



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Criminal Appeal 271 of 2006**

**FRANCIS GICHOVI MUTHONI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from conviction and sentence of the High Court of Kenya Malindi (Ouko, J) dated  
29<sup>th</sup> July, 2005 In H.C. Cr. Case No. 6 of 2004)**

\*\*\*\*\*

**JUDGMENT OF THE COURT:**

In an information dated 20<sup>th</sup> February 2004, the appellant, Francis Gichovi Muthoni, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were:

“..... on the 22<sup>nd</sup> day of November, 2003, at about 7.30 p.m. at Kihongwe Trading Centre, Mpeketoni Location in Lamu District within Coast Province, murdered Simon Mwiruri Kamau.”

The appellant pleaded not guilty to the charge and the trial proceeded with the aid of assessors before the superior court. After a full hearing by the superior court (Ouko J.) and after summing up to the assessors, each assessor gave an opinion that the appellant was guilty of the offence. The learned Judge of the superior court in a well considered judgment found the appellant guilty of murder as charged, convicted him and sentenced him to death. In finding him guilty and convicting him, the learned Judge addressed himself thus:

**“Given the close proximity of the accused person’s house and the spot where the deceased was found lying with injuries and the recovery of the likely murder weapons at the scene and in the accused person’s house and the fact of the accused locking himself up in the house, in my view point irresistibly to the guilt of the accused person to the exclusion of any other person. I also find no co-existing circumstances that tend to weaken or destroy the chain of circumstances pointing to the guilt of the accused. I find as a fact that he inflicted the injuries that caused the death of the deceased.**

**From the nature of these injuries – namely deep penetrating wounds next to the eye, a fracture on the right mandible, deep wound and fracture of bone behind the ear, wound on the back of the head, and a deep wound and fracture of the left eye (sic). I conclude that by repeatedly inflicting**

**these injuries, the accused death of the deceased (sic). I find no merit in his defence that he did not see the deceased on that day. It is also not true that he did not know how he met his death. The two assessors who participated in the trial, after the discharge of the third assessor, returned a unanimous verdict of guilty of murder.**

**I find the accused person guilty of murder and convict him accordingly.”**

The appellant was not satisfied with that decision and hence this appeal premised on five grounds of appeal filed by the appellant in person, the last of which was abandoned by the learned counsel for the appellant during the hearing of the appeal. The remaining four grounds were in summary that the learned Judge of the superior court erred in law and in fact in convicting the appellant on the evidence of the first prosecution witness's evidence whereas that witness was not an eye witness to the incident; that as the jembe which was alleged to be the murder weapon was not dusted for finger print to establish whether it was the murder weapon; the learned Judge erred in finding that the body of the deceased was found near the appellant's house where the jembe was found; that as some of the witnesses were not called particularly the arresting officer, there existed doubts in the prosecution case as to the guilt of the appellant, the benefit of which should have been given to the appellant; and that the learned Judge failed to consider adequately the defence case.

Moses Masandani Karani (PW 1) (Karani) had known the appellant since 1997. He was a student at Bakaja Secondary School. On the material day at about 7.00 p.m., his father sent him to take a spray pump to a neighbour. On his way he came across somebody lying down partly on the road and partly on the verandah of the plot where the appellant lived. He called out that person but there was no response. He called out the second time but still there was no response. On calling a third time, the appellant came out from a house next to the road. Karani asked the appellant why the person was lying on the road. The appellant in reply said the person was playing around and he (the appellant) beat him. The appellant then gave Karani a bicycle which was lying next to the body to take to Kinyua's hotel. As Karani had another bicycle, Karani declined to take that bicycle but the appellant forced him to take the bicycle and to leave his bicycle behind. Karani obeyed and took the appellant's bicycle to Kinyua's hotel. Karani took that bicycle to Kinyua's hotel but as he did not find Kinyua, he left that bicycle with Kinyua's brother. Karani was joined by other boys who had come from a foot ball match and together, they went to the appellant's place to collect his bicycle. Karani observed that that person lying down on his back was bleeding from the neck. He did not see any weapon nearby but a piece of wood was about 10 metres away. Karani took his bicycle and returned home. Next day, he heard women wailing and learnt that that person had died. That person is the deceased in the case that was before the superior court and is the subject of this appeal.

Michael Kimani (PW 2) (Kimani) was a neighbour to both the appellant and the deceased. On 22<sup>nd</sup> November 2003 at about 6.30 p.m., he was at Kihongwe at a football pitch. As they were coming from practice with the deceased, the deceased asked Kimani to give him his (Kimani's) bicycle. Kimani gave him the bicycle and the deceased left Kimani at a hotel as Kimani was waiting for a friend. After one hour, Kimani noticed people running towards the appellant's house. He followed them and on reaching there, he found the deceased lying down bleeding from the head. Kimani saw his bicycle near the deceased. He took the bicycle and returned it to the hotel. The appellant had locked himself in his house which was next to where the body was lying. His bicycle was on the steps near the appellant's door, about 4 metres away.

Daniel Mbugua Kamau (PW 3) (Kamau) was a neighbour of the appellant. He had given the appellant his bicycle as he remained at Kinyua's hotel. He was brother to the deceased. He was informed later by a Mr. Ndeti that the body surrounded by some people near the appellant's house was that of his brother. He went near the deceased, touched his body and found that he was already dead. The bicycle had been returned to the hotel but he did not know who had returned it to the hotel. He, together with Joseph Mwangi Kamau (PW 4) (Joseph) reported the incident to Mpeketoni Police Station. Pc Dickers Otieno Andete was on duty at Mpeketoni Police Station when Joseph and Kamau reported the death of the deceased.

Eunice Nyambura (PW 5) is the mother of the deceased. She received a report from Nderitu (PW 6)

about the death of her son. She went to the scene and saw the deceased in whose house the appellant had lived for some time. Many people went to the scene where the deceased lay dead. The appellant at that relevant time remained in his house and refused to open his door and to come out although the body was just next to his house and despite Samuel Njage (PW 8) knocking at his door. He told Njage he would not come out. John Nderitu Mwai (PW 6) (Mwai) a farmer at Kihongwe was one of the people who went to the scene on hearing of the incident. He heard the appellant, whose voice he knew, say from inside his house that he was coming out and the appellant added “*wait for me outside*”. Mwai regarded that as a threat. Others at the scene also took it in the same way and ran away as they thought the appellant was coming out with a weapon to attack them. Earlier, to the hearing of Njage, who also knew the appellant and knew his voice, the appellant said he would only come out of his house if ordered by the chief or the police. Eventually, the appellant’s door was broken and members of the public got hold of him. He was beaten and tied with a rope. Pc Dickson reported the incident to the OCS who joined him at the police station and ordered the police team to proceed to the scene. The police went to the scene and found the body of the deceased lying at the door step of the appellant’s house. It had injuries on the little finger, head and teeth. Next to the body was the deceased’s slippers, a jembe and a stone which were 4 metres away – both had blood stains. His head was lying on a stick. The appellant was being held by the public. The police collected the exhibits, removed the body and arrested the appellant. A post mortem was performed by Don Munano Gikonyo (PW 7) a Clinical Officer at Mpeketoni District Hospital who formed the opinion that the cause of death was due to head injuries, with brain involvement, and severe bleeding from the injuries. He produced the post mortem report.

The appellant was charged with the offence of murder of the deceased as we have stated above. Put to his defence, the appellant admitted that the deceased was known to him since 1978 and was his neighbour. They were friends. On 22<sup>nd</sup> November, 2003, he went to Mama Wangari in the morning to do some work and did not return to his house till 6.30 p.m. He then collected water and went to bed. He had not seen the deceased up to that time. As he was sleeping, about 8.30 p.m. many people came and knocked on his door. He did not open. They broke the door. When he went out, he saw the deceased lying down. Two people told him he had killed the deceased but he was not involved. Those two men ran away and the chief and the assistant chief went to the scene. In cross-examination, he said people banged his door when he was asleep. He denied talking to Karani whom he said he did not know. He stated he knew Mwai but he had disagreed with him as Mwai’s goats had invaded his shamba. He agreed that the disagreement was not serious and they remained good friends. It was his case that Mwai did not tell the truth when he testified that he (the appellant) had threatened the people at the scene of the incident with a panga.

The above were in brief the facts that were placed before the trial court and which upon consideration by the superior court, led to the conviction of the appellant. Mr. Mulongo, the learned counsel for the appellant, submitted that the learned Judge of the superior court did not properly analyse and evaluate the same evidence and that failure resulted in the conviction of the appellant. He also submitted that the learned Judge did not consider the entire case both put forward by the prosecution and the defence as a whole but rather considered the prosecution case separately and the defence case separately. His position was that the case was based entirely on circumstantial evidence and that being the case, proper analysis and evaluation of the evidence was necessary so as to arrive at a just conclusion. That legal principle was not respected in this appeal.

Mr. Ogoti, the Principal State Counsel, while accepting that the conviction was based on circumstantial evidence mainly, did submit however that the evidence adduced in the entire case proved the appellant’s guilt beyond reasonable doubt as the evidence irresistibly pointed at the appellant as the perpetrator of the offence as charged.

This is a first appeal. We are therefore enjoined to revisit the evidence that was before the superior court, analyse it, evaluate it and come to our own independent conclusion, but always bearing in mind that the superior court being the trial court, had the advantage of seeing the demeanour of the witnesses, and hearing the witnesses and thus giving allowance for the same.

Kamau gave the deceased his bicycle at about 6.30 p.m. An hour later, the deceased was found by

Karani lying down dead. A bicycle was near him. Kamau says he gave the appellant his bicycle at about 6.00 p.m. The appellant was to collect the charcoal with that bicycle. Karani says when he saw the deceased dead, the deceased was partly on the verandah of the appellant's house. The appellant was nearby for when Karani called twice and the deceased could not respond, it was the appellant who responded and told him that as the deceased was playing around with him, he beat him. The appellant then forced Karani to return the bicycle to Kinyua's hotel. Clearly this was a bicycle he had been given by Kamau. The effect of that is that Kamau's evidence was truthful. That truthful evidence was that on that fateful day, Kamau was coming from fishing and he met the appellant who asked him for a bicycle which he gave him to use for collecting charcoal. The evidence of Karani also falls into place that at about 7.00 p.m. the appellant forced him to return that bicycle to Kinyua's hotel. It cannot escape our mind that when Kamau gave the appellant the bicycle, Kamau said he remained at Kinyua's hotel. In short, the appellant could not be telling the truth when he said that on that day he left his house in the morning, went to do some work at Mama Wangari's place and did not return till 6.30 p.m., and when he returned, he collected water and went to bed. The evidence of Karani and Kamau makes it clear that the appellant was not sleeping at 6.30 p.m. Karani's evidence is that the appellant told him he beat the deceased who was lying down near his house. The appellant never denied that in his evidence in chief. It was in cross-examination when he denied having told Karani that. That evidence was an admission of what he did to a person who was lying down dead near his house. It was made to a person not in authority over the appellant. It was in law admissible and was rightly admitted. Further, the appellant said in his defence that the deceased was his friend. There was evidence from Nyambura that the deceased had given accommodation to the appellant in his house previously. At the material time, they were neighbours. In those circumstances, it is hard to understand why the appellant after talking to Karani decided to lock himself up in his house when more people went to the scene and refused to open the door to join the people who were outside his house seeing the deceased. Mwai said the appellant said from inside his house that he would not come out and later the appellant threatened the people at the scene telling them to wait for him outside there. Again, in his evidence in chief, he did not deny that evidence of Mwai. In cross-examination he said that he had disagreed with Mwai as Mwai's goats had invaded his shamba. He however agreed that that disagreement was minor and was in 1999 and they had patched up so that they were friends as at the time of the incident. Why then did he not want to see the deceased and why threaten those at the scene? Lastly, as the learned Judge found, a weapon suspected to have been used in the incident was in his house. All these are circumstances that were before the trial court

We have analysed the evidence as above. It is true the evidence was all circumstantial. Nobody saw the appellant inflict the fatal injuries. In the case of **REX VS KIPKERING ARAP KOSKE & ANOTHER (1949) 16 EACA 135** the predecessor to this Court stated as follows:

**“As said in Wills on “Circumstantial Evidence” 6<sup>th</sup> edition p. 311, “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”. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”**

We have analysed the evidence adduced in the trial court and evaluated it afresh as is evident above. We have perused the learned Judge's judgment. With respect, we cannot fault his analysis and evaluation of the evidence that was before him. We have also considered the same evidence, guided by the principles enunciated in the case of **Rex vs. Kipkering Arap Koske & another** (supra) and restated in **Simoni Musoke v. R [1958] EA 715**. We have come to our own independent conclusion that the evidence, though circumstantial, irresistibly points to only the appellant as the person who murdered the deceased and that there are no co-existing circumstances to weaken or destroy that inference. The appellant himself told Karani that he beat up the deceased because the deceased was playing around with him. He knew in what way the deceased was playing around with him, but that was the motive for his killing him. From the evidence of Don Munano Gikonyo and the entries in the post mortem form, the appellant inflicted deep penetrating wounds next to the eye, a fracture on the right mandible, deep wound and fracture of the bone behind the ear, deep wound on the back of the head and fracture of the left hand

which left the last finger hanging. All these injuries point at a person who intended to cause grievous harm to the deceased or to kill him. Thus, *mens rea* was proved.

In the result, considering the evidence that was adduced in the trial court afresh, analyzing it and evaluating it, our conclusion is that the learned Judge arrived at the inevitable conclusion that the appellant committed the offence charged and we decline to disturb his judgment which will stand.

For the above reasons, the appeal is dismissed.

**Dated and delivered at Mombasa this 20<sup>th</sup> day of July, 2007.**

**S.E. O BOSIRE**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**