IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, BOSIRE & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 287 OF 2010

BETWEEN

JOSEPH CHEMASWETI LOMULEI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kitale (Ombija, J.) dated 28th October 2009

in
H.C.CR.C. NO. 42 OF 2003)

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JUDGMENT OF THE COURT

Joseph Chemaswet Lomulei, the appellant, was on 27th July 2004, arraigned before the High Court (W. Karanja J) at Kitale for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. He denied the charge, and upon trial he was found guilty of that offence and was thereafter sentenced to death, which is the only sentence provided for that offence.

The particulars in the information alleged that on 11th September 2003, at Karara area of Trans- Nzoia District within Rift Valley Province the appellant murdered Patrick Juma, hereinafter referred to as the deceased.

The deceased operated a bicycle taxi, which was christened *"Sungura Mjanja"*. The last time he was seen alive he was riding his said bicycle with the appellant as a pillion passenger. The time was about 3 p.m. on 11th September 2003. For three days thereafter neither his mother, Frida Nafula, (PW1), nor close relatives and friends knew where the deceased was. Efforts to find him were fruitless, until a group of searchers found his body in a maize garden on 16th September, 2003. It had multiple cut wounds inflicted using a sharp object. Dr. Meshack Liru later performed a post mortem examination of the body which was identified to him by, among other people, Henry Wabwire and Robinson Juma. It had stab wounds on the chin, neck, chest and multiple cut wounds and bruises. The right lung was punctured. He formed the opinion that the cause of death was heamorrhagic shock due to the punctured lung.

The prosecution case at the trial was wholly based on circumstantial evidence. The trial Judge appreciated

this and cited the often cited case of ***R v. Kipkering Arap Koske and Another*** ***(1949) 16 EACA 135.*** She purported to quote a passage from that decision in the following manner:-

"In order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt."

We however wish to observe that the relevant passage in the above decision includes a quotation from Wills on Circumstantial Evidence, and reads thus:-

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

In ***Dhalley v. Republic*** ***[1995-1998] 1 EA 29*** this Court had occasion to deal with the issue whether the above test was sufficient. The Court had this to say:-

"Clearly the direction the learned Judge gave to the assessors and which she sets out in this part of her judgment is no longer adequate and it is no wonder Mr. Georgiadis conceded before us that had the Republic's case been based wholly on circumstantial evidence as the learned Judge thought it was the Republic would have had no leg to stand on. Mr. Kapila cited to us first the case of Teper v. Reginam [1952] AC 480 which was decided by the Privy Council after Kipkering's case (1949) and there the Privy Council laid down the further test that: "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."

Bearing the foregoing in mind it is quite clear that Karanja J, quoted correctly, in part the passage in ***R v. Kipkering arap Koske,*** *(supra)* but at the same time added a passage from ***Teper v. Reginam.*** *(supra).* This notwithstanding it is quite clear to us that the learned Judge had in mind the correct legal principles with regard to circumstantial evidence. We are also satisfied that she was alive to the fact that for a conviction to lie, the prosecution was duty bound to prove its case against the appellant beyond any reasonable doubt, and that the appellant does not assume any legal burden of establishing his innocence. She was also aware that in the course of a trial the evidential burden does in some cases shift to an accused person to explain certain facts particularly those which are especially within his own knowledge. (See ***section 111*** of the Evidence Act Cap 80 Laws of Kenya).

What were the circumstances in this case? Robinson Juma Khaemba (PW4), who, like the deceased, operated a bicycle taxi, testified he was present when the appellant approached the deceased on 11th September, 2003 and requested him to take him to some place. The deceased agreed and rode his bicycle away with the appellant as his passenger. The time was about 3 p.m. On the way they passed Benson Ng'ang'a Mwangi (PW6), who knew the deceased and the appellant well before. He testified that the appellant was then employed by one James Gichimu (PW7) who was PW6's neighbour. He knew the deceased's bicycle well, more so because it was labeled at the back with words *"Sungura Mjanja"*. He heard the deceased inquiring from the appellant whether he had reached his destination, but the appellant answered that he had not. He saw them branch into a path leading into a maize plantation. That was the last time the deceased was seen alive.

The deceased's bicycle was not recovered where his body was. It is in evidence that the appellant was arrested with it a fact he himself admitted in his unsworn statement to the Court. He, however, stated that he bought the bicycle from a known person whom he allegedly pointed out, but who thereafter escaped. He did not give the name of that person. He further stated that he executed a written agreement with the seller of that bicycle in the presence of his chief, but he did not produce a copy of that agreement as an exhibit. Nor did he make any reference to that agreement until the time when he made his statement

in his defence.

In her assessment of the evidence the trial Judge rendered herself thus:-

"In this case, the most logical and irrebutable conclusion or inference that this Court can make is to the effect that the accused person herein knew how the deceased had met his death. Indeed the recovery of the deceased's bicycle from him barely 3 days after the deceased's death further buttresses this presumption.

There is in this case no existing (sic) circumstances that can negate the presumption of the accused person's guilt. There is no possibility that the deceased was confronted by another person immediately after branching into the maize plantation and attacked and killed in the presence of the accused and this other person went and sold the deceased's bicycle to the accused person immediately thereafter. It is my considered view that the prosecution has established an unbroken chain link from the time the accused hired the deceased's bicycle at Karara as witnessed by PW4; to the time PW6 saw them branch into the maize plantation, to the recovery of the deceased's body in the said maize plantation and the recovery of the deceased's bicycle with the accused barely 3 days later."

The trial Judge then concluded that she was satisfied that the prosecution had proved beyond any reasonable doubt that the appellant murdered the deceased. She therefore found him guilty as charged, convicted him and sentenced him to death as earlier on stated. The appellant was aggrieved and hence this appeal.

The appellant filed a home-made memorandum of appeal with seven grounds, but at the hearing of the appeal Mr. Kiplagat J. Misoi, counsel for the appellant abandoned all but the 6th ground, which reads as follows:-

"6. That: Your Lordship the trial Judge erred in law in convicting I the appellant on the basis of contradicting evidence."

Learned counsel also filed a supplementary memorandum of appeal
with one ground as follows:-

"That the learned Judge erred in Law in relying on circumstantial evidence in convicting and sentencing the appellant."

Mr. Misoi in his submissions expressed the view that the evidence of
both PW4 and PW6 was inconclusive on the issue whether the appellant is the person who killed the deceased. Neither witness saw the deceased being killed. Their evidence is contradictory on essential aspects. Finally Mr. Misoi submitted that the explanation the appellant gave as to how he came to be in possession of the deceased's bicycle is reasonable, and believable.

This is a first appeal. We remind ourselves that it is our duty to re-evaluate the evidence and draw our own conclusions on it of course without overlooking the conclusions of the trial Judge. We must also bear in mind that unlike the trial Judge, we did not see and hear the witnesses testify as to be able to assess their credibility as witnesses. See ***Okeno v. Republic (1972) EALR*** page 32.

We have no doubt in our minds that the appellant was the last person seen with the deceased alive before his body was found in a maize plantation, dead with multiple injuries. PW4 was present when the deceased left on his bicycle carrying the appellant. PW6 saw and talked to them shortly later. Thereafter the deceased disappeared. He was seen alive near where his body was found two days later. The appellant had a duty to explain how and where he parted company with the deceased. He was expected to but did not offer any explanation in that regard as those are matters which were especially within his own knowledge. Coupled with that, the appellant was, three days thereafter found in possession of the deceased's bicycle which the deceased had at the time of his disappearance. The appellant explained that he bought the bicycle from a known person but whom he did not name. The appellant testified that he

pointed out that person, presumably to the police, and made available a copy of a sale agreement of the bicycle with the person he allegedly pointed out. However, the appellant deliberately or otherwise, did not make reference to the seller of the bicycle or the agreement he allegedly entered into with him until after the close of the prosecution case, when we think he knew his story could not be controverted by the prosecution.

The appellant's explanation is not believable, when considered against other evidence on record. As stated earlier the appellant was as at 11th September, 2002, an employee of PW7. He left PW7's employment on 8th September, 2002. He left PW7's home on that day saying he was going to get a bag in which to carry his clothes. He did not return until 11th September 2002, the day the deceased disappeared. As he was leaving he told PW7 and his wife that he was going to Moi's Bridge where he had got another job. He did not however go to Moi's Bridge but to Biririet where he was later arrested in possession of the deceased's bicycle. Besides, a bicycle is not an item which changes hands quickly. Therefore to suggest that the deceased's bicycle changed hands by way of sale within two or so days is not believable. The deceased's bicycle was well-known in his home area and such was not the type of bicycle which in our view would find a buyer who would buy it without raising issues.

Having come to the foregoing conclusion that the appellant's explanation as to how he came by the deceased's bicycle is not believable, a rebuttable presumption arises under ***section 119*** of the Evidence Act, that the appellant killed the deceased. He did not rebut that presumption. Consequently it is our view and we so hold that the appellant killed the deceased.

The trial Judge did not consider whether the killing was with the requisite malice aforethought. The deceased suffered several serious cut wounds one of which penetrated his chest and punctured his lungs. The injuries clearly are evidence that the killing of the deceased was pre-meditated and was therefore with malice aforethought as to constitute murder.

On sentence the appellant was sentenced to death. It is the only sentence provided under the penal provision. That being so, we affirm the conviction and sentence and consequently dismiss the appellant's appeal in its entirety. It is so ordered.

Dated and delivered at ELDORET this 25th day of MARCH, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR