REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CRIMINAL APPEAL 223 OF 2006

SAMUEL NDUNGU KAMAU …….……...…….…..…… 1ST APPELLANT

STEPHEN KAHENYA IRUNGU …….……...…… 2ND APPELLANT

AND

REPUBLIC ……..…….…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

Nairobi (Rawal, J.) dated 20th December, 1995

in

H.C.CR.C. NO. 136 OF 2004)

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JUDGMENT OF THE COURT

Samuel Ndungu Kamau, (1st appellant) and *Stephen Kahenya Irungu (2nd appellant)* have appealed to this Court against their respective conviction and sentence for the offence of murder contrary to *sections 203* and *204* of the Penal Code, particulars of which read as follows:-

"On the 3rd day of August, 2004, at Nyanduma Village in Kiambu District of the Central Province, jointly murdered John Murigi Kingu."

The two appellants were charged jointly with three other persons whose appeals are not before us, namely, *Jonathan Bwayo Lusese* (who was the *2nd accused*, *Peter Kamau Kiratu*, (the third accused) and *Peter Kibe Gathukia, (4th accused)*. The appellants were 5th and 1st accused respectively.

This is a first appeal. On the authority of ***PETERS V. SUNDAY POST LTD. [1958] E.A. 424***, we are obliged to re-evaluate the evidence and draw our own inferences on the basis of that evidence without overlooking the conclusions reached by the trial court. We must bear in mind our limitations on the matter because unlike the trial court we did not see or hear witnesses testify as to be able to appropriately assess their credibility. We must analyse the evidence because that is what an appellant would legitimately expect from us. – See also ***OKENO V. R. [1972] E.A. 32***.

The appellants' case depended wholly on circumstantial evidence, and their case was heard by Rawal, J. who heard the case with the aid of three assessors (as the law required then). The prosecution case was

short.

The deceased, ***John Murigi Kingu***, lived with his wife, ***Salome Wanjiru*** *(PW1)* in Nyandarua. The second appellant lived with them. He was employed by them as a farm hand, and was provided with a room within the deceased's house where he was putting up. The room had an independent door so that he did not have to pass through any other room in the house to access it.

On *3rd August, 2004*, the deceased and ***PW1*** went to sleep as usual. However, sometime in the middle of the night ***PW1*** went outside for a call of nature. The family was using a latrine and hence her going outside for a call. When she did so she noticed that the 2nd appellant was inside a separate house which the deceased and his wife used as a kitchen. He was roasting maize. ***PW1*** went inside to find out, and on realizing that the 2nd appellant was roasting maize she asked him to give her some, which he did. She went with the maize back to her bedroom, and according to her testimony, she shared the maize with the deceased. Shortly later the deceased also went outside for a call. No sooner had he returned than he heard the 2nd appellant calling him and asking him to go outside to meet one, Ndungu. Ndungu is the 1st appellant. It was ***PW1's*** testimony that she heard the 2nd appellant calling the deceased. The deceased obliged. He was then wearing a green vest, a pair of jeans shorts and slippers. That was the last time ***PW1*** saw the deceased alive. The deceased's body was on *5th September, 2004* exhumed from a shallow grave within his home. It was at an advanced stage of decomposition. However, it was possible to observe a deep transverse penetrating cut at the nape of the neck caused by a sharp object. The cut affected the head and the spinal cord and according to ***Dr. Moses Njue Gachoki*** who performed the post mortem examinations on the body, the injury caused the deceased's death.

In the meantime, when the deceased did not return to his bedroom, ***PW1*** went outside to find out what could have happened to him. She checked outside but did not see him. She went into the 2nd appellant's room to inquire from him where the deceased had gone to but did not find him there. As she was leaving the room, she met with the 2nd appellant coming in. She asked him about where the deceased was. The 2nd appellant replied that he had escorted the deceased to Nairobi; and that the deceased had said he would be back on *8th August, 2004*. That was not true and ***PW1*** suspected as much. She demanded to know how he would have travelled to Nairobi in a vest. The 2nd appellant told her that the deceased had borrowed clothes from Ndungu.

On *8th August, 2004*, the deceased did not return. ***PW1*** became anxious and notified close family members. Inquiries as to his whereabouts commenced. Nobody had heard of him. Police were contacted. Eventually, it was decided that a search be conducted within the precincts of the homestead.

Cpl. Tom Kisa Olodi *(PW7)* led the police team in the search. It was his evidence that ***Peter Kamau Kiratu*** *(3rd accused)* who was present during the search, pointed out a spot which was covered with firewood which appeared to have been recently dug. The place was dug up and the body of the deceased was found buried therein. The 3rd accused was as a result treated as a suspect and on that account he was charged jointly with other people for the murder of the accused.

In the meantime, the 2nd appellant disappeared. He sought employment elsewhere. The new employer likewise provided him with accommodation. His new employer lived in the Karaya area. The employer, ***Antony Kilingu Kungu*** *(PW3)* testified that the 2nd appellant was indeed his employee. ***Peter Gitau Kungu*** *(PW2)* was his brother and so was the deceased. ***PW2*** testified that on *22nd August, 2004* he met the 2nd appellant and observed that the clothes he had on were those of the deceased. He expressed a desire to report the matter to the police, but the 1st appellant, who was his uncle, persuaded him not to, arguing that the 2nd appellant was an orphan and that the proper thing was to report the matter to the 2nd appellant's employer. But soon thereafter the 2nd appellant disappeared. Police were notified. The 2nd appellant's residence was searched and a Co-operative Bank ATM Card and a passport, both belonging to the deceased, were recovered.

PW7 testified that on *25th August, 2004*, the 2nd appellant had allegedly attempted to rape ***PW1***, but she managed to flee from him. ***PW1*** did not however, testify on the issue.

That is the basic evidence tendered by the prosecution against the two appellants. Both appellants denied the offence. The 1st appellant gave his defence on oath, while the 2nd appellant made a statutory statement.

In his defence the 1st appellant denied the offence and merely narrated how the deceased's body was recovered and his subsequent arrest and arraignment in Court. He denied any knowledge as to how the deceased met his death.

The 2nd appellant on the other hand gave an account which varied from what ***PW1*** had testified about. He neither mentioned nor denied the account given by ***PW1*** that she had found him roasting maize in the middle of the night and that he had called the deceased and asked him to get outside to meet one Ndungu. In short he denied the offence.

The trial Judge did not believe both appellants. She believed ***PW1*** and ***PW2*** and on the basis of their evidence and the alleged recovery from the 2nd appellant's residence of the deceased's personal items and found both appellants guilty as charged. She was satisfied the inculpatory facts excluded all persons except themselves, as the people who killed the deceased. Likewise that there were no co-existing facts or circumstances which could destroy or weaken the inference of guilt. She therefore convicted both of them and proceeded to sentence them to the mandatory death penalty as earlier on stated, and thus provoked this appeal.

Mr. Kaigai, Senior State Cousnel, conceded the appeal against the first appellant, quite properly so in our view. In his view, which we agree with, the 1st appellant's conviction was based on mere suspicion. True, he urged ***PW2*** not to report the 1st appellant to the police concerning his possession of the deceased's property. That alone is not evidence connecting the 1st appellant to the killing of the deceased. In the circumstances, his conviction was based on insufficient evidence and we accordingly quash it and set aside the sentence of death imposed upon him.

Regarding the 2nd appellant he raised several grounds of appeal which we propose to deal with seriatim. The first one of those grounds is that the learned trial Judge did not comply with the provisions of ***section 306(2)*** of the Criminal Procedure Code. That provision relates to the need for the Court to explain to an accused his rights if, as happened here, the Court is satisfied that sufficient evidence had been adduced by the prosecution to show that the accused person committed the offence charged. Miss Sirma, for the 2nd appellant, did not however pursue this ground when we pointed out that indeed the Court complied with that provision of the law.

She did not also pursue the second ground which relates to the alleged failure by the trial Judge to give a ruling as to whether a prima facie case had been made out to require the 2nd appellant to defend himself.

The third ground is that the appellant was not presented to the Court within the period stipulated under ***Section 72(3)(b)*** of the Constitution. The sub-section provides, in pertinent part as follows:-

"***73(3) A person who is arrested or detained –***

(a) ……

(b) Upon reasonable suspicion of his having committed, or being about to commit a Criminal Offence, and who is not released, shall be brought before a Court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has

been brought before a Court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

The complaint that the 2nd appellant was not brought to Court promptly was raised before us for the first time. This Court has only appellate jurisdiction with regard to criminal and civil jurisdiction. The provisions of ***section 72(3)(b)*** above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under ***section 84*** of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual proposition. When such a complaint is raised for the first time before this Court, it may not be possible to investigate the truth or falsity of the allegation. That being our view of the matter this ground fails, more so when it does not relate to the question whether or not the 2nd appellant alone or together with other persons not before us, committed the offence he stands convicted of.

The fourth ground is that the trial Court failed to make a finding as to whether the deceased was killed with the necessary malice aforethought. The nature of the injury inflicted on the deceased clearly showed that whoever inflicted it intended either to cause grevious harm on him or to kill him. We say no more on that ground. It fails.

Grounds five to eight relate to findings of fact and we propose to deal with them. The evidence against the 2nd appellant is overwhelming. The behaviour of the appellant, ***PW1,*** and the deceased on the material night the deceased disappeared was quite strange. ***PW1*** and the deceased woke up to go for a call. They found the 2nd appellant roasting and eating maize. They decided to also have a share of the maize. It appears strange to us that an adult person can wake up in the middle of the night and his appetite would drive him to eat at that hour. Be that as it may, the 2nd appellant who was represented by counsel did not challenge that story. We have therefore no basis for disbelieving it, strange though it may be.

It is also in the evidence of ***PW1*** that the 2nd appellant called the deceased outside to meet one, Ndungu. The trial judge believed ***PW1*** on this aspect and also that the 2nd appellant told ***PW1*** that he had escorted the deceased to Nairobi. The appellant did not deny he met with ***PW1*** as she was leaving his room. Nor did he challenge her on her account that he told her about escorting the deceased to Nairobi. In those circumstances, it is quite clear that the 2nd appellant was the last person who was with the deceased when he was last seen alive. It was therefore his legal duty to explain where they parted company or how he met his death. A rebuttable presumption is raised under ***Section 119*** of the *Evidence Act* that the 2nd appellant alone or in conjunction with persons unknown killed the deceased. The 2nd appellant was duty bound to offer a reasonable explanation on the matter. ***Section 111*** of the *Evidence Act* places that duty on him. The 2nd appellant did not offer any explanation on the matter. In the circumstances we are satisfied that he was properly convicted of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.

Accordingly the 2nd appellant's appeal fails and it is dismissed in its entirety.

The 1st appellant shall be set at liberty forthwith unless otherwise lawfully held.

Order accordingly.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR