IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 84 OF 2014

BETWEEN

ERICK ODHIAMBO OKUMU…….……..……...APPELLANT

AND

REPUBLIC.……..…….....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Mombasa (Odero, J.) dated 15th March 2013

in

H.C.CR.C. NO. 53 OF 2009)

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JUDGMENT OF THE COURT

The appellant, ***Eric Odhiambo Akumu*** was, jointly with ***Judith Akinyi Mwai,*** tried before the High Court on an information that charged them with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars of the information were that on ***15th December 2009*** at ***Majengo Estate*** in ***Mombasa*** within ***Coast Province***, they jointly with others not before the court murdered ***Doreen Aoko Achacha (the deceased)***. ***Odero J.*** tried the two and acquitted Judith Akinyi Mwai on 26th April 2012 after ruling that the prosecution had not established a *prima facie* case against her. On15th March 2013 the learned judge convicted and sentenced the appellant to forty (40) years imprisonment, apparently relying on what she understood to be the law then, regarding the prescribed sentence for the offence of murder. (See ***GOEFFREY NGOTHO MUTISO V. REPUBLIC, CR. APP. NO. 17 OF 2008*** and ***JOSEPH NJUGUNA MWAURA & OTHERS V. REPUBLIC*, CR. APP. NO 5 OF 2008)**. Aggrieved by the judgment of the High Court, the appellant lodged the present appeal, challenging both his conviction and sentence.

The prosecution case against the appellant was constructed around the evidence of 14 witnesses. That case was that the deceased was a fishmonger at ***Mwembe Tayari*** in Mombasa. The appellant was at the material time a porter at ***Marikiti Market*** within the same Mwembe Tayari area whilst Judith Akinyi Mwai was a friend of the deceased and a tea trader at the same market. On 15th December 2009 the deceased was at her place of business until about 7.00 pm when she left her luggage with ***Florence Adhiambo Ogot (PW2).*** The appellant visited PW2 at about 8.00 pm the same day claiming that the

deceased had a headache and had sent him to collect the luggage. He produced an identity card that bore the name ***Eric Odhiambo***. PW2 declined to release the luggage, but did so after speaking on the phone to Judith Akinyi Mwai who confirmed that she knew the appellant and requested PW2 to release the luggage to him.

The deceased never returned home that night and was never again seen alive. Two days later, on 17th December 2009, her decomposing body was discovered in room No. 10 on the first floor of ***Kenya Bar,*** in ***Majengo*** Mombasa. ***Dida Kailu (PW8)*** who was employed at that bar as a cleaner testified that at about 5.00 pm on 15th December 2009 he saw ***Philip Kisia***, a fellow employee at the bar, opening room No. 10 for the deceased and two men. Then at about 9.00 pm he saw one of the men, who he identified as the appellant, "leaving out slowly". The next day PW8 was unable to access room No 10 for cleaning because the occupants had, according to information passed to him by Kisia, locked the door and left with the key. On 17th December 2013 a customer alerted him that a bad odour was reeking from room No. 10. He passed the information on to Kisia who subsequently broke the lock of the door to No. 10, leading to the grisly discovery of the decomposing body of the deceased.

Dr. K. N. Mandalya (PW 11), who conducted a postmortem examination of the remains of the deceased, noted hemorrhage around the larynx and vocal cord, fracture of cervical spine, and a very supple neck. He concluded that the cause of death of the deceased was cardio-respiratory failure due to cervical spine fractures possibly arising from pressure on the neck.

The appellant's unsworn defence was that he did not know the deceased; that he had not collected from PW2 or any other person any luggage on behalf of the deceased or any other person; that he had not given or shown his identity card to any person; and that he knew nothing about the murder of the deceased. No witness testified on behalf of the appellant.

Although in his grounds of appeal filed on 30th June 2014 the appellant raised eight grounds, at the hearing of the appeal ***Mr. Billy Kongere***, his learned counsel, canvassed the appeal on two grounds only, namely that the appellant was improperly convicted on the basis of weak circumstantial evidence and that his identification as the perpetrator of the murder was mere dock identification, which was unreliable and unsafe.

On the first ground of appeal, learned counsel submitted that the circumstantial evidence relied upon by the High Court to convict the appellant was full of gaps and was not exclusively consistent with appellant having committed the murder. As an example of the inconsistencies and gaps in the prosecution case, it was submitted that the timelines relied upon by the prosecution to place the appellant and the deceased at the scene of the murder at Kenya Bar on 15th December 2009 at 5.00 pm and 9.00 pm was inconsistent with other evidence adduced by the prosecution. Such other prosecution evidence placed the deceased at Mwembe Tayari at 7.00 pm, (depositing luggage with PW2) and the appellant at the same Mwembe Tayari at 8.00 pm (collecting luggage from PW2) on the same date.

Relying on ***MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013***, counsel submitted that to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else, without any reasonable doubt.

As regards identification of the appellant, Mr. Kongere argued that it was only PW8 who purported to identify the appellant at the scene of murder; that PW8 did not know and had not seen the appellant before 15th December 2009; that the witness did not testify as to how long he had observed the appellant and from how far; and that no identification parade had been conducted to enable PW8 identify the appellant. In the circumstances, counsel submitted that the purported identification of the appellant in court by PW8 amounted to no more than dock identification, which was worthless. The decisions of this Court in ***PETER MWANGI MUNGAI V. REPUBLIC, CR. APP. NO 140 OF 2000***; ***MUTONYA KARIUKI & ANOTHER V. REPUBLIC***, ***CR. APP. NO. 68 OF 2013 (KISUMU);*** and ***STEPHEN MATU KARIUKI & OTHERS V REPUBLIC***, ***CR. APP. NO. 81 OF 1988*** were relied upon to challenge the identification of the appellant.

Learned counsel concluded by assailing the judgment of the trial court for considering only the nature of the lighting at the time of the purported identification of the appellant by PW8, which was only one of several factors to be considered in determining whether the identification was safe. It was submitted that the court had failed to consider all other factors identified in ***R. V. TURNBULL & OTHERS [1976] 3 ALL ER 549.***

Mr. Jami Yamina, learned Principal Prosecution Counsel, opposed the appeal on behalf of the respondent, submitting that the appellant's conviction was based on cogent evidence and was therefore safe. Counsel argued that the identification of the appellant was not mere dock identification because, if we understood him right, dock identification involves identification of an accused person in court *by the victim* of the offence rather than by any other witness or witnesses. It was submitted therefore that in this case the dock identification of the appellant was not worthless.

In support of the respondent's contention that the identification of the appellant was safe, it was submitted that the learned trial judge had warned herself of the danger of convicting the appellant on the basis of the evidence of identification on record and that she had also addressed the nature of the lighting prevailing at the time of identification.

Regarding the circumstantial evidence, it was submitted that the trial judge was alive to the fact that to base a conviction upon circumstantial evidence the inculpatory facts must be incompatible with the innocence of the appellant and incapable of explanation by any other hypothesis except that of guilt, and further that the judge had even cited the decision of this Court to that effect in ***MWANGI V. REPUBLIC [1983] KLR 522*** regarding reliance on circumstantial evidence.

Mr. Yamina concluded by referring to what he considered to be an unbroken chain of events linking the appellant, and the appellant alone, to the death of the deceased, namely that the appellant was seen by PW8 in the company of the deceased going into room No 10 at Kenya Bar at about 5.00 pm; that the appellant had later on left that room at about 9.00 pm, locking the door behind him and taking away the key; that the deceased was found dead in the same room No. 10 two days later; and that it was the appellant who had collected the deceased's luggage from PW2. Accordingly we were urged to find the appeal bereft of merit and to dismiss the same.

We have carefully considered the recorded evidence that was adduced before the trial court, the judgment of the High Court, the grounds of appeal, the submissions of respective learned counsel, the authorities cited and the law. To the extent that the appeal before us is a first appeal, we are obliged to subject the evidence as a whole to a fresh and exhaustive examination, to weigh conflicting evidence, to draw our own conclusions and to come to our own decision on the evidence. In so doing, we shall also bear in mind our comparative disadvantage arising from the fact that that we do not have the advantage, which the learned judge below had, of hearing and seeing the witnesses testify. (See ***OKENO V. REPUBLIC [1972] EA 32, NJOROGE V. REPUBLIC [1982-88] 1 KAR 1134 and MWANGI V. REPUBLIC [2004] 2 KLR 28).***

The prosecution case against the appellant was purely circumstantial to the extent that none of the witnesses who testified witnessed how or by whose act the deceased died. The trial court appreciated that the evidence against the appellant was circumstantial when it delivered itself thus:

> ***"The facts show that the 1st accused (appellant) entered a hotel room No 101 (sic) with the deceased. A few hours later 1st accused emerges from the very room alone, locks the door and leaves with the key. The dead body of the deceased is recovered in the same room 101 (sic) two (2) days later badly decomposed (an indication that death had occurred some days earlier. The circumstantial evidence points squarely at the 1st accused as having had a direct involvement in the death of the deceased."***

It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of

an accused person as direct evidence. Indeed, as this Court stated in ***MUSILI TULO V. REPUBLIC*** (***supra),***:

> ***"[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."***

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ***ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990*** this Court tabulated the conditions as follows:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 tendency unerringly pointing towards 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 committed by the accused and none else."***

(See also ***SAWE V. REPUBLIC [2003] KLR 364*** and ***GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).***

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. ***(See TEPER V. R. [1952] All ER 480*** and ***MUSOKE V. R [1958] EA 715)***. In ***DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997*** this Court reiterated this principle as follows:

> ***"For our part, we think 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 and an accused is entitled to an acquittal."***

We are obliged to reconsider and reevaluate the circumstantial evidence adduced linking the appellant to the murder and in particular the evidence of the key witness, PW8. From the outset, it is worthy pointing out the challenges that faced PW8 as a witness which are readily apparent on the record. On various dates, for example on 21st October 2010, 11th May 2011 and 13th July 2011 the prosecutor described PW8 as a deaf and dumb witness who required a deaf/dumb interpreter to communicate with the Court. When the witness eventually testified on 22nd August 2011, he did so without the assistance of a deaf or dumb interpreter, apparently because the court found that he had a speech problem that made him "talk very slowly", but was otherwise capable of understanding the questions put to him.

For reasons that we cannot readily fathom, despite the finding of the trial court that the witness could understand questions put to him, his evidence and cross-examination, important a witness as he was, barely covered half a page of the proceedings. His statement made in Kiswahili on 18th December 2009 and translated into English by ***PC Kaberia Edward*** was however admitted in evidence as ***Exhibit No. 4.***

From the statement and the sketchy evidence that he gave in court, the witness testified that on 15th December 2009 at about 5.00 pm he was in the upstairs rooms of Kenya Bar when he saw the deceased and two men. Philip Kisia, his fellow employee at the bar, opened room No. 10 for them. At about 9.00 pm the same night, the witness was downstairs when he saw one of the men he had earlier seen going into room No. 10 with the deceased, namely the appellant, "leaving out slowly". The next day at about 9.00 am PW8 asked Philip Kisia for the key to room No. 10 so that he could clean the same, but he was informed that the occupants of the room had locked the door and left with the key.

On 17th December 2009, he was alerted by a customer at the bar of a bad smell emanating from room No 10. He passed this information to Philip Kisia who broke the padlock on the door, leading to the

discovery of the dead and decomposing body of the deceased.

From the above circumstantial evidence, can an inference be drawn that the appellant is guilty of the murder of the deceased? Does the circumstantial evidence point unerringly to the appellant, and the appellant alone, as the person who committed the murder? Are there any other co-existing circumstances that would destroy or weaken the inference that the appellant is guilty of the murder of the deceased?

To begin with, even if it is assumed that PW8's identification of the appellant was safe, his evidence was that he had seen the appellant and another unidentified man enter room No. 10 in the company of the deceased. At 9.00 pm, while he was downstairs, he saw the appellant leaving out slowly. PW8 never saw the appellant locking the door to No. 10; he was merely given that information by Philip Kisia. In light of the evidence on record, can it be said, without any reasonable doubt, that the appellant rather than the other unidentified man who was also seen getting into room No. 10 with the deceased committed the murder?

Of more concern to us is the evidence on record, which does not rule out the possibility that two employees at Kenya Bar could as well have murdered the deceased. The evidence indicates that Pauline Mbithe and Philip Kisia were also employees at Kenya Bar with PW8. Mbithe was the cashier and was responsible for hiring out rooms to lodgers, receiving payment, and issuing out receipts, while Kisia was a room attendant. It was Kisia who opened room No. 10 for the deceased and her two male companions. The counterfoil of the receipt that was issued by Mbithe to the person who rented room No. 10 on 15th December 2009 was produced as an exhibit. The receipt did not bear the name or particulars of the appellant or any name at all. Immediately after the murder of the deceased, both Mbithe and Kisia fled and had not been apprehended as of the date of the murder trial. Mbithe stole from her employer Kshs 80,000/- and permanently switched off her phone. Why did Mbithe and Kisia escape immediately after the discovery of the body of the deceased? Did they have anything to do with the death of the deceased?

The learned judge herself did not rule out the involvement of Mbithe and Kisia in the murder of the deceased, and we think rightly so, on account of the evidence on record. However, the manner in which she absolved them while fixing the responsibility for the murder on the appellant, with respect, left a lot to be desired. The learned judge expressed herself thus:

> ***"There is a possibility that the two (Mbithe and Kisia) may have been involved in the death of the deceased but on the other hand they may have just taken advantage of the situation to steal from the hotel and escape."***

In our view, there was reasonable suspicion that Mbithe and Kisia or the unidentified man, could have been responsible for the murder of the deceased. These co-existing circumstances completely destroyed or fundamentally weakened the inference that the appellant, and only the appellant, was guilty of murder of the deceased. The result, in our view, is that the prosecution did not prove its case against the appellant beyond reasonable doubt.

Before we leave the question of circumstantial evidence, it is worthy pointing out that the trial court accepted the prosecution version of the case that the deceased entered room No. 10 at about 5.00 pm and that she never left alive. In that respect, the learned judge stated:

> "***The fact that having entered the room together with the deceased the 1st accused (the appellant) calmly walks out four hours later leaving her battered and bloodied body inside the room is clear proof that it was the 1st accused who committed this murder."***

While it is obvious that most witnesses were testifying to approximate times, nevertheless the learned judge was obliged to consider the effect of the evidence on record which placed the deceased with PW2 at Mwembe Tayari at 7.00 pm and the appellant at the same Mwembe Tayari at 8.00 pm. There was no evidence of the two going back to Kenya Bar anytime after they were seen in Mwembe Tayari at 7.00 and 8.00 pm. If this evidence was duly considered, it could, in our opinion, have further undermined the inference of the appellant's guilt.

The identification of the appellant is, in our view, equally fraught with uncertainty and doubt. There is no evidence on record that PW8 had seen or known the appellant before he allegedly saw him at 5.00 pm. True, the trial court considered the nature of the lighting at 5.00 pm, but the court did not address other pertinent considerations that would have gone towards confirming the reliability of the identification of the appellant by PW8.

The judge did not consider the fact that PW8 had not known or seen the appellant before 5.00 pm on 15th December 2009; the distance from which PW8 had observed the appellant; the length of time that observation took; and the dress of the appellant or any other distinguishing features of the appellant that could have given assurance that his identification by PW8 was safe and free of error.

That PW8 was not able to identify the other man who had allegedly accompanied the deceased and the appellant to room No. 10 and the fact that there was evidence on record that placed the deceased and the appellant away from the scene of murder at 7.00 pm and 8.00 pm respectively, underlies why it was crucial for the trial court to consider these other factors.

This Court has emphasized time and again that it is of utmost importance for a trial court to closely test and scrutinize evidence of identification particularly where there is only a single identifying witness or in circumstances where identification is difficult. In ***KARANJA & ANOTHER V. REPUBLIC*** ***[2004] 2 KLR 140,*** the Court, relying on ***R. V. TURNBULL & OTHERS*** ***(supra),*** stated as follows:

> "***Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

Earlier in ***WAMUNGA V. REPUBLIC*** ***[1989] KLR 424, 426,*** the Court

had stated:

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

The importance of delving into all issues pertinent to identification was emphasized as follows in ***MAITANYI V. REPUBLIC*** ***(1986) KLR 198, AT 201:***

> ***"…the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light. Its size and its position relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."***

We would respectfully agree with the appellant that in the circumstances of this appeal and in the absence of a properly conducted identification parade, his identification by the PW8 was no more than dock identification, which is unreliable. On the rationale why this Court is reluctant to rely on dock identification, we shall cite only ***AMOLO V. REPUBLIC (1990-1994) EA 22*** where it was stated:

> ***"In the earlier case of Gabriel Njoroge v Republic (1987) 1 KAR 1134, Platt JA, delivering the judgment of the Court, said that the evidence of identification cannot, as it should, be tested with the greatest care unless the witness or witnesses had given a description of the accused in advance, and his or their ability to identify was tested on a properly conducted identification parade. The reason for the Courts' reluctance to accept a dock identification is part of the wider concept, or principle, of law that it is not permissible for a party to suggest answers to his own***

witness, or as is sometimes put, to lead his witness. Taking this stage further, the reason for the rule against leading a witness is that to do so would clearly detract from the veracity of the evidence given and reduce its value. For it is manifest that in all criminal cases, save perhaps a few company, by-law or minor traffic prosecutions, the accused persons stands in the dock of the Court. Consequently, it is self-evident to the witness that the person standing in the dock is the one whom the prosecution desires to be identified. If, however the procedure outlined in Njoroge's case (supra) is followed, that danger is eliminated, or at least, much reduced."

Taking all the foregoing circumstances into account, we have come to the conclusion that the conviction of the appellant on the basis of the circumstantial evidence that was adduced as well as his identification by PW8 was completely unsafe. In the premises, we allow this appeal, quash the appellant's conviction and set aside the sentence imposed upon him to the intent that the appellant shall be set to liberty forthwith, unless he is otherwise lawfully detained.

Dated and delivered at Mombasa this 15th day of May, 2015.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR