



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 192 OF 2012

BETWEEN

**ALI SALIM AWADH alias MAJID
APPELLANT**

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 30th March, 2012

In

H.C.Cr.C. No.23 of 2009)

JUDGMENT OF THE COURT

One year after the naked and decomposing body of the deceased person, Kalthum Ali was discovered on 22nd November, 2008 in a flat on the 3rd floor of Jiwaji Building, Mombasa, the appellant Ali Salim Awadh, alias, Majid was arrested as a suspect, tried, convicted and sentenced to a term of imprisonment for a period of 50 years in the **High Court** (Msa) Criminal Case No.23 of 2009 (**Odero, J**). The evidence upon which that conviction was based was purely circumstantial.

It was the case for the prosecution that at about 8.30 p.m on 16th November, 2008 the appellant who was known to some of the witnesses as Majid, was seen by two witnesses, Rashid Abdallah (PWI) and Musa Yusuf (PW3) in the company of a lady clad in a *bui bui* (vail) having coffee in a cafe' at Makadara grounds in Mombasa and later that night at 6 p.m. and early morning at 2.00 a.m. by Kioko Munzila Mutisya (PW14) at the General Post Office(G.P.O) bus stage.

PW1 and PW3 maintained that the appellant who had no fixed abode was a common figure in Makadara area and recalled that when they saw him on the night in question, his companion, a part from the vail was also wearing a pair of orange shoes and carrying a grey handbag. On the other hand PW14 narrated how on the night of 16th/17th November, 2008 at 6 p.m. he first saw the appellant wearing a white cap in the company of a lady dressed in *bui bui* and carrying a silverish/grey handbag. The two stood only 20 meters from him and he observed them for some 15 minutes. He saw the appellant for the second time at

2 a.m. and this time he was alone. The next day on 17th November, 2008 the scene was set at Malindi with the testimony of Mohamed Kher Obbo (PW6). According to him the appellant called him with a request to help in disposing of a broken golden chain and two mobile phones, which the appellant explained to have snatched from a lady after hitting her on the head with a bottle; that the lady collapsed and died. This witness was, during the trial and on the application of the prosecutor declared a hostile witness.

There was evidence that on 22nd November, 2008 when the body of the deceased was discovered, a handbag whose colour was variously described as grey, cream, whitish, silver/grey and silver was found at the scene. In the handbag were the deceased person's voters' card, Equity Bank ATM card, perfumes, a pair of lady's open shoes, (orange in colour), black/white striped sports shorts, a cream cap, white striped lady's top and a plastic hair comb.

With the evidence of PW1, PW3 and PW4, the only witnesses who alleged to have seen the appellant with the deceased as well as the evidence of PW6 who contended that the appellant had a broken golden chain and two phones robbed off a lady, the search for the appellant began in earnest. PW6 told the court in what was clearly hearsay evidence that his (PW6's) brother had seen the appellant in Tanzania. There was no such evidence from the police. The investigating officer however informed the trial court that nearly one year later in June, 2009, the appellant was traced and arrested at Shimo La Tewa Prison where he was serving a 30 days' term for the offence of loitering. Upon his arrest the appellant was charged with the murder of the deceased contrary to **Section 203** as read with **Section 204** of the Penal Code, with the only evidence linking him with the death of the deceased being the fact that he was the last person to be seen with the deceased, his cap was found at the scene, he attempted to dispose of a broken golden chain and two mobile phones and that he disappeared from Makadara area soon after the incident.

He denied in his sworn defence involvement in the deceased's death raising a defence of *alibi*, that throughout the period in question he was in Lamu where he lived and worked as a mechanic. As a mechanic he would occasionally travel to Mombasa to purchase spare parts. He made such a trip on 16th May, 2009. Upon reaching Mombasa he was arrested and charged with loitering as explained above. While serving the term for this offence at Shimo La Tewa Prison, he was arrested again in connection with the murder of the deceased. He maintained that the deceased, PW1, PW2, PW3, PW6 and PW14 were all strangers to him; that he was not known as Majid and that this was a clear case of mistaken identity.

The trial **Judge** was persuaded that the circumstantial evidence presented in proof of the charge pointed to the appellant and relying on the holding in **James Mwangi v (1983) KLR 522** convicted him. In arriving at that conclusion the learned Judge made the following factual findings on the question of identification;

“The accused insists that he does not know PW1, PW3 or PW14 at all. Why would three people who are totally unconnected to each other say that they saw the accused in Mombasa if he was not there? What would the witnesses have to gain by so stating?... the three witnesses knew the accused very well....It is not possible that three witnesses would falsely claim to have known the accused for great length of time if this were not true. The three witnesses could not all have been mistaken. The witnesses all state that the area was well-lit and they could see the accused very well. The court takes judicial notice of the fact that the GPO area ... is on a main street in Mombasa which is well served by street lights rendering visibility good (sic). Likewise the Makadara area is surrounded by restaurants which have electric lighting again making it easy to see and recognize others.”

Rejecting the appellant's *alibi* defence the learned Judge explained that;

“...the accused claims that on 16th November, 2008 he was nowhere near Mombasa.... That he was at his home in Lamu. The accused has tendered no evidence to prove that he was in Lamu. The accused must have been in the company of family and friends in Lamu. Nothing would have been easier than call a family member

or friend to confirm that indeed he was in Lamu.... There is no reason or motive these witnesses would have had to fabricate evidence against the accused.

On the appellant's "Majid" *alias* the Judge wondered once more;

"The accused's attempt to deny his nick-name "Majid" is also rejected. It is quite common for people to bear nick-names which are not their official names. All the witnesses have referred to the accused as "Majid". Where would this name have come from if it was not the name he was commonly referred to by (sic)...Four witnesses cannot impose upon the accused a name which was not his."

The learned Judge was ultimately satisfied, as a matter of fact that the lady who was seen with the appellant was the deceased because the appellant was properly identified as the last person to be seen with the deceased and that the handbag and orange shoes she had been seen carrying and wearing were recovered next to the body. On the handbag and the shoes the learned Judge developed yet another theory, that;

"Whilst it is quite common for a woman to carry a handbag of any colour, these exhibits were unique in that all the witnesses say the lady they saw with accused had a silver/grey handbag and wore orange shoes, which is not a common colour of footwear. The colour of footwear made it unique and easily identifiable. There could not have been many women wearing orange shoes in the Makadara area that same night."

We, finally reproduce other conclusions arrived at by the learned **Judge**, just like the previous ones that have caused us some concern. The next question the **Judge**

posed was whether the evidence before her was sufficient to found a conviction. She answered the question thus;

"The mere fact that the accused was in the company of the deceased the night when she disappeared will not of itself be sufficient. The accused could very well argue that although he was with the deceased at Makadara grounds he parted company with her before she met her untimely death....In the room where the body of the deceased was recovered police found a white cap. Whilst a white cap may be a common article of clothing it cannot be a mere coincidence that accused is seen in the company of the deceased wearing a white cap and in the room where the body of the deceased is recovered a white cap is also found. The only conclusion... the accused must have been in that room with the deceased at the time when she met her death"!

It was the learned Judge's view that what PW6 told the court regarding the appellant hitting and killing a lady before snatching a golden chain and two mobile phones from her, did not amount to a confession. We said earlier that we are concerned with the various conclusions reached by the learned Judge as reproduced in the preceding paragraphs. We shall deal with those concerns shortly.

The appellant was aggrieved by the conviction and the 50 year-term of imprisonment and has brought this first appeal in which he complains, in the main, of the learned trial Judge's treatment of circumstantial evidence. This single ground formed the plunk of Mr.Were's submissions on behalf of the appellant before us.

In his view the prosecution had failed to prove that the lady who was allegedly seen with the appellant was the deceased; that the evidence only related to what the lady was wearing, and carrying; that these were ordinary handbag and shoes and that since the lady was dressed in *bui bui* the witnesses were not able to identify her. Counsel added that the evidence of PW6 as to the cause of the deceased person's death, was not only inadmissible but also contradicted that of the doctor.

While PW6 stated that the appellant had told him how he had killed a lady by hitting her on the head with

a bottle, the doctor was emphatic that though the body was extensively decomposed, the head was normal with no fracture on the skull. Instead the doctor attributed the cause of death to cervical spine fracture secondary to pressure on the neck.

The respondent having filed a notice, we suppose under Rule 59 of the Court of Appeal Rules, whose import was to seek the enhancement of the 50 years imprisonment to death sentence, submitted through Mr. Kiprop, learned Senior Prosecution Counsel that the circumstantial evidence directly linked the appellant with the death of the deceased. The intent and purport of the notice filed by the respondent was brought to the attention of the appellant who through counsel opted nonetheless to proceed with the appeal.

This is a first appeal from the decision of the trial court. Our approach, in determining the main ground raised in this appeal, will be by way of a rehearing and re-evaluation of the recorded evidence, in which case we are not bound to follow the trial Judge's findings of fact should it appear to us that the findings were arrived at without taking into account particular circumstances or probabilities or if the findings were influenced by irrelevant factors. As we do this we also bear in mind the fact that we have not had a similar advantage as the trial court of seeing and hearing the witnesses. **See Pandya v R (1957) EA 336** cited with approval in the oft-cited **Okeno V R (1972) EA 32**.

It is a common factor based on the post mortem examination report produced by Dr. Mandalya that the body of the deceased had signs of congestion on the neck muscles, haemorrhage on the larynx and a fracture of the upper cervical spine which led him to conclude that death was caused by cardiorespiratory failure due to pressure on the neck. None of the witnesses saw who applied the pressure on the deceased person's neck leading to her death. We have said that the evidence relied on in charging the appellant and upon which the trial court found a conviction was only circumstantial as opposed to direct evidence. The law does not, however draw any distinction between circumstantial evidence and direct evidence in terms of weight or importance. The standard of proof remains proof beyond any reasonable doubt and the burden rests with the prosecution.

An inference of guilt will only be drawn if, from the facts and surrounding circumstances there is no other hypothesis except that the suspect committed the offence. If, on the other hand there is a reasonable hypothesis from these facts and circumstances consistent with the suspect's innocence the court must so find and acquit him. At the time the two leading local decisions in **R v Kipkering Arap Koskei (1949)16 EACA 135** and **Simoni Musoke v R(1959) EA 715** propounded these principles, the House of Lords also considered the value of circumstantial evidence in an equally famous case of **Lejzor Teper v The Queen (1952) AC 480**, which clearly influenced the decision in **Musoke** case (supra). The Law Lords said as follows;

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.

...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure there are no other co-existing circumstances which would weaken or destroy the inference.”

Were the exculpatory facts in this case incompatible with the innocence of the appellant and incapable of explanation, upon any other reasonable hypothesis than that of his guilt or were there factors in the circumstances that could weaken or even destroy the inference of guilt? The most critical evidence for the prosecution case was that on the night of 16th November, 2008 three witnesses insisted that they saw the appellant with a female companion.

PW1 and PW3 saw the two in a cafe' between 8.30 and 9.00 p.m, seated some 50 meters from the witnesses and observed that the appellant was wearing blue jeans, long sleeved shirt with white stripes and a white cap, while the lady was wearing a black *bui bui*, orange shoes and carrying a silver handbag. PW14, on the hand said he saw the appellant twice; the first time at 6 pm with a lady and in the wee hours (at 2 p.m)-alone. He also noted the lady's orange shoes.

Another incriminating evidence was that the next morning the appellant approached PW6 in Malindi, several miles from Mombasa, seeking his help to dispose of two mobile phones and a broken golden chain. Apart from this it is alleged that the appellant confided in PW6 that he obtained these items after attacking and killing his victim, a lady, by hitting her on the head with a bottle. In the end, and in view of the manner in which the items were obtained, the witness (PW6) declined to assist the appellant. Throughout his testimony and before he was declared a hostile witness the trial court observed his demeanour and recorded that the witness was “*evasive*” and “*confused*.”

We start with the first two witnesses (PW1 and PW3) and note that, apart from admitting that they did not see the face of the lady who was with the appellant due to the *bui bui* she was wearing, they also said that the lady was not known to them prior to this date and, further that she sat in a place that was “a bit dark”.

Even when the body was recovered they conceded that due to its state of decomposition they were not in a position to recognize her. So that they may have actually seen the appellant with a lady on that night but without evidence linking that lady with the deceased this piece of evidence was a long shot and simply a gamble. The two also claimed that they identified the deceased from her orange pair of shoes and silver handbag. There was no special feature or mark on them even as they admitted that such shoes and handbags were common items which were readily available in shops. The same reasoning would go to rebut the evidence of PW14 which was also based only on the colour of the lady’s shoes.

The investigating officer for his part categorically told the court that the deceased’s mother and sisters did not identify the orange pair of shoes to belong to the deceased. That is why we have expressed our concern at the casual treatment by the learned Judge of this evidence. After correctly observing that the items were of a common nature, she went on to water down that finding by stating, in a manner bordering on her giving evidence based on hypothesis and theories that cannot be tested, that the orange colour was unique in ladies’ footwear; that there could not have been many women wearing orange shoes in Makadara area that night.

The next evidence was a cap which was also found at the scene. Like the handbag, it was variously described as white and sometimes as cream.

Both PW1 and PW3 maintained in examination in-chief that it belonged to the appellant because he was wearing it on the fateful night. But in cross-examination they easily accepted that there was nothing unique about it and that white is a common colour in caps. Once again the learned Judge accepted the fact that such caps are common place but went ahead to discount it by holding that it could not have been just a coincidence that at one point the appellant is seen wearing a white cap and in the company of lady and after a few days the lady is found dead and a white cap is left next to the body. To her this was irresistible circumstantial evidence. We do not wish to repeat what we have said earlier about theories, except to reiterate what the predecessor of this Court said in 1965 in the case of **Okethi Okale & Others v R** (1965) EA 353, that a conviction in a criminal trial can only be based on the weight of the actual evidence presented before the court and not theories put forth by the trial court.

The trial court ought to have treated the evidence of PW6 as that of a hostile witness having been so declared. His evidence that the appellant confided in him how he had killed a lady in order to steal from her was, in the first place inadmissible. Regarding the two phones, the investigating officer confirmed that he submitted a request to Safaricom and Zain, respectively, for a report based on the usage before and after the period in question.

In his own words the “*Zain Report did not link the accused to the deceased*”. He also established no link between the appellant and the deceased person’s Safaricom line. Besides, PW6 did not know the make(s) of the two mobile phones. But of significance is the weight to be given to PW6’s evidence; the evidence of what **Section 152** of the Criminal Procedure Code refers to as a refractory witness. Once a witness comes within this provision and the court declares him hostile, **sections 153, 154, 161 and 163** of the Evidence Act kicks in and the prosecution, with the leave of the court is permitted to cross-examine the witness to establish his credibility, accuracy and veracity.

Even after subjecting the witness to cross-examination, the court is still bound to evaluate that evidence, though it may not necessarily be acted upon by the trial court. See **Maghenda V R**, Criminal Appeal No.182 of 2010 In **Daniel Odhiambo Koyo V R** Criminal Appeal No.182 of 2010 this Court held that the probative value of such evidence is negligible and may only be relied upon in clear cases to support either the prosecution case or the defence case. Indeed by allowing the witness to be cross-examined is itself a finding that the witness is unreliable and the purpose of cross-examination is to impeach his evidence. We therefore do not understand the basis upon which the learned Judge relied on PW6's discredited evidence in this case, which was by no means clear.

We turn to consider what in other jurisdictions is called exculpatory evidence or factors that weakened or destroyed the circumstantial evidence in this case. Jiwaji Building was at the time of the incident owned by Ismail Guliani Ali (PW9), a Canadian citizen. He confirmed that there were four (4) vacant flats in the building. Regarding Flat DI on the 3rd floor where the body of the deceased was discovered he said that it was leased to one old man by the name Mohamoud Hussein. His son regularly paid the monthly rent and also had the keys to the flat. But when the body was found in it, the flat did not appear to have been in use for some time. When the witness called the tenant's son and informed him of the incident, the latter has never been seen from that moment. He also stopped paying rent, and has never returned to claim his two months' rent deposit. This evidence was confirmed by the property manager, Hillary Kinundu Kuindwa (PW11).

The second piece of exculpatory evidence relates to common piece of evidence by the deceased's mother, her aunt and friend, Mujida (referred to in the proceedings throughout as Nufedha) and her elder sister (PW12) to the effect that the deceased person's marriage to a man called Munir Omar Bawazir was stormy leading to a divorce in a Malindi court. Their children lived with the deceased's mother. There was no attempt to ascertain the man's movements during the period in question.

Thirdly, there was evidence that when the deceased left Malindi for Mombasa she informed her sister PW12 that she had an appointment with "a Kikuyu man" who had promised to assist her purchase a lathe machine in Nairobi. The two (the Kikuyu man) and the deceased were to travel to Nairobi for this purpose. There were no investigations to establish the existence of this man. Mujida and the deceased apart from being relatives were also great friends. Each time the deceased came to Mombasa she would stay with Mujida just as she did before her death. According to Mujida a day before that fateful day the deceased informed her that she would be visiting a friend and business partner called Hawa. Did the two (the deceased and Hawa) meet and if they did, did they discuss business, and who was involved?

Finally if indeed the appellant was with the deceased on 16th November, 2008 which fact we have ruled out, and the body was discovered in a state of extensive decomposition on 22nd November, 2008, some six days later, is it possible some other person may have killed the deceased days after the night she is alleged to have been with the appellant? The precise date of her death having not been established, it cannot be assumed, that she was killed on the night she was allegedly seen with the appellant.

In the end we find that there were serious misdirections by the learned Judge with the result that her analysis of the evidence went off the grid.

The circumstantial evidence before her, as clearly demonstrated by our re-evaluation, did not irresistably or exclusively point to the appellant's guilt and further there were factors that weakened any inference of guilt. To the contrary there were several circumstances, as we have identified, that pointed to the appellant's innocence.

Finally the learned Judge did not explain, after finding that the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code was proved, why she imposed a 50 year sentence. In view of the decision we have reached we can only recommend the reading of this Court's decision on death sentence in **Joseph Njuguna Mwaura & 2 others V R Criminal Appeal No.5 of 2008**. In the result this appeal succeeds. The conviction is quashed, sentence set aside and the appellant shall be set at liberty unless held for any other lawful reason.

Dated and delivered at Mombasa this 16th day of October, 2015

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