



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 224 OF 2005

JOHN MUCHIRI GATHUMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nyeri (Okwengu J) dated 14th February, 2005

in

H.C.Cr. Appeal No. 127 of 2003)

JUDGMENT OF THE COURT

The appellant, John Muchiri Gathumbi, was arraigned before the High Court, at Nyeri, jointly with five others whose appeals if any, are not before us, with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and upon trial with the aid of assessors, that court (Okwengu, J) found him guilty of that charge, convicted him and thereafter sentenced him to the mandatory death penalty. He now appeals to this Court against both conviction and sentence.

This being a first appeal we are duty bound to re-evaluate the evidence, and draw our own conclusions in deciding whether the judgment of the superior court should stand, and in doing so, we are obliged to weigh conflicting evidence and come to our own conclusions on the matter. [see **Okeno v R. 1972 E.A. 32**]. It is also trite law that since we did not have the same advantage as the trial judge to hear and see witnesses testify, we are obliged to take that fact into account in assessing the evidence.

The deceased’s name in the matter before us was given as John Maina Kamau (deceased). He hailed from Kamakwa Village, Kiruri Location, Muranga District of Central Province. The prosecution case as presented to the superior court was, that the deceased left his home on 26th October, 2003, at about 6.00p.m. and went to visit his aunt one Abigail Mugure Gachara. He left his aunt’s residence at about 8.30 p.m. intending to return to his home, but he never reached there. His wife got concerned about his whereabouts, and decided to notify the deceased’s brothers who in turn reported the matter to the police. Police enquiries yielded no fruitful results.

David Kamau Matheri (David) testified before the superior court that he was walking to his home on 26th October, 2003, at about 11p.m when he met a person standing close to a fence near the appellant’s

house. Using torch light from a borrowed torch he was able to identify the person as Daniel Gathumbi Ndiya, and this person was later jointly charged with the appellant and four others with the murder of the deceased. He was the 1st accused, and we shall hereafter refer to him as such. 1st accused is the father of the appellant. It was further David's evidence that he did not talk to the 1st accused. As he continued walking he met two people carrying some luggage over their shoulders. He was not able to identify them visually, but he testified that he was able to identify the appellant by voice as one of the two people. David testified that he identified the voice when the said person greeted him thus – “**HI**”. These two men never uttered any other words. There were two other men following them who were illuminating their path with torches. David did not talk to them nor did they say anything to him. David testified that he saw all those people head towards the appellant's house which was nearby. He did not know what was being carried, but his suspicion was that it was stolen property.

By 6th November, 2003, the deceased had not been found, dead or alive. David testified that on that day at about 9.00a.m, he met the appellant near Kinyanyaini Secondary School, drunk. He was surprised that while the whole village was involved in the search for the deceased, the appellant showed little if any concern on the matter, and he decided to enquire from the appellant why he was not joining in the search. The appellant was allegedly drunk. In his drunken state, the appellant allegedly whispered to him that he (the appellant) and others had killed the deceased and buried his body in the appellant's house. David later reported this to Amos Kimani Kirikiri (Amos), who in turn reported the matter to John Matheri Mukono (John), the Assistant Chief of the area, who in turn reported the matter to the police at Kangema Police Station.

The appellant was arrested on 8th November, 2003 at about 10.00 p.m. along with his brother, Benson Chiuri Gathumbi, who was 3rd accused at the trial. Inspector of Police Joseph Muli, (Joseph), the then Officer in Charge, Kangema Police Station, effected the arrest, accompanied by other police officers. Joseph testified that he had earlier received a report about the deceased's disappearance, had made every effort to trace his whereabouts, in vain, and that it was Amos who reported to him that the deceased had been killed and his body buried in a certain house. He led the appellant to his house, which he found locked. The appellant upon request produced the keys which were used to open the house in the presence of the appellant. He witnessed the exhumation of the deceased's body from inside the appellant's house which was single roomed.

Amos and John, like Joseph, testified that they were present when the deceased's body was exhumed from inside the appellant's house. John added that he knew as a fact that the appellant and his wife resided in that house. Amos on the other hand testified on this aspect, that he saw the appellant produce the keys to his house which he handed over to the Assistant Chief who used the same to open the house. He witnessed the recovery of the deceased's body.

The deceased's body was later examined by Dr. James Njiru, a medical doctor then attached to Muriranga Sub-District hospital, in Muranga, who found and noted that the body had a rope tightly tied round its neck, a large gaping fracture on the forehead with rotten brain exposed, the tongue was protruding out of the mouth, genitalia was swollen, and other superficial bruises over the forelimbs. In his opinion, the cause of death was head injury and suffocation.

The appellant's co-accused were arrested, and at the conclusion of investigations, they were jointly charged with the murder of the deceased.

At the conclusion of the prosecution case, the appellant, his brother and their father were put on their defence. The other three co-accused were acquitted as no prima facie case had been made out against them to warrant calling upon them to offer their respective defences. As only the appellant was eventually convicted, it is only his defence which is relevant in this appeal.

The appellant's defence was an *alibi*. He stated that on the material date and time he was at his place of work at Juja, 70 kms away from his home, and he never left the place until 8th November 2003, when David, telephoned and requested him to return home urgently, which he did. On arrival, he was arrested

in connection with the death of the deceased. He denied killing the deceased and stated that he was framed by David in this matter. It was his case that he had left the keys to his house with David, whom he had left to take care of his home and to harvest his tea. In effect, the appellant was saying that if any explanation was needed regarding the presence of the deceased's body in his house, David was the right person to offer such explanation.

Okwengu J, in her judgment, rightly held that the prosecution case was based wholly on circumstantial evidence. Relying on the case of **R. V. Kiperung arap Koske and Another [1949] 16 EACA 123**, the learned Judge held that all the facts proved and circumstances surrounding them pointed irresistibly to the appellant as having participated in the killing of the deceased and concealment of his body in his house; that the circumstances were such that the death of the deceased could be presumed to have been deliberate and intentional on the part of the appellant jointly with other persons. She rejected the appellant's *alibi* and statement that he had left the keys to his house to David, and relying on the respective testimony of Amos, John and Joseph, she held that it was the appellant who all along had the keys to his house. She then proceeded to convict the appellant and to sentence him as earlier on stated. This appeal was thereby provoked.

It is now well settled that in a case depending exclusively upon circumstantial evidence, the court, must first be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of guilt, before entering a conviction. [**Simon Musoke v R. 1958 EA. 715**]. The Court must also be satisfied that there are no co-existing circumstances to weaken the inference of guilt.

In this appeal, the appellant has presented five grounds of appeal, but his counsel Mr Gacheru condensed them to these three.

- (1) The learned Judge of the superior court erred in holding the appellant was identified by his voice.**
- (2) That she erred in finding that the appellant had the keys to his house when in fact he had explained that he had left the keys with David.**
- (3) She erred in relying on David's evidence regarding the appellant's alleged confession of the murder to him, contrary to section 25 of the Evidence Act, Cap 80 Laws of Kenya.**

There is no doubt that the deceased died on or about 26th October, 2003. There is no dispute that his body was recovered from the appellant's house where it was found buried. There is no dispute that no one saw the deceased being killed, and that the prosecution case is exclusively based on circumstantial evidence. The learned trial Judge having expressly rejected David's evidence regarding the appellant's confession to the deceased's murder, we find no necessity of alluding to that evidence. Besides, it is our view that the learned trial judge did not place much reliance on the alleged identification of the appellant by voice. Besides, as rightly submitted by Mr. Gacheru for the appellant, one word uttered, may not provide sufficient exposure to the witness to facilitate a correct identification. So the crucial question that remains is whether indeed it was the appellant who produced the keys to his house at the time the deceased's body was recovered therefrom.

Two witnesses testified on this aspect of the case. Amos testified that "Muchiri produced keys to his house and gave [them to] the Assistant Chief". Joseph stated that "I asked him (appellant) for the keys which he produced. I gave the keys to Assistant Chief who opened the door". This evidence has to be considered against what the appellant said. The appellant stated that he did not have the keys with him. The keys were with David whom he had asked to take care of his home. The learned trial Judge believed Amos and Joseph. The appellant laments that she should have found that the key had been with David. Should the trial judge be faulted on her finding on that aspect? To answer that question, one must look at the proceedings. The appellant was represented by counsel during his trial. None of the witnesses who testified about the keys was asked any questions on them. Besides, no questions about the keys were put to David whom the appellant said had been left with the same. Is it that the appellant forgot to advise his

counsel on the matter? Whether or not that was so was a matter specifically within his own knowledge, and he did not offer any explanation as to why witnesses were not questioned on that fact. We agree with Mr. Orinda, Senior State Counsel, that the issue was raised as an afterthought. The learned trial Judge was right in holding that the appellant had the keys to his house on the day the deceased's body was recovered from his house.

Mr Gacheru wondered why those keys were not produced as an exhibit. In our view nothing turns on that. It was sufficient that there were eye witnesses who saw the appellant produce the keys. A related matter we need to consider is the appellant's *alibi* defence. The appellant was categorical that he was at his place of work, at Juja, seventy kilometers away from his home, when the deceased was killed. The law is well settled, that an accused assumes no burden of proving his *alibi*. It is the duty of the prosecution to dislodge it. The prosecution adduced evidence to show not only that the deceased was killed, but also, that subsequently, his body was found buried in the appellant's house. We have already held that the appellant produced the keys to his house on the date the body was recovered. We also held that because he did not suggest to David that he had the keys to that house during the material period, only the appellant in the circumstances had the duty of explaining the presence of the deceased's body in his house. It is a duty or burden which is cast upon him under **section 111** of the Evidence Act.

Section 111, above, as material to this case provides:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him”: [Emphasis Supplied]

The appellant's explanation that he had left the keys with David, is in the circumstances of this case not reasonable and it is clearly unbelievable. It is incomprehensible, if what he said is true, why he did not raise the matter when he was given an opportunity to cross-examine David. It was such a fundamental factor which ordinarily no reasonable person would overlook. As we stated earlier, the appellant was represented by counsel. Yet the issue was not raised until the appellant testified in his defence.

It is our view, and we so hold, that the appellant's *alibi* was properly rejected and we have no basis for faulting the learned trial Judge on that.

The appellant having failed to explain how the deceased's body came to be buried in his house a presumption of fact under **section 119** of the Evidence Act, arises, that the appellant alone or in conjunction with other persons, unknown, killed the deceased. In absence of any explanation to rebut that presumption we, like the trial Judge, hold that the appellant was party to the killing of the deceased.

As regards malice aforethought, the learned Judge held that it was inferable from the circumstances. We agree and ourselves add, that the degree and nature of the injuries which were noted on the deceased's body and the fact that there was a rope tightly tied round his neck is clear evidence of a premeditated and intentional brutal killing of the deceased. Besides there was bad blood between the deceased and the appellant's father arising from a pending assault case before a Muranga Court.

In the result, we come to the conclusion that the appellant was properly convicted and the sentence meted out is a lawful one and it is the only one stipulated under the law for murder. We accordingly, dismiss this appeal in its entirety.

Dated and delivered at Nyeri, this 4th day of August, 2006.

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

P.N.WAKI

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR