



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: BOSIRE, WAKI & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 71 OF 2010

BETWEEN

ERICK CHERUIYOT BII APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Musinga, J.) dated
27th February, 2009
in*

H.C.CR.C. NO. 12 OF 2005)

JUDGMENT OF THE COURT

Erick Cheruiyot Bii, the appellant, was presented to the High Court at Kericho with an information charging him with the offence of murder contrary to **section 203** as read with **section 204** respectively of the Penal Code, particulars being that:-

“On the 3rd day of April, 2005 at Kipchimchim Village in Kericho District, within Rift Valley Province, murdered Betty Chepkoech.”

He was tried with the aid of assessors by Musinga, J. who, at the conclusion of the trial found the appellant guilty of murder as charged, convicted him, and later sentenced him to death. The appellant’s conviction was wholly based on circumstantial evidence.

Betty Chepkoech, the deceased, was as at the date of the offence aged about 3 years, and was the daughter of ***Beatrice Chepkurui*** (PW1). The prosecution case was that on 3rd April, 2005 at 5:30 p.m., PW1 left the deceased at her residence at Kipchimchim, playing with other children, and went to fetch water from a nearby river. She returned but found the deceased absent. She was allegedly informed that the deceased had gone with one, ***Rachel Chebet*** (PW2), the mother of the appellant who lived nearby. Curiously, PW1 did not immediately go to PW2’s house to look for her daughter. The next day she learnt that the deceased had not slept at PW2’s house and her whereabouts was unknown. When PW2 was asked about the deceased, she explained that the appellant, whom as we stated earlier was her son, had left her house with the deceased. She did not personally see the appellant leaving with the deceased, but she testified that a 4 year old child called F had informed her about it. It was also her evidence,

contrary to what PW1 stated, that when she left with the deceased, PW1 was present and allowed her to go with the deceased.

F did not testify and no explanation was offered by the prosecution as to why she did not do so. Be that as it may, the deceased's body was recovered from a bush lying on its side without an under pant and her dress was partially pulled up. **B.K**, a 13 year old former pupil at K Primary School discovered the body and informed others about it. Police were contacted. On the basis of PW2's statement that the appellant was the last person who was seen with the deceased alive, the police arrested the appellant and later charged him as earlier on stated.

It is evident that the deceased's body was not subjected to any post mortem examination, as no evidence in that regard was adduced at the trial. No explanation is on record for that omission or as to why the post mortem report on the deceased was not produced or exhibited at the trial.

The appellant did not admit he was with the deceased on the material day. His case was that at 6:30 a.m. on the material date, he went to his uncle's house where he stayed for a short time before he returned to his home. He thereafter left for Kapseker where he arrived at about 4 p.m. He wanted to meet a friend. He did not find him and was informed the friend would not return soon. The appellant went to his uncle's home where he remained until 6th April, 2005, when he was arrested. It is clear that his defence was an alibi.

Although as we stated earlier the appellant's trial was with the aid of assessors, the record shows that the trial judge neither summed up the case to the assessors, nor did he seek or obtain their opinion on the matter.

An issue has been raised on this by Mr. Nyakundi, Senior State Counsel, but we will revert to it later on.

In his judgment, the learned trial Judge observed, quite correctly in our view, that a post mortem report on the deceased was essential and should have been produced in evidence, and too, that the investigating officer of the case should have but did not testify to show circumstances under which the appellant was arrested. He was, however, satisfied that a failure to produce the post mortem report on the deceased and to call the investigating officer as a witness was not fatal to the prosecution case. He relied on the evidence of PW2 to hold that the appellant was the last person seen with the deceased alive basing his decision on the conduct of the appellant. The appellant's conduct which the learned Judge had in mind is the appellant's alleged escape from home and his failure to inform his mother where he was going. The learned judge concluded his judgment thus:-

“In my view, there is strong circumstantial evidence that points to the accused as the only person who must have murdered the deceased.”

He then cited the case of ***Republic v. Kipkering Arap Koske, 16 EACA 135*** in support thereof.

In this appeal, the main issue and which the appellant's counsel, Mr. Maragia Ogaro harped on, is whether indeed the circumstances of this case irresistibly point to the appellant to the exclusion of all others, as the person who killed the deceased and whether those circumstances exclude any other reasonable hypothesis than his guilt and are not explainable or weakened by co-existing circumstances.

This being a first appeal, we are obliged to re-evaluate all the evidence and come to our own independent conclusion on the matter. We are bound to give allowance to the fact that unlike the trial court, we do not have the advantage of seeing and hearing witnesses testify as to fully assess their credibility. It is a duty an appellant justifiably expects us to perform, and which we shall endeavour to perform.

The starting point is the evidence of PW2. She was the mother of the appellant. She is the one who according to the evidence left with the deceased from the deceased's mother's home. Her evidence was that she did not witness the deceased leaving with the appellant. She said that she saw the appellant at his

uncle's house on 4th April, 2005 but she did not indicate the time. It appears it was soon after the deceased was found missing. She inquired from him where he had left the deceased. His answer was that **"the child was crying wanting to be taken where I was. He told me he decided to run away to Kapseger."** It was her evidence that she did not know why he ran away to Kapseger, which was quite a distance from his home. It should be recalled that the appellant testified that on the material day he left his home at 7 a.m. and arrived at Kapseger at about 4 p.m.

The appellant's response to his mother's inquiry does not unequivocally amount to an admission that he was with the deceased. Yet it is the evidence the trial Judge relied upon to convict the appellant coupled with PW2's statement that a 4 year old child told her the appellant had left with the deceased. On its own, the above evidence is insufficient to support the holding by the trial court that the appellant was the person who was last seen with the deceased alive. The 4 year old child did not, as stated earlier, testify. PW2's statement on that score is no more than hearsay evidence. Besides, the investigating officer having not testified, we do not know nor are we likely to know on what basis the appellant was arrested. No one testified that he saw the appellant with the deceased. His conduct of allegedly escaping to Kapseger does suggest guilt, but it is insufficient on its own without more to support a criminal charge, more so a serious one like murder.

It cannot also be gainsaid that the post mortem report was improperly omitted from the evidence which was tendered in court. If for any good reason a post mortem examination on the body of the deceased was not carried out that reason was not given to the Court, and in our view, that was a serious omission which would suggest a callous approach to the case by police officers who were assigned the duty of investigating the case. Had the post mortem been done and report thereof tendered in evidence, it would perhaps have shown the cause of the deceased's death. The investigation of this case was to our mind poorly handled, and for the reasons we have endeavoured to give, the conviction of the appellant was not based on sufficient evidence and for that reason, we are not satisfied the charge of murder against the appellant was proved beyond any reasonable doubt as required by law.

Besides, as stated earlier, the trial was commenced and continued with the aid of assessors. For some reason, the trial judge did not sum up the case to the assessors, nor do we have any note showing that the assessors were asked to or did give their opinion. Granted that the requirement of assessors has since been done away with, our obligation is to apply the law as it was during the trial. We believe that the assessors input was at that time an ingredient of the concept of a fair trial.

For the foregoing reasons, we agree with both Mr. Maragia Ogaro for the appellant, and Mr. Nyakundi for the State, that the appellant's conviction for the offence of murder is unsupportable by the evidence on record. Accordingly, we allow his appeal, quash his conviction for that offence and set aside the sentence of death imposed on him by the High Court. He shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Nakuru this 23rd day of February, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR