



IN THE COURT OF APPEAL

AT NYERI.

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 196 OF 2008

BETWEEN

MICHAEL KAMAU..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against conviction/sentence in the High Court of Kenya at Nakuru (Koome, J) dated 25th September, 2009

In

H.C.CR.A No. 40 of 2002)

JUDGMENT OF THE COURT

This is an appeal by **Michael Kamau Macharia** (the appellant) against his conviction and sentence meted on him by the High Court at Nakuru, (**Koome, J**, as she then was) for twin murders of **Nathaniel Kamau Thoigo** and **Esther Wangari Kamau** (the deceased) who were his grand-parents.

The gist of the prosecution case, as presented through some ten witnesses, is that a fortnight or so before their demise around the 28th of July 2001, the

deceased, an elderly couple, had invited the appellant to live with them at their home in Gachuhi, Njoro District of the former Rift Valley Province. This was confirmed by PW1 DAVID KAMAU THIONGO (DAVID) a son of the deceased, his wife GRACE NYAMBURA MAINA (PW7) and MARGARET WANJIKU NDUNGU (MARGARET) PW6 who was their neighbor, to whom the appellant had been introduced.

The first indications of trouble at the home of the deceased were in the morning of Monday 30th July 2001. **Jane Njoki** (PW2) went to the homestead at about 8.00 a.m. in the company of one **Priscilla**

Wanjiru (PW2), to harvest beans. They were surprised and intrigued that there was no one at home and all the houses were locked while the livestock were unattended. They found this to be highly unusual and so they went to the house of Margaret, who was the closest neighbor to enquire as to the deceased's whereabouts. Margaret had no idea and the trio went back to the deceased's home where they searched in their shamba but found no trace of them. It was decided that Margaret should go and find out from the deceased's son DAVID who lived and worked in Njoro. He had no idea where his parents, whom he visited regularly, might have gone.

Margaret and David returned to the deceased's homestead and found the appellant by a fence which he appeared to be repairing. When they asked him about the deceased's whereabouts, he answered that they had been collected in a car on the previous Saturday to go attend a relative's wedding in Narok and that they would be back on Wednesday 28th July 2001. David thought this did not add up and asked the appellant why his parents did not inform Margaret of that journey. To this the appellant explained that the deceased had been taken in a hurry.

David and Margaret decided to await the Wednesday the deceased were to return as stated by the appellant who in the meantime, was asked by David not to leave the homestead. David returned to his parent's home on Thursday morning but did not find the appellant. He requested another cousin of his **Mbuthia**, to mind the homestead until the appellant returned and also asked PW5, **Grace Njeri Ndungu** (Grace) to help with milking the cows.

To do so, Grace needed to boil water and after lighting the fire, she tried fetching water but the tap was empty. She decided to open the concrete tank and scoop water. Attempting to do so, a scene of horror confronted her: She saw floating in the tank the bodies of the deceased. She alerted Mbuthia and then ran crying to CRISPO MUMAI to report the gory find. Crispo (PW4) then informed DAVID who together with his brothers reported to the Police. **PC Joseph Ndwiga** (PW 10) and other officers retrieved the bodies from the water tank to the Nakuru Provincial Hospital Mortuary where they were identified and post mortem examinations conducted by **Dr. Paul Gachunga**. He concluded that the cause of death for both deceased was cardiac arrest due to severe head injuries. He duly completed post mortem reports which he produced in evidence.

Investigations commenced by the police focused on the appellant who had vanished from the homestead. **PC Samuel Parano** (PW8), then stationed at Elburgon Police Station, received information on 27th August 2001 that the appellant, who was wanted by Njoro Police, had been sighted at Elburgon. He went to the place where the appellant was under arrest by members of the public and re-arrested him before transferring him to Njoro Police Station from where he was arraigned in court.

That was the prosecution case and we have set it out in some detail consistent with our duty as a first appellate court to re-appraise, re-analyze and re-evaluate all the evidence as a whole before making our own inferences and conclusions of fact. See **Rule 29(1)** of the Court of Appeal Rules and **OKENO –VS- REPUBLIC** [1972] EA 32. We do so while aware that unlike the first instance court, we have not had the advantage of hearing and observing the live witnesses as they testified and will therefore make due allowance for that.

After hearing the prosecution's case, and the appellant's unsworn statement in which he denied the charge and simply stated that when he first went to the home of the deceased to assist them with mending the fence for cows he did not find them, and was told by an unnamed neighbour that they had gone for a meeting of water and that they would return after several days, the learned Judge convicted the appellant and sentenced him to death.

Even though the appellant's grievances against that conviction and sentence are expressed in a five-ground homegrown memorandum of appeal and a six-ground supplementary memorandum of appeal filed by his advocates, at the hearing of the appeal his learned counsel Mr. Ogaro condensed them into this single complaint:

“The learned Judge erred by convicting on mere suspicion which did not meet the test for

circumstantial evidence.”

Counsel submitted that there was no direct evidence linking the appellant to the death of the deceased whose bodies were discovered in the water tank. He asserted that the police improperly failed to investigate the appellant’s statement and concluded that the involvement of any of the other persons who frequented the homestead could not be ruled out.

Opposing the appeal, **Mr. J. K. Mutai**, the learned Senior Principal Prosecution Counsel contended that the appellant’s conviction was proper and based on sound evidence that the appellant was known to the witnesses and their testimony that he lived alone with the deceased was unchallenged.

Mr. Mutai added that the appellant’s conduct of telling the obvious lie that the deceased had gone to Narok to attend a wedding coupled with his leaving the homestead and going underground immediately after the deaths was indicative of the appellant’s guilt and inconsistent with his avowed innocence.

There was no direct evidence tendered by the prosecution to show appellant’s involvement, if at all, in the death of the deceased. There was no eye-witness account. Nor was there a lawful admission or (confession) by the appellant. The evidence connecting him to the offences was circumstantial or indirect. The guilt of a person accused of a crime may be inferred from surrounding facts and circumstances from which such guilt may be deduced as a logical and unerring conclusion. There is no dearth of authority on the subject. In the old and oft-cited case of **REPUBLIC –VS- KIPKERING ARAP KOSKE & ANOR** 16 EACA 135, the Predecessor of this Court stated it thus;

“In order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The evidence needs to be strong and compelling pointing irresistibly to guilt and excluding any reasonable prospect of innocence. Moreover, the evidence must go beyond mere suspicion, surmise or conjecture no matter how strongly held. See **JOAN CHEBICHII SAWE –VS- REPUBLIC** [2003] e KLR.

Applying the test to the case before us, we are unable to agree with **Mr. Ogaro** that the learned Judge based the appellant’s conviction on mere suspicion or that she misapprehended and misapplied the test of circumstantial evidence. We see from her judgment that the learned Judge was fully aware of the law on circumstantial evidence as set out in **SIMON MUSOKE –VS- REPUBLIC** [1958] EA 715 which she cited and applied.

We respectfully affirm the learned Judge’s finding that the appellant’s defence that he first arrived at the homestead and found the deceased gone to attend a water meeting “***defied even common sense.***”

There was cogent and consistent evidence that the appellant had in fact informed DAVID and MARGARET that the deceased had travelled “in a hurry” to attend a wedding and would be returning the following Wednesday, which was another lie. Margaret was understandably skeptical about this Narok wedding narrative given that the deceased made no mention of any wedding or journey to her, as they would if traveling, and the alleged relatives were unknown to David. The appellant’s lies apart, his conduct in fleeing the homestead immediately after the death of the deceased was not at all consistent with his innocence. He was the only other occupant of the homestead and whatever befell the deceased was a fact especially within his knowledge calling for some explanation in law (under **Section 111** of the **Evidence Act**), as in logic. The appellant’s attempted explanations turned out to be both false and contradictory and this, too, added to the rest of the circumstances, lent even greater assurance to the conclusion that the appellant was involved in the double murder of the deceased.

The conclusion is thus inescapable that the case against the appellant, though based on circumstantial evidence, was nonetheless so cogent and strong as to prove his guilt beyond reasonable doubt.

This appeal therefore lacks merit and it is accordingly dismissed.

Dated and delivered at Nakuru this 17th day of December, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR