REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 223 of 2007

KHADIJA MWAKA YAWA ……...…..…….. APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

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

Malindi (Ouko J) dated 5th September, 2005

in

H.C.CR.C. NO. 20 OF 2003)

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JUDGMENT OF THE COURT

It is now well established that 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 *Simoni Musoke v R* [1958] EA 715 where the following extract from *Teper v R* [1952] AC 480, 489, was quoted 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".***

The learned trial Judge having held that the case against the appellant must be decided on circumstantial evidence the main question then that arises in this appeal is whether the evidence adduced by the prosecution against the appellant during her trial was such as to be explained only upon the hypothesis of the appellant's guilt and incompatible with any other innocent explanation.

The appellant, ***Khadija Mwaka Yawa,*** was after a trial held with the aid of assessors convicted of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and sentenced to death as prescribed by law. This is her first and final appeal.

According to the information filed by the Attorney General the appellant on the night of 31st January, 2000 and 1st February, 2000 at Githure village in Hongwe within Lamu District of the Coast Province murdered Hassan Chichororo Chilaga her husband and the deceased herein.

The prosecution case was founded on the following evidence. On the material night the family of the deceased, comprising his wife who is the appellant herein and six children had dinner and retired to bed. At about 11 p.m., the deceased was heard calling the name of his first born, Halima (PW6) who rushed to his room only to find him dead with a deep cut wound on the head. She screamed and alerted the rest of the family members. Meanwhile, the appellant was standing outside the house. She too had alerted their neighbours, who included Kaingu Reuben (PW7), James Kabochi ((PW8), Baya Mramba (PW10) and Chira Kibanda (PW13). After investigations conducted by Cpl. Charles Kamau (PW1), the appellant was arrested and charged with the offence of murder as narrated hereinabove.

In her defence the appellant told the court how after retiring to bed, she left the deceased in the bedroom while she went to the latrine, which was located some 30m outside the house. On her way back she learnt from her son, Mohamed Chilanga (PW3), that the deceased had been injured in the bedroom. She went inside and confirmed this information. According to Dr. Kombo Bwana (PW4), who conducted post-mortem examination on the body of the deceased, the body had a large deep cut wound on the right side of the head extending across the cheek. The cut caused a fracture on the underlying bones and the skull. It had also caused brain damage. In his opinion the death of the deceased was caused by severe hemorrhage and brain damage.

That constitutes, in summary the evidence adduced at the trial of this case.

It is apparent from the record that although there were eight people in the house where the deceased was murdered, there was no eye-witness to his murder. The case had, according to the trial judge, and correctly so in our view, to be decided on circumstantial evidence.

What were the circumstances upon which the prosecution asked the learned trial Judge and the assessors to draw the inference that the appellant must have participated in the murder?

First, the deceased went to bed ahead of the rest of the family who had dinner before going to bed. Secondly, as the children went to bed, the appellant for unexplained reason remained at the dinning table. Thirdly, briefly after going to bed Halima heard the voice of the deceased calling her. She rushed to the room where the deceased was only to find him dead with serious head injuries. Fourthly, one axe out of the four usually kept in the house was missing from the room where Chizi Mijumaa Hassan (PW2) had kept them earlier on and the same was later found with blood stains and hidden outside the house. Finally, there was also evidence that the appellant was not pleased with the fact that the deceased had several women friends who would at times spend the night with the deceased in his matrimonial bedroom. These are the circumstances the prosecution has advanced to link the appellant with the murder of the deceased.

The learned trial Judge in a well considered judgment held:

"***On the circumstantial evidence adduced, I am satisfied that the accused deliberately remained behind as the rest of the family retired to bed. The axe was stored inside the house with other farming implements. A part from their children, there were no other people in the house. There was no reason for any of their six children to harm the deceased. Given the time the rest of the family went to bed and the time the deceased called out Halima, it is only the accused who had the opportunity to commit the offence. Otherwise, if there were intruders, the accused or her children would have seen or heard them. With the help of a torch light and using an axe, the accused attacked the deceased in bed hacking him to death".***

The learned trial Judge then convicted the appellant and sentenced her to death. However, it is significant to note that the assessors in the unanimous opinion returned a verdict of not guilty.

Mr. Magolo in a vigorous but persuasive submission before us argued that the instances and the circumstances narrated by the prosecution are not necessarily incompatible with the innocence of the appellant but that there were weaknesses in each link in the chain which on close and separate examination show that the chain of evidence when put together the inference drawn does not point irresistibly to the appellant as the person who caused the death of the deceased.

We have anxiously considered Mr. Magolo's submissions together with those of Mr. Ogoti, the Assistant Deputy Public Prosecutor and we think that there are many instances which weaken the circumstantial evidence herein. Firstly, there is doubt as to how and where the deceased was attacked. It is possible that he could have been attacked outside the house when he went to the latrine. Secondly, it is possible that the assailant could have laid in wait for him within the house for an opportune moment to attack. Thirdly, it is significant and worthy of note that another person known as Alfred Mburu had been arrested and the investigating officer Cpl. Charles Kamau (PW1) had intended to charge him along with the appellant but the charge against him was dropped later by the State. This person was not called as a witness by the prosecution and neither was he availed to the defence. Fourthly, there is contradiction in the prosecution evidence as to whether the deceased was cut with an axe or a panga. The children of the appellant testified that their mother was seen with a panga while PW1 insisted that the murder weapon was an axe.

In the result after our analysis above, we think that from the evidence drawn from the surrounding circumstances, it is not possible to conclude beyond per adventure that it is only the appellant and nobody else who could have caused the death of the deceased. So many circumstances do exist to weaken or destroy the inference of guilt on the part of the appellant.

With great respect to the learned trial Judge, we are not satisfied that the conviction recorded against the appellant was safe and we are inclined to agree with the unanimous opinion of the assessors that the appellant is not guilty as charged.

We accordingly allow the appeal, quash the conviction and set aside the sentence of death imposed upon the appellant. The appellant is entitled to her freedom forthwith unless otherwise lawfully held.

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