusal to return to her matrimonial home. I am satisfied that the circumstantial evidence meets the test considered above. The evidence is cogent, irresistibly points at the guilt of the accused and all circumstances considered form a chain that it is impossible for this court to reach any other conclusion other than that the deceased's death was caused by the accused and no one else. I am in agreement with the assessors' verdict.”

Ultimately, the trial court convicted the appellant for the offence of murder and sentenced him to death.

7. It is that decision that has sparked the appeal which is predicated on 8 grounds. The essence of the appellant's complaint is that the learned trial Judge erred in finding that the prosecution had proved its case beyond reasonable doubt.

8. Mr. A. L. Kariu, learned counsel for the appellant, submitted that the prosecution's case was based purely on circumstantial evidence. To him, the evidence adduced did not draw a continuous chain of events which irresistibly pointed to the appellant's guilt. He urged the Court to allow the appeal.

9. Ms. Maina, Senior Prosecution Counsel, conceded to the appeal on the ground that there was nothing connecting the appellant to the deceased's death. Elaborating further she stated that there was no direct evidence of what may have transpired between 9:00 a.m. when the deceased was last sighted alive by PW3 and 2:00 p.m. when her lifeless body was retrieved from the river. It is instructive to note that the concession made on behalf of the respondent does not lead to the automatic success of this appeal. This Court is still required to discharge its duty as the first appellate court. See

Norman Ambich Miero & Another vs. Republic [2012] eKLR.

10. We have considered the record, submissions by counsel and the law. From the postmortem report, there can be no doubt that the deceased's death was caused by someone who intended it or intended grievous harm to her. However, no one witnessed the murder hence the prosecution relied on circumstantial evidence to connect the appellant to the murder.

11. For a conviction to be rightly based on circumstantial evidence such evidence must meet a certain criteria. This Court in ***Musili Tulo vs. Republic [2014] eKLR***, while discussing the criteria observed,

“It follows that the evidence linking the appellant to that offence is circumstantial. We must

therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite

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 committed by the accused and none else.

The predecessor of this Court also set out an additional criteria in Simon Musoke vs. Republic [1958] EA 71 as follows:

“The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.” Emphasis added.

12. Did the circumstantial evidence adduced by the prosecution meet the above criteria? The fact that the appellant was seen with the deceased at the scene a few hours before her body was discovered coupled with the fact that their marriage was faced with the difficulties alluded to, in our view, did not irresistibly point towards the appellant’s guilt. The appellant and the deceased may have had matrimonial differences but numerous reconciliation initiatives had been undertaken in the past. The appellant had indeed visited his father in law in yet another attempt to resolve the dispute. Nothing was adduced in evidence to indicate any overwhelming differences as to trigger the appellant to commit the offence. Moreover, Mulwa (PW3) did not mention anything unusual between the appellant and the deceased when he met them at the stream. We also take note that the scene was a public place accessible to anybody. Therefore, the possibility that the deceased was killed by another person other than the appellant could not be ruled out.

13. The burden lay with the prosecution to prove that the chain of events relied on pointed to the appellant’s guilt. This much was restated by the predecessor of this Court in Rex vs. Kipkerring Arap Koske & 2 Others [1949] EACA 135 thus;

“In order to justify a conviction 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.”

Therefore, the trial Judge erroneously shifted the burden of proof to the appellant in making the following remarks: -

“The accused was the last person to be seen with the deceased alive on the morning of 17/6/02. He had been to see her parents the day before, that is, 16/6/02, to seek reconciliation and was asked to come back on 18/6/02 with his parents. What was he doing in a stream in the deceased’s village at 9:00 a.m? Common sense demanded that the accused explain why he was at the stream with the deceased on the fateful morning and when did they part since that was a matter which was within his knowledge and it is only him who would be expected to explain it....because he did not explain, a rebuttable presumption arises that the accused knew under what circumstances the deceased died.”

It follows that the prosecution had failed to prove its case. All that there was against the appellant was mere suspicion which could not be a basis for his conviction. See ***Sawe –vs- Republic [2003] KLR 364.***

14. In the result, the appeal has merit and is hereby allowed. We quash the appellant’s conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 9th day of December, 2016.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR