



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR JJA)

CRIMINAL APPEAL NO. 65 OF 2013

BETWEEN

CALEB OCHONGA AMENYA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 18<sup>th</sup> April, 2013,*

*in*

*H.C.C.R.A No. 58 of 2008)*

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JUDGMENT OF THE COURT

***Caleb Ochonga Amenity, the appellant***, was charged before the High Court at Kisii with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars of the offence were that on 27<sup>th</sup> November 2008 at Riosuta village, Botabori sub location, Gucha South District of Nyanza Province, he murdered ***Florence Mogoti Mocha (the deceased)***.

On 28<sup>th</sup> November 2008, at about 7pm ***Stephen Oragi Mocha PW1 (Stephen)*** went to the deceased's house as she was to accompany him to a funeral. He noticed that the door of his mother's kitchen was ajar. When he looked through the door he saw the deceased lying on the ground. Since she suffered from epilepsy, he put a stick in her mouth, but in doing so, found that she was already dead. She had injuries on her legs and neck, and there was blood on the left side of her mouth. Stephen called his uncle, ***Ongaga Nyang'ora, PW4 (Ongaga)***.

On the same day, when he heard screams coming from Mocha's house, Ongaga said he rushed to the scene where he found the deceased lying on her mother's kitchen floor. There were bruises on her head, hands and legs. The death was reported to Etago Police Station and the deceased's body was later removed to Tabaka Mission Hospital mortuary.

***Dennis Onsanse Nyareru PW3 (Dennis)***, testified that on 3<sup>rd</sup> December 2008, he went to the appellant's home to discuss the deceased's funeral arrangements and upon entering the house, he saw blood on the walls and on the floor. He was frightened, and reported what he had seen to Ongaga. On the same day

Ongaga went to the appellant's house and also saw the blood on the walls and floor. The blood stained walls were also seen by **Dominic Oumo s/o Onchweri (PW5)**, the deceased's nephew, and a cousin to the appellant who also stated that he saw blood on the walls of the appellant's house.

**Police Constable Sadiq Abdi (PW10)**, received the report of the deceased's death, and subsequently proceeded to the appellant's home. On seeing the police, the appellant fled into a sugar cane plantation. PC Abdi saw the blood on the walls and floor, and also found a blood stained panga and club under the appellant's bed. He took soil samples from the floor and walls of the appellant's sitting room and bedroom, and recovered the panga and club, as well as a black basin in which the appellant was washing a grey t-shirt. He sent the items to the Government Analyst.

After fleeing the scene, the appellant was later found by **Erastus Bongoye Onchweri, (PW8)** Assistant Chief of Mokubo sub location, with the assistance of village elders in the Bomachoge area hiding in the house of one Wanda Akama. The appellant was arrested by elders, rearrested by the police of Etago police station and later charged with the offence of murder.

**Dr. Willis Omwoyo (PW1)**, the Medical Officer of Health at Ndhwa District Hospital who conducted the postmortem on the deceased on 3<sup>rd</sup> December 2008, found that the deceased suffered multiple bruises on the legs and hands as well as bruises on the right aspect of the head. There was also bleeding from the vaginal orifice, the trachea was damaged and the lungs were pale in colour. Blood was found around the deceased's heart. In Dr. Omwoyo's opinion the deceased died from cardio respiratory arrest due to asphyxia or strangling. **Albert Gathuri Mwaniki (PW9)**, a Government Analyst stationed at Government Chemist, Nairobi, conducted a chemical analysis on items submitted to the Government Chemist by PC Abdi on 9<sup>th</sup> December 2008. He found that the panga and the club had some slight Group A human blood, all the soil samples were found to have blood samples of Group A, the t-shirt did not have any blood samples, but the black plastic basin had blood Group A. In summary, the blood in the samples was of Group A, the blood group of the deceased was found to be of Group A, while that of the appellant was Group B.

Mr. Mwaniki concluded that the blood stains on the panga, the club and in the basin, including the blood in the 3 soil samples matched the blood sample of the deceased; and could have originated from the deceased after she sustained injuries.

The appellant was found to have a case to answer after the close of the prosecution's case. The appellant gave an unsworn statement and did not call any witnesses.

In his evidence the appellant testified that on 3<sup>rd</sup> December 2008, the police went to his home and took him to the police station; that he was informed by the police officers that they would inform him of the reason for his arrest and that upon reaching the police station, he was arrested and charged with the offence of murder. He denied that he was found washing clothes, and stated that the black basin did not belong to him.

Following a full trial before Sitati, J. the appellant was found guilty as charged and sentenced to death.

Being dissatisfied with the conviction and sentence, the appellant filed an appeal to this Court.

At the hearing of the appeal, **Mr. Kowinoh**, learned counsel for the appellant, proceeded on the basis of the grounds of appeal filed on 9<sup>th</sup> July 2015. Counsel submitted that the conviction on circumstantial evidence was not justified as there were co-existing circumstances that weakened the inference of guilt. To begin with, the learned judge concluded that the blood taken for the appellant's house of blood Group A belonged to the deceased, yet the evidence of the Government Analyst was that 25% of the human population are blood Group A, and since no DNA test was conducted, the evidence was inconclusive that the blood stains originated from the deceased. Furthermore, since the deceased and the appellant were not staying in the same house, and there was no trail of blood leading from the deceased's house to her mother's house, neither was there evidence to show that the deceased was seen entering the appellant's house, the existence of blood alone in the appellant's house was too weak to lead to the conclusion that it

was the deceased's blood.

Further weakening of the chain of the circumstantial evidence was that the appellant did not live alone, but was married with two children, and there was the possibility that other persons could have injured the deceased.

Counsel faulted the judge's conclusion that the deceased was at one time in the appellant's house, and since it was not possible to state whether there was rape or the commission of a sexual offence, it was wrong for the judge to conclude that the deceased had been sexually assaulted.

A further inconsistency pointed out by counsel was that, the post mortem showed that injuries sustained by the deceased were from bruises, with the cause of death being by strangulation, and not cuts from a panga, and there was nothing to show that the cuts from the panga led to her death. Finally, counsel concluded by contending that the appellant took flight not due to his guilt, but because the police threatened to shoot him.

**Mr. Ketoo**, learned counsel for the State, opposed the appeal and asserted that the prosecution's case was based on circumstantial evidence which together with the Government Analyst and the postmortem reports pointed towards the appellant as being responsible for the deceased's death. It was his submission that the Government Analyst report showed that the deceased's blood group was type A, while that of the appellant was type B, and that no other blood samples were received; that the appellant's t-shirt in the basin showed the deceased's blood type; the deceased was found dead in her mother's house, and two days later, the appellant's house was found with blood, and that the soil sample taken from the appellant's house matched the deceased's blood group. According to the postmortem report the doctor also found bruises on the deceased and concluded that she died from strangulation. In addition; though the doctor could not tell whether the deceased was sexually assaulted as the examination was conducted 72 hours after the deceased had died, it could be safely concluded that she had been sexually assaulted.

On the issue that the appellant had taken flight, according to the evidence, the appellant had attempted to run away, but the police had shot in the air to secure his arrest. The appellant knew the reason for his arrest, and did not call any witnesses to dispel the prosecution's evidence on the findings.

Being a first appeal the role of the first appellate court was spelt out in ***Okeno vs Republic* [1972] E. A. 32** at page 36 thus:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs R [1975] E. A. 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E. A. 424”.***

In answer to whether there was sufficient circumstantial evidence to point to the appellant as the person who murdered the deceased the learned judge stated thus;

***“After careful consideration of the evidence and the law, I am persuaded that there is sufficient circumstantial evidence to connect the accused to the death of the deceased. The deceased was an auntie to the accused. She was epileptic and susceptible to attack by those who were closest to her. Although there appears to be a missing link as to how the deceased's blood was found in the accused's house while her body was found lying in her mother's kitchen, I am persuaded that at some point before she died, the deceased was in the accused's house. The evidence of bleeding from the deceased's vaginal orifice also suggests some sexual assault upon the deceased. It is possible that the accused took the deceased back to her mother's house after assaulting her while she***

***was in his house. The bruises seen on the deceased's lower and upper extremities and the right aspect of the head were likely inflicted upon the deceased in the course of the sexual assault. The accused completed the assignment by strangling the deceased.***

The issue before us is whether the trial court correctly found that the circumstantial evidence pointed to the appellant's guilt.

In *Mwangi vs. Republic [2004] 2 KLR 28* this Court said:-

***“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs Kipkering Arap Koskei & Another (1949) 16 EACA 135.”***

In the well-known case of *Republic vs Kipkering Arap Koske and another (supra)* it was held inter alia that:

***“In order to justify 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.”***

What circumstantial evidence was relied upon to arrive at the appellant's guilt? On 28<sup>th</sup> November 2008 at about 7am. Ongaga found the deceased lying dead on the floor of her mother's kitchen. She had bruises on her head, hands and legs and blood was oozing from the left side of her mouth. On 3<sup>rd</sup> December 2008, Dennis discovered dry blood on the walls and floor of the house. He reported it to Ongaga who, on the same day, went to the appellant's house and saw the blood stains on the walls and floor. A report was made to the police, following which PC Abdi went to the appellant's house. He also saw the blood stains, and described the scene thus,

***“We entered the house and saw blood spots on the floor in the sitting room. There were also blood spots on the wall of the sitting room. We went into the bedroom and found some blood spots there as well. The blood spots were on the floor.”***

PC Abdi also found a blood stained panga and a club under the appellant's bed. The blood samples collected from the appellant's house were dispatched for analysis. The blood stains from the walls, floor, as well as on the panga, the club were all found to be blood type A, and matched the deceased's blood. The post mortem report not only concluded that the deceased died from asphyxia/strangulation, but of importance was that it also found that there was bleeding from the vaginal orifice.

The chain of evidence when analysed, showed that before her death, the deceased was bleeding from her vagina. Subsequent to her death, blood stains were discovered in the appellant's house. Tests carried out on the blood samples were confirmed to be blood type A, and matched the deceased's blood type. As a consequence, it could be concluded that the blood on the walls and floor of the appellant's house belonged to the deceased. Bearing this in mind, and we agree with the learned judge that, some time before her death, the deceased may have been in the appellant's house.

In his evidence, the appellant did not provide any explanation as to how the blood came to be in his house. Under **section 111** of the **Evidence Act**, the burden of proof lay upon the appellant to explain how the blood stains came to be in his house, particularly where such facts would be well within his knowledge.

In our view, the circumstances were such that the discovery of blood that was of the same blood group as that of the deceased in the appellant's house undeniably linked the appellant to her death. Without an

explanation from the appellant regarding the presence of the deceased's blood in his house, and who was found dead only two days earlier, the only inference that could be reached was that the appellant was responsible for the death of the deceased.

Regarding counsel for the appellant's argument that there were co-existing circumstances that destroyed the inference of the appellant's guilt, in that there was no trail of blood leading from the appellant's house to her mother's house, or evidence of bad blood between the deceased and the appellant or evidence showing that the deceased was seen entering the appellant's house, we take the view that, the existence of the blood stains in the appellant's house two days after her death sufficiently linked the appellant to her death.

We can also find no inconsistency with respect to the manner in which the deceased died. From the postmortem report, the deceased's death was as a result of asphyxia or strangulation, which was consistent with damage to the trachea. Conversely, the blood stained panga and club found in the appellant's house with the deceased's blood type inevitably, served to reinforce the evidence that the deceased may have been in the appellant's house before her death, which pointed to the appellant as being responsible for her death.

Counsel further contended that it could not be conclusively stated that the blood taken for the appellant's house of blood type A was that of the deceased, since the Government Analyst had stated that 25% of the human population are blood type A, and no DNA tests were conducted.

Whether or not the blood sample can be conclusively found to have belonged to the deceased is a matter that must be determined by taking into account all the circumstances of the case.

The blood samples were lifted from the appellant's house. When tested, they were found to be blood type A. They matched the deceased's blood type, also found to be blood type A. The appellant was found to be blood type B. A few days earlier, the deceased had been found dead still bleeding from the vaginal orifice. This evidence points to a direct nexus between the blood in the appellant's house and the deceased, and as such, must have belonged to the deceased. The suggestion that it could have belonged to any other person given that 25% of the population are blood type A does not arise.

On the assertion that the appellant did not live alone, as she was married with two children, and hence the possibility that other persons could have injured the deceased, from the record, we can find no such evidence pointing to any other person. When the totality of the facts are taken into account, we find this contention to be far-fetched, and without merit.

Counsel's final issue was that the appellant took flight as the police threatened to shoot him which pointed to fear rather than to the appellant's guilt.

When the police went to the appellant's house, the appellant who was washing a grey t-shirt took flight. The evidence shows that it was after the appellant took flight that the police shot in the air so as to arrest him, but he in any event escaped. He was arrested a few days later hiding in the house of one Wanda Akama, where he was arrested.

We do not agree with counsel for the appellant that he ran away because he feared for his life. The appellant ran away to escape arrest, and like the learned judge, we find this to be inconsistent with his innocence, and in actual fact, a further inference of guilt.

For the aforesaid reasons, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed.

***DATED and delivered at Kisumu this 23<sup>rd</sup> day of October, 2015.***

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**