



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 42 OF 2007

MARTIN OMOLLO ODONGO *alias* JOHN ONDIRAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii

(Bauni, J) dated 30th March, 2007

in

H.C.Cr.C. No. 1 of 2004)

JUDGMENT OF THE COURT

MARTIN OMOLO ODONGO *alias* **JOHN ONDIRA**, the appellant herein, was tried by the High Court of Kenya at Kisii (**Bauni, J**) with the aid of assessors (*as the law then provided*) on an information which charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the information were that on the 2nd day of October 2003 at around 0900 hours at Koninga Location, Rachuonyo District of Nyanza Province the appellant murdered **DORINE OTIENO OCHICHI** (the deceased).

The trial of the appellant in the superior court commenced on 13th May 2004 when two prosecution witnesses testified. These were **Ulda Otuge Mbare** (PW1) and **Festo Mbare** (PW2). The summary of the evidence of these two witnesses was that the appellant had been employed by Ulda (PW1) and her husband Festo (PW2) at their home in Koningo Sub-Location. The appellant used to sleep in the house of the son of the two witnesses who was overseas. On the morning of 2nd October 2003 Ulda went to the house where the appellant slept but she found it locked and the appellant was nowhere to be found. There was a foul smell coming from that house where the appellant slept. Ulda looked through the window and saw the bed on which the appellant used to sleep. The bed was empty. Ulda called her husband Festo to confirm what she had observed. The two decided to call a village elder and the Assistant Chief **Lawrence Mbaka** (PW3). The Assistant Chief reported the matter to the police who visited the scene. Among the police officers who visited the scene were **IP. Maxwell Otieno** (PW8) and **Pc. Edwin Wawire** (PW7). The police officers broke into the house in which they found the body of the deceased under the bed. Also recovered from the house were two blood stained knives and a panga. The body was removed to the

mortuary where a postmortem examination was conducted by **Dr. Peter Ogola** (PW9) who formed the opinion that cause of death was “*due to lack of oxygen due to strangulation and also due to blood loss due to cut wounds.*” The same doctor examined the appellant on 19th December 2003 for mental status. Dr. Ogola testified that he found the appellant to have normal memory and speech and his age was about 17 years. Dr. Ogola concluded that the appellant was of normal mental status and fit to stand trial.

The appellant disappeared from his place of work from 2nd October 2003 to the 4th December 2003 when he was arrested at Vipingo Estate in Mombasa. He was then taken back to Oyugis Police Station and charged with the offence of murder.

When put to his defence the appellant chose to give unsworn statement. He denied having killed the deceased. He stated that on 2nd October 2003 he woke up feeling unwell and when he was told to milk the cows and go to the posho mill he could not do so on account of being sick. His employer (*Ulda*) started quarreling with him and as a result the appellant decided to go back to his home where he told his father of the mistreatment at the home of PW1 and PW2. He stayed at his home for two weeks and left for Mombasa with his cousin. He was then arrested in Mombasa.

The learned Judge heard the final submissions and then summed up the case to the assessors who returned a unanimous opinion of guilty as charged.

The learned Judge considered the evidence, the submissions by counsel appearing and the verdict of the assessors and came to the conclusion that the appellant was the one who killed the deceased. In concluding his judgment the learned Judge said:

“PW7 & 8 both told the court that they found the body under a bed in the house. Accused had disappeared that morning. The body was decomposing which was an indication that she had died earlier. It seems that after killing the deceased accused put the body under a bed but after it started to decompose and stink he ran away. He was the one with the keys to the house. He had taken super with PW1 in her house the previous evening but the next day he was nowhere. He left the house locked. Police had to break the rear door to gain entry into the house. Police found two knives and a panga which had blood stains. There (sic) were the weapons accused used to inflict the injuries described by the doctor. He then strangled her. Deceased home was within the neighbourhood. Though the reason for the macabre killing were not clear it is clear that the deceased for one reason or another went to the house with the accused and later met her death. The circumstances were such that no other conclusion can be made other than it was the accused who killed her.”

The learned Judge then observed that the appellant was below 18 years when he committed the offence. Consequently the learned Judge ordered that the appellant be detained at the President’s pleasure.

Being aggrieved by the foregoing the appellant now comes to this Court by way of first and final appeal. That being so this appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and have this Court’s decision on that evidence. But as we do so, we must bear in mind that we have not had the advantage (*which the learned Judge had*) of hearing and seeing the witnesses and give allowance for that (see ***OKENO V. R [1972] E.A. 32*** and ***MWANGI V.R [2006] 2 KLR 28***).

In the superior court the prosecution called a total of nine witnesses. The testimony of the first two witnesses (PW1 and PW2) was crucial. These witnesses gave clear testimony as to how the appellant had been employed in their home and how he had been allowed to be using the house of these witnesses’ son who was overseas. Evidence was led to the effect that on the same day the body of the deceased was discovered in that house the appellant disappeared. He never showed up until he was apprehended almost two months later away in Mombasa. It was the appellant who had the exclusive use of the house in which the body of the deceased was discovered. It is to be noted that the door to the house was locked and had to be broken into by the police. The appellant’s explanation as regards his disappearance was that his employer (PW1) quarreled with him that morning. But PW1 was never cross-examined on this issue of the quarrel by the appellant’s advocate. She testified that the appellant merely went missing from his

normal place of abode.

Having considered the evidence tendered in the superior court it is clear that the appellant was convicted on circumstantial evidence since there was no eye witness to the killing of the deceased. In ***MWITA V. R [2004] 2 KLR 60*** at p. 66 this Court said:

“It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see Simon Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted ([1958] E.A. at page 719:-

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

And in ***MWANGI V. R [2004] 2 KLR 28*** the court said:-

“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs Kipkering Arap Koskei & Another (1949) 16 EACA 135.”

In the earlier decision of ***R V. TAYLOR WEAVER AND DONOVAN [1928] 21 Cr. App. R. 20*** the principle as regards the application of circumstantial evidence was enunciated in these words:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

We think it is in view of the foregoing that the learned Judge came to the conclusion that it was the appellant who killed the deceased.

The appellant, through his counsel, filed a Memorandum of Appeal setting out the following grounds:-

- 1. That the appellant’s trial before the superior court was illegal and a nullity as it violated the appellant’s constitutional rights as enshrined in section 72(3) of the Constitution of Kenya.***
- 2. That the trial before the superior court was not conducted in a language understood by the appellant in contravention of section 77(2) of the Constitution of Kenya as well as Section 198 of the Criminal Procedure Code, Cap. 75.***
- 3. That the appellant’s conviction was based purely on circumstantial evidence which was weak and unreliable.***
- 4. That the trial Judge failed to properly address the assessors on how to deal with the circumstantial evidence.***
- 5. That there was a travesty of justice because of the failure of the trial Judge to caution the assessors that there was no onus on the appellant to prove his defence of alibi.”***

When this appeal came up for hearing before us on 16th June 2009 the appellant’s counsel **Mr. Moses J.A. Orengo** abandoned all the other grounds and argued only the first ground of appeal. We have however taken the liberty of reviewing the evidence since this is a first appeal and hence it is our duty to

re-evaluate the evidence and make our own conclusions. We have done so and it is our conclusion that the appellant was convicted on very sound evidence as there would have been no other hypothesis than that it was the appellant who killed the deceased.

Mr. Orengo addressed us at length on the constitutional issue that the appellant's trial was a nullity in view of **section 72(3)** of the Constitution. It was his submission that the appellant was arrested on 4th February, 2003 and taken to court on 19th January 2004. He relied on this Court's decision in **GERALD MACHARIA GITHUKU V. REPUBLIC – Criminal Appeal No. 119 of 2004 (unreported)**. According to the record of appeal the information charging the appellant with murder was filed in the High Court of Kenya at Kisii on 14th January 2004. The offence is alleged to have taken place on 2nd October 2003. The appellant was arrested on 4th December 2003 (*and not 4th February 2003 as submitted by Mr. Orengo*) and arraigned before the High Court on 29th January 2004. The submission by Mr. Orengo was that there is no explanation as to what happened between 4th December 2003 and 29th January 2004.

In his response to **Mr. Orengo's** submission and in a bid to explain the delay in taking the appellant to court **Mr. Musau**, the learned Senior Principal State counsel was of the view that a delay was not ipso facto a breach of the constitutional provisions. He submitted that the trial was in the High Court which was a constitutional court where the appellant was represented by a competent advocate.

In this matter it must be appreciated that the appellant was arrested in Mombasa and therefore had to be ferried all the way to the local police station and then to the High Court. As we have stated in our other decisions, courts must take judicial notice of public holidays in the month of December and the distances within the country. As correctly submitted by Mr. Musau the appellant was before the High Court which is a constitutional court where this same issue being raised here for the first time could have been raised. If they had raised it the prosecution would have investigated and given an explanation for the delay. We find an answer to what has been raised by Mr. Orengo in the provision of **section 84(1)** of the Constitution which provides:-

“Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

In view of the foregoing we would agree with **Mr. Musau** that the ground raised by **Mr. Orengo** is devoid of merit. The same is accordingly rejected. As that was the only ground argued by Mr. Orengo and in view of our re-evaluation of the evidence and conclusion reached by this Court to the effect that the appellant was convicted on sound evidence we find no merit in the appeal against conviction.

As regards the sentence the learned Judge correctly noted that the appellant was under the age of 18 when he committed the offence hence he was to be detained at the pleasure of the President.

For all the foregoing reasons we find no merit in this appeal and order that it be and is hereby dismissed in its entirety.

Dated and delivered at KISUMU this 19th day of June, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR