



**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WAKI, ONYANGO OTIENO & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 425 OF 2007

BETWEEN

**JACINTA WAMBUI MWANGI 1ST APPELLANT
PATRICK KARANJA MWANGI 2ND APPELLANT
AND
REPUBLIC RESPONDENT**

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Apondi, J.) dated 18th April, 2007

in

H.C.CR.C. No. 87 of 2004)

JUDGMENT OF THE COURT

The 1st appellant, **Jacinta Wambui Mwangi**, and the 2nd appellant, **Patrick Karanja Mwangi**, together with others not before Court were charged in the High Court at Nakuru with the murder of the deceased **Joseph Mwangi Kagwi** on diverse dates between 10th and 26th October, 2005 at Subukia Valley Farm Kabazi Location in the then Nakuru District. After a full hearing, the High Court, Kimaru J. found the two appellants guilty of murder and sentenced each one of them to death provoking a first and probably last appeal to this Court. The first appellant was the wife of the deceased whereas the second appellant was the son of the deceased.

The background facts in this matter, according to the evidence presented by the prosecution in the trial court, were that the deceased had a farm in Gatundu where he resided with his family members including the appellants. The deceased decided to dispose of the Gatundu farm and relocate the family to Kabazi area of the then Nakuru District. After the sale of the Gatundu farm, the deceased bought four parcels of land within Kabazi area which parcels included a plot at Kabazi Trading Centre. Three of the parcels were within Subukia Valley.

According to the testimony of the area Chief, **George Kahara Wanjohi (PW4)**, the two appellants had a strained relationship with the deceased and as a result, as the area Chief, he was called upon to mediate in the dispute about a year before the deceased's demise. The mediation concerned an expression of an intention by the deceased to sell the Kabazi Trading Centre plot which idea was resisted by the two appellants. According to PW4, the mediation was successful and the deceased gave up the idea of selling that parcel of land. In the course of the mediation process, PW4 testified, that the deceased had complained to him that the second appellant had threatened to cut him with a panga. The threat in turn

made the deceased to relocate from Kabazi Trading Centre to a house he had constructed on one of the other three parcels at Subukia Valley where he lived alone.

On 8th October, 2005, the deceased went to the house of **Stephen Macharia Njuguna (PW7)** a carpenter by profession and told him that he would require his services to assist him construct a store next to the house in the Subukia Valley. The two had agreed to commence the works on 11th October, 2005. On the same day the deceased did also seek the assistance of his close friend **Mr. John Charagu Mbugua (PW6)**, to assist him in constructing the store. According to PW6, when the deceased sought his services, he had just come from Kabazi Trading Centre where he allegedly retrieved three title deeds in respect of the Subukia Valley parcels and the reason why he obtained the title was because the deceased feared that the 1st appellant intended to destroy the titles following the deceased's disagreement with the appellants. The thrust of the prosecution's case was that it is only the appellants who had the opportunity and the motive to kill the deceased.

The appellant was represented by Mr. N. Bichanga, advocate and the State was represented by Mr. V.O. Nyakundi, State Counsel.

In his submissions, Mr. Bichanga attacked the courts reliance on the evidence of the recent possession of title deeds by the second appellant despite the fact that the deceased and the appellants lived in different places and on the reliance by the court on circumstantial evidence. He submitted that the circumstantial evidence was shaky in that the evidence of Mr. Joel Chege Kimani, (PW2) administration police officer did suggest that it was possible that the deceased's neighbour could have informed the area chief of the disappearance of the deceased from his house, long before the recovery of his body and this piece of evidence pointed to the possibility that other people could have had access to the deceased's house at the time second appellant was alleged to have killed him. In particular, Mr. Bichanga submitted that the involvement of **Mr. John Charagu, (PW6)** and his wife **Virginia Muthoni Charagu, (PW5)** were in his view suspects in that it was not clear why they were so concerned about the deceased's disappearance and further they did not explain where the meetings between them and the 1st appellant took place and in which the 1st appellant is said to have given different reasons as to where the deceased had gone to.

Learned counsel stressed that the alleged motive for the killing was not in existence since the dispute concerning the sale of Kabazi Trading Centre parcel had been resolved by the area Chief one year before the incident. Furthermore, the 2nd appellant's possession of his father's bicycle a few days after the alleged disappearance of the deceased was not corroborated because there was no proof that there was bad blood between him and the father. Again, concerning the circumstantial evidence relating to title deeds, counsel pointed out that although several witnesses talked about three titles to three parcels of land, the one allegedly recovered from the forest with the assistance of the 2nd appellant had a frame and some clothing which allegedly was used to wrap up the title were never produced in court as exhibits. In addition, counsel submitted that after the first arrest of the appellants, the local OCPD had, after interrogating them, ordered their release. However, the area Chief apparently acting on information which he kept to himself and which was perhaps given by undisclosed neighbours of the deceased, insisted that the appellants were the suspects notwithstanding the fact that under normal circumstances, it is the OCPD who should have been more informed in the matter pertaining to investigations.

In conclusion, Mr. Bichanga submitted that the circumstantial evidence relied on did not point to the guilt of the appellants only but was also compatible with the possible guilt of the **Charagus** namely PW5 and PW6 who were the last persons to see the deceased alive and also strangely the first persons who enquired about the deceased disappearance.

Mr. Nyakundi opposed the appeal by submitting, inter alia, that the prosecution had successfully demonstrated that the appellants had a land dispute with the deceased and had therefore a motive for the killing; that the 1st appellant upon insistence of the area Chief pointed out the pit where the deceased's body was finally recovered although she had previously said that the deceased had gone to places such as Kiambu and other places; and therefore it was evident that she had acted pursuant to a common intention with the killers otherwise she would not have been able to identify the pit and further, she had not

reported to the authorities concerning the location of the body.

Turning to the 2nd appellant's involvement, Mr. Nyakundi submitted that the evidence of the neighbour witnesses such as the **Charagus** (PW5) and PW6 was to the effect that the appellants had not visited the deceased before, yet the appellants had been seen in the Subukia Valley on 10th October, 2005 which is just the time the deceased went missing; in addition **Stephen Macharia Njuguna** PW7 saw the 2nd appellant come from the direction of the deceased homestead riding on the deceased bicycle on 11th October 2005 at about 7.00 a.m. and after paying a visit to the deceased home on the same day, he did not find the deceased in his homestead.

As regards the title deeds, the learned State Counsel submitted that since there was evidence that the deceased had just before his disappearance returned there from Kabati where the two appellants lived and he had immediately informed his friend **Charagu** PW6 that he had returned them because he feared that the appellants might destroy them, the subsequent possession and recovery of the titles from the forest with the assistance of the 2nd appellant was strong incriminating circumstantial evidence against the 2nd appellant. Mr. Nyakundi drew the Court's attention to the evidence that just before recovery of the body from the pit, the 2nd appellant had also given conflicting stories concerning his whereabouts and was only surfaced after the discovery of the body.

Concerning possible involvement of **PW5** and **PW6** with the murder of the deceased, Mr. Nyakundi submitted that they had no motive or reason to commit the crime and it is apparent from cross examination that their evidence remained unshaken and the High Court had clearly stated that they were truthful witnesses.

To discharge our duty in law as the first appellate Court, we must re-evaluate the evidence and endeavour to reach our own independent conclusions on it, subject to the usual caveat that we must give allowance to the fact that we neither saw or heard the witnesses testify as the trial court did.

At the outset, we are of the view that the appeal turns on the circumstantial evidence against the appellants and the recovery of the title deeds. In addition, it is clear to us that the proof of the existence of a motive in this case to explain the involvement of the two appellants in the alleged murder is also an important cog in the wheel of justice in the appeal for reasons which will become clear later on in this judgment. In this regard, we wish to reproduce the general rule concerning the role of "motive" if any in criminal responsibility. **Section 9(3)** states:-

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

While the above remains a respected general rule as regards criminal responsibility, motive as is clearly shown later on in the judgment remains an important lifeline in criminal investigations.

Concerning sufficiency of circumstantial evidence relied on, a good starting point is the evidence of **Simon Mwangi Kihongo**, PW3 who was a former neighbour of the deceased at the Kabazi Trading Centre. When Mr. Charagu sent his wife, Mrs. Charagu (PW5) to him to report the deceased's disappearance, he testified:-

"She told us that her husband had sent her to tell me that the deceased had not been seen from 11th October, 2005. Charagu was a neighbor
.....

On 24th October 2005, I went to the house of the chief and made a report. I informed him of the disappearance of the deceased. I returned to (sic) home on 29th October 2005. On 29th October 2005 the chief sent for me He told me to accompany him to Kirengero Police Station to record a statement.

The chief of Kabazi Location testified:-

“The accused persons used to reside at Kabazi Trading Centre. I was told that the 1st accused had gone to Subukia Valley on 10th October 2005. I was given this information by Charagu. The 2nd accused was also seen at Subukia Valley”.

Listen to what the Chief had to say concerning the recovery of the deceased’s body.

“On 26th October 2005, we went to the farm of the deceased. At 11.00 a.m. the 2nd accused had not arrived. We asked the 1st accused where the son was. She told us that the 2nd accused had gone to inform his brother of the disappearance of their father. The assistant chief interrogated the 1st accused. She told us we should return to the 1st plot, 2nd plot and 3rd plot. We went to the 3rd plot under the direction of the 1st accused. The 1st accused led AP. Salim to part of the firm where the deceased was. AP Salim called us. We went to the scene. The 1st accused confirmed it was the place. We instructed Charagu to go inside the hole. He took a spade and removed some soil. He saw a body. A.P Salim entered the hole and confirmed that there was a human remains (sic).”

The chief in cross examination stated:-

***“Charagu was surprised that accused persons had been seen on the farm on 10th October 2005 yet they had not visited the deceased before. The deceased was last seen alone on 9th October 2005.
.....***

Charagu was a friend of the deceased.”

Mrs. Charagu’s testimony concerning the 1st appellant’s response to her inquiries was:-

“My husband told me to tell the 1st accused to inform me where the deceased was since he had disappeared from his house at Subukia Valley. My husband had left his working tools in the house of the deceased. The 1st accused told me that the deceased was at Subukia Valley. She again told me that the deceased had gone to Kiambu to see his people. She did not stop there. She again told me that the deceased had gone to Mombasa.

On Sunday I went to the market at Kabazi. My husband sent me to again ask the 1st accused to open the house of the deceased for her so that he could remove his tools. I saw the 1st accused. She told me to tell my husband not to bother with the tools because she told me that the deceased had gone to a place where he could not return”.

And this is the story concerning the titles as narrated by Mr. Charagu PW6:-

“On 8th October 2005 at 1.00 p.m., Mr. Mwangi came to my house – Joseph Mwangi Wakagwi. He found me in my house. He was riding his bicycle. He had just arrived from Kabaxi (sic). I knew Mwangi because I had constructed a house for him. Mwangi is the deceased. He was carrying a paper bag. He showed me three title deeds which he claimed he had brought from Kabazi because he was apprehensive that the wife would destroy the said titles because they had disagreed. The deceased had requested that I construct him a structure (sic) to harvest his maize. He told me to se (sic) him on 11th October 2005 so that I could commence construction. On 10th October 2005, I met with the deceased in the morning. He asked me if I still remembered our appointment. I answered in the affirmative. On 11th October 2005 at about 8.00 p.m. I started my journey to the home of the deceased. I met with Stephen Macharia and Josphat Kiarie near the Ministry of Works Offices. I told them that I was going to the house of the deceased to build a store. Stephen told me that he had seen the 2nd accused in the morning coming from the direction of the house of the deceased. He was riding a bicycle and carrying green maize. I wondered how Karanja (the son of the deceased) could have gone to see his father yet they had disagreed. The 2nd accused was not living with his father. When I went to the house of the deceased I found no one.”

And listen to **Macharia's** (PW7) direct evidence concerning the 2nd appellant's presence in the deceased house:-

"I reside at Subukia Valley, Kabazi Location. I am a farmer. On 10th October 2005 at 9.00 a.m., I went to visit my friend who resided at Subukia Valley. He is called Mwangi Kagwe (deceased). We spoke for about 30 minutes. He requested me to roof his house with iron sheets on the following day i.e 11th October 2005. We parted ways.

On 11th October 205 at about 7.30 a.m., I was taking my donkey to graze at the Ministry of Public Works yard next to my farm. I saw the 2nd accused coming from the direction of his father's homestead. He was riding on a bicycle. I waved at him. He waved back. We did not speak. He was carrying a small luggage in a nylon bag on the bicycle. At 9.30 a.m. I went to the house of the deceased. I did not find anyone."

On 2nd appellant's disappearance, **Inspector Joseph Kenduywo** PW8 testified.

"I was told by the chief that the deceased disappeared on 10th October 2005. The 2nd accused was arrested in a forest near Kabazi Centre. It was about 1¹/₂ km from their home".

According to **Dr. Masolo**, PW10, the cause of the deceased death was head injury resulting in depressed skull fracture that caused haematoma in the part of occipital area.

An evaluation of the above circumstantial evidence in our view establishes that it is both appellants who were last seen near the home of the deceased on the fateful days namely 10th October 2005 and 11th October 2005 when the deceased is believed to have disappeared. In addition, the 2nd appellant was seen riding the deceased's bicycle in the morning of 11th October 2005 and who was also found to have pointed to the forest and location where the title deeds recently in possession of the deceased had been hidden and where they were recovered with his assistance.

There was also evidence of the 1st appellant's presence in the home of the deceased at the material time coupled with her four conflicting and suspicious stories as to the deceased whereabouts following his disappearance which stories included a disclosure that the deceased ***"had gone to a place where he could not return"***.

It was also satisfactorily established that it is the 1st appellant who led the investigating officer to the pit where the deceased's body was recovered, which evidence reflected on the fact that she had knowledge that the appellant had been buried in a pit. This piece of evidence reflected or suggested that she shared common intention with the killers of the deceased. We think that having been part of the common intention it was not necessary for the prosecution to prove that she pulled the trigger or hit the deceased with the stone herself. Her subsequent conduct and utterances, in our view, demonstrate that she was part of the gang that killed the deceased. As regards the 2nd appellant's participation his association with the titles recently in possession of the deceased including his bicycle placed him at the scene as well.

Finally, as regards Mr. Bichanga's contention that the participation of the Charagus was suspect, the evidence reproduced above established that they had good reasons for the inquiries they made because Mr. Charagu's tools were in the deceased's house and the deceased was also a friend and neighbour. Contrary to the learned counsel's contention concerning the role of the ***"Charagus"***, in our view, they played a major role in setting in motion discovery of the deceased's body in that they took the initiative to report to the Chief the deceased's disappearance. Their participation, in our view, was salutary and commendable. In the circumstances, their conduct could not be said to be suspicious.

Taking a broad view of the grounds raised in support of the appeal we find no basis for interfering with the judgment of the High Court because in exercise of our independent role and having analysed the evidence on record afresh, we have come to the same conclusion. In the result, the appeal is hereby dismissed.

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

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR