



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Criminal Appeal 175 of 2008**

**ADAN GABABA DAPA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a sentence and conviction of the High Court of Kenya at Malindi (Ouko, J) dated 5<sup>th</sup> July, 2007*

**In**

**H.C. Cr. C. No. 24 of 2005)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**ADAN GABABA DAPA**, the appellant, was on 5<sup>th</sup> July, 2007 convicted by Ouko, J of the murder of his wife Hajila Abdulla Shungi, the deceased, and sentenced to death.

According to the information filed by the Attorney General, the appellant on 18<sup>th</sup> August, 2005 at Moyo village in Garsen Division within Tana River District of the Coast Province murdered the deceased.

The prosecution presented the following facts to the trial court and we must add that they were largely not in dispute. At about 5.30 a.m. on the fateful day, the appellant reported to his brother Saidi Dababa (PW1) that his wife had lost consciousness. Both of them rushed to the appellant’s house wherein PW1 found the deceased lying on the floor. He felt her pulse and he confirmed that she was dead. He screamed and neighbours streamed onto the compound of the appellant. Later in the morning preparation for the burial began in accordance with the tradition of the Islamic faith with the women, among them Diram Gogo (PW4) and Hadiketi Boru (PW7) washing the body of the deceased. As PW4 carried out the ritual she noticed some injuries in the body. These were bruises in the buttocks area and a patch on the back. However, after the washing rites were over the deceased was buried. About a week later the OCS, Garsen Police Station received a report that the death of the deceased was suspect and was probably not due to natural causes. The OCS, CIP Khamis (PW9), obtained an exhumation order and directed Dr. Mandalya (PW5) to carry out a post mortem on the body of the deceased. He noted extensive decomposed state of the body including internal organs. He also observed that although there were no signs of external injuries the neck was abnormally loose while the bone below the chest and the cervical spine were both fractured. As a result of the examination the doctor formed the opinion that the cause of death was due to the cervical spine fracture.

The police also interviewed Solo Abudu (PW6) who recalled that on a date he could not remember the deceased reported to him that the appellant was angry with her and had attempted to assault her for distributing tobacco to people in quantities he had not authorized. PW6 had intervened and reconciled them.

In his defence before the trial court the appellant testified that he woke up on 18<sup>th</sup> August, 2005 at 4.30 am and asked the deceased to go with him to the mosque for prayers but she complained of headache and pain in the neck. The appellant left her to rest while he went to the mosque and when he returned he found her unconscious. He ran to his brother's (PW1's) house but met him on his way to the mosque. Both went to the house where the deceased was confirmed dead.

In convicting the appellant, the learned Judge held, inter alia, that:

***“There is evidence, once again from Saidi that the accused and the deceased lived alone in their house. This is infact confirmed by the accused person’s own testimony of the events of the morning of 18<sup>th</sup> August, 2005. In my view these are circumstances that would lead to an inference that the accused ought to have known how such severe injuries could have been sustained by a person who spent the night with him. That was a fact especially within his knowledge. Only he could specifically explain the injury to the deceased person’s buttocks, a patch on the neck, a fracture on bone below the chest and the fatal fracture in the spine.”***

The learned Judge further properly held that as there was no direct evidence as to how the deceased sustained the injuries and in particular the cervical spine fracture the case must be decided on circumstantial evidence. He took into account the fact that the appellant had quarrelled with the deceased as testified by PW6 and the fact that the couple was alone in their house the previous night. After examining in detail all these pieces of circumstantial evidence, the learned Judge held that the prosecution had proved beyond reasonable doubt that the appellant had with malice aforethought, caused the death of the deceased.

The memorandum of appeal lodged by the appellant contains 5 grounds of appeal, but, in essence the only one substantial ground of appeal is whether the evidence satisfies the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record.

It seems to us that the learned Judge read more into the quarrel between the couple. However, PW6 who reconciled the parties does not remember when the disagreement arose and does not say whether it was proximate to the alleged killing or not. Again, the postmortem revealed no external injuries, thus contradicting the testimony of PW4. Above all, the postmortem report was of no evidential value in this particular case, the body having been extensively decomposed. In short, there is no evidence that the deceased did not die of natural causes. It must follow, therefore, that in the circumstances, the evidence presented before the trial court does not irresistibly point to the appellant as the only killer to the exclusion of all other causes within the meaning of **R v. Kipkering Arap Koske & Another 16 EACA 135** that:

***“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.”***

See also **Sawe v. Republic [2003] & KLR 364**.

In our view, the evidence on record does not rule out other co-existing circumstances weakening the chain of circumstances relied upon by the prosecution. We are, therefore, unable to uphold the conviction as there is really nothing to connect the appellant with the death of the deceased.

Mr. Ondari, the learned Assistant Deputy Public Prosecutor, concedes the appeal and we think rightly so. Moreover, the two assessors on record were unanimous that the appellant was not guilty as charged. However, the learned Judge gave no convincing reason for differing with them.

In the result, this appeal is allowed. We quash the appellant's conviction and set aside the sentence of death. We order that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2009

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**