



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KIHARA KARIUKI, GATEMBU-KAIRU, OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 634 of 2010

BETWEEN

MOSES KIPKORIR TOO..... 1ST APPELLANT

CHARLES KIPKOECH KORIR.....2ND APPELLANT

GEOFFREY KIPKEMOI KEMEI..... 3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kericho (Muga Apondi J.) dated 20th July 2007

in

H.C.CR C. NO. 7 of 2003)

JUDGMENT OF THE COURT

1.The appellants were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and sentenced to death. The particulars of the offence are that on or about 28th July 2002 at Kaplutiet village in Kericho District within the Rift Valley Province, the appellant jointly murdered **A.C.B.**

2. At the hearing of the appeal, Prosecution Counsel I Ms *Nerolyne Idagwa* appeared for the respondent while learned counsel *Mr Maragia Ogaro* represented the 1st and 3rd appellants. The court was informed that the 2nd appellant was deceased and his appeal had abated. The appeal of the 1st and 3rd appellant proceeded to full hearing.

3.The grounds of appeal as stated in the supplementary memorandum of appeal dated 24th January 2013 is that the learned trial judge erred in law and in fact in arriving at an erroneous finding that the appellants had murdered the deceased as a result of realizing that they had raped the deceased. That the trial judge erred in arriving at an erroneous finding that PW 7 had witnessed the deceased being raped by the 1st

appellant. That the judge erred in misconceiving that the 1st appellant statement to PW 4 that he (1st appellant) had finished a certain job as being an admission or confession by the accused that he had killed the deceased. That the judge erred in failing to properly analyze and scrutinize the circumstantial evidence as to the effect that the deceased could have been killed by a different person.

4. Counsel for the respondent submitted that the trial judge did not err in finding the appellants guilty of murder. It was submitted that the appellants were charged with the offence of murder and not rape. That the circumstantial evidence tendered in court proved beyond reasonable doubt the guilt of the appellants. That the identity of the perpetrators of the offence of murder was not in issue and the appellants had positively been identified by witnesses while they raped the deceased.

5. This being a first appeal from the High Court, we are mindful of our duty which was succinctly put in **OKENO VS. REPUBLIC [1972] EA 32** at page 36 as follows:

“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 V R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILAL M RUWALA V. R [1957] EA 570). 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 court’s findings and conclusion; 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 V SUNDAY POST [1958] EA 424.

6. In this case, we now reconsidered and evaluate the evidence which was adduced before the trial judge. This court finds that the evidence of PW4, PW 6, PW 7 and PW 8 is pertinent and germane to the findings in this appeal. The 1st appellant is known as Moses but the witnesses called him Musa in their testimony.

7. The summary of the evidence before the trial court is that the appellants raped the deceased and caused her death.

8. **Isaya Arap Bore (PW 1)**, testified that he is the widower of the deceased. That on 28th July 2002 at around 7.30 am, the deceased went to do some shopping and never went back home. On the following day, PW 1 got information that somebody had been killed next to the river. He went to the scene and found his wife had injuries on her private parts and was dead.

9. **Gilbert Kipkemoi Langat, (PW4)** testified that on 28th July 2002 at around 6.00 pm, he went to see his friend *Mr. Chemutai* and on his way back, he saw the 1st appellant walking across the river with the deceased. On going back at 7.00 pm, he found them having sex by the riverside. On arrival home PW 4 took supper and went to sleep. Later, the 1st accused (1st appellant) went to sleep in the same house. While in the house, the 1st appellant bragged that “he, the 2nd appellant and 3rd appellant had accomplished a certain job”. On the following morning, PW 4 heard some screams and on rushing to the scene, he saw the deceased who had blood stains on her thighs and her body was less than hundred meters from where PW 4 had seen the 1st appellant having sex with the deceased.

10. **Evans Kipkorir, (PW 6)** testified that on 28th July 2002 at around 5.00 pm, he went to the river with *Victor Kibet* in order to wash their legs. While there, PW 6 saw *A.C.B* (the deceased) and **Musa (1st appellant)**. He also saw **Charles Korir (2nd appellant)** and **Geoffrey Kemei (3rd appellant)** approaching at a distance. On the following day, PW6 testified he was informed that the deceased had passed away. When PW 6 went to the scene, he found the body of the deceased which was five meters away from where he had seen her seated with the 1st appellant.

11. **Purity Chelangat Bii (PW 7)** testified that on 28th July 2002 at around 5.00 pm, she went to fetch firewood while accompanied by *Mercy Cherotich* and **Mercy Chepkemoi, (PW 8)**. Subsequently, PW 7 saw the 1st appellant having sex with the deceased across the river. PW 7 observed them for about half an

hour leaving behind the other two children.

12.PW 8 testified that she recalled that on 28th July 2002, she had gone to the river to collect firewood with *Caroline Chelangat* and *Mercy Cherotich* and on the way she saw Musa (1st appellant) and A.C.B (deceased) doing bad things meaning that the two were having sexual intercourse. Subsequently, PW 8 saw *Charles* (2nd appellant) and *Geoffrey Kemei* (3rd appellant) joining them. PW 8 testified that all the three raped the deceased who screamed and nobody went to her assistance.

13.PW 10 police constable *Paul Mbaabu* testified that on 29th July 2002, while he was attached to Kericho Police Station he was instructed to proceed to Jamji Patrol base and report to the officer in charge. On arrival, PW 10 found Corporal Rutto and the Assistant Chief of Kaplutiet sub-location before being led to a river where he was shown the body of A.C.B (the deceased). PW 10 observed that the deceased was lying in a pool of blood and also bleeding from her private parts.

14.**Dr. Athanasius Kaseta Ochieng, (PW 11)** testified and produced a post mortem report whose conclusion was that the deceased had died due to cardio-respiratory arrest secondary to severe hemorrhage due to severe vaginal injuries from blunt objects.

15.Having summarized the prosecution evidence, what evidence was led by the defence?

16.The 1st appellant testified that on 28th July 2002, he went with deceased to a busaa den that was across the river. That they both drunk busaa and later went to the house of the employer of the 1st accused. The 1st appellant stated that the deceased excused herself and went away. That on the following day, he went to his home where he slept and never heard anything about the deceased.

17.The 2nd appellant (now deceased) testified that on 28th July 2002 at around 1.00 pm he had lunch and went to the shopping centre where he played a game of pool and at around 6.30 pm he had supper and retired to bed. On the following morning he had screams and rushed to the scene where he saw the body of the deceased.

18.The 3rd appellant testified that on 28th July 2002 at around 8.00 am he took his school uniform to wash in the river. At around 8.45 am, he went for breakfast before proceeding to school. He revised his school notes upto 1.00 pm after which he went back home and proceeded to the market for lunch. He returned home around 6.50 pm. The 3rd appellant stated he was surprised that PW 7 and PW 8 had implicated him. He denied any involvement in the murder of the deceased.

19.The trial judge considered the evidence and made the following finding in his judgment at page 12 thereof:

“It is apparent that none of the prosecution witnesses actually saw the accused persons killing the deceased. It is significant to note that the prosecution relied entirely on circumstantial evidence to prove their case.”

20.Having re-evaluated the evidence on record, we find that the trial judge made a correct finding and analysis of the evidence. The trial Judge did not misdirect himself that the evidence before the court was circumstantial. The prosecution evidence was circumstantial and there was no direct evidence from an eye witnesses who saw the appellants kill the deceased. The next issue for this court to re-evaluate is whether the circumstantial evidence before the trial judge was sufficient to convict the appellants.

21.The High Court after examining the evidence concluded at pages 12 to 13 of the judgment that the evidence adduced show that PW 4 had seen the 1st appellant walking with the deceased across the river. At around 7.00 pm, PW 4 saw the two having sexual intercourse by the riverside. The above evidence was confirmed and corroborated by PW 7 and PW 8. PW 8 testified that she saw the 2nd and 3rd appellants joining the 1st appellant in raping the deceased. Specifically, PW 8 testified that the deceased screamed and nobody came to her assistance. The trial Judge found that the above evidence put all the three appellants within the vicinity of the scene of crime on the material day. At page 14 of the judgment,

the trial judge concludes that taking all the evidence in totality, "it leads to one conclusion, that the appellants jointly raped the deceased and knowing the seriousness of the charge of rape killed the deceased in cold blood." The issue for this court to determine is whether the trial judge was correct in arriving at the conclusion that the appellants jointly raped the deceased and killed the deceased in cold blood. Is there sufficient circumstantial evidence to justify this conclusion?

22. The law is also clear that an appellate court would not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless, among other things, no reasonable tribunal could have made such findings (***REPUBLIC VS. OYIER [1985] KLR 353***). The credibility of PW4, PW 6, PW 7 and PW 8 was not impugned. The real question in this case is an issue of fact – whether the appellants participated in the murder of the deceased. The trial court below considered the evidence and made findings of fact associating the appellants with the murder of the deceased. It has not been shown that the trial court misdirected itself in any material particular. The testimony by PW 8 that she saw the 2nd and 3rd accused joining the 1st appellant in rape of the deceased was not challenge. The credibility of PW 8 was not shaken. All that the 3rd appellant stated in his defence is that he was surprised that PW 7 and PW 8 implicated him. The testimony by the 3rd appellant is that he was not at the scene at the time the alleged rape was taking place. PW 7 and PW 8 stated that the 1st and 3rd appellants were at the scene and they participated in the rape of the deceased. The evidence of PW 7 and PW 8 remains unchallenged and cannot be displaced by a mere allegation from the 3rd appellant that he revised his school notes upto 1.00 pm when he went back home and subsequently went to the market for lunch and returned home around 6.50 pm.

23. Our re-evaluation of the evidence indicate that the testimony of PW 6, PW 7 and PW 8 corroborate each other. All these witnesses saw the 1st appellant having sex with the deceased. All of their testimony indicate that the 1st appellant was with the deceased roughly at the same time between 5 pm and 7 pm. The testimony of PW 6 and PW 8 reveals that the 2nd and 3rd appellants were also at the scene and had intercourse with the deceased. We find it material the testimony by PW 8 that the deceased screamed and nobody came to her assistance. From the testimony given, we find that the trial judge was correct in holding that the appellants raped the deceased.

24. We remind ourselves that there was no eye witness who testified who saw the appellants kill the deceased. The question is whether from the circumstantial evidence adduced, an inference can be drawn that the appellants killed the deceased. To sustain a conviction on circumstantial evidence, it was held by this Court in ***JAMES MWANGI V. REPUBLIC [1983] KLR 327 at page 331*** that:-

“In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incomparable with innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10 the Edition Pg 31) it was also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there is no other co -existing circumstances which would weaken or destroy the inference – TEPER V. THE QUEEN [1952] AC 480 AT PAGE 489.”

25. In the present case, witnesses testified that the appellants were seen having sexual intercourse with the deceased. PW 8 testified that the deceased screamed and nobody came to her assistance. PW 4 testified that the body of the deceased when found had blood on her thighs. The testimony of PW6 was that the body of the deceased was found near where the appellants had been seen having sex with the deceased. The postmortem report shows that the deceased had died due to cardio-respiratory arrest secondary to severe hemorrhage due to server vaginal injuries from blunt objects. From all these circumstantial evidence, we find that there is credible and overwhelming evidence connecting the appellants with the rape and death of the deceased.

26. We find that there are sufficient circumstantial incriminating facts incompatible with the innocence of the appellants and incapable of any other explanation other than the guilt of the appellants. The Appellant argued that the trial judge erred in convicting them based on the some confession or admission of the

offence. Having gone through the record, we are satisfied that both the trial magistrate and the High Court did not convict the appellants based on an alleged confession or admission of the crime. There is nothing on record to suggest that the conviction was based on the testimony by PW4 “that the 1st appellant bragged that he, the 2nd accused and 3rd accused had accomplished a certain job.” Even if we are wrong on this issue (of which we are not). There is sufficient circumstantial evidence pointing irresistibly to the guilt of the appellants.

27. From the foregoing, we dismiss the appeal of the 1st and 3rd appellants as being unmeritorious.

Dated and delivered at Nakuru this 12th day of APRIL, 2013.

P. KIHARA KARIUKI

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JUDGE OF APPEAL

S. GATEMBU-KAIRU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR