



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAKURU

(CORAM: TUNOI, O’KUBASU & WAKI, J.J.A.)

Criminal Appeal 248 of 2004

BETWEEN

GODFREY OKUMU OPAPA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

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

Nakuru (Lady Justice Ondeyo) dated 20th January, 2003 in

H.C.C.R.A. NO. 22 OF 2001)

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JUDGMENT OF THE COURT

The Assistant Deputy Public Prosecutor, Mr. Gumo, does not support the conviction in this appeal, and, we think, he is right to concede.

In the early hours of 23rd August, 2000 the body of **Patrick Lumumba Fadamula** (hereinafter “**the deceased**”) was found floating on river Kipsonoi in Litein area of Buret District. It was taken to Lazarus Funeral Home in Kericho where a postmortem was conducted by the Medical Officer of Health Dr. Makokha (**PW4**). The pathologist found a sisal string tied round the neck four times and she performed a thorough examination of the body internally and externally. She came to the conclusion that the cause of death was severe hypoxia (lack of oxygen) as a result of strangulation with a sisal string which fractured the upper trachea. There was no direct evidence on how the deceased ended up in Kipsonoi river, or how he died.

The deceased was an employee of M/s. Njoro Canning Company, at their Litein Branch and he had possession of the company vehicle, a Toyota Pick-up Reg. No. KAK 482H. Only six hours earlier on 22nd August, 2000, the deceased was enjoying drinks with his friend **Godfrey Okumu Opapa** (hereinafter “**the appellant**”) at Members Bar in Litein town. Between them they drank five beers each between 7 p.m. and 10 p.m. when they both left. At about midnight the vehicle, KAK 487H, was seen by David Kipngetich Bett (**PW2**) on the Litein/Kapkoros road near Litein town. It had rammed into a sign-post off the road and was stationary, though its engine was still running. **PW2** stopped to find out if anyone was injured but whoever was in the vehicle said no one was injured, and so **PW2** left. The vehicle was next

seen at about 4 a.m. on 23rd August, 2000 by policemen on night patrol, parked in the middle of the road at Shabab Estate in Nakuru. It was towed to Nakuru Divisional CID Headquarters.

At about 7 a.m. the same day, information came to the D.C.I.O.'s office from Nakuru Central Police Station that there was someone there making a report of a robbery. Cpl. Hamisi Alfani (**PW10**) was sent to that station and he found it was the appellant at the report office. He asked him why he went to the report office and the appellant told him that he and another person had been attacked by robbers who separated them, one group taking motor vehicle KAK 487H together with the owner of the vehicle, and the other group taking off with him in the robbers' vehicle. Cpl. Alfani then noticed some bloodstains on the appellant's jacket, trouser, and shirt and he immediately told him to remove them. He gave the appellant other clothes, arrested him and locked him up. Cpl. Alfani then went with scenes of crime personnel to the recovered vehicle and found more bloodstains on one door and one carpet of the car. He cut out the blood-stained areas. All the blood stained material were handed over by Cpl. Alfani to PC John Misoi (**PW8**) of Buret CID office, who was the investigating officer.

On 28th August, 2000, the appellant was examined by a doctor and was found to have small bruises on the head and neck, which were inflicted some four days or so earlier by a blunt object. He was at first charged with the offence of robbery with violence in Kericho *PMCC No. 2679 of 2000* but that case was withdrawn on 5th May, 2001. He was instead charged in the High Court with the murder of the deceased. His report that he and the deceased were the ones who were robbed was never investigated by the police. What was his story?

It is best taken from the appellant's own testimony in court, after he and the deceased left Members Bar in Litein at 10 p.m.:

***"We left together in his vehicle to go to our respective houses. We did not live in the same estate. We lived on opposite sides of the town.***

***He drove the vehicle. It was the two of us who were in that vehicle.***

***When we reached the Litein-Sotik junction, there was a vehicle ahead of ours which had stopped to give way to vehicles which were on the major road. We also stopped. Six people came from that vehicle which was ahead of ours and they had guns (two of them). The last had pangas and clubs. They attacked us to open the doors and to remain where we were sitting. We complied.***

***They forced us to sit on the floor of the car and we complied. They ordered us to removed all the money that we had as they checked our clothes. I had Kshs.10,450/= which they stole. All that took place for about two minutes and later four of those people removed me from the vehicle of the deceased to their vehicle. The other two remained with the deceased in his car. The four warned me against raising alarm or else, I would see.***

***They removed my shirt and tied my eyes with it. I did not know where they took me. I was sandwiched between two men on the back seat and there were another two in front. They drove the vehicle and I did not know where it was heading to. They spoke in Kikuyu and I did not understand what they said.***

***After a very long drive, they stopped the vehicle and someone pushed me out of the car. The car then drove off. It was 4.00 a.m. I untied the shirt and realized that I was on the outskirts of Nakuru. I saw a church, on which it was written Happy Church, Nakuru.***

***I telephoned police as there was a call box there. The officer on duty said that I should go to Central Police Station. It was about 4.00 a.m. I then walked upto Nakuru Police Station and reached the station before 6.00 a.m. I then made a report and recorded a statement to one police officer who said he was IP John Mwangi. They did not appear to be in a hurry to take action and they told me that I should go back there after seven days.***

***My report was that the deceased and I had been attacked in Litein and I had been robbed of Kshs.10,450/=. I then decided to go to CID when I saw that the police officer at the station were not bothered. I recorded a statement with Cpl Hamisi Alphan (PW10). Cpl. Hamisi then told me that I had blood on my clothes and I should remove them and I removed my coat and I removed it and gave it to him. He told me to sit there for some time so, I sat in the compound. After three hours, he asked me remove all my clothes for investigation. I then gave him a pair of trousers and shirt. I do not know if there was my blood on the shirt and trouser. The coat had blood stains on it.***

***When I went to the police station, I wanted them to investigate my robbery and kidnap report. It was surprised at the treatment I was given because I was arrested and accused of stealing a vehicle.***

***On 24th August, 2000 I was taken to Litein Police Station and I was interrogated by DCIO Bureti IP Danson Mwangi. I recorded a statement on how we were robbed, my cash stolen and how I was kidnapped by the robbers. On 4th September, 2000, I was brought to court and charged with the offence of robbery with violence. It was Kericho Criminal Case Number 2679/2000. Later on 5th February, 2001 that charge was withdrawn and I was charged with the present offence. I did not commit any of the two offences. I know nothing concerning this case”.***

The superior court, Ondeyo J, surmised correctly on the outset that the prosecution case stood or fell on circumstantial evidence. She therefore set out to establish whether the inculpatory facts put forward by the prosecution were incompatible with the innocence of the appellant and that they were incapable of explanation upon any other reasonable hypothesis than that of his guilt. Only two sets of inculpatory facts were put forward for consideration: firstly, that the appellant was the last person seen with the deceased when he was alive; and secondly, that the clothes of the appellant had stains which matched the blood group of the deceased. Upon analysis of the evidence, however, the latter category of evidence was discounted in the following finding:

***“According to the postmortem report (exhibit 1) the deceased did not suffer any cut wounds. The lacerations which the doctor found on the face and right side of the neck were in her view occasioned by insect bites. She also saw bruises on the forehead. A bruise is an injury with a discoloration but which does not break the skin, (See Collins Concise Dictionary at page 186). A bruise would therefore not lead to bleeding.***

***There is indeed no evidence to show that the deceased suffered any injury that led to bleeding. Even the postmortem report does not show that the clothes of the deceased had any blood on them at the time of postmortem. I am satisfied and I find that the blood found on the clothes of the accused at the time of arrest, was not in the circumstances of this case, the blood of the deceased person. The blood which was found in the vehicle of the deceased, when it was recovered, could also not have been the blood of the deceased person. I reach this finding in the absence of any evidence from the prosecution to show that the deceased suffered an injury that led to bleeding”.***

The only inculpatory evidence left was thus the fact that the appellant was the last person seen with the deceased which, without more, cannot sustain a conviction for the offence charged. So how was the appellant convicted for the offence?

After making the finding reproduced above, the learned Judge in the same breath stated:

***“I have earlier found that the fact that the clothes of the accused person were stained with human blood whose group matched (sic) that which was found in the vehicle of the deceased is evidence that the accused person was in that vehicle at the time when that blood was there. There is no evidence that as at the time the accused and the deceased left the bar, there was blood in that car”.***

And with that the learned Judge dismissed the robbery story as fabricated and proceeded to convict the appellant.

Learned counsel for the appellant Mrs. Ndeda submitted that there was no basis for the finding that the clothes of the appellant were stained with the blood of the deceased since the report of the pathologist discounted that possibility. The learned Judge had indeed made that finding. We agree. It was clearly erroneous for the learned Judge to make contradicting findings on the issue of bloodstains. It is however, plain to us that the first finding was well supported on the facts, and the learned Judge was therefore right in discounting the evidence on blood stains. It is also our view that the version of events given by the appellant presented a reasonable hypothesis that was incompatible with his guilt. If the police wanted to discount that hypothesis, it was incumbent on them to investigate the robbery report made by the appellant. They did not and there is therefore no basis for rejecting it outright.

For those reasons, we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Nakuru this 30th day of September, 2005.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**