



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 315 of 2006

JAMES NGUGI NJOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction & judgment of the High Court of Kenya

Nairobi (Ombija, J.) dated 3rd August, 2006

in

H.C.C.R.C. NO. 246 OF 2003)

JUDGMENT OF THE COURT

The appellant, *James Ngugi Njoki*, was charged before the superior court upon an information with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code respectively, particulars of which alleged that on *14th September, 2001* at *Limuru Town, Kiambu District of Central Province*, he murdered *Joan Mbaika Kithome*.

The circumstances of the alleged offence are puzzling as they are bizarre. The deceased in this case is *Joan Mbaika Kithome*. She was the appellant's lover. On *13th September, 2002*, the appellant went to collect her from her sister's residence at *Limuru*. The time was between *7:15 and 7:20 p.m.* The appellant said he wanted to go with the deceased to his aunt's house, in *Buruburu*. There is no evidence on record that the two went to *Buruburu*. The deceased's sister, *Christine Mbithe Kithome (PW3)* advised the appellant that she expected her sister to be back by about *9p.m.* She never returned.

The next morning at about *9 a.m.*, the deceased's body was found in the appellant's house. The body had multiple stab wounds. *George Mungai Jambo (PW1)* testified that on that day the appellant went to see him at about *9 a.m.* He (appellant) wanted an elasto-plast bandage from him. *PW1* was a shop keeper and the appellant went to see him at his shop. *PW1* and the appellant were friends. He used the bandage to cover cut wounds on his fingers. It is apparent from the evidence that the wounds were fresh as they were then bleeding.

The appellant asked *PW1* to go to his house as something unusual had happened there, which *PW1* did.

Using the keys the appellant had given him, *PW1* opened the former's house. On the floor of the house he saw a plastic bucket with blood. Earlier as he was opening the door he observed that the door handle was blood stained. There was blood on the floor, on a coffee table, and on a sofa set. *PW1* saw a person sleeping on a bed. A closer observation revealed that it was the deceased, but she appeared motionless. He knew her to be the appellant's girlfriend. He called her by name but she did not answer. He observed stab wounds on her face, chest and thigh. There was a blood stained kitchen knife at the bedside. Blood was splashed all over the bedroom. The bed was disturbed "as if there was a fight". The deceased was half covered with a blanket and her upper body was naked. The house, a flat, was on the 3rd floor of the building which had several other flats. *PW1* thereafter ran downstairs and called neighbours and the deceased's mother, one ***Adoline Mueni Kithome*** (*PW4*). The police were also informed who immediately went to the place and collected the body after scenes of crime personnel had taken pictures of the deceased's body.

The appellant was arrested the same day from a Nairobi bound matatu reg.No. KAN 042U. He had an apparently freshly cut wound on one of his fingers. ***Police Constable Jackson Ngera*** (*PW12*) effected the arrest. He was later charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.

The prosecution case was wholly based on circumstantial evidence. The appellant denied he killed the deceased, and in an unsworn statement he stated, in his defence, that on 14th September, 2001, he woke up at about 7:30 a.m., had breakfast and left his house at about 8:30 a.m. The deceased had spent the night there. He left her behind. He told her he was proceeding to Nairobi to purchase shop goods for his shop at Limuru. He left a neighbour, one Karagi, washing the verandah floor. He passed through his shop to collect a stock list of the things he wanted to buy. He left the shop at about 9:30 a.m. He thereafter boarded a Matatu and travelled to Nairobi reaching there at about 10:30 a.m. He bought the items he wanted and took another matatu back to Limuru. He was however arrested before he reached Limuru. He was beaten up, his money and shop goods were taken along with receipts for the goods he had bought. While in police custody he was tortured to confess to killing the deceased and was later made to sign a statement whose contents he was unaware of. He was later charged as aforesaid.

The appellant's case was heard by Ombija, J. who found as fact that the appellant and the deceased were lovers; had spent the night together in the appellant's house on the material night of the alleged murder, had a rocky love relationship; both had fresh cut wounds on their bodies apparently caused by a sharp object and there was a blood stained knife next to the deceased's body stained with blood of a group B secretor. He also found as fact that the deceased's blood group was B, and that of the appellant was group O, and that the appellant's pair of shorts and pair of trousers, both which were found in his house, had blood stains of a group "O" secretor.

After considering all the evidence the learned Judge concluded that determination of the appellant's case depended on credibility of witnesses, and in his view the appellant killed the deceased. He had the opportunity, the motive and the means to kill the deceased. He believed prosecution witnesses but disbelieved the appellant and rejected his alibi defence. He agreed with the assessors who returned a finding of guilty of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and thereafter proceeded to convict and sentence him for that offence. He thus provoked this appeal.

The appellant filed a home made memorandum of appeal with six grounds. His first advocate, Mr. Wamwayi, filed a supplementary Memorandum with twelve grounds, and his second advocate, Mr. Ondieki, filed a further supplementary Memorandum with leave and the same has 10 grounds. It is quite clear that most of those grounds are common. Mr. Evans Ondieki argued the appeal on behalf of the appellant on five broad grounds, namely:-

1. ***The evidence against the appellant being circumstantial, was not sufficient to sustain a conviction and merely showed that the appellant's Conviction was based on mere suspicion.***
2. ***The trial Judge improperly relied on accomplice evidence to convict the appellant.***

3. *Mens rea was not proved.*

4. *Hearsay was improperly admitted and relied upon and the totality of the evidence did not prove the charge of murder beyond any reasonable doubt.*

5. *Certain findings of fact by the trial Judge are inconclusive, more particularly his findings relating to the appellant's alleged presence at the scene of the murder.*

This is a first appeal, and on the authority of the case of *OKENO V. R. [1972] EA. 32* among other authorities on the issue, this Court is duty bound to reconsider the evidence, re-evaluate it itself and come to its own independent conclusions without losing sight of the conclusions of the trial Court. In doing so, the Court has to bear in mind that unlike the trial court, it did not have the advantage of seeing and hearing witnesses testify. This is more so, in this case in which the trial Court based its decision on credibility of witnesses.

Besides, it is quite clear from the recorded evidence that there were no eye witnesses. The case depended on circumstantial evidence, which is evidence of surrounding circumstances. The Court is obliged to examine all the evidence and be satisfied not only that the evidence irresistibly point to the appellant, to the exclusion of all others, as the person who killed the deceased, but also, that there are no co-existing circumstances which would weaken or destroy the inference of guilt. See *R. V. KIPKERING ARAP KOSKE 16 EACA 135* and *SIMON MUSOKE V. R [1958] EA 715.*

There is no doubt that the appellant and the deceased shared the appellant's house on the night before the deceased's body was found on the appellant's bed, dead. There is no doubt that the two were lovers.

As we stated at the beginning of this judgment the circumstances under which the deceased died are bizarre. The appellant went for the deceased from her sister's residence alleging that he wanted her to accompany him to his aunt's residence at Buruburu. *PW3* testified that the appellant promised to return the deceased on the same day namely, *13th September, 2001*, but he never did. Nor did the appellant go to Buruburu. Instead he went with the deceased to his house. What transpired between the appellant and the deceased is unknown. What is clear is that when *PW1* went to the appellant's house, the house was locked. It was a flat which was adjacent to other flats. The immediate neighbours never heard any commotion in the course of the night of *13th/14th September, 2001*, which would have suggested that the two had engaged in a physical fight. *Wanjiku Kinguri (PW7)* was categorical, that she never heard any screams during that night. Her house was only **9 metres** away from that of the appellant. It was quite close so that any slight commotion would have attracted attention. There was none according to *PW7*. *PW7* was at her residence on the morning of *14th September, 2001*. She was one of the people **George Mungai Njambo (PW1)** called to the appellant's house to see what had happened. It should be recalled that the appellant left his house at about **8.39 a.m.** According to his statutory statement in his defence, *PW1* found the deceased dead at about **9.15 to 9.30 a.m.** *PW7* testified that *PW1* called her at about **10.00 a.m.** But by the time *PW7* and other people went to the appellant's house the deceased had died much earlier than **9.00 a.m.** **Dr. Josephat Ndirangu Thiongo (PW11)** examined her body at about that time and in his view, death had occurred "**only a few hours before.**" This suggests that the deceased was not killed between **8.39 a.m.** and **9.30 a.m.**, the time, according to the evidence on record *PW1* had access to the appellant's house, alone.

Besides, the conduct of the appellant exonerates *PW1*. The appellant had told *PW3* he wanted the deceased to accompany him to Buruburu, but he never went there. Instead he went with her to his residence. The next morning he went to see *PW1* and surrendered his house key to him. Why did he do so? This was a matter peculiarly within the appellant's own knowledge. He had a duty under **section 111** of the Evidence Act to offer a reasonable explanation as to why he gave the witness his keys. He did not offer any explanation. The inference to draw from the circumstances is that he wanted to confuse the evidence to create an impression that somebody else could have possibly killed the deceased.

There are other circumstances which implicate the appellant. He had an injury on one of his fingers. His clothes had blood stains which matched his own blood. The deceased had several stab wounds all over

her body suggesting that she had displayed little if any resistance. The appellant did not accompany PW1 to his own house and instead left hurriedly. He was arrested on his way to Nairobi and not on his way to Limuru, as he alleged.

On the basis of the foregoing, we do not agree with Mr. Ondieki that the conviction of the appellant was based on mere suspicion, or that the circumstantial evidence left gaps in the prosecution case. Nor do we agree that PW1 was an accomplice. We have analyzed the evidence to show that his involvement was innocent. Clearly the appellant had a duty to explain how the deceased met her death, and having failed to do so and considering the circumstances as outlined above, it is clear that the appellant, and no other person, killed the deceased and he possessed the necessary *mens rea*. The number of stab wounds testify to this.

The evidence against the appellant is overwhelming and we agree with Mr. Kaigai, Senior State Counsel who agreed with the trial Judge that the appellant and no other person killed the deceased with the necessary malice – aforethought and was thus guilty of murder contrary to **section 203** as read with **section 204** of the Penal Code respectively. There are no co-existing circumstances to weaken or destroy that inference.

In the result, his appeal fails and is dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 14th day of December, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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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