



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CRIMINAL APPEAL 335 OF 2006

DOUGLAS THIONGO KIBOCHA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction, judgment, decree, order, or as the case may be)

of the High Court of Kenya at Nakuru (Musinga J) dated 15th December 2006

in

H.C.CR.C. NO. 141 OF 2006

JUDGMENT OF THE COURT

MARY NYAMBURA KIMANI (the deceased) was, on or about 13th October, 2003, killed and her body was cut into several pieces and some parts of it were thrown into a pit latrine. Other parts were hidden in two different places from where they were recovered by the police on or about 19th October, 2003. No one witnessed the bizarre act.

The appeal is by **DOUGLAS THIONGO KIBUCHA** (the appellant). On the material date when the deceased was killed he was residing at the Ministry of Water Camp at Maralal. Before that date he had been cohabiting with the deceased as husband and wife. The appellant was suspected to have killed the deceased. He was arrested upon recovery of the deceased's body parts from a latrine, which witnesses testified was about 20 metres from his residence. When the police concluded their investigations as to the cause of the deceased's death, the appellant was arraigned before the High Court, on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code, was tried with the aid of assessors, was convicted and later sentenced for that offence.

In convicting the appellant the High Court (Musinga J.), found as fact that the deceased and the appellant indeed cohabited as husband and wife; they used to quarrel often and on occasions the deceased would walk away and live elsewhere for sometime, and as at the material date the deceased had been living away for over a week. The learned judge also found as fact that there were no eye witnesses to the killing of the deceased, and that determination of the appellant's case depended wholly on circumstantial evidence. He was satisfied that the circumstances as had been presented by prosecution witnesses left no doubt in his mind that the appellant to the exclusion of all other people was responsible for the death of the deceased. In his view the appellant killed the deceased with the necessary malice aforethought and

the killing constituted, murder. He then found him guilty as charged, convicted him and meted out the mandatory death penalty. This appeal is against the conviction and sentence.

In his memorandum and supplementary memorandum of appeal, the appellant attacks findings of fact by the trial court, and also that the circumstantial evidence on record is not only insufficient to sustain a conviction but also that it does not exclude the possibility that another person could have killed the deceased. Second, that the trial court relied on the evidence of Wycliff Atola, a Chief Inspector of police (Atola) who testified that the appellant led him, along with other police officers, to where the head and other parts of the deceased's body were recovered. Mr. Kahiga who appeared for the appellant submitted that that evidence was in the nature of a confession, which was inadmissible in evidence in view of the provisions of **section 25 A** of the Evidence Act Cap 80 of the Laws of Kenya, and was therefore improperly admitted and acted upon.

In answer to those submissions Mr. Mugambi, state counsel, while agreeing with Mr. Kahiga, that the evidence against the appellant was wholly circumstantial, did not however think that the evidence was insufficient in establishing the guilt of the appellant to the standard required in criminal cases. In his view when the appellant led Atola to the bush where parts of the deceased's body were recovered that was not a confession, but merely part of the explanation which he was duty bound to offer pursuant to the provisions of **section 111** of the Evidence Act.

We have carefully analysed the evidence on record. The appellant and the deceased lived together as husband and wife. The appellant conceded that their relationship was stormy. The appellant suspected the deceased to have had a parallel love relationship with one Musau. He accused her in the presence of one Jane Wairuiru Gachina (Jane) of being involved in what he considered to be an illicit relationship with Musau. There was no dispute that prior to 14th October, 2003 the deceased had not been seen in the appellant's house for about a week. Jane met the deceased at the Ministry of Works canteen on or about 14th October, 2003, in the company of two people. Jane noticed that the deceased had a boil on her cheek which was bleeding. The time was about 4 p.m. The deceased complained to her that the appellant had beaten her. Later that day Jane accompanied the deceased to the appellant's house. The appellant was there. Jane witnessed a quarrel between the appellant and the deceased which centred on Musau. Jane had gone to the appellant's house with the deceased because she wanted the latter to give her some charcoal. As she left the appellant's house at about 6 p.m, the deceased tried to follow her. Jane testified that the appellant restrained the deceased from leaving by blocking her way. Jane's evidence on that aspect was as follows:

“The deceased followed me. The accused blocked the door. The deceased wanted to change her clothes since they were blood stained because of the boil. Thiongo, the accused refused, saying his house was not a lodging. He then called her back; telling her he wanted them to reconcile. I then left and went away. From my house to the accused's house was about 5 minutes walk. The following day I did not see the deceased.”

The appellant did not challenge Jane on that testimony. No other witness testified on that aspect. That was the last time the deceased was seen alive. It was 6 p.m. The next time the deceased was seen she was dead and her body parts were scattered. Some of those parts were recovered in a latrine while others were recovered in a bush nearby. Atola testified that the appellant led him to a place from where some of those body parts were recovered. The question which was raised is whether that amounted to a confession or not. The term confession is defined under section 25 of the Evidence Act as comprising:

“... Words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 25 A (1) of the Evidence Act, does make confessions and admissions inadmissible unless made before a judge or magistrate or a police officer above the rank of inspector, and who is not the investigating officer. We have no doubt that if the appellant led Atola to a bush from where some parts of the deceased's body were recovered, that was conduct leading to an inference that an offence may have

been committed. However, as submitted by Mr. Mugambi, how can one reconcile the provisions of **sections 25 A** and **111** of the Evidence Act respectively? The latter provision requires the accused to offer a reasonable explanation on matters peculiar within his own knowledge. Where an offence is alleged to have been committed he is obliged to offer an explanation to a police officer who is investigating the matter. Apparently if he give such an explanation to the investigating officer which leads to discovery of incriminating matter, that evidence will not be admissible in a criminal trial without breaching the provisions of **section 25 A**, above. There is an apparent conflict.

It is quite clear to us that when Parliament enacted **section 25 A**, above, it had no intention of repealing **section 111 (1)** of the Evidence Act. That section, as material provides as follows:

“111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be discharged if the court is satisfied that, the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”.

A statute or a section or part of a section of a statute cannot be said to have been repealed by implication. Express words must be used. When Parliament enacted **section 111 (1)**, above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. **Section 111 (1)**, above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact. In the event we think that Section 25 A, above should not be relied upon to excuse the accused from giving the explanation.

In **George Wimpey & Co. Ltd v. British Overseas Airways Corporation** [1955] AC 169 at P. 191, Lord Reid, said this concerning interpretation of statutes:

“This is therefore an example of the not uncommon situation where language not calculated to deal with an unforeseen case must nevertheless be so interpreted as to apply to it. In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law.”

In view of what we have stated above it is our view that if indeed the appellant led Atola to the recovery of the deceased's body parts, that was a confession. However, it is a confession which by reason of **section 111 (1)** of the Evidence Act is admissible if given as an explanation to satisfy the evidential burden under that sub-section. It was not the appellant's information which led to the recovery of the parts of the deceased's body which were in the latrine. There is evidence on record from witnesses who discovered the presence of some of the deceased's body parts in the latrine.

Atola testified as follows regarding the recovery of the other body parts:

“We took the suspect and he told me personally that the body parts belonged to a woman called Nyambura whom he had been living with. He volunteered to show me where the other body parts were. He told me that they quarreled on the night of 13th and 14th October, 2003. He said that he had beaten her and she fell down. She never gained consciousness and on the following day he found she was dead..... He led me to a small bush near the stadium where the torso.... was found.”

An explanation under **section 111 (1)**, above, need not be under caution or oath.

The evidence before the trial court was clear that the appellant was the last person seen with the deceased alive. Jane testified that she left the deceased with the appellant at the latter's residence. No other person was with them. It was the appellant who restrained the deceased from leaving. He said that he wanted to reconcile with her. That witness was not challenged on that testimony. The appellant had the evidential burden under **section 111 (1)** of the Evidence Act, to explain what happened to the deceased after Jane left. His explanation, which the trial Judge rightly ejected, was that the deceased left with Jane. Had that been so the appellant would have put that to the witness for her comment. He did not. The witness was clear that the appellant wanted to reconcile with the deceased. This was understandable as they had been living apart for about a week.

The deceased was not seen thereafter until her body parts were found. The only explanation we have as to what happened is that of the appellant which he gave to Atola, namely, that the appellant and the deceased quarreled. He beat her and as a result she fell down and died. The explanation the appellant gave in court was different and contradicted that explanation. The explanation he gave in court was rejected by the trial judge. Consequently the rebuttable presumption is that the appellant killed the deceased.

An issue was raised concerning the blood stains which were found in the appellant's house. It is in evidence that some blood was found on a stool inside the appellant's house. The appellant explained that the blood came from a boil on the deceased. That is possible as Jane also testified that the deceased had a boil which was bleeding with blood. Considering all the evidence on record, it points irresistibly to the appellant as the person who killed the deceased. The absence of a reasonable explanation by the appellant as to how he and the deceased parted company excludes the possibility of any other person being responsible for her death. There are no co-existing circumstances to weaken the presumption of fact that the appellant and no other person killed the deceased.

We have no explanation as to the legal or any other reason as to the killing of the deceased. That being the case, the logical conclusion is that she was killed with the necessary malice aforethought. Her body was cut into small parts clearly showing that the death was not accidental.

The appellant's appeal against both conviction and sentence lacks merit. It is accordingly dismissed. We so order.

Dated and delivered at Nakuru this 2nd day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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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.