



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, SICHALE & KANTAI, J.J.A)

CRIMINAL APPEAL NO.518 OF 2010 (R)

BETWEEN

GEOFFREY CHERUIYOT CHIRCHIR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction and sentence from the High Court of Kenya at Kericho (Ang'awa J) dated 12th November, 2009

in

Criminal Case No. 40 of 2006)

JUDGMENT OF THE COURT

The Appellant **Geoffrey Cheruiyot Chirchir** was charged in the High Court at Kericho vide Criminal Case No.40 of 2006, with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, in that on the 25th day of November, 2006, at Ririk village in Bureti District of the Rift Valley Province murdered **David Yegon**.

The appellant denied the charge. He was tried by the Superior Court. The record indicates that at first the trial commenced before **Musinga J** (as he then was) on the 10th day of July, 2007 with assessors. One witness fully gave evidence namely (PW1) Geoffrey Sigei. On the 25th day of June, 2008, the trial proceeded before **G.B.M. Kariuki J** (as he then was) when two witnesses fully gave evidence namely (PW2) **Irene Charono** and (PW3) **Philip Kipkemoi Chirchir**. On the 10th day of November, 2008, when the matter came up for hearing before **Ang'awa J**, **Mr. T.M. O. Nyangiri** learned counsel who was defending the appellant at the trial before the High Court asked for hearing to start denovo. **Ang'awa J** gave directions that the trial do commence under sections 200 (1) (b) and 200 (2) Criminal Procedure Code. Thereafter prosecution called (PW1), **Sharon Chepkorir** who was discounted because she was wife to the appellant, (PW2), **Jonathan Kipchirchir Kiprop**, (PW3), **Victor Kipkemoi Lang'at**, (PW4), **David Kipsang Korir**, (PW5) **Elijah Kibet Kipyegon**, (PW6) **Paul Cheruiyot Rotich**, (PW7) **Irene Charono**, (PW8) **Philip Kipkemoi Chirchir**, (PW9) **No.6809 P.C. Duncan Wambua** (PW10)

No.88116 P.C. Wanjala Mohamed and (PW11) **Doctor Gilbert Cheruiyot**. The appellant was the sole defence witness. He gave unsworn evidence.

In a brief Judgment dated the 8th day of October, 2009 at Kericho **Ang'awa J** delivered herself thus:-

“12 The accused person was initially detained for assault on the deceased person. The injuries inflicted were so grievous that it amounted to the loss of the deceaseds’ life.

13 The accused went to the chief for shelter.

14. I am of the opinion that the deceased was found having been inflicted injuries and members of public who were around namely PW3, PW4, and PW5 found him injured and took him to hospital.

15 I am of the opinion, that the circumstantial evidence including the detention of the accused on a charge of assault upon the deceased that later led to the deceaseds’ death accordingly point to and establishes that the accused did commit the said offence.

16 I find him guilty as charged”

The appellant was thereafter sentenced to the only mandatory sentence of death for the disclosed offence of murder after a probation officer’s report called for by the prosecution was found to be unfavourable.

The appellant was aggrieved by the said decision and he has appealed to this court citing 13 grounds of appeal. At the hearing of the appeal, learned counsel **Nyangiri Martin T.O. Momanyi** appeared for the appellant, while the state was represented by **A.J. Omutelema**, senior Assistant Director of Public prosecutions. In his oral submissions to court learned counsel for the appellant urged us to allow the appeal on the grounds that the conviction is not safe as it was based on circumstantial evidence as none of the prosecution witnesses saw the appellant commit the offence; that the evidence was contradictory and inconsistent; that the learned trial Judge did not take into consideration other relevant factors such as the fact that the offence occurred as a result of the breakdown of societal morals and that the appellant and the deceased had a domestic quarrel. Lastly that it is not known how the appellant came to be arrested and why he was arrested. Also that the introduction of the probation officers’ report and the use of its content to determine the sentence was prejudicial to the appellant.

In opposition to the appeal, learned counsel for the state submitted that circumstantial evidence is strong; that PW6 the area chief recovered a blood stained hammer which had been used to inflict the fatal injuries; the appellant and deceased were friends and there is no explanation as to why the appellant hit his friend. Further that the probation officer’s report was not tendered in evidence and as such it was not used to determine the sentence and lastly that the totality of the evidence does not point to any other possible assailant other than the appellant.

This being a first appeal, we are reminded of our role as the first appellate court, namely to revisit the evidence that was tendered before the High Court , reevaluate , reassess and analyse it and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Muthoka and Another versus Republic (2008) KLR 297.**

We have revisited the content of the evidence tendered before the learned trial Judge. We have noted from the content of the typed record of the proceedings as well as the hand draft record of proceeding which we called for that the learned trial Judge after finding the appellant guilty, received mitigation and then passed the sentence without entering a conviction. The question we have to pause to ourselves is whether this omission is fatal. In response, we wish to refer to the provisions of section 382 of the Criminal Procedure Code and Article 159 (2) (d) of the current Kenya Constitution 2010. These provide:-

“Subject to the provisions herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint summons, warrant, charge, proclamation order, Judgment or other proceeding before or during the trial or in any inquiry or proceedings under this code unless the earlier omission or irregularity has occasioned failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”

“Justice shall be administered without undue regard to procedural technicalities...”

On the basis of the above two provisions of law, we are satisfied that the learned trial Judges’ failure to enter a conviction against the appellant after finding him guilty did not occasion any miscarriage of justice and that is why no objection was raised to this omission in the grounds of appeal. We also find that it is a mere technicality. The appellant is therefore deemed to have been convicted after being found guilty. He was therefore properly given a chance to mitigate before being sentenced in the manner done.

Turning to the merits of the appeal, we find that direct evidence to the commission of the offence is absent. In the absence of direct evidence both the Superior court and this first appellate court have no alternative but to rely on circumstantial evidence. The parameters on the circumstances under which a court of law will convict an accused person on the basis of circumstantial evidence have now been crystallized by case law. In the case of **Rex versus Kipkering Arap Koskel & (2) Kimure Arap Matatu (1949) 16 EACA 135**, the predecessor of this court namely, the Court of Appeal for Eastern Africa held inter alia that:-

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be in compatible with the innocence of the accused and incapable of explanation upon any other reasonable 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 reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

In the case of **Neema Mwandaro Ndurya versus Republic Mombasa CR Criminal Appeal No.446 (2007) (UR)** this Court of Appeal reiterated that:-

“It is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factors or circumstances which may weaken or destroy the inference of the guilt of the accused person”. In the same decision the court referred to the case of Teper versus Republic (1952) A.C. 489 where in it had been held inter alia that:-

“Circumstantial evidence 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 that there are no other co-existing circumstances which would weaken or destroy the inference...”

In the case of **Mary Wanjiku versus Republic (Criminal Appeal No.17 of 1998 (UR)** the Court of Appeal held that:-

“Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence”

The circumstantial evidence relied upon by the prosecution in support of the conviction was that (PW7) **Irene Cheron** left for the appellants house intending to borrow a box of matches but found the door closed from outside with a latch. There appeared to be somebody snoring inside. (PW7) saw blood on the door. She pushed the door and peeped through and saw blood on the floor of the house. She immediately alerted her husband (PW8) **Philip Kipkemoi Chirchir** who came to the scene. He instructed

her to scream to attract attention. **Irene** screamed. Neighbours responded. They came to the appellants house. They forced the door open and found the deceased lying on the floor with injuries on the head. There was blood all over the floor, on a jacket and on a hammer which were near the deceased. The appellant and his wife were nowhere to be seen. The deceased was still alive. He was rushed to hospital but he died shortly after arrival at the hospital.

The incident was reported to (PW6) **Paul Cheruyoit Rotich** the area chief as an assault case. (PW6) in turn relayed that report to Sotik police station (PW6) visited the appellant's house and observed blood all over the floor. He recovered a blood stained jacket and a hammer which he later handed over to Sotik Police station. (PW6) later learnt that the deceased had passed on. It is (PW6's) testimony that the appellant was at large. (PW6) sent members of the public to search for the appellant. An unnamed neighbour rang PW6 and informed him that the appellant was at his place. (PW6) left for the unnamed neighbour's place and found the appellant there. (PW6) requested the appellant to accompany him (PW6) to the police station but the appellant refused saying that he feared for his life. (PW6) then rang the police for assistance. At 11.30 p.m. (PW9), **No.6809 P.C. Duncan Wambua** received instructions from the OCPD Sotick to proceed to where (PW6) was in connection with the offence subject of this appeal. He did so while in the company of **P.C. Kimeto and P.C. Kagwima**. On arrival, they found (PW6) with the appellant. Appellant was arrested and taken to Sotik police station where he was charged with the offence of murder.

Doctor Gilbert Cheruyoit (PWII) carried out post mortem on the body of the deceased. According to the Doctor's observations, the body had three scalp wounds inflicted by a blunt object. There was also a cut on the right shoulder and bruises on the anterior chest wall. In the Doctor's opinion the cause of death was head injury.

The appellant gave unsworn evidence to the effect that on the 24th day of November, 2006, he spent the whole day at the place where his brother had been initiated. The next morning is when he was given information that somebody had been found injured in his (appellant's) house. The appellant and others set about to look for a vehicle to take the injured person to hospital but the relatives of the deceased found a vehicle ahead of the appellant's party. The deceased was rushed to hospital. The appellant later learnt that the deceased had passed on. When the appellant thereafter tried to go to his house he was told not to. The matter was reported to the police. The Appellant then accompanied the Chief to the police station to record a statement as a person in whose house the deceased was found injured. The appellant was surprised when he was locked up as a suspect for an offence he knew nothing about.

From the evidence we have assessed above, it is undisputed that the deceased was found in the appellant's house having received fatal injuries from which he later succumbed to death. As observed herein earlier on, there is no direct evidence as to the causation of those injuries. The Superior Court relied on the circumstantial evidence to find the conviction. We have been invited by the appellant to rely on the same circumstantial evidence to upset his conviction. Whereas the State has on the other hand invited us to rely on the same circumstantial evidence to confirm the Superior Courts conviction.

The appellant set up a defence known to law as an "***a libi***." Case law has crystallized parameters within which that defence can hold. In the case of **Karanja versus Republic (1983) KLR561** the Court of Appeal held inter alia that:-

"the word "alibi" is a Latin verb meaning "elsewhere" or at another place." Therefore where an accused person alleges he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. In a proper case a court may in testing a defence of "a libi" and in weighing it with all the other evidence to see if the accused guilt is established beyond all reasonable doubt take into account the fact that he had not put forward his defence or his alibi if it amounted here to at an early stage in the case and so that it can be tested by those responsible for investigation and proven any suggestion that the defence was an after thought.

See also the case of **Kiarie versus Republic (1984) KLR 739** wherein the same Court of Appeal held

inter alia that ***“an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that it is not unreasonable”***. See also the case of **Ganzi & 2 others versus Republic (2001) KLR 52** where in it was held inter alia that ***“where the a libi is first raised in the appellants’ defence and not when he pleaded guilty to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecutions evidence.”***

We have weighed these two competing versions together and we are in agreement that the version of the appellant stands ousted. The reason being that if indeed the appellants’ absence from his house was innocent as he wants us to believe, there is no reason as to why (PW6) the area chief could fabricate facts against him that the appellant went missing after the deceased was found lying injured in the appellants house and was found hiding in an unnamed neighbours’ house. There was also no reason as to why PW6 could allege that the appellant refused to accompany the chief (PW6) to the police station allegedly fearing for his life, forcing the police to come to arrest the appellant from this neighbour’s house. To us the appellant’s conduct after the event is relevant. It demonstrates guilt conscience. It is not mere suspicion. It is not explainable in any other hypothesis. This fact when considered together with the fact that the scene of the infliction of the fatal injuries was the appellant’s house leaves no doubt that the appellant was the person who inflicted the fatal injuries to the deceased. Indeed the appellant may have gone to the initiation ceremony the previous night, but nothing prevented the appellant from coming back to his house that same night, commit the offence and then go back to the initiation ceremony. He had an opportunity to do so.

The motive for inflicting the fatal injuries is not borne out from the evidence. But one thing we are sure of is that who ever inflicted the fatal injuries had an intention to kill. This is borne out by the fact that a hammer was used to inflict those fatal injuries. The injuries were directed to the head. The Doctor’s findings were that the cause of the deceased’s’ death were injuries inflicted on the deceased head by a blunt object. To us a hammer is a blunt object.

The appellant’s conduct cannot be explained on any other hypothesis other than that of guilt. The inculpatory facts are incompatible with the innocence of the appellant and are incapable of an explanation upon any other reasonable hypothesis other than his guilt. The circumstantial evidence points to the appellant as the person who inflicted the fatal injuries on the deceased to the exclusion of any other person. There are no co-existing factors or circumstances demonstrated by the facts on the record which tend to weaken or destroy the inference of the appellant’s guilt.

We have keenly examined the inculpatory facts and have accordingly ruled out any suspicion which may cast doubt on the appellants’ guilt. There is nothing either from the evidence of the prosecution or the defence which has tended to weaken the inference of guilt drawn by us.

On the whole we are satisfied that the person who had the opportunity to commit the offence was the appellant and he did commit the said offence. He had the opportunity to do so and his guilty conscience confirmed that he did so. Issues of societal moral decadency may be blamed for the appellant’s behavior but that is not our concern here now. Our concern here now is whether the facts relied upon by the learned trial Judge placed the appellant at the scene of the infliction of the fatal injuries or not. We have confirmed they did place the appellant at the scene of the crime.

In the result we find no merit in this appeal. We dismiss it in its entirety and confirm the findings of guilt, the deemed conviction and sentence.

Dated at Nakuru this 12th day of April, 2013

R.N.NAMBUYE
.....
JUDGE OF APPEAL

F. SICHALE

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

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DEPUTY REGISTRAR