



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 164 of 2004

ANN WANGARI MUNGAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Mr. Justice A. Visram)
dated 26th day of July, 2004*

in

H.C.CR.C. NO 73 OF 2001)

JUDGMENT OF THE COURT

Upon pleading not guilty to the charge of murder contrary to *section 203* as read with *section 204* of the Penal Code, *Ann Wangari Mungai*, was tried with the aid of assessors for that offence, convicted and thereafter was sentenced to the mandatory death penalty provided under the Penal Section. She was aggrieved and hence this appeal.

This is a first appeal and on the authority of *OKENO V. R. [1972] EA 32*, our duty as a first appellate court is to reconsider the evidence, evaluate it ourselves and draw our own conclusions in deciding whether the judgment of the trial court and the sentence it imposed should be upheld. In doing so, we are not to overlook the decision of the trial court more so because, unlike that court, we did not have the advantage of seeing and hearing witnesses testify as to be able to assess their credibility as witnesses.

The evidence against the appellant was wholly circumstantial. The law on circumstantial evidence is well settled. For a court to base a conviction wholly on circumstantial evidence, the inculpatory facts must be inconsistent with the innocence of the accused person and must be incapable of explanation upon any other reasonable hypothesis than the guilt of the accused, and must exclude any reasonable co-existing circumstances which might weaken or destroy the inference of guilt. See *MKENDESHWO V. R. [2002] 1 KLR 461*, *KIMEU V. R. [2002] 1 KLR 756* and *PRAVIN SINGH DHALLAY V. R.* What were the circumstances the prosecution relied upon?

The deceased *Danston Wambugu Waithaka*, a boy aged about 16 years at the date of his death, namely 18th September, 2000, was hacked to death and his body was stuffed inside a polythene bag head first,

and then put in a sack which was then put among bags of potatoes inside the kitchen store of the appellant. There was no eye witness. His father, *James Waithaka Muiruri (James)* discovered the body there, a day after the deceased disappeared. James and the appellant are the only people who had the key to the house. Both James and his son *Morris Muiruri Waithaka (Morris)* testified that other people would only have access into the house in their presence. James suspected the appellant as having killed the deceased or at least that she knew who killed the deceased. He told the police as much. The appellant was then arrested and later charged with the murder of the deceased.

The appellant's defence was an alibi. In her statutory statement she denied killing the deceased or having any knowledge of how he met his death. She stated that on the material date and time he is alleged to have been killed, she was at her place of work. It was also her case that upon her arrest by the police they beat her thoroughly, to make her confess to the killing, but that notwithstanding the beatings she denied responsibility and in her words:

"I did not say anything because I did not know anything."

Visram J heard the appellant's case. In his summing up to the assessors, after citing the well known case on circumstantial evidence of *KIPKERING ARAP KOSKE V. R. (1949) 16 EACA 135*, he directed the assessors as follows:-

"If you are to rely on circumstantial evidence to find an accused person guilty of an offence:

- (1) The inculpatory facts must be incompatible with the innocence of the accused.*
- (2) They must be incapable of no other conclusion or explanation except the guilt of the accused.*

You must therefore consider if the evidence in this case is not capable of any other inference but the guilt of the accused, that is to say does the evidence lead to any other conclusion but that it is the accused who killed the deceased?"

Mr. Karanja, for the appellant, in his submissions before us, raised issue on this, and urged the view that the summing up to the extent that technical language was used, was inadequate in view of the fact that assessors are lay people. We will revert to this point later on in this judgment.

In his judgment Visram J, after analysing all the evidence came to the conclusion that the circumstantial evidence overwhelmingly showed that the appellant murdered the deceased and proceeded to convict and sentence the appellant as earlier on stated.

Mr. Karanja, in urging the appellant's appeal, did not think that the evidence excluded any other reasonable hypothesis than the guilt of the appellant, or that there were no co-existing circumstances which could weaken or destroy the inference of her guilt. He took us through aspects which, in his view, materially weaken the inference of the appellant's guilt of the charge of murder. These were, inter alia, the fact that the prosecution did not establish the blood group of the appellant to exclude the possibility of the blood stain on her skirt being of her own blood group; the possibility of somebody outside the deceased's family killing him and dumping his body where it was found; the conflicting evidence as to the blood group of the deceased, in view of the fact that a witness stated on oath that it was group "O" when the Government Analyst's report showed it was of group "A".

Mr. Gumo, Principal State Counsel, was of the view that the evidence against the appellant is overwhelming and as a result her conviction and sentence should not be disturbed.

As we stated earlier this is a first appeal, and it is therefore in the nature of a rehearing. We start with the date, *18th September, 2000*, when the deceased was last seen alive. *Elizabeth Njoki Macharia (Elizabeth)* testified that she saw the deceased leading his father's cow to where it was to graze. She saw him again at lunch time, and later at about 4:30 p.m. Only she testified having seen the deceased return home at that time. She did not see him leave his home thereafter.

There is also the evidence of *Anthony Karimi Gathee (Anthony)* a teacher at Subukia, P.C.E.A. Umoja Academy, who testified that on 18th September, 2000, the appellant went to his school earlier than usual to collect her son, *Nicholas Muiruri (Nicholas)* at about 4:30 p.m. saying she had gone to Nyahururu on duty and she thought it wise to collect her son at that time. It is noteworthy that the appellant left her place of work at about 10a.m. on that day, according to two of her workmates, *Cherono Yator* and *Florence Kosgei*. Their testimony is believable because *Miriam Muthoni Muiruri (Miriam)*, the appellant's mother-in-law, testified that the appellant visited her on that day at about 1pm. and complained that because of problems she was facing from her co-wife's children's bad behaviour to her she was planning to leave her husband.

The appellant was unsettled on that day, and her behaviour clearly portrayed her as a disturbed person. James testified that the appellant, quite unlike her usual behaviour when she would wait for him to pick her up on his way home, left her place of work, asked a colleague, one George, to contact him to inform him that the appellant had gone home ahead of him and he did not need to pick her up. The appellant had travelled to Nyahururu without informing him. She had not gone there on duty, but on an errand of her own. That evening, she was not in any mood to engage in any conversation. She told her husband she had left her place of work at 1.30 pm. and gave no explanation for leaving early.

The deceased's body was discovered inside the appellant's kitchen store on 19th September, 2000. This, the appellant did not deny, nor did she suggest to James, the only other person who had a key to the house, that he could have been responsible for the deceased's death. James was categorical that other people would only have access into that house in their presence, and the house could only be open when either himself, or the appellant or both were around.

In the foregoing circumstances, the killer could only be either, the appellant, James, or both of them or a person known to either or both of them. Circumstances, however, weigh heavily against the appellant. The body of the deceased was found in her kitchen store, a place she frequents when making meals. Her skirt, which was tendered in evidence, was found stained with blood of the same group as that of the deceased. She had a duty to explain how the blood came to be on her skirt.

Mr. Karanja, submitted before us, that it is possible the appellant's blood group was also of the same group. If not, it was the prosecution's duty to adduce evidence to that effect to exclude that possibility. While we agree that the prosecution should have but did not eliminate that possibility, their failure to do so was not fatal to the prosecution case. The skirt was found in the appellant's bed-room. True, the appellant, according to a P3 form produced to show her fitness to plead to the charge she faced, showed the appellant had bruises all over her body, but those could not possibly be the source of the blood stains on her skirt. She explained that the police beat her while she was in police custody, and that explains how she got those bruises. That was a fact peculiarly within her own knowledge and only she could explain how they were inflicted, and she did. The injuries having been inflicted after the appellant's arrest, they could not have possibly been the source of the blood stains on her skirt. Besides, the skirt was recovered from the appellant's bed-room. We had the opportunity of examining it. The blood stains were concentrated on the groin area. There were two or so stains in the hip area. There were none on the back side or the thigh area. Yet according to the P3 form on the appellant, she had bruises all over her body.

Besides, there are other circumstances, which when considered along with the blood stains on her skirt, show that the appellant alone or in conjunction with another person or persons were responsible for the death of the deceased. The relationship between the appellant and the deceased and his siblings was not harmonious. *Morris*, the deceased's elder brother, *Hannah Nyokabi Mwaura*, *Peris Wangare Njuguna* and *Miriam*, testified as much. She was hostile to the deceased and his siblings to the extent that she wanted to leave her husband on that account alone. She had reason for wanting to kill the deceased. We appreciate that motive, under the Penal Code, is not a factor in criminal responsibility. However, motive becomes relevant when considered with other circumstances, to establish criminal responsibility. In *LIBAMBULA V. R. [2003] KLR 683*, this Court stated thus:-

“Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not

essential to prove a crime.”

The appellant told her mother-in-law that, she wanted to separate with her husband because of the deceased and his siblings. In her mind, the children made her stay with her husband intolerable. It was on the same day when she expressed that feeling that the deceased disappeared.

The circumstances of the case, when taken cumulatively leave no doubt in our minds that the appellant, and no other person, killed the deceased. She had the necessary *mens rea*, considering the several injuries on his body.

Regarding the contradiction between the evidence of Edward Mundia, and the Government Analyst’s report on the blood group of the deceased, nothing much turns on it. The Government Analyst’s report is primary evidence and by dint of the provisions of *section 65(1) of the Evidence Act Cap 80 Laws of Kenya*, primary evidence means the document itself produced for the inspection of the Court. The report was produced, and any oral testimony in conflict with it is of no probative value. It must therefore be rejected. Moreover the witness must have misread the report as his evidence was based on it.

Mr. Karanja, for the appellant, raised two other issues, the first one being that the trial Judge erred in using technical language in his direction to the assessors. We find no merit in this complaint. Law by its very nature is technical, and sometimes appropriate language is lacking to explain certain legal principles. We are satisfied that the language the trial Judge used sufficiently explained the issues the assessors were called upon to deal with and was reasonably simple enough for the assessors’ understanding.

As regards the second complaint, namely, that the trial Judge shifted the burden of proof to the appellant, we do not agree with learned counsel that the trial Judge did so. In criminal practice and procedure there are times in the course of a trial when an accused person is required to offer explanations on matters which, in the circumstances of the case, are peculiarly within his or her own knowledge. For instance, in the case before us, the appellant’s conduct on *18th September, 2000*, was peculiar. She left her place of work early without an explanation. She left for Nyahururu and later lied to her husband and Anthony, the teacher at her son’s school, that she had gone to Nyahururu on duty when that was not the case. Elizabeth heard Nicholas calling the deceased telling him to drive their cow home because the deceased needed a rope which was used to tether it, for purposes of drawing up water from a well. No water was freshly drawn from the well, according to James. These are matters which were relevant and within the appellant’s personal knowledge, and which the law placed a burden on her to offer some explanation. The appellant did not offer any. We are satisfied that the trial Judge did not shift the general burden of proving a charge to the appellant. We agree with Mr. Gumo, Principal State Counsel, that the appellant’s conviction was based on sound and overwhelming circumstances. Accordingly, we dismiss her appeal in its entirety. Orders accordingly.

Dated and delivered at Nakuru this 2nd day of March, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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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