



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 188 of 2006

FAITH LUCAS APPELLANT

AND

REPUBLIC RESPONDENT

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

Malindi (Ouko J) dated 6th February, 2005

in

H.C.CR.C. NO. 2 OF 2005)

JUDGMENT OF THE COURT

The appellant herein, *Faith Lucas*, was initially charged jointly with three others with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the offence were that on unknown date between 15th October and 18th November, 2004 at Parani village in Mtwapa, the appellant and three others jointly murdered Muthoni Muthusi. The appellant's co-accused were, however, acquitted on 10th November, 2005 for want of sufficient evidence.

The facts of the case against the appellant may be briefly stated. The appellant and her husband Lucas Maitha sought the help of Jembe Ngole (PW4) to identify for them a piece of land to buy. Jembe approached Kaingu Konde (the 2nd accused in the trial before the superior court) who agreed to sell a parcel of land to the couple. After this transaction the appellant and her husband settled on the said piece of land and as if to assert their ownership built on it. One day a neighbour known as Sidi Kadenge Katithi (PW1) saw the appellant's husband collapse outside their house. She later saw him being helped into a taxi. That was the last time Sidi saw the appellant's husband. One month later, Sidi saw the appellant's son Muthoni Muthusi (the deceased) crying for nearly one hour. Again, that was the last time Sidi saw the deceased alive. According to Salama Lali Mwanyawa (PW2) on 14th January, 2005 at about 5.00 p.m. while walking home, she saw a large crowd outside the appellant's home. The crowd was throwing stones while the appellant was trying to chase away the crowd. Salama then decided to report this incident to the village elder Karisa Kapitau Kiti (PW3) who went to the appellant's house. On inspecting the burnt house, Kiti noticed a grave in the house. The next day Kiti arranged for more police officers who on further inspection of the house came across a second grave. Two bodies were exhumed from

those graves for postmortem examination. The two bodies were identified as those of the appellant's husband and the appellant's son (the deceased in this case). Dr. Mandalya (PW8) who conducted postmortem examination on the two bodies was of the opinion that the probable cause of the deceaseds death was cut wounds.

In her defence, the appellant recounted how after the purchase of the land from Konde and settling thereon, bad blood developed between her family and Konde's family. Konde and his family obstructed the appellant's husband from developing the land and went as far as threatening them with eviction. On 27th September, 2004, Konde and his son Karisa Fungo Konde (3rd accused during the trial in the superior court) invited the appellant's husband for a drink of palm wine. Later the appellant was informed that her husband had fallen sick. She rushed him to the Coast General Hospital but unfortunately he passed away before reaching the hospital. The body was brought home for burial. As a result of this incident, Konde and his son were arrested but later released. The two did not relent with their threats and intimidation after their release. The young Muthusi (deceased) also kept on accusing Konde and his son Fungo of causing his father's death. Reports made to the local D.O.'s office were never acted upon. An elders' meeting called to resolve the acrimony between the two families did not help. After all these efforts, finally, one night Konde, his sons Fungo and Ibrahim Kazungu Kahindi (4th accused in the trial) attacked the appellant and the deceased. Kahindi kept watch armed with an axe while Konde and Fungo beat up the deceased in one room where they were also digging. The appellant managed to escape but behind her all her household effects as well as money were stolen. She reported the matter and the deceased was found buried in one of the rooms in the house.

The learned Judge of the superior court (Ouko J) considered the evidence before him and was of the view that the case against the appellant was based on circumstantial evidence. In the course of his judgment, the learned Judge said:

“From all these circumstances, I am persuaded that the circumstantial evidence adduced point irresistibly to the participation and knowledge of the accused person as to how the deceased met his death. I find no other evidence that would weaken this conclusion”.

In rejecting the appellant's defence, the learned Judge said:

“I reject the defence advanced by the accused that the Konde's family committed the deceased's murder. According to her she was attacked by Konde and his sons one night before she discovered that the body of the deceased buried (sic) in a room. The body that was retrieved had completely decomposed, an indication that it was buried several days before it was discovered.”

The learned Judge proceeded to find the appellant guilty as charged, convicted her and sentenced her to death.

The appellant now comes to this Court challenging his conviction and sentence by the superior court.

Mrs. J.M. Adogo, the learned counsel for the appellant, submitted that there were procedural errors during the trial which errors caused injustice to the appellant. She pointed out that while several people had been charged with the murder of the deceased all of them except the appellant were acquitted for lack of evidence. It was Mrs. Adogo's contention that since the trial Judge relied on circumstantial evidence such evidence ought to be watertight. Mrs. Adogo reminded us that there was no direct evidence linking the appellant as there was no eye witness account as to how the deceased met his death.

Mrs. Adogo further submitted that the deceased was the appellant's son who was aged 15 years and for that reason there was no motive for the appellant to cause the death of her own son.

The learned Assistant DPP did not seek to support the conviction and sentence as it was his view that this case was poorly investigated to the extent that it was doubtful whether the appellant knew how the deceased met his death.

On our part, we have endeavoured to reconsider the evidence, re-evaluate it and come to our own conclusions since this is a first appeal – see **OKENO V. REPUBLIC** [1972] E.A 32. We agree with the learned Judge that the evidence against the appellant was circumstantial since there was no eye witness account on how the appellant caused the death of the deceased. All there was as we can decipher from the record is that the deceased’s body was found buried in a grave inside a room in what used to be the appellant’s house. But the appellant has given an explanation as to what happened to her and the deceased at the hands of the family of Konde. It has not been shown that the appellant’s explanation was not plausible. There was evidence of bad blood between the appellant’s family and Konde’s family. It is to be observed that indeed Konde and his sons were arrested and charged (jointly with the appellant) in respect of the death of the deceased. It would appear that the appellant was arrested, charged, convicted and sentenced purely on mere suspicion. We must point out that suspicion, however strong, cannot be used as evidence in a criminal case of this nature. It was upon the prosecution to prove its case against the appellant beyond reasonable doubt. In this case, the members of Konde family and or their agents are not excluded from being persons who might have been involved in the death of the deceased.

In **SAWE V. REPUBLIC** [2003] KLR 364 at pp. 375-6 this Court said:-

“In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering arap Koske & Another 16 EACA 135 where it held, inter alia, 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’.

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku v Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt”.

The foregoing applies to the facts of this case. We similarly disagree with the learned Judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

That being our view of this matter, we allow this appeal, quash the appellant’s conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.

Order accordingly.

Dated and delivered at Mombasa this 25th day of January, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR