



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: O’KUBASU, GITHINJI & VISRAM, J.J.A)

CRIMINAL APPEAL NO. 392 OF 2006

BETWEEN

JAMES GITHINJI NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J) dated 27th November, 2006

In

H.C. Cr. C. No. 3 of 2004)

JUDGMENT OF THE COURT

The appellant, James Githinji Ndungu, was tried by the High Court of Kenya at Nakuru (Kimaru, J) with the aid of assessors (as the law then provided), on Information which charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information were that on the night of 3rd and 4th November, 2003 at Kwa Amos Centre, Bahati, in Nakuru District, he murdered Elizabeth Waithera Mwangi (the deceased).

The trial of the appellant in the High Court commenced on 17th October, 2005. The prosecution presented ten witnesses. The summary of the evidence before the court was that the deceased and her grandson, David Mwangi (PW2) (David), then aged 14, lived in the same house and slept in separate bedrooms, divided in between by the sitting room. The kitchen was outside the main house. On that fateful night of 3rd November, 2003, David and the deceased had dinner together, and at about 9.00 p.m. David left the kitchen to retire in his bedroom. He slept soundly through the night, and heard absolutely no noise or commotion in the house. When he woke up at 6.00 a.m. the following morning, he went to wake up the deceased, as he always did in the past, so that she could prepare his breakfast. When he did not get any response, he walked into her bedroom, and was shocked to find things scattered all over the place, and his grandmother missing. He rushed to the neighbour’s house and called out for Musa Okoth (PW1) (Musa), and together they went back to the house. As they did, they alerted other neighbours, and soon many people gathered at the house. Musa and David saw marks on the ground of someone having been dragged out. They followed the signs to the pit latrine in which the body of the deceased was found. They immediately informed the area chief, who, in turn, alerted the police. Sgt. Maurice Odhiambo (PW7) of the Bahati Police Station visited the scene, together with other police officers, took

several photographs of the scene and the body, recovered the body, and arranged for the same to be taken to the Nakuru municipal mortuary.

Meanwhile, back at the house, and within its vicinity, at about 6.00 a.m. on the same morning, John Mathu Githuka (PW5) (John), who also lived in the same neighbourhood, was rushing to his place of work when he encountered the appellant walking from the direction of the deceased's house, carrying a wooden box. According to his testimony, the appellant, who he knew as a neighbour, appeared in a hurry and they did not talk. He simply proceeded to his employee's farm. Some two hours later, he heard that the deceased had been killed, and a wooden box stolen from her house. He immediately reported to the police about his "hurried" encounter with the appellant, who, he said, was carrying a wooden box.

With that information, P.C. George Odera (PW9), the investigating officer, tracked down the appellant's brother, Naftali Nganga Ndungu (PW8) (Naftali), who, in turn, led the police officers to the house of the appellant, some 100 km from the scene of crime. Upon being asked about the wooden box, the appellant said that it was a gift that the deceased had given him several months ago when he used to work for her, and the same was at the residence of Waweru, his friend. The appellant also voluntarily showed the police officers two cups which he said were also a gift from the deceased. As Waweru could not be found then, the appellant was arrested and taken to the police station. The following day Waweru produced the wooden box. John later identified the box as the one belonging to the deceased. The police made absolutely no enquiries about the authenticity of the appellant's claim that he had received the wooden box as a gift from the deceased several months ago.

Eventually, an autopsy was performed by Dr. Aduro, who concluded that the deceased died of cardiopulmonary arrest due to massive haemothorax. The appellant was charged with the offence stated earlier.

When put to his defence, the appellant chose to give unsworn statement. He denied having killed the deceased, and stated that the deceased had given him the wooden box and cups several months ago.

The learned Judge heard the final submissions and then summed up the case to the assessors who returned a unanimous opinion of **not** guilty as charged. The Judge came to a different conclusion, stating in part, as follows:-

"The evidence that however connects the accused with the death of the deceased is the testimony of PW5 who testified that at 6.00 a.m., on the 4th of November, 2003 as he was walking towards his place of employment, he saw the accused carrying a wooden box (which he later identified when the same was recovered from the accused). The accused was walking very fast from the general direction of the house of the deceased. The accused was known to PW5 prior to that fateful morning. The accused did not have a conversation with PW5. The two passed each other and each went on his way. At about 8.00 a.m., PW5 was informed that the deceased had been killed and her wooden box stolen. PW5 then recalled that he had seen the accused carrying the wooden box in the morning. He informed the police. The police conducted the investigations and later recovered the wooden box and even cups in the possession of the accused. The wooden box was positively identified by PW2 and PW4 as the one belonging to the deceased and which was stolen from the deceased on the night that she was killed. The explanation given by the accused is that he was given the wooden box, which was produced as an exhibit in the trial by the deceased. He testified that he was given the wooden box seven months prior to the deceased's being found brutally killed.

I have evaluated the evidence adduced by the prosecution and that which was offered by the accused in his defence. The prosecution established that the accused was in the vicinity or in the area within which the house of the deceased is situated. I believe the testimony of PW5 to have been truthful. There was no reason why PW5 could have given false testimony against the accused person. No grudge existed between the accused and PW5. The accused and PW5 were known to each other but were not friends. When PW5 testified that he saw the accused carrying a wooden box at 6.00 a.m. on the 4th of November, 2003 he was telling the truth.

I further believed the testimony of PW2 when he testified that the wooden box was in the bedroom of the deceased on the 3rd of November, 2003. PW2 was the only person who used to live with the deceased. He knew the household contents in the house of the deceased. When he was asked by the police if he was aware if anything was missing in the bedroom of the deceased, he did not hesitate to point that the wooden box owned by the deceased, and in which the deceased used to keep her valuables was missing. Similarly, PW2 had no grudge against the accused. In fact, PW2 testified that he did not see the accused prior to the brutal killing of the deceased nor on the following day. When the said wooden box was recovered in the possession of the accused about a month after the death of the deceased, the accused did not deny that the wooden box belonged to the deceased. His explanation was that the said wooden box was given to him by the deceased as a gift. He further stated that the seven cups were given to him by the deceased as gifts.

Having carefully evaluated the above evidence, it is clear that, it is the accused who killed the deceased in the course of robbing her. The accused, having worked for the deceased, thought that the deceased kept valuables in the wooden box in her bedroom. That is why there was evidence that the person who robbed and killed the deceased, thoroughly searched the bedroom while looking for valuables. The accused then decided to take the wooden box and the seven cups after dumping the body of the deceased in the pit latrine where it was later recovered. The accused was seen by PW5 walking from the direction of the house of the deceased. He appeared to be in a hurry. When the accused was arrested, he did not deny that he had in his possession the wooden box belonging to the deceased. He took the police to the house of his friend called Waweru where he had kept the wooden box. I did not believe the explanation given by the accused that he had been given the said wooden box as a gift by the deceased. If the accused had indeed been given the wooden box as a gift, why did he hide it in the house of his friend Waweru and not have it in his house? It is the opinion of this court that the doctrine of recent possession applies in this case to establish the guilt of the accused on the charge of murder.”

The learned Judge then concluded as follows:

“The assessors who assisted this court during the hearing of this murder trial reached the verdict that the accused was not guilty on the grounds that the accused was not sufficiently connected to the death of the deceased by the prosecution witnesses. In the opinion of this court, however, the said assessors misunderstood the application of circumstantial evidence and the doctrine of recent possession in finding an accused person guilty of a criminal offence.”

Being aggrieved by the foregoing, the appellant now comes to this Court by way of first, and possibly final, appeal. That being so, the appellant is entitled to expect the evidence tendered in the High Court to be subjected to a fresh and exhaustive examination and to have this Court’s decision on that evidence. But as we do, we must bear in mind that we have not had the advantage (which the learned Judge had) of hearing and seeing the witnesses and give allowance for that (see **Okeno v. R [1972] 2 KLR 28**).

In his home made memorandum of appeal filed on 2nd December, 2006, the appellant outlined seven grounds of appeal, while his learned counsel, Mr. D. N. Mongeri filed supplementary grounds of appeal dated 21st December, 2011, raising six additional grounds, all revolving around two key issues: -

- (i) that the circumstantial evidence relied upon was not sufficient or strong to uphold a conviction of guilt, and
- (ii) that the doctrine of recent possession was inapplicable and wrongly invoked in this case.

At the hearing of this appeal on 10th January, 2012, Mr. Mongeri, for the appellant, addressed us at length on the above two issues, emphasizing essentially that the only connection between the appellant and the alleged crime was the “wooden box”, and the only person who saw him, albeit “hurriedly”, with the box, was John (PW5).

He questioned whether that alone was sufficient to uphold the conviction in this case, given further that

the appellant had offered a reasonable explanation as to how, and why, he came to be in possession of the said box. Finally, Mr. Mongeri argued that the prosecution had not established the “motive” of killing.

Mr. A.J. Omutelema, learned Senior Principal State Counsel, for the respondent, argued that the appellant was identified by John (PW5), carrying the box, positively identified as belonging to the deceased, and that the learned Judge correctly disregarded the appellant’s explanation that the box was given to him as a gift by the deceased.

Having considered the evidence tendered in the superior court, it is clear that the appellant was convicted on circumstantial evidence since there was no eye witness to the killing of the deceased. In **Mwita vs. Republic [2004] 2 KLR 60** at p. 66 this Court said:-

“It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see Simon Musoke vs. Republic [1958] EA 715 where the following extract from Teper vs. R. [1952] AC 480, 489, was quoted [1958] EA at page 719:-

“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.”

And in **Mwangi & Another vs. Republic [2004] 2 KLR 32** the Court said:-

“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs. Kipkering Arap Koske & Another [1949] 16 EACA 135.”

In the earlier decision of **R. vs. Taylor Weaver and Donovan [1928] 21 Cr. App. R. 20**, the principle as regards the application of circumstantial evidence was enunciated in these words:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Can we really say, in the case before us, that the evidence of surrounding circumstances is capable of proving the proposition of the appellant’s guilt beyond any reasonable doubt?

On our part, we have serious doubts about that. There were no eye witnesses here. The only real evidence of the appellant’s alleged involvement in this crime is that he was seen carrying a wooden box at 6.00 a.m. on the morning of the deceased’s death by John (PW5). By his own admission, John was in a hurry to get to his work place, as was the appellant to get to his destination. There was a brief encounter, during which not a word was said. John simply saw him carrying a box, which he never described in any detail as to the size, colour or dimensions. It was just a box. All these facts raise a serious doubt in our minds about the strength and credibility of this testimony. When the police officers caught up with the appellant, the latter instantly admitted being in possession of the box, and voluntarily led them to where he had put the same – at his friend, Waweru’s house. He immediately offered an explanation stating that the same had been given to him as a gift several months ago by the deceased. His conduct throughout was not that of a guilty person. In our view, that was a reasonable explanation and it was for the police to follow up to determine whether, in fact, that box had been with Waweru for some months prior to the incident. The police did no such thing, carried out no further investigations, and simply relied upon John’s evidence to conclude their investigation. Unfortunately, the learned Judge failed to direct his mind to the failure of the investigators to positively determine that the box was brought to Waweru on or

immediately after the incident, on 4th November, 2003. The learned Judge's conclusion that because the box was placed at Waweru's residence, "it must have been stolen", is highly speculative, and without basis. We are of the view that the doctrine of recent possession was inapplicable in this case, and was wrongly invoked to convict the appellant.

Accordingly, we fully agree with the assessors who offered a unanimous opinion of not guilty. We find the conviction to be unsafe, quash the same, set aside the sentence imposed on the appellant, and order that he be released from prison forthwith, unless otherwise lawfully held. Orders accordingly.

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

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.