IN THE COURT OF APPEAL
AT NAKURU

CORAM: OMOLO, O'KUBASU & VISRAM, JJ.A.

CRIMINAL APPEAL NO. 480 OF 2009

BETWEEN

STEPHEN KARIUKI NGURE.................................APPELLANT
AND
REPUBLIC..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J) dated 2nd August, 2007

in

H.C.CR.C. NO. 75 OF 2004)

****

JUDGMENT OF THE COURT

The appellant ***STEPHEN KARIUKI NGURE,*** and two others were arraigned in the High Court of Kenya at Nakuru on the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. It was alleged that on 19th June, 2004 at Kapsita/Songocho Farm Elburgon in Nakuru District within the Rift Valley Province they murdered ***Margaret Nyambura Thiongo***.

The appellant and his co-accused pleaded not guilty to the charge. The prosecution called eight witnesses in its bid to establish the case against the appellant and the co-accused.

The facts of the case as can be reconstructed from the evidence adduced by the prosecution and the defence before the High Court were as follows: On the 7th June, 2004 ***George Mbuthia Rigio (PW4)*** a resident of Kapsita Farm received an anonymous letter threatening him with death. The said letter also threatened members of his family. The said letter specifically stated that the writers of the letters were going to get the head of ***Rigio (PW4)*** or a head of a member of his family. Upon receiving the said letter PW4 reported the matter to the area District Officer (D.O) at Elbugron who asked him (PW4) whether he suspected anyone but PW4 told the D.O that he did not suspect anyone because the letter was unsigned. It was the evidence of PW4 that the deceased was once married to one of the appellant's co-accused while his daughter ***Judy Waithera Mbuthia (PW2)*** was married to the appellant. He further told the court that his two daughters (the deceased and PW2) had been separated from their husbands for reasons that were unknown to him.

PW2 testified that she was married to the appellant for about a year prior to the death of her sister (the deceased). She had however separated from the appellant because the appellant never used to support her.

She was further incensed by the fact that the appellant upon harvesting potatoes would sell them but would not give her any money. She recalled that their marriage was not blessed with any child. She further testified that on 6th June, 2004 the appellant left some shoes with her sister ***Mary Wambui*** with instructions that the said shoes be given to PW2 which PW2 took. However, after about two weeks the appellant told PW2 to return the shoes and PW2 complied by returning the shoes to the appellant. Somehow the appellant was not amused by the turn of events and sent the shoes back to PW2. The appellant then wrote a letter to PW2 to the effect that if she did not want the shoes she might as well burn them. PW2 further recalled that the appellant had written in the letter that if she did not burn the shoes, she might as well wear them when she was in a coffin.

It was the evidence of PW4 that on 19th June, 2004, he went to herd his sheep in a forest near his homestead and at about mid-day he decided to go home for lunch. He then sent his daughter Margaret Nyambura (the deceased) to go and herd the sheep. The deceased went to look after the sheep with her younger sister ***N.W (PW1).*** The deceased had a young child whom she was cuddling.

PW1, who was aged seven years on the material date (she was nine years old when she testified before the High Court) testified that while they were herding the sheep, the appellant, who was known to her called the deceased towards some thicket. PW1 recalled that the appellant was wearing a red cap and a jacket. PW1 remained herding the sheep until her father (PW4) came back from lunch.

It was the evidence of ***Margaret Njeri (PW6)*** that on the same day (19th June, 2004) at about mid-day she had gone to fetch water from Shogocho River near the forest where PW1 and PW4 were herding sheep when the appellant emerged from the bush, walked to the river and washed his hands. PW6 asked the appellant to assist her load the water containers on the donkey but the appellant refused to assist her and instead ran towards the direction of a camp known as Desmond. PW6 testified that at the material time the appellant was wearing a black jacket and a red cap.

When PW4 came back from lunch he asked PW1 where the deceased was and PW1 informed him that the deceased had gone towards the direction of the road after she had been called by someone. It was at that moment that PW4 heard screams emanating from the direction that the deceased was said to have gone. PW4 heard a woman screaming that someone had been killed. PW6 also heard the screams and according to her (PW6) the screams were emanating from the forest that the appellant had emerged from. PW4 and PW6 proceeded to the scene and found that it was the deceased who had been killed. Her neck had been cut. The deceased had a child who was found abandoned at the scene. The child was then taken away. The matter was reported to the police who came and took away the body of the deceased. The appellant was the main suspect and he was immediately apprehended and taken to Elburgon Police Station. The body of the deceased was taken to Elburgon Hospital Mortuary where postmortem examination was conducted.

The appellant was taken to Elburgon Police Station cells on 19th June, 2004 at about 6.30 p.m. where he joined ***Reuben Mzee Odiara (PW3)*** who had been arrested on suspicion that he had stolen five bags of maize from his employer. PW3 testified that when the appellant got used to the people in the police cell, he told PW3 that he (appellant) had been arrested because the parents of his wife had refused the shoes that he had purchased for his wife. The appellant gave more details about the letter he had written and about telling the wife that she would wear the shoes while she was in a coffin. PW3 dismissed what the appellant was telling him as a mere story. Two days later another suspect who happened to be a preacher was brought in the police cells. At about 6.00 a.m. the preacher started praying. PW3 recalled in his evidence that after the preacher had finished praying the appellant who was wearing a jacket removed it and threw it on the floor and started calling someone by the name ***John*** saying that he had made him kill someone. It was the evidence of PW3 that the appellant claimed that it was John who had made him kill someone. PW3 testified that he did not know the person who had been killed.

PC Juma Kisira (PW7) of Elburgon Police Station is the one who visited the scene and took the body of the deceased to the mortuary for postmortem examination. It was the same PW7 who arrested the appellant and took him to the police cells.

Postmortem examination on the body of the deceased was conducted by ***Dr. Amwayi*** but the postmortem report was produced by ***Dr. Caroline Mwololo (PW8).***

At the close of prosecution case the appellant and his co-accused were put to their defence. Each of them denied having been involved in any way with the death of the deceased. Each of them said that he was undertaking his own business when screams were heard emanating from the forest. Everybody rushed to the scene where the body of the deceased was found.

The appellant in particular testified that he was at the local trading centre and that when he went to the scene of the murder he even helped the police in loading the body of the deceased onto the police vehicle. He called his sister ***Margaret Njeri (DW4)*** as a witness who supported his testimony.

As the appellant's trial in the High Court was conducted by aid of assessors (as the law then provided) the learned Judge *(Kimaru J)* summed up the evidence and the law to the assessors and sought their opinion on the matter. At the close of the trial there were two assessors remaining as the third one had been discharged. Each of the remaining two assessors was of the opinion that the appellant was guilty as charged.

In a carefully prepared judgment delivered at Nakuru on 2nd August, 2007 *Kimaru J.* convicted the appellant on a charge of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code, and sentenced him to death. The learned Judge acquitted the appellant's co-accused.

The appellant being aggrieved by both conviction and sentence comes to this Court by way of first appeal. This is the appeal that came up for hearing before us on 12th January 2012 when *Mrs. G.A. Ndeda* appeared for the appellant while the State was represented by *Mr. A.J. Omutelema* (Senior Principal State Counsel). The grounds of appeal are aptly summarized in the Supplementary Memorandum of Appeal as follows:-

"1. THAT the learned Judge failed in law and fact by convicting the appellant on circumstantial evidence which was so weak and could not be a sound basis for a conviction.

2. THAT the learned Judge erred in law and fact by not considering the defence put forward by the appellant which was not challenged by the prosecution.

3. THAT the trial Judge erred in law and fact by failing to analyze the evidence and therefore failed to appreciate that the prosecution failed to prove its case beyond any reasonable doubt."

In her submission *Mrs. Ndeda* started by pointing out that the conviction of the appellant was based on circumstantial evidence and that the evidence adduced did not meet the standard acceptable in law. She pointed out that PW1 was a child aged 7 years at the time the offence is alleged to have been committed. *Mrs. Ndeda* submitted that in her evidence PW1 contradicted herself since in evidence in chief she said that she saw the appellant go away with the deceased while in cross-examination she said that she did not know the person who called the deceased.

On the issue of confession by the appellant after the preaching in police cells *Mrs. Ndeda* submitted that it was not clear how the appellant started confessing. It was further submitted that the appellant was arrested and convicted on mere suspicion by PW4 who was the father of the deceased. *Mrs. Ndeda* reminded us that the appellant admitted being at the river and even assisted in searching for the deceased and that his conduct was not consistent with a guilty person.

To buttress her submissions, *Mrs. Ndeda* relied on a number of authorities on circumstantial evidence.

On his part *Mr. Omutelema* supported both conviction and sentence submitting that circumstantial evidence met the required standard in law. He submitted that PW1 had described the appellant's attire and that description was corroborated by the evidence of PW6.

Mr. Omutelema was of the view that when all the evidence is taken together it meets the standard required in law to support the conviction of the appellant. *Mr. Omutelema* went on to submit that the appellant's defence was considered and rejected and that the learned Judge gave reasons for rejecting the appellant's defence. *Mr. Omutelema* therefore, urged us to dismiss this appeal.

This is a first appeal and that being the case it is our duty to reconsider the evidence, re-evaluate it and draw our own conclusions while bearing in mind that we have neither seen nor heard the witnesses and giving due allowance for this – see ***OKENO V. R* [1972] E.A.32**, ***NGUI V. R* [1984] KLR 729** and ***NJOROGE V. R* [1987] KLR 19**.

It is in view of the foregoing that we set out in some detail the evidence adduced during the trial in the High Court.

It is indeed true that the appellant's conviction was solely based on circumstantial evidence and the learned Judge was alive to this and in the course of his judgment he stated as follows:-

"In the present case, no one saw the accused persons kill the deceased. There were no eye witnesses when the deceased was killed. The prosecution offered circumstantial evidence. Circumstantial evidence is the evidence that points out the guilt of an accused person for the crime committed to the exclusion of any other person. The circumstances adduced in evidence by prosecution must exclude any explanation that could exonerate the accused persons by pointing to their innocence. In law, circumstantial evidence was defined by the Court of Appeal in the case of *MWANGI VS. REPUBLIC [1983] KLR 52* ***at page*** *531* ***as:-***

"An offence like murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed. It is well established that 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 that of guilt; *PETER KUBAITA PAUL V. REPUBLIC Cr. Appeal No. 71 of 1971* ***(unreported). In*** *SIMONI MUSOKE V. REPUBLIC[1958] EA 751* ***the predecessor of this Court said:-***

'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.'"

Before a court can base a conviction solely on circumstantial evidence it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference – see ***REX V. KIPKERING ARAP KOSKE* 16 EACA 135, *MWANGI V. R* (1983) KLR 522, *KARIUKI KARNAJA V. R* (1986) KLR 196** and ***SAWE V. R* [2003] KLR 364.**

In our re-evaluation of the evidence adduced during the trial we are of the view that the starting point is the letter written to the father of the deceased which letter was received on 7th June, 2004. It must be remembered that the appellant had been married to PW2 the deceased's sister and the two ladies were daughters of PW4. There was then the question of the shoes that were bought by the appellant and sent to PW2 and then returned to the appellant. That was the cause of tension between the appellant on one side and PW4 and his family on the other hand. Then on 19th June, 2004 the deceased's body is found in the bush. How is the appellant connected with the death of the deceased? The key witnesses are PW1 and PW6. It was the evidence of PW1 that she saw the appellant on the material day and that it was the appellant who called the deceased and the two disappeared in the bush. A few moments later the body of the deceased was found in the bush. PW1 gave evidence on how she saw the appellant on the material day call the deceased and the two went towards a bush and disappeared. There was then the evidence of PW6 the lady at the river who testified that on the material day and almost at the same time described by PW1, she (PW6) saw the appellant emerge from the bush, went to the river and washed his hands. When PW6

asked the appellant to assist her in loading water containers on the donkey the appellant refused and ran away. PW1 described the attire of the appellant and that is the same attire that PW6 described in her evidence. Immediately the body of the deceased was recovered the appellant was the main suspect. He was arrested on the same day and taken to Elbergon Police cells. While in the cells there was the evidence of PW3 to the effect that after a suspect who was a preacher had prayed, the appellant appears to have *"been touched"* and threw down his jacket and talked of having killed somebody.

In the course of his judgment the learned Judge said:-

"In the present case, the testimony of PW1 was corroborated by PW6. PW6 had gone to Shogocho River to fetch water with her donkey. PW6 is an adult. She testified that at about the same time that PW1 testified that the 1st accused had summoned the deceased, she saw the 1st accused emerged from a thicket near the river. PW6 testified that the 1st accused walked to the river and washed his hands. She recalled that the 1st accused was wearing a black jacket and a red cap. She corroborated the testimony of PW1 which placed the 1st accused at the scene where the body of the deceased was subsequently discovered. I observed the demeanour of PW1 and PW6 when they testified before this Court it was obvious to this court that they were telling the truth. Their testimonies were not shaken during cross-examination."

The evidence of PW1 and PW6 had to be considered together with that of PW3. Towards the conclusion of his judgment the learned Judge said:-

"PW3 could not have become aware of this information if he was not told the same by the 1st accused. I observed the demeanour of PW3 when he testified before court. I noted that PW3 did not know the 1st accused prior to the day when both of them were detained at the Elbergon Police Station. He had no reason therefore to tell lies to this Court. He had no grudge against the 1st accused. This Court believed PW3 was telling the truth. PW3 further told the court that two days later, after some prayer session by a pastor who at the time had also been arrested for unrelated offence, the 1st accused removed his jacket and threw it to the ground after which he screamed that he had killed someone at the instance of one *'John'*. ***PW3 testified that the 1st accused did not however disclose the person whom he claimed to have killed.***

I therefore hold that the prosecution proved by circumstantial evidence, to the required standard of proof beyond reasonable doubt that it was the 1st accused that killed the deceased. The prosecution established that the 1st accused had a motive to kill the deceased. Prior to the fateful day, the 1st accused had disagreed with his wife, PW2. He was unhappy with the father of his wife (PW4) for not promoting reconciliation between him and his wife. It is apparent that the 1st accused formed a grudge against the family of PW4. Although the 1st accused put forward an alibi defence, after evaluating the evidence that he had offered in his defence, in light of the evidence offered by prosecution witnesses, it was clear that the version of events as narrated by the prosecution witnesses sufficiently implicates the 1st accused with the death of the deceased. I therefore hold that the prosecution proved to the required standard of proof beyond reasonable doubt that the 1st accused together with others not before court killed the deceased with malice aforethought. The two assessors who assisted this Court reached a verdict that the 1st accused was guilty of murder. I have no reason to disagree with their finding."

On our part we are satisfied that taking into account the evidence of PW1, PW2, PW3, PW4 and PW6, there is a chain of events that lead to the conclusion that it was the appellant who murdered the deceased. We reach this conclusion due to the fact that on examination of surrounding circumstances, there can be no any other conclusion than that the appellant is the one who murdered the deceased.

In ***R. V. TAYLOR WEAVER AND DONOVON*** ***[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 a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

On our evaluation of the evidence and the submissions by both *Mrs. Ndeda* and *Mr. Omutelema* we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so strong that the appellant's conviction was, indeed, inevitable.

In the result we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety.

DATED and DELIVEED at NAKURU this 23RD day of FEBRUARY, 2012.

R.S.C. OMOLO

..
JUDGE OF APPEAL

E.O. O'KUBASU
...
JUDGE OF APPEAL

ALNASHIR VISRAM
..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR