



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, O’KUBASU & DEVERELL, J.J.A.)
Criminal Appeal 122 of 2003
BETWEEN

MOSES MASESI MBINDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

Moses Masesi Mbinda Uvyu, the appellant hereinafter, was tried before Mwera, J. with the aid of assessors on an information which charged him with offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the said information were that on the night of 12th and 13th November, 1994 at Ngaani village, Mbooni location in Makueni District of Eastern Province, the appellant, jointly with Patricia Mulekyo Mwololo, hereinafter Patricia, murdered Daniel Mwololo Musyimi, hereinafter the deceased. Patricia was the wife of the deceased and was charged with the appellant as accused number one. At the conclusion of their trial and after the learned Judge had summed up the case to the remaining two assessors, the said assessors found the appellant and Patricia not guilty of the murder charged. In his considered judgment dated and delivered on 9th November, 1999, Mwera, J. found Patricia not guilty and acquitted her; the appellant was, however, found guilty, convicted and sentenced to death. He now appeals to this Court against the conviction and sentence, and Mr. Ogesa Onalo, learned counsel for the appellant, set out a total of four grounds of appeal.

These are:-

- 1. THAT the learned superior court Judge erred on a point of law and in fact in convicting the appellant on unproved circumstantial evidence by relying on uncorroborated and unsubstantiated evidence of the prosecution witnesses.***
- 2. THAT the learned superior court Judge erred on a point of law and in fact in considering and admitting exhibits which ought not to have been admitted.***
- 3. THAT the learned superior court Judge erred on a point of law and in fact in failing to consider the alibi evidence tendered by the appellant.***
- 4. THAT the learned superior court Judge erred on a point of law and in fact in failing to consider lack of identification of the appellant.”***

Before we deal with these grounds, it would be appropriate for us to set out brief background facts underlying this appeal. The deceased was, apparently, a primary school teacher and he lived with his wife Patricia and their children at Ngaani village. Among their children was Angeline Ndunge Mwololo (PW2). The deceased and his family lived in a house which had just been put up and was not yet

complete. The deceased owned a bicycle and it appears from the recorded evidence that on 12th November, 1994, the deceased had been out of his home and returned at about 8 p.m. PW2 said she saw her father return home at around 8.00 p.m. and she saw him park his bicycle against the sitting room wall where the bicycle was usually parked. Thereafter PW2 and her other siblings went to bed in their room and the deceased and Patricia went to their bed-room.

Thereafter it is not known what happened. PW2 said she was woken up at around 2.00 a.m. and on going outside the house, the body of the deceased was found lying at the door with deep cut wounds on the head. There can be no doubt from the evidence of Dr. Magdalene Njeri Kuria (PW7) that the deceased died from those wounds and it is equally clear that those wounds were inflicted by someone. The deceased's bicycle which, according to PW2, had been parked in the sitting-room was missing. Then, there was the evidence of Kiso Kieti (PW3) and his father David Kieti Ndotu (PW4). The effect of their evidence was that on 13th November, 1994 the appellant attempted to sell a bicycle to them. PW3 said he had been a pupil of the deceased and that he knew the bicycle of the deceased as on occasions he would help the deceased in pushing the bicycle to the school. The appellant had attempted to sell the bicycle to PW3 alone but when his father came home in the evening he (PW3) informed his father and also told the father that he (PW3) knew of the death of the deceased. The appellant was still around with the bicycle and PW4 chased him away. According to PW3 and PW4, they then reported the matter to the local assistant chief but it appears that officer did nothing about the report.

The next evidence came from Jackson Nzomo Mutiso (PW6) with whom the bicycle alleged to be that of the deceased was found. The evidence of that witness was that sometime in November, 1994, the appellant visited his home and offered him a bicycle for sale. The appellant wanted shs.1,500/- for the bicycle. He paid him Shs.800/- and they agreed that the balance of the money would be paid upon the appellant bringing to PW6 the permit for the bicycle. The appellant went away and PW6 did not see him again. On 23rd February, 1996 nearly two years after the deceased had been killed Inspector Francis Mwangi (PW10) arrested the appellant. According to PW10, the appellant told him where the bicycle was and on some date in March, 1996, Inspector Mwangi detailed Inspector Francis Kiprop (PW8) to go to the home of PW6. PW8 proceeded to the home of PW6, found PW6 and after a search, the bicycle was recovered in a store. PW6 was also arrested and was only released from custody after he explained to PW10 how he had come by the bicycle. The appellant also made a cautioned statement under inquiry to PW10 and that statement was admitted in evidence after a trial within the main trial as the appellant had contended that he had not made the statement but had been beaten into signing some blank papers. That was the sum total of the prosecution's evidence against the appellant.

Testifying on oath the appellant denied that he had offered to sell the bicycle to PW3 or that he had asked PW3 to keep it for him. He denied going to the home of PW4 and he also denied knowing PW3 at all. As respects PW6, he denied knowing him at all and he also denied having sold any bicycle to him. He never went to the home of the deceased and he could not, therefore, have killed him. As we have said the appellant denied ever making any statement to PW10 as that witness contended.

That was the state of the evidence on which the learned trial Judge, despite the advice of the assessors that the appellant was not guilty, convicted the appellant and sentenced him to death. We have already set out in full the grounds upon which the appellant asks the Court to reverse the learned Judge's decision and as we have seen the complaint in ground one is that the learned Judge was in error in relying on unproved circumstantial evidence which was uncorroborated and unsubstantiated. Is that complaint justified? It is true the evidence against the appellant was entirely circumstantial in the sense that none of the witnesses brought by the prosecution could or did testify that he or she saw the person or persons who attacked the deceased and killed him. Indeed all we have on record is that the body of the deceased was found outside his door, but how the deceased left the room and with whom or why he had left his bed-room was never known. The only person who had been with him in the bed-room was Patricia but as Patricia was charged jointly with the appellant the prosecution could not call her as a witness to explain the circumstances under which her husband left the bed-room. So no witness saw the person or persons who killed the deceased and the prosecution relied only on certain circumstances to prove that it was the appellant who had killed the deceased. That is what is called circumstantial evidence – i.e. relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the person charged who

committed the offence. The learned trial Judge appreciated this point for in his judgment he says:-

“..... Everything remains by circumstances - nothing direct .

In a criminal trial evidence should point to nothing else but the guilt of the accused. If it is not that watertight that circumstantial evidence is not good enough to found a conviction on”

There can be no doubt from the record before us that the learned trial Judge was fully aware of the requirements of law with respect to circumstantial evidence. Those requirements are now trite law and there is no occasion for us to rehash them herein or cite the numerous decisions of the courts thereon. Learned counsel for the appellant, or even the Republic, did not complain before us that the trial Judge did not correctly set out the law as to circumstantial evidence. The complaint in ground one, as we understand it ourselves, is that though the trial Judge correctly appreciated the law with regard to circumstantial evidence, yet he erred in law and in fact by relying on unproved circumstances and on uncorroborated and unsubstantiated evidence. According to Mr. Onalo, the only thing tying the appellant to the murder was the bicycle produced as Exhibit P3A . What were the circumstances relating to that bicycle? As we have seen, PW2 said her father had had that bicycle when he came home on the evening of 12th November 1994 and that the deceased had parked the bicycle in the sitting- room. The following morning it was found missing and nearly two years later a similar bicycle was recovered from PW6. PW6 testified it was the appellant who had sold the same to him. PW3 and PW4 also swore that the appellant had attempted to sell a similar bicycle to them on 13th November, 1994. PW3 specifically swore that he had known the bicycle of his teacher and that on occasions, he had assisted the deceased in pushing the bicycle to the school . Then the appellant was arrested by PW10 in February 1996, and it is noteworthy that the bicycle was recovered from PW6 by PW8 only after the appellant had been arrested. The explanation given by PW10 for the recovery of the bicycle was that it was the appellant who told him where the bicycle was and thereupon, he dispatched PW8 to go and look for that bicycle. PW8 did recover a bicycle in the store of PW6. As at to-day, that evidence would be inadmissible under section 102 of the Criminal Law Amendment Act, Act No. 5 of 2003 which deleted section 31 of the Evidence Act, Cap 80 Laws of Kenya. But at the time of the appellant’s trial, that section was still existing and valid and it provided as follows:-

“31. Notwithstanding the provisions of sections 26, 28 and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

So that PW10, swore that the appellant gave him information relating to the bicycle being with PW6 and as a result of that information, PW10 sent PW8 to the home of PW6 and the bicycle was recovered there.

The learned trial Judge accepted the evidence given by PW10 and as we have already pointed out it is to be noted that the bicycle, which had disappeared on the night the deceased was killed in 1994, was only recovered after the appellant was arrested by PW10 in February, 1996. We think the learned trial Judge was fully justified in accepting the evidence of PW8 and PW10 on this aspect of the matter and the evidence of these two witnesses fully supported the evidence of PW6 that it was the appellant who left PW6 with the bicycle . Like the learned trial Judge, we are satisfied on the recorded evidence that the discovery of the bicycle with PW6 so soon after the arrest of the appellant was not merely a coincidence. The appellant must have given PW10 the information which led to the recovery of the bicycle with PW6. That evidence was perfectly admissible at the time the appellant was tried and convicted and we must uphold the learned Judge’s findings on that aspect of the matter.

There was a dispute as to whether the bicycle found with PW6 was the one stolen from the house of the deceased during the night of the killing. That must be the basis of the complaint in ground two of the grounds of appeal where the complaint is that certain exhibits which ought not to have been admitted were wrongly admitted in evidence by the Judge. Those exhibits were copies of documents relating to the purchase and ownership of the bicycle, but in our view, even if those documents had been rejected, there was more than sufficient evidence from which the learned Judge was entitled to come to the conclusion

that the bicycle found with PW6 actually belonged to the deceased. PW2, the daughter of the deceased said she knew the bicycle and we do not accept the proposition that because PW2 said the bicycle was similar to or resembled that of her deceased father, the same was not her father's bicycle. She was sure, for example, about the head-lamp and PW3 was equally sure about the bicycle. Certain markings were said to have been untraceable on the bicycle but it is to be remembered the same was recovered nearly two years after its disappearance. PW3 and PW4 swore they saw the appellant with the bicycle on 13th November, 1994 and that is about the time the bicycle was taken to PW6. PW6 did not claim it as his own and the appellant who took it to PW6 did not claim that it was his bicycle. In those circumstances, we are fully satisfied that even if the documents complained about in ground two were wrongly admitted in evidence, there was other evidence, independent of the documents, and upon that other evidence the learned Judge was fully justified in his conclusion that the bicycle found with PW6 was the same one which was stolen from the deceased during the night of his demise. Even if the documents were wrongly admitted, and we are not saying they were, their admission did not occasion any injustice to the appellant. As to the complaint that the appellant's alibi was not considered (ground 3), once the trial Judge accepted the evidence of PW2 and PW3 that the bicycle belonged to the deceased and further once the evidence of PW3 and PW4 that the appellant was seen with the same bicycle on 13th February, 1994, that he took it and left it with PW6 about the same period, the appellant's alibi was bound to be, and in our view, was rightly rejected by the Judge. The question of identification of the appellant did not arise at all because there was no prosecution witness who testified that the appellant was seen at the scene of the crime. All the grounds of appeal upon which the appellant rely in support of his appeal before us must accordingly fail. Like the learned trial Judge, we are equally satisfied that the circumstantial evidence brought by the prosecution against the appellant exclusively pointed at him and only him as the killer of the deceased. The nature of the injuries he inflicted upon the deceased showed that he either intended to kill the deceased or to inflict very grave injuries on the deceased. Either way, malice on his part was proved. We are satisfied, like the learned Judge was, that the charge of murder was proved against the appellant beyond any reasonable doubt and his appeal to this Court fails and we order that it be and is hereby dismissed.

Dated & delivered in Nairobi this 18th day of November, 2005.

R.S.C. OMOLO

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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.