REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 265 of 2006

JULIUS KARISA CHARO……..APPELLANT

AND

REPUBLIC……..…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Ouko, J.) dated 6th February, 2006

in

H.C.CR.C. NO. 7 of 2006)

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JUDGMENT OF THE COURT

JULIUS KARISA CHARO, the appellant, was after trial convicted of murder and sentenced to death by the High Court of Kenya at Malindi (Ouko, J.) on 6th February, 2006. According to the information filed by the Attorney General on behalf of the Republic, the appellant on 12th June, 2001 at Mkunguni Village in Malindi Location within Malindi District of the Coast Province murdered Peters Peter Karel Johan, a Belgian tourist. He shall be referred to hereinafter as "the deceased".

The facts of the case so far as can be discerned from the evidence tendered in the trial court are simple and we narrate them. The deceased first came to Kenya in 1998 and visited Malindi where he met the appellant, a diver in one of the clubs within the beaches of Malindi. They became friends from that period and when the deceased returned home the two exchanged letters and post cards. The deceased again visited the appellant at his village on 11th June, 2001, but missed him. The following day, he returned and found the appellant at home. Together they visited a local joint known as Jogolos club where palm wine was being sold. The club was owned by **Gabriel Karisa (PW6**). At this club the appellant and his guest, the deceased, were entertained by traditional music and dance as the rest of the patrons enjoyed their palm wine. The deceased however, did not join them in drinking. PW6 testified that the two left the club at about 8.30p.m but as to where they went thereafter no one for certain knows except that about a month later, it became apparent that the deceased had disappeared and his whereabouts were unknown.

In the course of the investigations a number of people including **PW6** and the appellant were arrested. After their interrogation, the rest of the suspects were released but the appellant was detained for further interrogation. On 14th July 2001, one month after the deceased was seen alive at the Jogolo's club, the

police went to the appellant's home where they recovered several personal effects of the deceased buried in one room in the appellant's house. About 100m from the appellant's home, on a piece of land belonging to Charo Katsendezere (PW3), a grave was discovered and from it a body exhumed and moved to the mortuary for post-mortem examination. Dr. Kirasi Olumbe conducted the post-mortem examination of the body. However, at the time of the hearing Dr. Olumbe, it was established, had left the Court's jurisdiction and the post- mortem report prepared by him was tendered in evidence under the provisions of **sections 33** and **77** of **the Evidence Act**, by Dr. Moses Njue. According to that report, the body was extensively decomposed and partially reduced to a skeleton, with remnants of soft tissue. All the bones were intact, except hyoid bone which was not traced. The pathologist noted five fractures of the skull, multiple fractures on both maxillae and mandible, fracture of radius and ulna bones, fracture of the mid-shaft of the left clavicle and two superficial stab wounds of the left upper chest measuring 3 cm in length. In his opinion, the death of the deceased was caused by severe multiple head injuries due to a sharp object.

In his defence, the appellant confirmed that on 11th June, 2001 the deceased visited him and also returned the following day in the company of one Joseph Karanja. The three of them went for a drink at Jogolo Club where a fracas erupted among the drunken youth forcing the deceased to declare his intention to leave.

But before he left, the deceased gave the appellant Ksh. 50,000 as pocket money. The deceased then left in the company of Joseph Karanja, as his flight back to Belgium was departing from Mombasa at 11 p.m that evening and that was the last time the appellant saw the deceased. The appellant further testified that on 13th July, 2001, he heard that there were investigations going on regarding the death of the deceased and in this regard he was shown an anonymous letter in which it was claimed that he had been involved in his murder. The police took him to Mkunguni village where the villagers were directed by the police to exhume a body which was buried under a tree. The appellant denied that any of the items alleged to have been recovered were actually recovered from his house and instead, he was categorical; and indeed, maintained that they were collected from the deceased person's hotel room.

The trial of the appellant was quite protracted. It took about 4 years. The plea was taken on 10th June, 2002 before Ouna, J. at Mombasa and though the assessors were selected, no trial commenced. Instead, there were myriad mentions until Ouna J. retired over a year later. The case was placed before Sergon, J on 13th May, 2003 who fixed the hearing for 23rd and 24th July, 2003. However, it appears that Mr Ngombo, the counsel assigned to defend the appellant never attended court leading to his brief being withdrawn. After very many mentions at Mombasa, the trial was then ordered to commence before Maraga J. on 28th and 29th July, 2004. Again, it never took place but the case was finally transferred to the High Court of Kenya at Malindi where Ouko, J. began the trial on 12th November, 2004. It is apparent that despite the most unsatisfactory manner of how the trial was commenced, Ouko, J. put in great industry and a lot of diligence to see that this difficult case was properly concluded.

We reiterate that this being a first appeal, it is our duty to re-evaluate the evidence, draw our own conclusions, without of course ignoring the findings and conclusions of the trial court.

The case against the appellant was purely circumstantial, and the learned Judge correctly directed himself on the relevant law. To found a conviction exclusively upon circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. This was stated so by the predecessor of this court in **Simoni Musoke V Republic [1958] E.A. 715**, or, as said in **Teper v Republic [1952] AC 480;-**

"**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."**

See also **Rex v Kipkering Arap Koske** and **Another [1949] EACA 135** and **Mkendeshwo v Republic [2002] 1 KLR 461.**

The learned trial Judge in a well considered judgment held that:-

"**The circumstantial evidence in this trial is that the accused spent a better part of the 12th June, 2001 with the deceased. He left the club with the deceased. He was not at home after 9 pm. The deceased person's personal effects were found buried in his house and finally the deceased person's remains were exhumed from a shallow grave nearby his house.**

All these, in my view, point irresistibly to the participation of the accused in the deceased's murder."

Mr Mulongo, counsel for the appellant, submitted that the death of the deceased was not proved beyond reasonable doubt and that the post mortem report was inconclusive, especially in that the skeletal remains were not shown to be those of Peter Peters Karel Johan.

It is clear from the post mortem report that the pathologist was able to tell from the remnants of soft tissue on the scalp, neck and hair that the body was that of a person of Caucasian race to which the deceased belonged. Also from the long bones, dimensions of the skull and its weight the pathologist could conclude that the remains were of a male aged between 43 and 48 years. He also estimated the time of death to be between four to six weeks. All these characteristics as far as they could be ascertained from the deceased's documents, especially the details of the passport, show that the body belonged to the deceased. Further, the time of death fell within the period the deceased was at Mkunguni Village. We would agree with the learned trial Judge that there cannot be any doubt, given the circumstances of this case, that the body that was exhumed was that of Peters Peter Karel Johan, the deceased.

Mr Mulongo has further submitted that the instances cited by the prosecution as constituting circumstantial evidence were capable of innocent explanation, and that moreover; the deceased did not spend time with the appellant alone. We have considered all the submissions canvassed by Mr Mulongo on these. It is true the appellant did not alone socialize with the deceased. However, his other actions betray him. For example, there is evidence that the appellant was with the deceased during the evening the deceased disappeared. They had been to Jogolos Club and left together at 8.30pm. The appellant's siblings, Elvis Bahati Charo, (PW7) Dhambu Charo (PW1) and the appellant's wife went to look for him at Jogolos Club after 9 pm but found the club closed and the appellant and the deceased were nowhere. However, when they returned home they found him without the deceased and he feigned ignorance of where the deceased was.

The prosecution also adduced evidence that personal documents and items belonging to the deceased were found buried in one of the rooms in a house occupied by the appellant, his wife and their two young children. In particular, the discovery of the passport, a Belgian National Identification Card, a driving licence and an air ticket, all in the deceased person's name. It was not possible for a stranger to have buried these articles therein without the knowledge of the appellant. We think that the learned trial Judge was right when he said that this was a clear indication that the appellant must have known the fate of the deceased and that the burial of these and other items was done to cover up and erase any trace of the deceased person.

There was overwhelming evidence that the deceased met his demise in the hands of the appellant, alone or with the aid of others only the appellant would know. There is evidence that PW3 saw the appellant and the deceased earlier on the fateful day as the appellant was looking for a chicken to buy to feed his guest. PW6 on his part was emphatic that the deceased was in the company of the appellant when they went to his club on the day in question at about 3 pm. The only other person who accompanied them there was Juma Kazungu Barawa. It is not known at what stage he left. However, PW6 was certain that the deceased and the accused left together without a third party. We think that the person so-called Joseph Karanja does not exist except in the mind of the appellant.

Further, we are satisfied on our evaluation of the evidence that the deceased's personal documents were recovered from a hole dug in the appellant's house and were not collected from a hotel room as suggested by the appellant.

Mr Mulongo also submitted that the prosecution did not prove motive for the killing. It is trite that the failure to prove motive does not, per se, vitiate the appellant's conviction as by dint of the provisions of **section 9** of the Penal Code, motive is not one of the elements necessary to prove in a criminal offence. We hold, after consideration of the entire evidence on record and submissions by counsel that the circumstantial evidence not only irresistibly pointed to the appellant as the person who killed the deceased, but also excluded any co-existing circumstances which would weaken or destroy such inference.

In the result, we come to the inevitable conclusion that the appellant's conviction for the offence of murder contrary to section 203 as read with section 204 of the Penal Code was based on sound and credible evidence. His appeal, therefore fails and is dismissed in its entirety. It is so ordered.

Dated and delivered at Mombasa this 26th day of January 2007.

P. K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR