REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 243 OF 2006

BETWEEN

ANTHONY MAGUA GITUCHU .....APPELLANT
AND
REPUBLIC .....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 8th February, 2005

in
H.C.CR.C. NO. 129 OF 2003)
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JUDGMENT OF THE COURT

At about 6.30 a.m. on 2nd August, 2001, ***Susan Wangui Ngure***, bid goodbye to her parents in Gikambura village, Kiambu, and left for her school, Magutuini Primary School, where she was in standard four. She never made it there. Her dead body was discovered eight days later in a bush, not far from her home, with a missing left leg, missing private parts and a deep cut near one of her ears. No one witnessed the macabre killing. On the strength of two pieces of circumstantial evidence, Anthony Magua Gituchu, the appellant now before us, was suspected to have caused the death and was charged for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, before the superior court. According to the Information filed by the Attorney General, between the 2nd day of August, 2001 and 10th day of August, 2001, at Gikambura Village in Kiambu District of Central Province, the appellant murdered Susan Wangui Ngure (*"the deceased"*).

The first piece of circumstantial evidence came from the deceased's cousin, ***S. W. T*** (PW4), who was a standard six pupil in the same school. Ordinarily, the deceased together with Susan and another cousin who was in standard five, used to go to school together as they were required to report very early in the morning. But on the morning of 2nd August, 2001, the deceased did not accompany them. She was delayed at home up to 6.30 a.m. as her father, ***R. N. M*** (PW1) had arrived from Mombasa the previous night and wanted to greet her. Her mother, ***J. W.N*** (PW2) was also at home and she saw the deceased off after she finished talking to her father. When the deceased did not return home from school after 4.30 p.m, her father, R, went to check with S but S said she did not see her at school. He asked her whether they had seen anybody that morning on their way to school and S said she had seen the appellant standing along the road and greeted him. When R prodded further to know whether they had talked to the appellant

any other day, S said at one time the appellant had asked her who the brown girl was. R proceeded to Riu Police Post where he was given two officers to go to the appellant's home but he was not at home. They went to report to Kikuyu Police Station and the appellant was arrested the following morning. The Officer Commanding Station (O.C.S.) however released the appellant as he was of the view that there was no sufficient evidence to hold him. The appellant, in the company of his father had already voluntarily gone to the police station when they heard that he was being sought. The release of the appellant extremely angered R. He continued to search for his missing daughter. On 7th August, 2001 he returned to Kikuyu Police station and in the company of four police officers including ***Pc.* Ngugi Wamaya** (PW8), they headed for the appellant's home. It was the evidence of R and Pc. Ngugi that the appellant escaped from the house when he saw the policemen but they found the appellant's father, ***Benson Gituchu Magua*** (DW2). It is also their evidence that they entered into the appellants' house and carried out a search which unearthed a blood stained rope found on the floor of his room. Pc. Ngugi took possession of the rope and subsequently, on 15th August, 2001, submitted it to a Government Chemist, ***Cyrus Otieno Ojode*** (PW7) for forensic examination. This was the second piece of circumstantial evidence.

In the meantime, on the 10th August, 2001, ***George Mugo Ngure*** (PW3) was attending a ceremony in his aunt's home which is in the same neighbourhood as the appellants' home and R's home. The two homesteads are about 500 meters apart. It was about 6 p.m. when George saw some five young boys running through the home and he stopped them. One of them was carrying a blood stained rope and said they had seen a dead body of a child. They all headed to R's home where they found many people praying. R and some other villagers accompanied George and the young boys to the place where the body lay. It was in a bush about 200 meters from the appellant's home. One of the young boys explained how they came about the discovery of the body. It was ***Stephen Mucheru Nyama*** (PW6) who said he was called by his cousin to go and assist in pulling out a dog which had fallen in a ditch. They went with three other boys. As they pondered on how to pull out the dog, they stumbled on the dead body of the deceased in a sack with a protruding leg. They ran out to inform others who also went to the scene. The police were also informed and on arrival at the scene, ***IP. Helen Rotich*** (PW5) observed that "*the body had a deep cut near her ear and also her left leg was chopped off. Her private parts were chopped off.*"

A post mortem was subsequently carried out by Dr. P.K. Maundu who formed the opinion that the cause of death was "*head injury, brain haemorrhage and Asphyxia due to strangulation*". The Government Chemist also confirmed that the bloodstains on the sisal rope he examined and that of the deceased were both blood group A.

The appellant was not arrested until after four months since he left his home. In his sworn testimony, he said he was in the business of selling secondhand merchandize at Dagorretti, Wangige and Kawangware markets. He would always rise up early from his Gikambura Village home to go to those markets. On the 2nd August, 2001, he was up as usual and went to the roadside to wait for a lift from a neighbor, one Githua, who was going to Wangige. As he stood there, at about 6.30 a.m, he saw a girl he was familiar with as he used to see her in a group of others going to school. This time she was alone. He greeted her and asked her why she was alone. She went past, then Githua's vehicle came along and he boarded it. As they passed the girl he offered her a lift but she refused. They proceeded on to Wangige. After two days, he was informed by his cousin that police officers had been to his house looking for him in relation to a missing girl. He went home and found his house had been broken down. He decided not to enter. His father told him police and the deceased's father had been there and made a search in his presence but they found nothing incriminating. He and his father went to Riu Police Post and were directed to Kikuyu Police Station where they went. They found the deceased's father there and in the presence of the OCS he was asked questions about the missing girl but denied any connection with the disappearance. The OCS decided to release him but the deceased's father was livid and vowed to revenge. A day or so later the appellant found many people in his home removing clothes from the drying line and he sensed danger. He ran off from the area to the safety of his cousin's residence in Mumias. Thereafter both his house and that of his parents were burnt down by a mob, a fact confirmed by the prosecution witnesses. After four months, he thought things had cooled down and returned to Dagoretti but a person who saw him in a bar, called the police and he was arrested. His father (DW2) testified that some two A.Ps accompanied R to his home and demanded to search the appellant's house. He went with them and they carried out a search but found nothing. They asked him to take the appellant to Riu Police Post, which he did the following

day and the appellant was interrogated but he denied involvement. They were referred to Kikuyu Police Station where further questioning by the OCS in the presence of the deceased's father elicited no offence and the appellant was asked to go home.

After the evidence was summed up for the three assessors who assisted the trial Judge, they were of the unanimous opinion that the appellant was not guilty as charged as there was no evidence to connect him. The learned Judge however, in her judgment, believed the evidence of Susan (PW4) despite some contradictions; that the appellant had spoken to her about the deceased one day before her disappearance; that a blood stained rope was found in the appellant's house and that the appellant escaped and was not arrested until four months later. The learned judge also examined but curiously said nothing about the bloody rope seen by George (PW3) on the day the deceased's body was discovered in the bush. She also rejected the evidence of the appellant's father stating that he was sitting in court when prosecution witnesses testified.

The superior court appreciated, correctly so, that the case rested on circumstantial evidence, stating: -

"The prosecution has to show from the facts presented before the court that they inevitably lead to the inference of the guilt of the accused , and that there is not and cannot be any reasonable doubt that the accused could be innocent. In other words there should not be any weak link in the chain of circumstances leading to death which points an unwavering finger at the guilt of the accused. The facts should naturally lead from series of facts to the unavoidable guilt of the accused. I have to satisfy myself that this is what I have before me."

The court further referred to the appellant's evidence that he saw and spoke to the deceased that morning for a short while before the vehicle he was waiting for arrived. On this evidence the court stated:

"After this evidence in my humble submission (sic)**, it was incumbent upon the accused, to call Githua to confirm his story. This fact was only within his knowledge and thus onus to prove his alibi on balance of probability is entirely on the accused. He has failed to discharge that onus."**

Finally the court drew an adverse inference from the appellant's disappearance from the scene for a period of four months.

Those findings aggrieved the appellant who challenged them on six grounds argued by his learned counsel Mr. Roch Odhiambo. We think however that it is on two grounds that this appeal will rest and we shall now examine them.

The first of those grounds relates to the *"bloody rope"* which was the vital second link in the chain of circumstantial evidence incriminating the appellant. In his submissions, Mr. Odhiambo contended that the prosecution evidence relating to the rope was not only confusing but was not properly summed up to the assessors or evaluated by the trial Judge. In his view, there were two *"bloody ropes"* put forward by the prosecution but only one of them was subjected to forensic examination. The first *"bloody rope"* was allegedly recovered in the appellant's house by R in the company of the police on 7th August, 2001 and was retained by the police. The second *"bloody rope"* was found by a group of young boys where the dead body of the deceased lay. In Mr. Odhiambo's submission therefore there was no consistent evidence on the "bloody rope" thus inviting the conclusion that the *"bloody rope"* was either planted in the appellant's house in his absence or was never found in his house as his father (DW2) testified.

In response to that submission, learned Senior State Counsel Mr. Monda submitted that there were never two *"bloody ropes"* as only one was recovered from the appellant's house. In his view, the evidence of PW3 in relation to a rope ought to be ignored since the defence counsel did not show such rope to the witness to confirm or deny its existence.

With respect, we do not understand the view taken by Mr. Monda on that evidence. The evidence of George (PW3) was adduced by the prosecution and there was no onus or burden on the appellant or his counsel to produce any evidence to disprove it. We may reproduce the relevant part on that evidence:-

"I recall 10th August, 2001 at around 6 p.m. I was at my aunt's home for a ceremony. Five young boys came running to that place. I asked them why they were taking this route which is an act of trespass. One got courageous and was carrying a blood stained rope. He said they saw a dead body of a child. They told us where it was. They also told us the home of her parents. We all went to their home."

The prosecution was certainly putting forward the proposition that a "bloody rope" was being carried by a young man who had just seen the deceased's body. That was on the 10th August, 2001. The prosecution also put forward the evidence of Pc. Ngugi (PW8) on the rope as follows:-

"On 15/8/01 I went to the City Mortuary to witness the postmortem of the body. I requested from the pathologist samples of blood of the deceased for comparison of the blood stains on the rope which was recovered from accused's home on 7th August, 2001. I was with other officers Pc. Kimaru and another officer from Kikuyu Police Station whom (sic) when we recovered rope. I look at a rope shown and confirm that that is the one I recovered. (MFI.1) I produce the rope in evidence. (Exhibit 1)"

The evidence of R (PW1) on the same subject was as follows: -

"We returned to Riu Police Post and police officers named Kimani and went to police station we were given four police officers and came back to Antony's home. When we reached his gate, his father was called and Antony escaped from the house. We entered the house. After search, we found a rope with blood stains. I am shown the rope and confirm that is the one (MFI. 1). It was taken by police to investigate."

So that; the *"bloody rope"* identified as "MFI.1" by both R and Ngugi and produced as Exhibit 1, was recovered on 7th August, 2001; while George saw a *"bloody rope"* on 10th August, 2001. There was no attempt to connect the two pieces of evidence and to relate it to Exhibit 1 or to establish whether there were two different ropes. If they were two, what became of the second rope? If there was only one, was the prosecution witness George truthful or a liar? We think in such state of evidence, the assessors ought to have been directed accordingly but were not. We do not know what they would have stated if they were. The learned Judge was also under a duty to evaluate the evidence before making the factual finding that there was one *"bloody rope"* which was found in the appellant's house and therefore connected the appellant with the death of the deceased. Ordinarily, this Court would not interfere with findings of fact by the trial court, especially when they are based on credibility of witnesses, but will certainly do so if such findings are based on no evidence or on a perversion of it. The credibility of the witness George (PW3) was not assessed nor was his evidence properly evaluated. On our own assessment, the prosecution must be held to the evidence they put forward and on the face of it, there were two *"bloody ropes"* one of which was totally ignored. We find on that basis that there were co-existing circumstances militating against the finding that the *"bloody rope"* which tended to connect the appellant with the offence, irresistibly did so, or was incompatible with his innocence. We allow that ground of appeal.

The second ground raised by Mr. Odhiambo was in relation to the disappearance of the appellant from the scene for a period of four months and the manner his defence was evaluated. As stated earlier, an adverse inference was drawn from such conduct, the trial Judge stating that the onus was on the appellant to prove his *alibi*. The submission by Mr. Odhiambo was that there was a genuine fear by the appellant who had, as soon as he became aware of the incident, voluntarily gone to the police to proclaim his innocence only to be harassed by visits to his home by police, the angry and bitter father of the deceased, and mobs who ended up burning down his house and those of his parents. It was a natural reaction therefore that the appellant would seek refuge from his hostile villagers who wrongly believed that he was responsible for the deceased's death. That is how he joined his cousin in Mumias and returned later on the wrong assumption that tempers had cooled down. In Mr. Odhiambo's submission, the appellant was not the only one who had the opportunity to harm the deceased that day and he had no duty to prove, as the trial Judge erroneously stated, that he was with one Ngugi that morning.

In his response to those submissions Mr. Monda contended that the defence of the appellant was an afterthought as it was not put to the investigating officer in cross-examination that the appellant was given a lift by one Ngugi on the material date. He relied on ***section 111*** of the Evidence Act which shifts

evidential burden in some circumstances. Finally he submitted that the appellant had no reason to run away if he was innocent and such conduct supported the findings of the trial Judge on his culpaliability.

We have considered that ground of appeal anxiously and we think, with respect, that the learned trial Judge erred in shifting the burden of proof to the appellant in the circumstances of this case. Firstly, it is not correct to state, as contended by Mr. Monda, that the appellants' defence was an afterthought and he should therefore have called evidence to prove it. As stated by Sir Udo Udoma, Chief Justice in **Sekitoleko v Uganda [1967] EA 531**:

"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R v. Johnson [1961] 3 All E.R. 969 applied; Leonard Aniseth v Republic [1963] E.A 206 follows);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"

That general rule may only be departed from in limited circumstances when the evidential burden is shifted under ***section 111*** of the Evidence Act. In this case there was evidence, confirmed by the prosecution ,that the appellant had voluntarily gone to the police station and had been interrogated and recorded a statement before he was set free by the OCS. It must be presumed that the story he gave to the police was consistent with the defence he gave in court on oath, since he was not cross-examined on any inconsistency about his story. The police therefore had ample opportunity to cross-check the story about one Githua and the vehicle the appellant stated he boarded to go to work in Wangige on the material date. It cannot therefore be said that his defence was an afterthought or that he failed to discharge any burden of proof. He had none to discharge. In the circumstances explained by the appellant we also think it was plausible that he was in mortal fear of his life and therefore left his village after seeing the conduct of the police, the deceased's father and other villagers. We give him the benefit of doubt, and reverse the adverse inference drawn by the trial Judge.

All in all, it is our finding after re-evaluation of the entire evidence, that the circumstantial evidence relied on to convict the appellant did not measure up to the standards proclaimed by this Court and its predecessors in such cases as **Kipkering arap Koske (1949) EACA 135**, **Teper v Reginam (1952) AC 480** and **Parvin Singh Dhalay v Republic** [**1995 – 98] 1 EA 29**. We allow the appeal, quash the conviction and set aside the sentence of death (now commuted to life) imposed on the appellant. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered at Nairobi this 8th day of April, 2011.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

This judgment has been delivered under ***rule 32(2)*** of the Court of Appeal Rules. The Hon. Mr. Justice Nyamu has not signed it.

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

DEPUTY REGISTRAR