IN THE COURT OF APPEAL

AT NYERI

(CORAM: OMOLO, TUNOI JJ A & RINGERA AG JA)

CRIMINAL APPEAL NO. 72 OF 1997

BETWEEN

PETER MUGENDI MUGAMBI

CHARLES MATHENGI MWANGI ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from convictions and sentences of the High Court of Kenya at Nyeri (Mr Justice Osiemo) dated 23rd September, 1997

in

High Court Criminal Case No 21 of 1996)

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JUDGMENT

Peter Mugendi Mugambi, the appellant hereinafter, together with another person called Charles Mathengi Mwangi, were tried and convicted by the High Court, Osiemo J on four counts of an information charging them with murder contrary to section 203 as read with section 204 of the Penal Code. The counts against the appellant and Mwangi had stated in their particulars that between the 4th day of November, 1995 and the 2nd day of December, 1995 the appellant with Mwangi, jointly with others not before the Court, murdered Catherine Kirigo Komu (count one), Alice Wangui Komu (count two), David Wambugu Komu (count three) and Annah Wangechi Komu (count four). Before she was killed Catherine Kirigo Komu was the wife of Philip Komu Wachira (PW 1) and as their names suggest the other persons named in counts two, three and four were the children of Catherine and Philip. Catherine lived with her children at Mahiga Village in Nyeri District while Philip lived with his other wife at his place of work in Nanyuki. Philip last saw the family on 5th November, 1995 when he visited them at Mahiga. He next saw their remains being removed from a shallow trench or furrow in his compound on 4th December, 1995. The appellant and Mwangi were subsequently charged with the four murders and as we pointed out earlier, Osiemo J sitting with assessors, found the appellant and Mwangi guilty of the murders, convicted them and sentenced both of them to suffer death in the manner authorized by law. The sentence of death was passed even on Mwangi who was clearly under eighteen years (ie a minor) at the time the offence was committed. The sentence imposed on Mwangi was clearly contrary to law for section 25(2) of the Penal Code provides:

"Sentence of death shall not be pronounced on or recorded against any person convicted of any offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the Court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody."

The P3 form produced by Dr Kariuki (PW 2) in respect of Mwangi showed his age as sixteen years. Mwangi was examined on 12th January, 1996, about one month after the murders. Mwangi was clearly a minor and the learned trial judge was not entitled to impose the sentence of death on him. However, though the sentence imposed on him was illegal and though Mwangi appealed to this Court against both conviction and sentence, all those matters are now irrelevant because Mwangi died in prison before his appeal could be heard. His appeal accordingly abated under rule 68(1) (a) of the Court of Appeal Rules.

That leaves us only with the appeal of the appellant, Peter Mugendi Mugambi. His appeal to us is a first appeal and that being so, the appellant is entitled to expect from us a fresh reconsideration of the evidence, our own evaluation of that evidence and our own conclusions drawn from such evidence – see *Okeno v Republic* [1972] EA 32. We shall proceed to look at the recorded evidence.

The prosecution's case against this appellant was based entirely on circumstantial evidence. The deceased appellant (Mwangi) had made some statements implicating the appellant in the crimes, but those statements were both repudiated and retracted during the trial and were only admitted in evidence after trials within the main trial. Accordingly, in terms of section 32 (1) of the Evidence Act such evidence could only be taken into consideration against the appellant in support of other cogent available evidence. We need not cite any authority for the proposition that the retracted and repudiated confession of a co-accused is the weakest kind of evidence against a third party and such evidence can only lend support to other independent available evidence.

What were the circumstances upon which the prosecution asked the learned trial judge and the assessors to draw the inference that the appellant must have participated in the four murders? First there was the evidence Nancy Wambui Githinji (PW 3) and her daughter Lucy Wangari Wagaki (PW 4) that they visited the home of the deceased persons on the 23rd November, 1995 and found the appellant and Mwangi in the house. Mwangi was an employee of the deceased. The appellant was not but it was agreed on the evidence that the appellant, like Mwangi, was a herdsboy in the area. It might well have been true that the appellant was found with Mwangi in the house of the deceased but to move from that position and conclude that because he was found there with Mwangi, the appellant must have participated in the murder seems to us to be a rather very long jump. He could have been in that house simply because he had gone to visit his fellow herdsman Mwangi. Even Nancy and Lucy did not say that the appellant told them anything concerning the whereabouts of the deceased. It was Mwangi who was alleged to have said the deceased Catherine and her children had gone to visit some relatives. There was no allegation whatsoever that the appellant attempted in any way to confirm what Mwangi told Nancy and Lucy. The presence of the appellant in that house could be given an innocent explanation and was not necessarily incompatible with the appellant's innocence.

Next there was the evidence of Jedidah Wangechi Wanjohi (PW 10) that sometime in November, 1995 the appellant and Mwangi went to her house to take shelter from the rain and that the two had a radio which was subsequently identified by Catherine's husband (PW 1) as belonging to his dead wife. That radio was eventually traced to the deceased Mwangi and there is absolutely nothing on the recorded evidence to show that the appellant also exhibited any signs indicating his ownership of the radio. As we have already pointed out, Mwangi was an employee of Catherine and to conclude from his possession of the radio that the appellant must have killed the deceased with him and that must be why they had the radio is once again a very long jump. At any rate, the presence of the appellant with Mwangi at Jedidah's house is not necessarily incompatible with the innocence of the appellant. It can be given an innocent explanation. Lastly, there was the evidence of Sammy Ndirangu Ndiritu (PW 17) to whom the deceased Mwangi attempted to sell various items. Sammy's evidence shows that he wholly dealt with Mwangi and the only reference to the appellant in his entire evidence is to be found in one single sentence:

"…when I came to see the battery accused 2 was there but all the negotiations were made by accused 1."

In cross-examination, Sammy said:

"…from the stage accused 1 was with accused 2. They were standing together but accused 2 later went inside the bar".

Lastly he says:

"…..accused 2 did not accompany us to my house. He was left in the bar. He was (sic) never talked to me. I came to know the name of accused 2 when we were at Murang'a Police Station cells…."

This was one of the circumstances from which the prosecution asked the judge and the assessors to draw the inference that the appellant and Mwangi must have killed the deceased Catherine and her children. The same considerations we have given to the question of being in the deceased's house with Mwangi and being with Mwangi with the radio at Jedidah's house must apply to the evidence of Sammy ie that the presence of the appellant with Mwangi under the circumstances stated is not necessarily incompatible with the innocence of the appellant. His presence in those places is capable of an innocent explanation.

It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example *Rex vs Kipkering Arap Koskei & another* (1949) 16 EACA 135.

How did the learned judge deal with this evidence? The truth is that the learned judge did not deal with the individual or any circumstance at all. He simply set out the principle applicable to circumstantial evidence and then ended his consideration of the case as follows:

"I have evaluated both the prosecution and defence evidence carefully and I am satisfied that the circumstantial evidence irresistibly points at the accused persons as the murderers of the four deceased persons….The assessors returned a verdict of guilty. But one assessor returned a verdict of not guilty. But I beg to differ with the verdict of one assessor and agree with the verdict of the two majority assessors. As I have said earlier the circumstantial evidence do irresistibly point at the accused as the persons who committed this offence."

With profound respect to the learned judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the judge would have come to the same conclusions had he set out each individual circumstance, and analysed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.

We have said enough, we think, to show that we are not satisfied the conviction recorded against the appellant was safe. We are more inclined to agree with the dissenting assessor than with the learned trial judge and the majority of the assessors. We accordingly allow the appeal, quash each of the four convictions recorded against the appellant, set aside the sentences of death imposed on each count and order that the appellant be released from prison forthwith unless he is held for some other lawful cause. Those shall be our orders in the appeal.

Dated and Delivered at Nyeri this 7th day of May 2004.

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

A.G.RINGERA

.....

Ag. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR