REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 183 & 188 of 2006

BETWEEN

1. **JOSEPH KARIUKI NDUNGU**
2. **JOHN KIBAKI KAMAU ……. APPELLANTS**

AND

REPUBLIC …….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Musinga, J.) dated 19th May, 2006

in

H.C.CR.C. NOS. 77 & 79 OF 2004 (CONSOLIDATED)
****
JUDGMENT OF THE COURT

The first appellant **Josephat Kariuki Ndungu** and the second appellant **John Kibaki Kamau** were jointly with two others (co-accused) arraigned before the High Court, Nakuru on an Information charging them with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The co-accused were **Joshua Wilson Otieno** who was the first accused (Joshua) and **Monicah Nyambura Otieno** who was the second accused (Monicah). The first appellant was the 4th accused at the trial the second appellant the 3rd accused.

The particulars of the charge alleged that on the nights of 12th and 13th June, 2004 the appellants and the co-accused jointly murdered **AWG**. The co-accused were acquitted after trial. The superior court however, convicted the two appellants and sentenced each to suffer death as prescribed by law.

The deceased, a 19 year old girl, was employed by G Supermarket, Nakuru Town as a cashier. She was living with her parents **LWA** (PW2)and **WGN** (PW3) in B M area about 30 kilometres from Nakuru Town. She used to travel by matatu to and from work. On the way home, she used to alight at Ahero Trading Centre (Ahero) which is at the junction of Nyahururu road and Karuga road and walk to her parent's home about 1½ - 2 kms from the junction. The deceased had a Nokia 3310 handset with a Kencell line No. which was bought in Nairobi on her behalf by her sister **MWG** sometime in May, 2003.

On 12th June, 2004, the deceased left for work at about 7.00 a.m. She worked all day at Gilani's Supermarket until 6.00 p.m. when she left. At about 7.00 p.m. **C.W** (PW9), a girl aged 10 years, met the deceased walking home from the direction of Ahero and greeted the deceased. At about the same time **Josphine Njeri Kagira** (PW10) who was working on the fence along the road saw the deceased walking towards her parent's home from Ahero matatu stage. The deceased did not, however, reach home at the usual time (about 7.00 p.m.) which made her parents anxious. Her parents called her mobile phone number but there was no answer.

At about 8.30 p.m. her father walked to Ahero to look for her but returned home when he did not find her. On the morning of 13th June, 2004 at about 6.30 a.m. Loise, the deceased's mother, decided to report at the nearby Bahati Police Station which was past Ahero. On the way to Ahero, Loise saw the body of the deceased lying next to the road facing up. The deceased had two deep cut wounds on the face and one eye was swollen while the other was protruding. She was still wearing a trouser and shoes but she had no under-pant or bicker. Her handbag containing her personal effects was missing. Her mobile phone was also missing. The incident was reported at Bahati Police Station and C.I. Patrick Oduma (PW11) the O.C.S. went to the scene. The scene was about 1 km from Ahero and about 400 metres from the home of the deceased's parents. There was dried blood stains where the body was lying and the body had deep cut wounds on the face. The body was taken to the mortuary but was washed by the mortuary attendants before investigations were completed. The case was ultimately taken over by the District Criminal Investigations Officer (DCIO), Nakuru District for investigations. The DCIO enlisted the help of I.P. Paul Mumo (PW5) an investigator and crime analyst based at CID Headquarters, Nairobi who obtained computer print outs of the incoming and outgoing calls relating to the deceased's mobile number from two mobile service providers – Kencell Telecommunications Ltd and Safaricom Ltd. After analysis of the data, IP. Paul Mumo established, among other things, that the Serial Number (i.e. International Mobile Equipment Identity) of the deceased's hand set was 351458805299120; that on 16th June, 2004, the deceased's handset was used by mobile no. 0722928111 within Bahati registered in the name of Josphat Okwari; that from 18th June, 2004 the deceased's hand set was fitted with a new Safaricom line – 0722455893 whose subscriber was within Bahati area and that the handset was thereafter used constantly.

On 23rd June, 2004 **I.P. Paul Mumo** and other police officers including **C.I. Gerald Wambugu** (PW17) – the investigating officer, proceeded to Bahati area where they arrested the first accused at the trial, Joshua, who was in possession of a motorolla handset in which mobile line no. 07222928111 had been fitted. Joshua was arrested within Ahero about 1 km from where the body of the deceased was recovered. He was interrogated after which he disclosed that he had used a Nokia 3310 which he had bought from one Kibaki and that he had given it to his wife. He led police to his house and pointed out his wife. Joshua's wife (Monicah) produced the handset which was fitted with line NO.. On checking the screen of the mobile it showed the name of the deceased *"Anne"* and police established that the handset belonged to the deceased. Thereafter, Joshua led police to the house of Kibaki (2nd appellant) who was arrested in possession of handset Nokia 3310 with two lines – 0721726890 and 072334724486.

On the following day i.e. 24th June, 2004, Joshua and the 2nd appellant led **I.P. Paul Mumo, PC. Nzioka Wambua** (PW14) and other police officers to Bahati area where the sim-card of the deceased's handset was recovered under a tree a few metres from the junction of Nyahururu road/Karunga road and about 1 km from where the body of the deceased was found. The sim-card had a unique identification number - 03032030073586. On 26th July, 2004, **IP. Jeremiah Musyoki** (PW8) and other police officers arrested the first appellant in Ngachura area of Bahati.

The first appellant vehemently denied in his sworn evidence at the trial that he had sold any mobile phone to the second appellant. He claimed that he never left his house on the night of 12th and 13th June, 2004 and that he was never involved in the murder of the deceased.

The second appellant, similarly, gave sworn testimony at the trial. He testified, in essence that, on 13th or 14th June, 2004 he was drinking changaa in the company of **Joseph Kamau Kigondu** alias **Shaban** (PW6) (Kigondu) who was in the company of the 1st appellant; that he did not know the 1st appellant before; that Kigondu asked him, if he wanted to buy a mobile phone which the 1st appellant had; that the first appellant removed a Nokia 3310 from his pocket; that he negotiated the price with the 1st appellant; that they agreed on a price of Shs.2,000/=; that he gave Shs.1,000/= to Kigondu who in turn handed over the money to the 1st appellant; that he sold the same phone to

Joshua on 14th June, 2004 at Shs.2,000/=; that he paid the balance to the 1st appellant on 19th June, 2004 and that he was in his house on the night the deceased was murdered.

The appellants were tried with the aid of three assessors. The first assessor formed the opinion that all the four accused persons were not guilty. The other two assessors formed the opinion that Accused 1 – 3 were not guilty but that the 4th accused was guilty. The trial judge after evaluating the evidence made the following findings of fact that the deceased was physically assaulted, raped and eventually killed shortly after she alighted from a public service vehicle at Ahero on her way home; that her body was dumped at the edge of the road a few metres from her parent's home; that in the course of the ordeal, her mobile phone Nokia 3310 Serial Number 351458805299120 fitted with mobile line number 0733793972 was stolen; that the 1st accused's (Joshua) acquisition of the deceased's mobile phone per se was not sufficient to connect him with the murder of the deceased; that the evidence of the 1st appellant that he bought the mobile phone from the 2nd appellant for Shs.2,000/= and sold it to Joshua for same amount was against the basic principle of commerce; that it is the second appellant who removed the sim-card from the deceased's mobile telephone and threw it where it was recovered; that the evidence of the second appellant that he did not know the first appellant before and was introduced to him by Kigondu was not credible; that the first and second appellants knew each other fairly well; that the demeanour of the 1st and 2nd appellants in court showed that they were not speaking the truth; that it was likely that the 2nd appellant got the mobile phone from the 1st appellant and sold it to Joshua for Shs.2,000/= and then shared the proceeds with the 1st appellant; that both appellants were in possession of the deceased's mobile phone just a day after the deceased was killed; that neither appellant advanced any plausible explanation for their possession, and, lastly, that their possession of the deceased's mobile phone was so recent as to lead to no other reasonable conclusion than that they were the ones who murdered the deceased or among the people who committed the offence and took the deceased's mobile phone.

Although the memorandum of appeal filed by the 1st appellant contains four grounds of appeal, the first three grounds raise technical issues, namely, that the charge was not read over and explained to him; that the trial judge relied on evidence which does not show the name of the interpreter and the nature of interpretation. Those grounds were not pursued and are not supported by the record. Indeed, Mr. Ateya who represented the first appellant at the trial did not raise such complaints. That leaves only one ground which deals with the question of insufficiency of the evidence.

There are 18 grounds of appeal in the supplementary memorandum of appeal filed by the 2nd appellant but the principal grounds can be condensed into eight grounds, in essence, that, there was no direct evidence linking the 2nd appellant to the murder; that the evidence did not exclude the possibility that the offence was committed by other people, particularly the five young men seen by **Caroline Wanja** (PW9) riding behind the deceased; that the ingredients of the offence of murder was not proved; that the probable motive of murder was rape and not theft; that the conviction was based on speculation and theories; that the circumstantial evidence was too flimsy, speculative and fluid; that the doctrine of recent of possession was wrongly applied; that the second appellant sufficiently explained his possession of the mobile phone and his defence of alibi which was not rebutted was wrongly rejected; that police did shoddy investigations, and, lastly, that the prosecution of the second appellant was oppressive.

This being a first appeal, we have a duty to re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier** [1985] KLR 353.

The trial judge made a finding that the deceased was physically assaulted, raped and killed on her way home shortly after she had alighted at Ahero and that her mobile phone was stolen in the course of the ordeal. There was overwhelming evidence proving that the deceased was assaulted, robbed of the mobile phone and killed as she walked home from Ahero on the material day at about 7.00 p.m. Caroline Wanja met the deceased on her way home from Ahero and even greeted her. The deceased was also seen walking home from Ahero by Josephine Njeri Kagira. There was also ample evidence that the body of the deceased was found on the following morning lying off the edge of the road about 400 metres from her parent's home. The deceased had several injuries including two deep cut wounds on the face.

Dr. Noah Oloo Kamidago who performed the post mortem on the body of the deceased found that the deceased had a deep cut wound measuring 10cm x 2cm exposing the underlying bone on the left side of frontal bone just above the left eyebrow; a deep cut wound 4cm x 2cm also exposing the underlying bone 2cm away from the left eyebrow; superficial bruises on the left knee and deep bruise 2cm x 2cm on the lateral aspect of the ankle and a v-shaped wound in the right jaw angle.

There was also a marked gaping of the vulva exposing vaginal canal. The pathologist formed the opinion that the cause of death was increased intracranial pressure due to blunt-force head injury with depressed fracture skull. There was also the evidence of the deceased's mother Loise that the deceased had no underpants and that her hand bag containing personal items was missing.

Further, there was also ample evidence from IP Paul Mumo that the mobile phone of the deceased was recovered from Monica – the wife of Joshua within Bahati area. There was concrete evidence that the mobile phone recovered Nokia 3310 belonged to the deceased. Millicent, a sister of the deceased identified the mobile phone as the one she had bought for the deceased in Nairobi and produced the receipt and the box in which it was parked. The handset was also identified by its IMEI – International Mobile Equipment Identity Number. The sim-card with an unusual International Identification number 03032030073586 was also recovered about 1 km from where the body of the deceased was recovered. Lastly, the handset was identified by the deceased's name *"Anne"* which appeared on the screen when the phone is activated.

Although there was no forensic evidence that the deceased was raped, the physical appearance of the deceased's private parts as seen by the pathologist, the fact that the deceased was lying facing up, the injuries on her knees and ankle and the fact that her underpants was missing is strong circumstantial evidence showing that the finding of the trial judgment was correct. Indeed, Mr. Kibe Muigai, learned counsel for the 2nd appellant submitted that there was strong evidence that deceased may have been raped.

Mr. Kibe, however, contended that two ingredients of murder, that is, malice aforethought and unlawful act were not proved as against the 2nd appellant. By **section 206** of the Penal Code malice aforethought is deemed to be established, among other things, if there is evidence proving an intention to cause death or to do grievous harm or intent to commit a felony. In this case the severe head injuries sustained by the deceased show that she was struck once or twice with a heavy object on the head. The person who assaulted her must have intended to cause death, which in fact occurred, or to cause grievous harm. Furthermore the fact that deceased was raped and robbed of her mobile phone establishes that the attackers intended to commit a felony, that is, rape and robbery in the course of which the deceased was killed. Thus malice aforethought was clearly established.

It is convenient to consider the appeal of the 2nd appellant first. It is true that there was no direct evidence linking him to the offence. There was however, overwhelming evidence which the 2nd appellant admitted that, on or about the 14th June 2004 at 11.00 a.m. a day after the robbery was committed the 2nd appellant was in possession of the mobile phone stolen from the deceased at the time the offence was committed; that he sold the same mobile phone to Joshua for Kshs.2,000/=, and that he was paid Kshs.1,000/= as first installment. The

2nd appellant explained in his evidence that he had bought the same mobile phone from 1st appellant on 13th or 14th June 2004 (should be on 13th June 2004) as the two appellants and Kigondu were drinking changaa in Mama Dan's house.

The trial Judge disbelieved the 2nd appellant's evidence saying in part:-

> **"Although the 3rd accused stated in his defence that he was introduced to the 4th accused by PW6 when he was buying the mobile phone from him, I did not believe him for the following reasons:-**
>
> **Firstly, the evidence of PW6 showed that the 3rd accused and the 4th accused were not strangers to one another. Secondly, the 4th accused said that he had known the 3rd accused for over five years. Thirdly, it is rather unusual for anyone to buy a used mobile phone from a stranger. In my view, PW6 the 3rd accused and the 4th accused knew one another fairly well. They all hailed from the same area and were dealing with quarry stones in one way or another. PW6 was a stone dresser, the 3rd accused was a quarry worker cum lorry driver and 4th accused was a mason. They used to frequent the same** "changaa" **and** "busaa" **drinking places."**

There were two other reasons why the trial Judge did not believe the evidence of 2nd appellant; firstly, that the 2nd appellant sold the mobile phone on the following day at the same price without making a profit, which, according to the trial Judge, was contrary to the basic principle of commerce, and, secondly, that the demeanour of the two appellants showed that they were not speaking the truth.

Mr. Kibe submitted that the conviction of the 2nd appellant was based on speculations and theories and that the best judge on the rule of commerce should have been the assessors.

By **Section 119** of the Evidence Act, *"the Court may presume the existence of any likely fact which it thinks likely to have happened having regard the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."*

We agree that it would be wrong for a trial court to base a conviction on fanciful theories or attractive reasoning for the conviction must be based solely on the weight of evidence. (**Okale vs. Republic** [1965] EA 555). Nevertheless, **Section 119** of the Evidence Act allows the court to make presumptions or inferences from the evidence. There is a clear difference between theories or speculations not arising from evidence and presumptions drawn from the actual evidence.

We readily agree that the third reason given by the trial Judge for disbelieving the evidence of the 2nd appellant namely, that, it is unusual for any one to buy a mobile phone from a stranger is not valid as it is a theory which was not based on evidence. However, the trial Judge correctly made a presumption that buying a mobile phone at Kshs. 2,000/= and selling it on the following day at the same price and without making a profit is against the basic principle of commerce for it is an inference drawn from the evidence of the 2nd appellant.

The evidence of the 2nd appellant at the trial that the 1st appellant sold the mobile phone to him at Mama Dan's house in the presence of Kigondu is contradicted by the evidence of Kigondu. The evidence of Kigondu was in essence that he was introduced to 1st appellant by Mama Dan in her house sometime in December 2003; that 1st appellant used to sell mobile phones; that Kigondu told 1st appellant to get mobile phone to sell to him, that in June 2004 he met 1st appellant at Ahero and 1st appellant asked him if he had money to buy a hand set he had; that Kigondu said he had no money; that 1st appellant did not show him the handset; that 1st appellant asked Kigondu if he had seen 2nd appellant; that 1st appellant left, and that he later met 1st appellant who told him that he had sold a mobile phone to 2nd appellant and had been paid Kshs.1,000/= leaving a balance of Kshs.1,000/=.

It is clear that Kigondu did not say that he saw the mobile phone in possession of 1st appellant; or that he was in the company of 1st

and 2nd appellants or that 1st appellant as a matter of fact sold a mobile phone to 2nd appellant. It seems that Kigondu was evasive on the question of possession and sale of the mobile phone.

There was the uncontradicted evidence of PC. Nzioka Wambua that the 2nd appellant led to the recovery of the sim-card of the deceased's mobile phone. The 2nd appellant admitted that he is the one who had thrown the sim-card where it was recovered on the day he sold the hand set to Joshua.

Having reconsidered the entire evidence we are satisfied that the findings by the trial Judge particularly the finding that 2nd appellant had bought the deceased's mobile phone from the 1st appellant was incredible are correct and that the defence was properly rejected.

As regards the 1st appellant's appeal the only evidence which links him with the possession of the deceased's mobile phone is mainly the evidence of 2nd appellant and to a lesser degree the evidence of Kigondu.

According to the evidence of Kigondu, the 1st appellant offered to sell a mobile phone to him but when he said he had no money 1st appellant asked the whereabouts of the 2nd appellant and later in the day 1st appellant told him that he had sold the mobile phone to 2nd appellant.

The evidence of 2nd appellant against the 1st appellant is accomplice evidence. By **Section 141** of the Evidence Act an accomplice is a competent witness against an accused person and a conviction based on the evidence of an accomplice is not illegal merely because it was based on uncorroborated evidence of an accomplice. However, in **Odongo v Republic** [1983] KLR 307 this Court said at page 304 paragraph 30 – 35:-

> **"In fact, even where one accused gives evidence on oath such evidence must be regarded with extreme caution when it is to be used against a co-accused."**

The evidence of Chief Inspector Gerald Wambugu (investigating officer), IP Paul Mumo and PC. Nzioka Wambua show that when Joshua led police to the house of the 2nd appellant, the appellant admitted that he had sold the mobile phone to Joshua but claimed that he had bought it from the 1st appellant. A few days later he led police to the recovery of the sim-card.

It is clear that the 2nd appellant co-operated with the police and told them the truth regarding the sale of the phone to Joshua and the whereabouts of the sim-card. He could have denied having sold a phone to Joshua but he did not do so. He could also have feigned ignorance of the whereabouts of the sim- card but he did not do so. The trial Judge made findings of fact that Kigondu, 1st and 2nd appellants were known to each other; that they hailed from the same area; that they were engaged in similar business and that they used to drink liquor at the same places .

Although the evidence of the 2nd appellant that he had bought the mobile phone from 1st appellant is exculpatory and incredible, nevertheless, his evidence that he got the mobile phone from the 4th appellant is in the circumstances credible. It was safe for the trial court to rely on it. By the definition of *"possession"* in **Section 4** of the Penal Code (b), if the 2nd appellant had possession of the mobile phone with the knowledge and consent of the 1st appellant both would be deemed to be in joint possession.

The inference drawn by the trial Judge that 2nd appellant got the mobile phone from the 1st appellant sold it to Joshua for Kshs.2,000/- and shared sale proceeds with 1st appellant, is in our view, the most probable.

The accomplice evidence, in our view, was partially supported by the evidence of Kigondu and by the circumstances of the case.

Lastly, the findings of the trial Judge that the 1st and 2nd appellants were in possession of the deceased's mobile phone just a day

after she was killed; that the appellants had not given a plausible explanation of their possession and that the doctrine of recent possession applied cannot be faulted.

In the result, we are satisfied that the appellants were properly convicted. We dismiss the respective appeals.

Dated and delivered at Nairobi this 24th day of March, 2010.

S. E. O. BOSIRE

……...……
JUDGE OF APPEAL

E. M. GITHINJI

…….……..
JUDGE OF APPEAL

D. K. S. AGANYANYA

…….……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR