



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 236 OF 2009**

**JAMES LOVE MWANGANGO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nairobi (Muga Apondi, J.) dated 8<sup>th</sup> March, 2007*

*in*

*H.C.Cr.C.47 of 2005)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant, **James Love Mwangango** was convicted by the superior court (**Apondi, J.**) for the murder of his girlfriend, **Stella Njeri Kibaki (the deceased)** contrary to **section 203** as read with **section 204** of the Penal Code. He is alleged to have done so on 18<sup>th</sup> February 2005 at Kimathi Estate House No. F37 in Nairobi.

The prosecution case was that on 18<sup>th</sup> February 2000 at around 1.50 p.m. the appellant went to Kimathi Estate and asked for the deceased who lived in house No.F37. At the main gate, the appellant enquired if the deceased was in her house but when the watchman answered that he was not sure that the deceased was in her house, the appellant nonetheless proceeded to the deceased's house leaving the watchman at the main gate. A few moments later, the deceased accompanied by her mother came to the estate and upon the watchman informing the deceased that he had seen the appellant coming in but had not seen him go out, the deceased told the watchman that if he ever saw the appellant again, he should tell him that she was not in. On the same night, **Susane Wanjiku Kibaki**, a cousin to the deceased and a fashion designer who at the material time shared accommodation with the deceased in House No.F37 testified that when she returned to the house at around 8.00 p.m., she found the bathroom lights on and as the doors were locked, she opened the main door first, went to the kitchen before proceeding to their bedroom which she used to share with the deceased. To her surprise, she found the door to the bedroom open, and noticed that clothes and documents were scattered all over the bedroom and to her consternation she immediately saw the deceased lying on the bed with her legs touching the floor. She was able to observe that the deceased's neck and chest were blood stained and that the deceased had only

a vest and pant on and had died.

It was the prosecution case that the appellant had killed the deceased by cutting open the trachea and the esophagus and the cause of the death was a penetrating neck injury which caused massive bleeding due to severance of carotid vessel.

The matter is now before us as a first appeal. During the hearing, the appellant was represented by **Mr. E. Ondieki** advocate and the State was represented by **Mr. Monda**, Senior State Counsel from the State Law Office.

At the commencement of his submissions, the learned counsel for the appellant informed the Court that he wished to abandon the home made memorandum of appeal and supplementary memorandum of appeal previously filed and instead rely solely on the supplementary memorandum of Appeal filed by his firm on 19<sup>th</sup> July 2010 containing the following grounds:-

- 1. THAT the trial court erred in law and fact by relying on hearsay evidence without corroboration.**
- 2. That the superior court erred in law by convicting on the basis of circumstantial evidence that did not meet the required Legal standards.**
- 3. THAT the superior court erred in law and fact by failing to resolve material contradictions and inconsistencies in favour of the appellant.**
- 4. THAT the superior court erred in law and fact by convicting on the basis of suspicion without cogent evidence.**
- 5. THAT superior court erred in law by convicting yet the prosecution had failed to call critical witnesses.**
- 6. THAT the prosecution never proved the case beyond reasonable doubt as required by law.**
- 7. THAT the superior court erred in law by convicting without the requisite mensrea within the meaning of section 206 of the Penal code (Cap 63) Laws of Kenya.**
- 8. THAT the superior court erred in law by failing to comply with section 77(2)(b),(e),(f) of the Constitution as read with section 198 of the Criminal Procedure Code (Cap 75) Laws of Kenya.**
- 9. THAT the superior court erred in law by admitting the statement under inquiry which amounted to a confession contrary to the law.**
- 10. THAT the superior court erred in law by shifting the burden of proof contrary to the law.**
- 11. THAT the superior court misdirected itself as to the law and facts by drawing wrong inferences to the prejudice of the appellant.**

Although the appellant's counsel gave indications that he would rely on the grounds of appeal as listed above, nevertheless he laid more emphasis on the grounds that the circumstantial evidence relied on did not meet the required legal standards because it was weakened by co-existing circumstances not pointing to the guilt of the appellant; that the evidence relied on was at its best mere suspicion; that the prosecution had failed to call three critical witnesses; that there was no proof of malice aforethought as defined in **section 206** of the Penal Code; that the appellant was not accorded a fair trial as stipulated in **section 77(2)(b)(e)** and **(f)** of the Constitution, since repealed, because it was the appellant's wish to testify but his advocate acted against his wish in informing the Court that the defence did not wish to give any evidence after the close of the prosecution case; and finally that, the superior court shifted the burden of proof to the appellant contrary to law.

In response, Mr Monda, learned Senior State Counsel while conceding that the conviction was based on circumstantial evidence submitted that the evidence was watertight and placed the appellant at the scene of crime, and further that the evidence included proof of a love triangle between the appellant, the deceased and **Caroline Wangechi Wachira** (PW7); that the deceased cut links with the appellant in 2004 due to a strained relationship; that on the fateful day, the appellant was seen going to the deceased's house after making inquiries on whether she was in the house and stayed there upto 6.20 p.m. according to the evidence of the mother of the deceased **Esther Murige Kibaki** (PW4); direct evidence of PW7 that the appellant had told her after the murder that he had killed the deceased; the recovery of personal items of the appellant including her blood stained trouser which upon a DNA examination had blood which matched that of the deceased, and that no explanation was given by the appellant concerning the blood stain. As regards the representation of the appellant, it was clear, Mr. Monda submitted, that his advocate **Mr Kiage**, had informed the court in clear terms that the defence did not wish to offer any evidence and that what was left was to sum up case, and that having made this choice of keeping quiet the hearing proceeded in accordance with **section 311** of the Criminal Procedure Code which provision gives the advocate the right of addressing the Court on behalf of a client. Mr. Monda further submitted that the court could not overrule the advocate for the accused on the options available under **section 311** and therefore the court did not and could not properly interfere with the appellant's choice. In the circumstances the court did not contravene **section 77(2)(b)(e)(f)** of the Constitution as contended by the appellant and that the appellant was accorded all the facilities aimed at securing a fair hearing under **section 77** of the Constitution.

On the contention that there was no malice aforethought proved, the learned State Counsel stated that it was clearly evident in view of the nature of injuries sustained by the deceased as reflected by the postmortem which included the opening up of the trachea and the esophagus.

Touching on the contention that critical witnesses were never called, learned Senior State Counsel submitted that their evidence would have been superfluous in the face of the consistent description of the clothing which the appellant wore on the material day and the consistent description of the other items by **Michael Munguti Mwai** (PW1) the watchman who saw the appellant on the fateful day and the appellant's girlfriend, PW7 including the police witnesses who collected the items from the appellant's house. It was Mr. Monda's submission that the cumulative effect of this evidence placed the appellant at the scene of crime.

After setting out the submissions as above, a good starting point is to remind ourselves of the extent of our mandate as the first appellate court. That mandate was well expressed in the seminal case of **PETERS v SUNDAY POST LTD (1958) E.A. 424** as follows:-

***"It is the duty of a first appellate court to reconsider the evidence, evaluate it and draw its own conclusions thereon in deciding whether to uphold the trial court judgment. However, this is a jurisdiction to be exercised with caution in view of the fact the appellate court would not have seen or heard the witnesses who testified."***

It is also important for us to state that the common ground in the case is that the conviction was based almost exclusively on circumstantial evidence. It follows therefore that while discharging our mandate as defined above we should test the evidence and ascertain if it satisfies the benchmarks for a conviction based on circumstantial evidence. Again on this, we would not be walking on virgin land, the work having been done for us as early as 1949 in the case **KIPKERING ARAP KOSKE & ANOTHER 1949 EACA 135** where the Predecessor of this Court held:-

***"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 guilt."***

And at the turn of this new century in the case of **MUNENE v REPUBLIC [2002] 2 KLR 367** this Court held:-

1. ***“It is trite law that where a conviction is exclusively based on circumstantial evidence, such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exist no co-existing circumstances which could weaken or destroy such inference.***

2. ***It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.”***

At the other end of the pendulum and in order to keep reconsideration and evaluation of evidence properly focused we should also keep in mind the timely option expressed in the case of **R. v SHARMPAL SINGH S/O PRITAM SINGH SHARMPAL SINGH S/O PRITAM SINGH** [1962] E.A. 13:-

***“The incompleteness of the tale must not deter the court from drawing the inference that flow from the evidence available and that on the evidence there was no reasonable doubt that the case was one of manslaughter”***

The flow of the evidence which completes the story is as reproduced herebelow:-

The watchman at the Estate where the deceased lived at the relevant time was **Michael Munguti Mwai** (PW1). Concerning the appellant the witness testified:

***“On 18<sup>th</sup> February 2005 at around 1.50 p.m., the accused came and asked for Stella. I replied that I was not sure. Thereafter the accused proceeded to the house of stella ...”***

After the above discussion, the same witness said this of the deceased:

***“I explained to her that though I had seen the accused coming in, I had not seen him going out. In response, she told me that if I ever saw the accused again, then I should tell him that she was not in.”***

After his recall, PW1 testified as follows concerning the items the appellant was wearing:-

***“Accused was wearing a black t-shirt and a trouser close to black. I can see the trouser (MFI 5) that the accused was wearing on that particular day.”***

The mother of the deceased **Esther Murige Kibaki** (PW4) described the clothing the appellant was wearing on the fateful day as follows:-

***“When James came he was wearing a white shirt. Inside, he wore a black t-shirt. The white shirt was not buttoned upto the top. He was wearing a green long trouser. This is the black t-shirt (MFI 6) that he was wearing. He was also wearing the green long trouser (MFI 5) that is now in court***

...

***On reaching the gate, I found the watchman. Stella asked him whether there was anybody who had been looking for her. The watchman replied; ‘ndio yule rafiki yako alikuwa hapa.’ When Stella asked the time, the watchman replied that it was at around 2.00 p.m.***

On the same issue of the dress the appellant wore his girlfriend **Caroline Wangeshi Wachira** PW7 gave evidence as under:-

***“On 18<sup>th</sup> February 2005, I left the house at 6.30. I left James behind and I came back before 7.30 p.m. I found the house was locked and hence I opened the same. I never found James in***

*the house. Subsequently, I cooked rice and potatoes. James came back before 8-9 p.m. and found me in the bedroom. Then he told me that he had killed Stella. James later told me to wash his clothes but I refused. James was wearing a black t-shirt and a green trouser. I can see the t-shirt (MFI 6) and trouser (MFI 5) that James was wearing.*

...

*Earlier, James removed the clothes and put them in a closet in the bed-room.”*

**IP. Sembe** (PW13) said this concerning the exhibits.

*“On 18<sup>th</sup> February 2005 I ensured that the doors to the house of James was locked and I took custody of the keys*

...

*After recovering the exhibits, I kept them in an exhibit store in a safe.*

...

*Ultimately on 30<sup>th</sup> June, 2005, I received a report from the government Analyst. He stated that the DNA profile generated from the blood stains from the white t-shirt (EX c) bed cover the pillowcases and the black grey trouser – matched the profile of the blood sample of Stella Njeri Kibaki. I would like to produce.*

...

*Greenish stained trouser EX.5.*

*I found the trousers Ex.5 in the house of the accused*

The government analyst **Mr. R.N. Sikuku** produced a report confirming the above findings vide his report dated 30<sup>th</sup> June, 2005 Exhibit 9.

On the basis of the above evidence, the deceased’s blood in the stained greenish trouser which belonged to the appellant and which he was wearing on the material day squarely placed the appellant at the scene of crime. The exhibit was found hidden in the appellant’s house. In addition, the evidence of the appellant’s girlfriend (PW7) was believed by the trial court and we too find no reason to disbelieve her evidence incriminating the appellant. To illustrate the point, the green trouser as described by her is confirmed by the deceased’s mother as the trouser the appellant was wearing on the fateful day and which was later found to have had blood stains of the deceased’s blood group.

The appellant’s counsel has raised the important point of the exhibits not having been produced by IP. Njagi (*who was not called as witness*) who had picked the items at the Kimathi Estate and the fact that **Mr Sembe** (PW13) the investigating officer was not present when the Kimathi Estate exhibits were recovered from the house. However, it is clear to us that the investigating officer personally found the green trouser exhibit 5 in the house of the appellant and sent it to the Government chemist. As it turned out, this proved to be the missing link in the chain of evidence in that the trouser had the bloodstains of the deceased and that it was the same trouser that at least two witnesses saw the appellant wearing on the fateful day. It is for this reason that we are of the view that, while it would have been useful to call IP. Njagi, failure to call him was not fatal to the evidence that linked the appellant to the murder. It is clear to us that the material evidence that linked the appellant to the murder was acceptable and believable. It agrees with the evidence of several witnesses who had seen the green trouser under different circumstances at the material time, and who included PW4, the mother of the deceased and PW7 the girlfriend of the deceased. With respect, the evidence of IP. Njagi would not have added value to the story as narrated herein concerning the involvement of the appellant.

It has also been suggested that the deceased could have been killed by another person or persons who could have used the alternative gate to the Estate. On this, we note from the evidence that, the watchman who guarded the alternative route did not see any such person or persons access the deceased's house at the material time. Thus, the co-existing circumstances of another access to the deceased's house did not weaken the inference of the appellant's guilt in view of the evidence of the green trouser with the deceased blood stains which placed the appellant at the scene. An issue was also raised concerning the statement under Inquiry made by the appellant. In the superior court judgment, we note that the trial court did not rely on that statement and there is no mention of it in the judgment and we say no more on this.

All in all, the incriminating facts linked to the exhibits produced in court and which were found in the appellant's house placed the guilt of the appellant beyond suspicion. It is clear to us that the nature of the circumstantial evidence in the case was eminently reliable in that it was derived from independent eye witnesses who gave consistent description of the incriminating exhibits. This evidence was also sufficiently reinforced by the expert evidence of the government analyst. Consequently we are of the view that the evidence as analyzed and evaluated above satisfies the two tests of circumstantial evidence as enunciated in this Court's decision in the case of ***JAMES MWANGI vs REPUBLIC [1983] KLR 327*** where it stated:-

***1. "In a case depending on circumstantial evidence, in order to justify the inference of guilt, the circumstantial facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.***

***2. In order to draw the inference of the accused; guilt from circumstantial evidence there must be no other co-existing circumstances which would weaken or destroy the inference.***

...

In our view, the analysis of the evidence as a whole links the appellant to the crime and there is no evidence on record which would weaken or destroy the inference of guilt on the part of the appellant.

On the contention that in the circumstances, there was no malice aforethought, we are of the view that, there was direct evidence that at the material time the relationship between the deceased and the appellant was strained as per the evidence of the deceased's mother PW4. She testified that there was a scuffle concerning failure by the appellant to give money to the appellant to go to hospital. In addition the nature of the injuries inflicted on the deceased as described in the postmortem report namely the opening up of the trachea and oesophagus demonstrates the existence of malice aforethought. The manner of the killing demonstrated fully the existence of malice aforethought. Section 206 of the Penal Code states:-

***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

- a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***
- b) Knowledge that the act or omission concerning death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.***
- c) Not relevant.***
- d) Not relevant."***

In this regard, the learned Judge addressed this point admirably in these words:-

***“The slicing of the trachea and esophagus (sic) was akin to slaughtering an animal. That meant that the accused had only one intention. He wanted to completely punish (sic) the deceased.”***

Finally on the issue of the alleged contravention of **section 77(2)(b)(e) and (f)** of the Constitution; as we stated earlier the appellant’s counsel after the close of the prosecution case informed the Court that the appellant did not wish to give any evidence and expressed his client’s choice in these words:-

***“The defence exercises its option of not tendering any evidence in this matter. The only right we will exercise is to address the court through an advocate in accordance with section 306 of the Criminal Procedure Code. Having made that choice, section 306(3) of the Criminal Procedure Code as read with section 311 of Criminal Procedure Code come (sic) into operation. That means that the state counsel will sum up their case and then we; shall address you”:-***

It is therefore quite evident that the appellant exercised his right of silence as expressed on his behalf by his counsel. He was entitled under the quoted provisions to exercise his right of silence and having done so it would not be right to purport to change his mind` on appeal and allege a contravention of his constitutional right. In the circumstances, we find that the appellant did as a matter of choice waive the rights he now alleges to have been contravened. We say no more on this.

In the result the appeal is hereby dismissed and it is so ordered.

***Dated and delivered at Nairobi this 8<sup>th</sup> day of October, 2010.***

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**