REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 21 of 2008

JUMA MZURI CHOVU ……..APPELLANT

AND

REPUBLIC ……..……..……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Mr. Justice Sergon) dated 29th February, 2008

in

H.C.CR.C. NO. 53 OF 2004)

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JUDGMENT OF THE COURT

This is a first appeal by ***Juma Mzuri Chovu*** from his conviction for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It had been alleged in the information filed by the Attorney General on 10th December, 2004 that the appellant did, on 27th May 1999 at about 7.30 a.m. at Vikombani village of Miritini location, Changamwe, Mombasa murder ***Mariam Kitsesho*** (the deceased). Mariam was the appellant's wife at the time although, as we shall see later, there were domestic problems.

As this is a first appeal, we must subject the evidence on record to our own evaluation and assessment and come to our own independent decision on the issues submitted before us. In so doing however, we must have due regard and make allowance for the findings and conclusions made by the learned trial Judge who had the added advantage of seeing and hearing the witnesses testify before him – see ***Okeno v Republic*** [1972] EA 32.

The appellant in person drew up a memorandum of appeal setting out nine grounds to challenge his conviction, but at the hearing of the appeal, his learned counsel, Mr. Magolo, condensed them into one ground, namely: that the conviction was erroneous as it was based on insufficient circumstantial evidence. We shall revert to the submissions made in that regard presently. What facts led to the appellant's conviction?

On 28th May 1999, a pathologist, Dr. K. N. Mandalya (PW1) carried out a post mortem examination on the body of the deceased at the Pandya Memorial Hospital mortuary in Mombasa and noted the following injuries:-

"*……cut wound on the left forehead – 5cm, stab wound on the right nasal bridge, stab wound on the upper sternum, stab wound on the left breast and axilla, 5 multiple cut wounds on the right hand and forearm, stab wound on the right mid-arm, 5 stab wounds on left thigh, 3 stab wounds on left and mid abdomen, stab wound on the left axilla, deep stab wound on the right medial thigh, cut wound on left and right side of chin, chest cavity, lacerated root of the aorta, massive bleeding, bleeding in the abdomen with stab wound on the left lower side of the liver.*"

In his opinion the cause of death was "*heamorrhage shock due to multiple stab wounds to the body. A sharp object was used to inflict the injuries."* The finding by the learned Judge was that the deceased was stabbed more than twenty times all over the body.

The record shows that there was one eye-witness to the killing of the deceased. The eye-witness gave out the report of the killing and the name of the appellant to the police and to a neighbour at the scene; Kassim Panga (PW2). That witness was one ***Regina Mwikali*** who recorded a statement with the police and was listed as a prosecution witness. But she never testified as she died before the hearing of the case commenced. Consequently, there was no direct connection of the appellant with the deceased's death.

The first report of the death was made to Chief Inspector of Police, Elisha Otuli (PW6) at Changamwe Police Station on the morning of 27th May 1999. Chief Inspector Otuli then proceeded to the scene with three other Police officers, conducted preliminary investigations, photographed the body and removed it to Pandya Hospital Mortuary. It was at that time that Chief Inspector Otuli received information from ***Regina Mwikali*** that it was the appellant who had inflicted the fatal wounds on the deceased and disappeared. He recorded the information in the Occurrence Book at 2.30 p.m. According to Chief Inspector Otuli, investigations continued pending arrest of known accused, in police parlance, "*PAKA"*. The initial investigations were conducted by Inspector Joel Kange (not a witness) before Inspector Daniel Chacha (PW5) took over the case in August 2003. On 16th November, 2004 the appellant was eventually arrested in Kaloleni and was taken to Changamwe Police Station. In his statement under inquiry, the appellant denied that he had been in hiding for the previous five years and asserted that he was an employee of M/s Big Apple Tours and Safaris since 1999.

Five years earlier on 29th May 1999, the deceased's uncle, Ishmael Mwanzala Kitoja (PW1) had recorded a statement with the investigating officer relating how he had separately met both the deceased and the appellant early on the morning of 27th May 1999. It was his sworn testimony in Court that he was heading to his place of work in Miritini at 6 a.m. on 27th May 1999 when he saw the deceased washing her feet. She informed him that she was heading to the house of one Mzee Maganga to finalise a case. The case, as explained shortly, was a matrimonial one between the deceased and the appellant, which had been referred to village elders. (PW1) further stated that, as he proceeded to his place of work, he met the appellant and greeted him. Later that morning he was sent by his employer to Mombasa town and that is where he was informed by someone that his niece, the deceased, had been killed. He returned home and found his brother, Kitsesho Kitoja (PW3) who was the deceased's father. They proceeded to the scene and confirmed the brutal killing of the deceased. Police came and collected the body together with the suspected killer knife which was left near the scene. The following day the deceased was buried.

The father of the deceased, (PW3), testified that the deceased and the appellant were married but a matrimonial dispute had arisen. According to (PW3) and the investigating officer, Inspector Chacha (PW5), the appellant alleged that the deceased was having extra-marital affairs and that her father had refused her to leave his homestead. The dispute was to be heard before village elders on 23rd May 1999 but the appellant did not attend and it was therefore adjourned to 30th May 1999. The elders, in the meantime, decided that the deceased should stay in the custody of her father (PW3), pending resolution of the dispute. On 27th May 1999 she was killed on the way to the village elder's home.

In his unsworn testimony in defence, the appellant confirmed that the deceased was his wife and that there was a matrimonial dispute that was being arbitrated by elders. At the time of her death, she was at her father's home pending settlement of the case before elders on 30th May, 1999. The appellant also confirmed, as stated by Ishmael Mwanzala Kitoja (PW1), that he had met him at 6 a.m. on 27th May 1999 and they greeted each other. He stated however, that he boarded a matatu and headed to his place of work in Mombasa whereupon he was assigned duties to go to Malindi. In the evening he received information that his wife had been killed and he returned home where he was told by (PW1) and other relatives that his wife had been attacked by thugs and killed. He was present at the funeral and remained home for one week before returning to work. At no time did he disappear from home and he wondered why he was arrested by the police on 16th November, 2004 when he took his first wife to visit her parents in Kaloleni.

The learned trial Judge surmised, correctly so in our view, that the case fell for decision on circumstantial evidence. He also laid out the principles of law applicable before reaching the conclusion that it was the appellant and no one else who was responsible for the brutal murder of the deceased. He stated in part:-

"***It is very clear from the evidence that there was no eye witness who testified. Consequently, this case heavily depends on circumstantial evidence. Where the prosecution's case depends on circumstantial evidence the law is well settled that first the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused and thirdly, when the said circumstances are taken cumulatively they should form a chain so complete that there is no escape***

from the conclusion that within all human probability the crime was committed by the accused and no one else. In a nutshell the inference of guilt should only be drawn where the facts said to incriminate the accused are incapable of any other rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. In this case there is evidence that the accused was near the scene of crime but escaped after the death of the deceased to an unknown destination until 5 years thereafter. There was also evidence that the deceased and the accused had a matrimonial dispute. If indeed, the accused was innocent then why did he run away from his home. His conduct betrayed him. The circumstances lead me to only one conclusion, that the accused and no one else committed the offence."

In setting out the legal principles, the learned Judge was citing the well known authorities of this Court which govern circumstantial evidence. They include ***Omar Chimera v Republic*** Criminal Appeal No. 56 of 1998 and ***Mwangi v Republic*** [1983] KLR 522. Once the circumstantial evidence under consideration qualifies application, it is as good as any direct evidence to prove a criminal charge.

As stated earlier, the appellants complaint is that the circumstantial evidence on record ought not to have been relied on to convict him. Learned Counsel Mr. Magolo particularly wondered why the appellant was not arrested for a period of five years, if as he stated, he was available at his home all the time. There was no basis Mr. Magolo submitted, for the finding by the trial Judge that the appellant had gone into hiding when there was evidence that he even attended the funeral of his wife and returned on duty at his place of employment until his arrest. The only inference, he submitted, would be that there was no basis for suspecting him in the first place and the arrest was an afterthought.

The State on the other hand supported the findings of the trial court fully. Learned Senior State Counsel, Mr. Monda, singled out the chain of events that point to the appellant's culpability: the fact that the appellant was squarely placed on the scene shortly before the deceased's murder; the fact that the very first report made to the police in the matter implicated the appellant specifically by name and recorded his disappearance to an unknown destination; the obvious motive for the crime considering the evident matrimonial dispute between the deceased and the appellant; multiple stabbing of the deceased which was calculated to cause certain death and eliminate the deceased; the prosecution witnesses were not cross-examined about the presence of the appellant at the funeral or his employment, hence the rejection of the appellant's alibi as an afterthought.

We have carefully weighed the evidence on record and considered the submissions of counsel. In our assessment, we are satisfied that the appellant was properly convicted on the evidence on record and we have no reason to interfere with the findings and conclusions made by the learned trial Judge. Motive has no relevance in assigning criminal responsibility and this is clear from ***section 9 (3)*** of the Penal Code. In this case, however, the appellant, not only had the motive but the opportunity to commit the offence he was charged with. We find nothing in his unsworn defence to cast doubt on the prosecution evidence that he had disappeared from the village to an unknown destination until his arrest five years down the line. The police record which was produced in evidence was clear that he was known by name and his arrest was pending as investigations continued. At no time did the prosecution witnesses state that the appellant's workplace was known or that he attended the funeral of the deceased. Those were surely crucial facts which the appellant could have raised with the witnesses during cross-examination. But he said nothing about his whereabouts until his assertions were made in an unsworn statement on which he could not be cross-examined, in his defence. We are aware that there is no onus of proof placed on an accused person even where an alibi is pleaded. In this case however, the omission to confront the prosecution witnesses, especially the police, on their assertions that the appellant disappeared and could not be arrested for a long period, left that evidence open for assessment as it stands and we have no reason to doubt that the prosecution witnesses were truthful in those assertions. The defence was an afterthought and in our judgment, it was properly rejected. The conduct of disappearance from the scene completed the chain of circumstances that are inconsistent with the appellant's innocence and irresistibly point to his guilt.

In the result, we find no merit in the appeal before us and we dismiss it in its entirety.

Dated and delivered at Mombasa this 23rd day of January, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR