



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, KIAGE & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 139 OF 2013

BETWEEN

MUTUA KILONZO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*Being an appeal from the judgment of the High Court at Machakos by (Nambuye, J) dated January 2003*

*in*

*HCCRA 16 OF 2003*

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JUDGMENT OF THE COURT

MUTUA KILONZO (the appellant) appeals to this Court against his conviction and the sentence of death meted on 17<sup>th</sup> January 2003 by the High Court at Machakos for the murder between 4<sup>th</sup> June and 5<sup>th</sup> August 2000, of his grandfather MASAI NDANI (the deceased) contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

That conviction and sentence followed a trial before Nambuye J. (as she then was) before whom evidence was led that on 4<sup>th</sup> June 2000, the deceased was last seen alive in the company of the appellant. The duo had left the deceased’s home at Makuusya village, Kyusyaani Sub-Location of Yatta Location in Kitui District, to visit the home of the deceased’s daughter ANNE NJERI MUKWATI (PW1) at Kilanzuni Village in the same district. The object of the Sunday afternoon visit was for the deceased to collect some KShs. 15,000 which he had given PW1 to keep for him. He needed the money for the purchase of a cow or cattle at the Kabati livestock market to be held the next day.

After the deceased collected his KShs. 15,000 from PW1, he left, as he had arrived, in the company of the

appellant. They did not get back to the deceased's home where they lived, the appellant being there accommodated together with his wife and five children since February of that year when they arrived from far-away Mbitini. It was not until the next morning that the appellant returned to the home at about 8.00 a.m – alone. He seems not to have mentioned or explained the deceased's whereabouts or fate to any one, at any rate not to the only other resident of that home, the deceased's granddaughter named **NORAH SERAH MASAI** (PW2).

On the third day after the visit to her house, PW1 went to her father's homestead to see whether the deceased managed to purchase the cow he intended. Upon her arrival, she did not find him and she asked the appellant, who was home, where the deceased was. In answer, the appellant retorted, after the style of Biblical Cain, that **he was not his grandfather's keeper**. This answer rang alarm bells in PW1's mind and prompted her to seek out her uncle

**Karuti Ndana** to whom she reported that her father was missing. Word soon reached other members of the family including two of his daughters **JANET MUNDI DAVID (PW3)** and **JERUSHA NGOVE MASAI (PW4)** and his brother **TITUS WAMBUA KIMANI (PW5)** who started making frantic enquiries as to the deceased's whereabouts.

On 22<sup>nd</sup> June 2000, PW5 left his home in Kitui and went to Yatta to the deceased's homestead. He questioned the appellant who claimed that when the deceased disappeared, he, the appellant, was away visiting his mother. Asked what steps he had subsequently taken to look for the deceased, the appellant's reply was that **"he did not bother as he knew that he (the deceased) had come to Militu, our village."**

A family meeting was held at PW5's home, some 20 kilometers away, on 24<sup>th</sup> June 2000 attended by among others, the deceased's married daughters (PW1, 3 and 4) with the appellant in attendance. The meeting resolved to send PW4 all the way to Mombasa where another of the deceased's daughters **Serah Masai** resided. That trip was made by PW4 but both there and at Kangwete in Mwingi where a friend of the deceased lived, the deceased had not been seen.

The family had in the meantime reported the deceased's disappearance to the police but their suspicions settled on the appellant proper when he suddenly left the deceased's homestead with no intention of returning. He told PW2 that he was relocating to his wife's home as he moved PW2 to PW1's home. He moved out with his wife and children and emptied the deceased's house of household items including bedding and cooking pans. He also took the deceased's donkey and chicken. On learning of the theft of those items on 27<sup>th</sup>

June 2000, PW3 went all the way to the appellant's in-laws' home and collected some of the items and carried them to her home in a sack.

After these events, and convinced that something untoward had befallen the deceased, the family started searching in earnest for his remains. On 5<sup>th</sup> August 2000 the search party scoured the area around the deceased's now-deserted homestead. Some 250 metres from that homestead, in a bushy gully just 5 metres off the feeder road leading to the homestead, they found a mound that appeared to be a shallow grave covered with leaves and charcoal dust. Someone poked that mound and a stench ensued. The group left the place undisturbed and **Kakiti Ndana** reported to Kitui Police Station about their suspicious find.

The next day on 6<sup>th</sup> August 2000, two policemen **Inspector CHAROGONY** and **P. C. PETER MUSYOKI (PW6)** drove to the scene, arriving at Noon. The scene was dug up and it yielded the partly-decomposed body of the deceased. The deceased's it was, for his relatives and neighbours were able to identify with ease. PW1 could see that the body still had on the pair of blue long trousers that the deceased had on the day he was last seen in the company of the appellant. PW5 on his part was able to identify the deceased from the long hair his uncle used to keep that was still on the skull. The body was retrieved from the scene and taken to the Kutui District Hospital where a post-mortem examination was conducted by the local Medical Officer of Health

**DR. MUTUNGI** and retired pathologist **DR. MUTUMA**. The two medics prepared and signed a joint post-mortem report indicating the opinion that the cause of death was a fracture of the head following blunt injury to the head.

The body was thereafter released to the relatives for internment. PW6 meanwhile continued with investigations and his testimony was that on 19<sup>th</sup> August 2000 the appellant was arrested by one P.C Gathima. This was at Kisasi in Kisekani Village where the appellant was said to have been hiding. He was subsequently charged with the offence.

After the prosecution case as we have summarized was closed, the learned judge found a *prima facie* case established and called upon the appellant to enter upon his defence. This he did by way of an unsworn statement in which he denied involvement in the death of the deceased. He essentially raised an alibi by stating that he had left the deceased's homestead to go to Kisasi where his mother lived. He returned on 4<sup>th</sup> June 2000 at about 2.00 p.m but did not find the deceased. On enquiry, he was told by his wife and children that the deceased had left that morning and had not returned. He had no more to say before the trial court.

In his appeal to this Court, the appellant initially filed some seven self-authored grounds of appeal on 16<sup>th</sup> April 2012. A supplementary Memorandum of Appeal dated 11<sup>th</sup> June 2014 was subsequently filed on his behalf by his advocates Ms Otieno Ogola & Co. raising the following three grounds;

**“1. The superior court erred in law by convicting the Appellant on the basis of circumstantial evidence that did not meet the required legal standard.**

**2.The Appellant gave a plausible defence that was believable and ought to have been believed.**

**3.The trial court misapplied the facts and applied wrong principles to the prejudice of the Appellant.”**

Arguing the appeal before us, the appellant's learned counsel, Mr. Oruenjo abandoned the appellant's homegrown grounds and relied on the supplementary memorandum of appeal, the grounds wherein he argued together. Counsel assailed the prosecution case as presented before the learned trial Judge terming it weak because it revolved around the testimony of PW1 who, in counsel's view, ought not to have been believed absent corroboration as **“she was a relative of the deceased and therefore not independent.”** Counsel submitted that the prosecution should have called witnesses unconnected to the victim and urged that there was no evidentiary support for PW1's testimony that the appellant had made threats that he would kill someone if the deceased did not subdivide his land in a manner satisfactory to the appellant.

Citing the case of **RAPHAEL ISOLO (ECHAKARA & ANOR –VS- REPUBLIC, C. A. CR. APPEAL NO. 44 OF 2013**, (unreported), Mr. Oruenjo submitted that the inculpatory facts proved by the prosecution did not suffice to found a conviction and further that they did not exclude the possibility of the appellant's innocence.

Counsel laid emphasis on the fact that even though the appellant did leave the deceased's homestead, he did so several weeks after the deceased's disappearance and the fact should not be held against him. He also submitted that there was the possibility that the deceased may have been the victim of a robbery in which the appellant was in no way involved.

Counsel concluded that no motive had been established to form a basis for the appellant's alleged murder of the deceased. He pointed out that there was no bad blood between the appellant and the deceased. To counsel, unless motive was proved by evidence, the requirement of 'malice aforethought' as defined in **Section 206 of the Penal Code, Cap 63**, Laws of Kenya, was not proved and the appellant was therefore entitled to an acquittal.

Opposing the appeal, Mr. Nderitu, the learned Senior Assistant Director of Public Prosecutions submitted that even though the appellant's conviction was based on circumstantial evidence, that evidence pointed to the guilt of the appellant. The Senior Assistant Director of Public Prosecutions pointed out that the appellant was the last person to be seen with the deceased alive. Earlier the appellant had demanded land from the deceased but even when the deceased obliged, the appellant was dissatisfied and uttered threats; the appellant was suffering acute financial embarrassment and in dire need of money to support his large family; and he may have wanted some or all of the KShs. 15,000 given to the deceased by PW1; the appellant deliberately refused to co-operate with the rest of the family in the search for the deceased and, finally, before the deceased's body was discovered, the appellant left the homestead together with his wife and children carrying with him all of the deceased's household items and livestock. Counsel concluded by urging us to find that PW1 was a credible witness and that there is no rule of law that a witness is any less competent by reason of being related to the victim of a crime.

When this Court hears a first appeal such as the one before us, it proceeds by way of a re-hearing but on the basis of the record as it does not have the advantage of hearing and observing live witnesses as they testify. The Court has a constitutional and statutory duty to subject all the evidence on record to a fresh and exhaustive analysis and evaluation before drawing its own inferences and conclusions of fact and applying the law to them. This has been stated in a long line of authorities including **PANDYA –VS- R [1957] EA 336**; **OKENO –VS- R [1972] EA 32** and **NGUI –VS – R [1984] KLR 729**.

Having ourselves perused the entire record of the evidence that was tendered against the appellant, we are left in no doubt whatsoever that the circumstantial evidence not only led to the logical conclusion that the appellant murdered the deceased but also excluded any possibility that the deceased met his death through a set of facts and circumstances explicable on a hypothesis consistent with the innocence of the accused. We are satisfied that the test for circumstantial evidence stated in the old case of **REPUBLIC –VS- KIPKERING ARAP KOSKE & ANOR [1949] 16 EACA 135** was fully met;

***“In order to justify on circumstantial evidence the inference of guilt then inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other 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 recoverable hypothesis of innocence is always on the prosecution and never shifts to the accused.”***

See also **SIMONI MUSOKE –VS - R[1958] EA715** and **SAWE –VS- R [2003] KLR 364**.

As we have pointed out in the summary of the evidence we set out herein, the appellant was a man in dire financial straits and in need of money. He had five hungry mouths besides his own to feed and fend for, and it would seem he was not settled in terms of place of abode. He was with the deceased when the deceased collected some KShs. 15,000 from PW1 on the fateful Sunday evening. He left PW1's home in the company of the deceased who was alive and well. The fact that the appellant never got home until the next morning, and alone, without the deceased, cast the first shadow of suspicion on the appellant. He told PW1, the deceased's daughter, that he was not his grandfather's keeper, words which are easily reminiscent of what biblical Cain uttered after killing his brother Abel. He did not actively participate or co-operate in the search for the deceased as did the rest of the frantic family. He knew such a search would not find the deceased, who was no longer among the living. Even before the body was found but with suspicion beginning to coalesce about him, the appellant left and literally abandoned the deceased homestead taking with him the deceased's household items like sufurias and bedding. He knew the deceased was never coming back and would not need those items. As he deserted that homestead he relocated his young cousin Norah (PW2) who would have remained all alone, to PW1's home. He knew the deceased was never coming back to continue living with PW2.

It seems to us that all these facts taken together with the fact that the body of the deceased was buried but 250 metres from the homestead and a mere five metres from the path leading to it exclude the possibility that some stranger or robber might have killed the deceased and proceeded to bury his remains, carefully concealing the crime. The defence statement given by the appellant was no more than a bare denial and did nothing to weaken the strong and compelling chain of circumstantial evidence that had been placed

before the trial court by the prosecution. Moreover, the appellant's conduct following the disappearance of the deceased was wholly inconsistent with innocence but instead loudly declared his guilt.

We therefore come to the conclusion that the learned judge was wholly entitled to convict the appellant. His appeal to this Court is patently devoid of merit and it is dismissed in entirety.

**Dated and delivered at Nairobi this 23rd day of January, 2015.**

**P. KIHARA KARIUKI, P.C.A**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**

