



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 251 OF 2005

NGORIANYANG KINYANG APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya

Kitale (Lady Justice Karanja) dated 26th September, 2005

in

H.C.CR.C. NO. 11 OF 1999)

JUDGMENT OF THE COURT

The appellant *Ngorinyang Kinyang* was jointly charged with one *William Pkemoi Kamolo* (co-accused) before the High Court at Kitale with murder contrary to *section 203* as read with *section 204* of the Penal Code. They were alleged to have murdered one *Michael Priot Kamolo* during the night of 15th and 16th July, 1998 at Kangilikwan village, West Pokot District. After the trial with the aid of assessors, the superior court (Wanjiru Karanja, J.) recorded a finding of not guilty under *section 306 (1)* of the Penal Code in respect of the appellant's co - accused. The superior court however convicted the appellant and sentenced him to suffer death.

The deceased was a relative of *Teresa Chebet Terer* (PW2), (Teresa) and was at the material time living in her kitchen. He was working as casual labourer in the neighbourhood. He was living in the kitchen with one *Jacob Loitareng Cherekeng Kemoi* (Jacob) (PW3) who was employed by Teresa as a herdsboy. The appellant comes from Kolowo but had been living with the relatives of Teresa in the neighbourhood for a long time. He used to sleep in the house of *Regina Chebochok alias Chesoton* (PW4), (Regina), an old woman, but used to go to the house of one Chebet for meals. Regina had only one key to the house which both Regina and the appellant used to share.

On 15th July, 1998 at bout 5 p.m. the deceased and Regina left for a drink in the neighbourhood.

Regina left the appellant in her house. She also left the key to the house with the appellant. The two went to the house of **Helen Chemutai** (PW5), (Helen) where they bought chang'aa. Regina drunk two glasses of changaa and got so drunk that she could not walk. She slept in the house of Helen. The deceased however went back home at about 9 p.m. Teresa heard him singing a Christian song as he walked home. He went to the kitchen and Jacob told him that there was no food. Thereafter, he went to the house of Teresa to borrow some salt but he was told that there was salt in the kitchen. The deceased left saying that he was going to borrow salt from Chebet, his aunt, who lives in the neighbourhood. The deceased did not return home on that night. When Regina returned to her house the following morning at about 7 a.m. she found her house locked. She went to look for the appellant and found him in the house of Chebet taking tea. The appellant gave her the house keys. She went to the house, opened the door, took a bag and locked the house; gave the keys to the appellant and she went to the shamba. Meanwhile, Teresa went to the appellant's house in the morning. She found the appellant standing outside the house and asked him whether he saw the deceased on the previous night. The appellant denied seeing the deceased.

As Teresa was walking away, she saw a trail of blood stains coming from the house. Later Regina found the appellant on the way as she was coming from the shamba at about 4 p.m. She asked appellant for the keys to the house. They walked together to the house and the appellant gave her the keys to the house. When Regina opened the door, she saw blood at the door and on the walls. There was also blood in a kimbo tin. He asked the appellant where the blood had come from. The appellant said he did not know. Meanwhile Teresa who was taking her cattle home in the evening, heard Regina questioning the appellant about the blood and entered into the house. She also saw blood at the door and in the house. The mattress used by Regina, the blanket and two cow hides therein had also blood stains. On the morning of 17th July, 1998, Jacob saw a trail of dragging leading from the house where the appellant used to sleep to an ant-bear hill in the nearby bushes where soil had been freshly dug and compressed.

The disappearance of the deceased was reported at Kapenguria Police Station. On 17th July, 1998 *Cpl. Leonard Osewe* (PW9) visited the scene. He noticed blood in the house and collected the blood stained items. He also noticed a trail-drag marks which started at the door step of the house to a freshly dug grave in the nearby bushes. Later he obtained an exhumation order from Kapenguria Magistrate's Court. On 23rd July, 1998 he went to the grave accompanied by a Doctor. The grave was dug up and the body of the deceased recovered. His two legs had been severed below the knee with dramatic amputation of tibia and fibula of both legs apparently to make the body fit into the shallow ant-bear hole. There was a deep cut on the right side of the head towards the brain. The cause of death was diagnosed as due to cardio-pulmonary failure due to severe head injury. The appellant disappeared from the area. He was arrested in West Pokot about 3 weeks later.

The appellant made a short unsworn statement at the trial, merely stating that he did not know anything about the charge and further that he had gone back to his home to take money and maize to his children.

The trial Judge considered the evidence and the law and concluded:

“So were the circumstances in this case incompatible with the accused person's innocence? To start with, it is noted-and this has not been disputed by the defence that the accused and PW4 used to sleep in the same house. The evidence on record also shows that they had only one key to that house which key used to be in the custody of either the accused or PW4. There is no evidence whatsoever that there was any key to that room or that the said key was even left in the custody of a 3rd person. On 15th July, when PW4 went drinking with the deceased, she locked her house and left the key with the accused herein. There is uncontroverted evidence that she did not go back home that night. She did not therefore have access to that room. It was only the accused person and nobody else who had access to that room on 15th July, 1998. Indeed when PW4 came back from her drinking spree the following morning, she found her house still locked and to gain access, she had to get the keys from the accused. It is evident therefore, that the accused still had total and unfettered access to the said room to the exclusion of any other person. Nobody would gain access to that room without the accused allowing him entry into that house/room. There is no evidence whatsoever that the door or padlock to that room had been broken

that night to enable a stranger to have access into the house. Whatever happened inside that house on the night of 15/7/98 happened with the full knowledge and participation of the accused. He must be and indeed was the one who opened the door to let deceased into that room. I have made a finding earlier on that the deceased was killed inside that house and his body dragged from there into the bushes where it was buried. The accused is the one who had the keys the following morning so he must have locked the room after the body of the deceased was dragged out into the bushes. He was therefore part and parcel of what happened inside that room.

These circumstances point to only one logical conclusion. That it is the accused person either on his own or in company of others who killed the deceased inside the house where he had exclusive access and dragged him into the bushes where they buried him”.

There are five grounds of appeal but the 1st, 4th and 5th grounds do not raise any specific question of law or fact. The second ground is to the effect that the trial Judge erred in law and fact in finding that the prosecution had proved its case beyond any doubt which was not the case. The 3rd ground questions the finding of the trial Judge that the deceased was killed inside Regina’s house.

This being a first appeal, it is incumbent upon the Court to make an independent evaluation of the evidence and draw its own conclusions while recognizing that it has not had an opportunity to see or hear the witnesses itself and giving allowance for that (see ***Okeno v R*** [1972] EA 32, ***Nguli v Republic*** [1984] KLR 729).

It is also trite law that in order to justify a conviction depending exclusively upon circumstantial evidence the court must be satisfied not only that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of guilt of the accused but also that there are no co-existing circumstances which may tend to weaken or destroy the inference of guilt. (See ***Simon Musoke v R*** [1958 EA 715; ***Mkendeshwo v Republic*** [2002] 1 KLR 461).

The conviction of the appellant in this case was exclusively dependent on circumstantial evidence, a fact that the learned trial Judge fully appreciated. The question is whether the circumstantial evidence relied on was so cogent as to prove the guilt of the appellant beyond any reasonable doubt. It was submitted on behalf of the appellant that it was dangerous on the part of the trial Judge to rely on the evidence of Teresa (PW2), Jacob (PW3) and Regina (PW4) because their evidence had some contradictions.

We have restated the evidence above. It is clear from the excerpt of the judgment of the superior court that we have quoted above, that the trial Judge dealt with the evidence with circumspection and considered all the relevant circumstances. There was ample evidence from Teresa and Jacob that the deceased returned home drunk on the evening of 15th July, 1998 and shortly left saying that he was going to look for salt from Chebet - a neighbour. There was also evidence that Chebet used to give the appellant food although the appellant used to sleep in the house of Regina. The evidence of Regina that she left the appellant in her house with the key and that she slept in the house of Helen Chemutai (PW5) on the material night was consistent. Helen Chemutai testified at the trial that Regina slept in her house on the material night. Regina testified that when she returned to her house in the morning it was still locked and she had to get the key from the appellant to open the house. There was overwhelming evidence from ***Julius Kamomai Masinyang*** (PW1); Teresia, Jacob, Regina and Cpl. Leonard Osewe that the walls of the house and the beddings in the house had blood stains.

Lastly, there was ample evidence from Jacob, Teresa and Cpl. Leonard Osewe that there was a blood trail and “*drag marks*” from the door step to the grave in the bush which trail was graphically shown in the diagram drawn by Cpl. Leonard Osewe. It is true, as found by the trial Judge, that there was no forensic evidence that the blood stains found on the walls and on the beddings was that of the deceased. Nevertheless, there was credible evidence that there were blood stains outside the house and a well marked trail, *drag marks* or a track leading from the door step to the grave, about one kilometre from the house, where the body had been buried in a shallow ant-bear hole. There was also blood in a tin inside

the house. From all the circumstances, the trial Judge, made a correct finding that the blood was of the deceased and that the deceased was killed in the house belonging to Regina and his body dragged from the house up to the bushes where it was buried.

The evidence of Regina that she had left the appellant inside her house on the evening of 15th July, 1998 and that the appellant had the sole custody of the key to the house was not challenged by the appellant. Indeed, the appellant did not offer any explanation at all prompting the trial Judge to make the following apt observation:

“In our case, it is only this accused who can explain how the deceased gained access into the house to which only him (the accused) had the keys. It is only the accused who can explain how the deceased died inside that house and how he was removed from the house and dragged into his grave. It is only the accused who can explain how the house was locked again and he remained in custody of the keys until the following day when he gave them back to PW4. In the absence of these explanations, the court is justified to make an inference that it was the accused person who killed the deceased”.

The trial Judge considered whether there were co-existing circumstances which could weaken or destroy the inference of guilt from circumstantial evidence and found none.

On our own evaluation of the evidence, we are satisfied that the circumstantial evidence against the appellant was watertight and justified an inference that he participated in the murder of the deceased. The conduct of the appellant of disappearing from the area immediately the murder was uncovered and remaining away until he was arrested about 3 weeks later supports that inference (see Malowa v The Republic [1980] KLR 110).

In the result, the appeal has no merit and we dismiss it.

Dated and delivered at Eldoret this 21st day of September, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR