



IN THE COURT OF APPEAL OF KENYA AT NYERI

Criminal Appeal 229 of 2006

JAMES KARUGA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J.)

dated 28th July, 2006

In H.C.CR.C. NO. 29 OF 2005)

JUDGMENT OF THE COURT

The appellant, **James Karuga Kamau**, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code pursuant to an information filed by the Attorney-General on behalf of the Republic. The particulars of the offence were as follows:-

“JAMES KARUGA KAMAU: On 4th day of August, 2005 at Mathioya River Kanyenyaini Bridge in Kiawambogo s/location in Muranga District of the Central Province murdered SUSAN JEAN KING.”

According to the record the appellant was arraigned before the Deputy Registrar of the High Court at Nyeri (*R.N. Nyakundi, Esq.*) on the 30th September, 2005 when his case was fixed for the plea to be taken on 12th October, 2005. Come the 12th October, 2005, the appellant was arraigned before Okwengu J. who took the plea. The appellant pleaded “**Not Guilty**” to the charge and the case was adjourned to 24th October, 2005 for fixing of a hearing date. On 24th October, 2005 the case was mentioned and the hearing date fixed for 22nd June, 2006.

The appellant’s trial commenced on 22nd June, 2006 before Khamoni, J. sitting with three assessors. The prosecution called twelve witnesses. The prosecution case was that on the 4th day of August, 2005 the deceased in the company of her husband, **Robert Charles King (PW3)**, her daughter, her son and a friend of her son, left Nairobi in the morning for a fishing camp known as the Kenya Flying Fish Club at Kanyenyaini bridge Mathioya River. They arrived there at about mid-day, took lunch and went to the river for fishing.

At the river they divided themselves into three groups so that the son with his friend were taken to fish at one section of the river, while **Robert Charles King (PW3)**, and his daughter went to fish at a section of the river known as *Glass Black Snake*. The deceased left them there and proceeded to a different section of the river to fish and she was to meet her husband and daughter at **Kanyenyaini bridge at 6:30 p.m.**

At 6:30 p.m. when **King (PW3)** and his daughter went where they were to meet the deceased next to the motor vehicle, they did not find her. A search for the deceased was mounted which led to the discovery of her body held between stones in the river. This unfortunate turn of events was reported to Kangema Police Station. As a result of the report, police officers from Kangema Police Station went to the scene and took the body of the deceased to Muranga District Hospital Mortuary from where the body was transferred to the Lee Funeral Home where **Dr. Moses Njue (PW1)** performed postmortem examination on 8th August, 2005. In his evidence in chief, **Dr. Njue (PW1)** stated, inter alia:-

“I formed the opinion that the cause of death was a combination of:-

- 1) *Manual strangulation*
- 2) *A fall*
- 3) *Drowning (mild)*

That is there was manual strangulation as a result of which the deceased fell (sic) into the water before she died and thereafter she drowned during the last seconds.”

Dr. Njue produced the postmortem form as **Exhibit 1**.

Going back to the events of the material day there was the evidence of **Zakary Gichuki Ngunjiri (PW5)** who testified that he was at the Kenya Flying Club Camp when **King (PW3)** and his family arrived. It was **Ngunjiri (PW5)** who took the deceased to Kanyenyaini Bridge as she went fishing while PW5 was left to guard the vehicle. At about 6:30 p.m. the deceased's husband (**PW3**) came and on discovering that the deceased was missing **PW5** joined the search party which eventually recovered the body of the deceased in the river.

Samuel Obadiah Njoroge (PW6) was another employee of Kenya Flying Fish Club who also took part in the search and recovery of the body of the deceased.

The evidence of **Agnes Nyambura Kimani (PW7)** is, in our view, crucial in this appeal. In her evidence in chief this lady is recorded to have stated:-

“I live at Kiawambogo where I am a farmer. I remember on 4/8/2004 I was manuring my shamba when I met a European carrying a bag and a fish rod. She saluted me asking “Habari Mama” at about 4:00 to 4:30 p.m. I continued taking manure and saw Karuga Kamau following that lady. I thought of finding out why he was following her as I could see the lady pointing a finger at him although they were not talking to each other. Whenever I looked there, Karuga would tend to hide. I cannot estimate the distance from where I was. My shamba goes up to the river. That lady was passing inside my shamba. They went at a (sic) until they reached out a place when I could not see them because of some bushes there. I did not know what happened and I did not see them again. After they had passed and gone I continued with my work and did nothing to find out why they were following each other.

At about 5:15 p.m. James Kimeme Ndegwa told me he saw Karuga at the boundary of Mary Wanjiru naked. The boundary of our land. I told him that I had seen Karuga following a European lady. Now I was at my home.

About 6:00 to 7:00 p.m. I heard Njoroge (P.W.6 pointed at) calling me. I become shocked. I gave my torch to take to Njoroge because Njoroge wanted a torch. I did not go. Later I heard the European was found dead, in the river. The river is called Mathiyoa River.

My land is six acres. I saw them walking along the river but I cannot estimate the distance from where I was to where they were passing. Karuga Kamau I am talking about is the Accused in this court (pointed at). I knew him before at his home which is far from mine.”

James Mbaria Macharia (PW8), a student at *Kiawambogo Secondary School* in his evidence told the trial court that on the material day he was at home when the appellant called in at about 6:00 p.m. The appellant asked for a pair of trousers from **PW8** who obliged by handing over his clothes. The appellant left his pair of trousers and proceeded to his house.

The next witness to testify was **Mary Wanjiru Mugo (PW9)** who is recorded to have said as follows in her evidence in chief:-

"I live at Kiawambogo, Itaha Migwi Village. I recall on 4/8/2004 about 5:30 p.m. I left home and to look for Napier grass for animals. Before I reached the road I saw somebody passing through my shamba walking in a hurry. I watched him. I saw him hide in a tea bush. I went to he (sic) was to find out what was the problem when I reached him. I recognized him as James Karuga Kamau. I had known him before long time ago. I knew him by name and appearance. We come from same sub-location. Our homes separated by a distance one can walk for two hours. I asked him what is wrong.

He told me he was unwell and he told me he was coming from the river to bath (sic). I offered to take him to my home. He refused. I held his hand to pull him. He refused. I called Githaiga. He told me not to call children because he was naked. He was having a coat but holding trousers in his hand seated down. I got shocked and moved aside from him. That is where I was when I called Githaiga. I saw my neighbour James Kimere and went where he was. I told him I had seen Karuga seated there I showed him. I added Karuga had told me he was naked. I asked James Kimere to go and see him. As he started going where that person was I started also walking towards my home as it was becoming dark.

On my way home I met Githaiga and told him to follow Kimere to (sic) who was going to check on Karuga who was saying he was naked. From there I went away cut nappier grass and went at my home. When I was feeding my cattle, I heard screams coming from the river. I did not know what was happening. But the following morning I learned that there was a white lady who had fallen into Mathioya River. It was not far from the place where I found Karuga.

Karuga is here in court. He is seated opposite me. That one near the askari (points at the accused in the dock). When I found him all his clothes were wet. It had rained but at that time it was not raining."

Pursuant to a report made to her by **Mary Wanjiru Mugo (PW9)**, **James Kimere Ndegwa (PW10)** went to where the appellant was and found him half naked. In his evidence in chief, **Ndegwa (PW10)** stated inter alia:-

"I recall on 4/8/2004 at about 5:30 p.m. I was at my home when Mary Wanjiru Mugo came and told me that she had found Karuga Kamau at the border of our land and he was naked. She showed me the place. I went to the place and found Karuga Kamau half naked. He had an underpant on and was holding a wet pair of long trousers. He was wearing a dark blue coat. Those were the clothes I saw. I felt ashamed to see him in that state. He was a person I knew before. His clothes were wet and he was also wet. It was not raining. Witness got from walking through plantation with water could not be like that intensive (sic).

I told him to wear the clothes and asked him what was wrong. He was at a place on a boundary between my land and that of Mary. I told him to wear clothes and go away and he did so and I went back to my home then to Kanyenyaini shops."

Pc Joseph Wachira (PW11) a police officer from Kangema Police Station was one of the officers who proceeded to the scene where the body of the deceased was recovered. He assisted in removing the body of the deceased from the river to Muranga Hospital Mortuary. He also took part in the investigations and was with **Pc Musembi (PW12)** when the wrist watch (**Exhibit 5**) was recovered from where it was alleged the appellant had been sitting on the day the deceased died.

The appellant was arrested on 6th August, 2005 and on 18th August, 2005 he was examined by **Dr. Samuel Owino (PW2)**. In his evidence **Dr. Owino (PW2)** stated:-

“I am a Psychiatrist from Provincial General Hospital Nyeri. I remember on 18/8/2005 James Karuga Kamau was brought to me by police to examine his mental state. I found him of sound mind and formed the opinion he was fit to plead. I filed this P3 form which I now produce (Exhibit 2).”

After hearing the evidence of the twelve prosecution witnesses, the learned Judge put the appellant to his defence. The appellant elected to give unsworn statement in which he stated:-

“I come from Kiawambogo where I am a farmer. I remember 4/8/2004 at 8:00 a.m. I left my home and went Kanyenyaini at the bank to withdraw some money for my children’s school fees. I met Bithon Mwangi and Wanganga Mwangi. We went to take beer. I had already withdrawn some money from the Bank. I told them I would not take long. After a short time I started going to Kiawambogo. I passed Mathioya Bridge at about 3:30 p.m. I did not see any white lady as I passed at the bridge. It was raining. I went straight to Kiawambogo Secondary School and paid the fees. I then went back home.

At home I went to feed my heard (sic) of cattle. After feeding them, I did not leave home again. It was around 6:00 p.m. I stayed at home until night. The following morning on 5/8/2004 I was still at home and spent the whole day there. On 6/8/2004 I went to my shamba to work. About 5:00 p.m. I saw my Assistant Chief come to my home with four police officers.

They came to me and handcuffed me. I was still in my shamba but they took me from there to my home. The house was locked and I did not have the key but when they wanted to break open the door, I told hem my wife had the key. She came and opened the door. They entered the house and removed my clothes and took them away. They took me to the road where we found the Assistant Chief’s motor-vehicle. We got in the vehicle and it was driven to Kiawambogo Shopping Centre where we found a police motor-vehicle.

We got on that police motor-vehicle and it was driven to Kangema Police Station. That is when they asked me about the white lady. I told them I did not know anything. They put me into the police cells. On 12/8/2004 I was collected by police CID from Muranga and taken to the police cells at Muranga where they assaulted me asking me about a white lady. I told them I did not know anything. They did not ask me anything else. That is when they took me to court up to this time. That is all.

I know James Mbaria Macharia. I heard what he said about me. It was not truth as I did not go to his house as he alleged. Mary Wanjiru Mugo. I heard what she said about me. It was not true as I did not go where she said she saw me in her shamba. Similarly what James Kimere Ndegwa said.

I know Agnes Nyambura Kimani. I heard what she said about me. I did not see her or a white lady on that day and what she told the court about me is not true. That is all.” The prosecution’s case be dismissed.”

After the unsworn statement by the appellant, his advocate Mr. Wachira informed the trial Judge that he (Mr. Wachira) would not make any submissions. The learned Judge then summed up to the assessors who on their part returned a unanimous finding of guilty. Assessor **Irene Wangari Ngure** is recorded to have said:-

“After consultation we are of the unanimous opinion that the Accused is guilty.”

Assessor **John Gatungo Mwangi** said:-

“I confirm that is my opinion. We are unanimous.”

Assessor **Mary Nyambura Muthoga** said:-

“I confirm that is our unanimous opinion that the Accused is guilty as charged.”

The learned trial judge reserved his judgment which he delivered on 28th July, 2006. In his judgment, the learned Judge reviewed the evidence before him and concluded it thus:-

“I have been commenting on the evidence as I summarized it and now putting together all I have been saying, I find that a part from the evidence trying to connect the Accused person with murder of the deceased that afternoon, there is evidence of his unique behaviour that evening in addition to the evidence of unreliability in his defence. All those, in my view, irresistibly point at the guilt of the Accused person and indeed the three assessors unanimously found the accused to be guilty of murder. The conclusion I have come to agrees with the unanimous opinion of the Assessors.

Accordingly, I do find the Accused guilty as charged and convict him accordingly.”

The learned Judge then proceeded to sentence the appellant to suffer death as prescribed by **section 204** of the Penal Code.

It is from that conviction and sentence that the appellant comes to us by way of appeal. The appellant filed his own home made grounds of appeal but his counsel Mr. P.M. Muchira improved on these grounds by filing a supplementary Memorandum of Appeal containing the following grounds of appeal:-

- “1. The Learned Judge of the Superior court erred in law and fact in convicting the appellant of the charge of murder which in the particulars of the offence was alleged to have occurred on 4th August, 2005 which was in variance with the evidence tendered before him.***
- 2. The Learned Judge of the Superior court erred in law in basing his judgment on circumstantial evidence without making a finding that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.***
- 3. The Learned Judge of the Superior court erred in law and fact in the appraisal and analysis of the evidence tendered before him.***
- 4. The Learned Judge of the Superior court erred in law in failing to find that the appellant’s trial was a gross violation of the appellants rights as enshrined in section 72 and 77 of the constitution of Kenya.***
- 5. The Learned Judge of the Superior court erred in law in shifting the burden of proof for the offence charged on the appellant.”***

When this appeal came up for hearing before us on 15th May, 2007, Mr. Muchira took us through the five grounds of appeal in urging us to allow the appeal.

This being a first appeal, it is the duty of this court to reconsider the evidence, re-evaluate it itself and draw its own conclusions but making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses – see ***OKENO V. R. [1972] E.A. 32, KAINGO V. R. [1982] KLR 213*** and ***MACHARIA V. R. [2001] KLR 156.***

It is in view of the foregoing authorities that we have set out in some detail the evidence adduced before the trial court leading to the conviction of the appellant by that court.

On the first ground of the appeal, (*as per the supplementary memorandum of appeal*) the main complaint related to the variance in dates. In the information filed by the Attorney-General the appellant was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge were set out showing that the alleged offence was committed on the 4th day of August, 2005. It was Mr. Muchira’s submissions that while the charge refers to 4th August,

2005 the witnesses were referring to dates in August, 2004.

In our view nothing much turns on that submission. We say so because all the material before the court would show clearly that the offence is alleged to have been committed on the evening of 4th August, 2005 and not 2004. For example, **Dr. Owino (PW2)** who examined the appellant as to his mental status stated clearly that he examined the appellant on 18th August, 2005. Dr. Owino produced his report (**Ex. 2**) on the appellant. That report is dated 18th August, 2005. The postmortem report (**Ex.1**) was produced in evidence. The report is dated 8th August, 2005.

From the foregoing, there can be no doubt that the witnesses were referring to dates in the year **2005** and not 2004. So that any reference to the year **2004** was certainly an error in recording of evidence by the trial judge.

That ground must therefore fail.

It follows that the fourth ground in which contravention of the Constitution is raised must fail as this was raised on the assumption that the alleged offence took place in the year 2004. For clarity of the record, we now wish to point out that the alleged offence took place on 4th August, 2005. The appellant was arrested on 6th August, 2005 and he (appellant) was examined by **Dr. Owino (PW2)** on 18th August, 2005. The postmortem examination was conducted on 8th August, 2005. As already indicated at the commencement of this judgment, the appellant was brought to court for the first time on 30th September, 2005. It would therefore be mischievous for anyone to argue that the witnesses were referring to the year **2004**.

The other three grounds can be considered together. These raise the issue of circumstantial evidence being relied upon in convicting the appellant. Mr. Muchira submitted that the evidence of the villagers who gave evidence was found unreliable by the learned Judge who later concluded that they were credible witnesses. It was Mr. Muchira's contention that the learned Judge appeared to have changed his mind on the credibility of the witnesses.

As regards the recovery of the wrist watch at a place where the appellant had been seen, Mr. Muchira argued that the evidence of the officer who recovered the watch was not reliable. Mr. Muchira reminded us that the scene of the offence was open to all manner of people and hence it could not be said that it was only the appellant who could reach the scene of crime.

In urging us to dismiss this appeal, Mr. Orinda, the learned Principal State Counsel, submitted that the evidence adduced taken in totality showed that it was the appellant who committed the offence and that his guilt was proved beyond any reasonable doubt. He pointed out that the appellant was seen by **PW7, PW8, PW9** and **PW10**, on the material day.

As already stated elsewhere in this judgment, this is a first appeal. It is our duty to subject the entire evidence to fresh and exhaustive examination. That is why we set out in full the evidence of various witnesses who testified before the trial court. Certain facts were not in dispute. The deceased died as a result of a combination of manual strangulation, a fall and drowning. According to Dr. Njue's evidence:-

“That there was manual strangulation as a result of which deceased fell into the water before she died and therefore she drowned during the last seconds.”

From the foregoing, there can be no dispute that the deceased was indeed strangled before being thrown into the river. The appellant's conviction was based on circumstantial evidence since there was no eye-witness to what happened to the deceased before she met her death. Nobody testified that he/she saw the appellant committing the offence. However, it was the conduct of the appellant on the material day and other circumstantial evidence that led to his arrest, arraignment before court and subsequent conviction.

The prosecution's case against the appellant as already stated was based on circumstantial evidence. The deceased went fishing down the river and there was evidence from two witnesses (**PW7 and PW9**) that they saw the appellant on the material day going down the river following the deceased. There was the evidence of the school boy **Macharia (PW8)** who saw the appellant at 6:00 p.m. and from whom the appellant borrowed a pair of trousers. And finally there was the evidence of **Ndegwa (PW10)** who found the appellant "half naked". We have reproduced the evidence of these witnesses elsewhere in this judgment. In his defence, the appellant denied having seen these witnesses (**PW7, PW8, PW9 and PW10**). What comes from the foregoing is that the appellant was seen in suspicious circumstances on the material day and his conduct was rather disturbing in that he was found almost naked and immediately thereafter the body of the deceased found in the nearby river. Taking into account the evidence of those who saw the appellant on that day, there can be no doubt that the appellant was connected with the death of the deceased. And as if to remove any lingering doubt, the watch belonging to the deceased was recovered at the place where the appellant was found hiding or sitting in the bush.

In **R. V. TAYLOR WEAVER AND DONOVAN [1928] 21 CR. APP.R.20** the principle as regards the application of circumstantial evidence was enunciated in these words:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

We see from the record that the prosecution relied mainly on the fact that the appellant was seen following the deceased towards the river and the appellant behaved as if he was trying to hide. That is according to the evidence of **PW7**. It is important to note that according to **PW7**, she saw the deceased pointing a finger at the appellant.

In **MUCHENE V. R. [2002] 2 KLR 367** at p. 370 this Court said:-

"It is trite law that where as here, the conviction is exclusively based on such evidence it can only be properly upheld if, as was authoritatively stated by the Court of Appeal for Eastern Africa, in the case of SIMON MUSOKE V. R. [1958] EA, 715, the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exists no co-existing circumstances which would weaken or destroy such inference. It is also settled law that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the accused person."

Thus, as already stated, the conviction of the appellant must depend entirely upon circumstantial evidence noted by the learned judge. It is established by **PW7, PW8, PW9 and PW10** that the appellant was seen on the material day in the evening either following the deceased or within the area where the offence was committed. The appellant though not under any obligation to prove his innocence chose to say that he did not see these four witnesses. But these witnesses knew the appellant well and they were testifying to the effect that they saw the appellant clearly and that they knew him.

In the final analysis, therefore, we arrive at the conclusion that the appellant was convicted upon very sound evidence and we have no reason to interfere with the decision reached by the superior court. We find no merit in this appeal and the same is dismissed in its entirety.

Dated and delivered at NYERI this 18th day of May, 2007.

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