



IN THE COURT OF APPEAL

AT ELDORET

CORAM: TUNOI, O’KUBASU, JJ.A & DEVERELL, AG.J.A

CRIMINAL APPEAL NO. 250 OF 2003

PETER NYONGESA WANYONYI.....1ST APPELLANT

SAMUEL WAFULA WANYONYI.....2ND APPELLANT

RICHARD WANYONYI NABENDE.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kitale (Nambuye, J) dated 19th November, 2002

in

H.C.CR.C. NO. 8 OF 1999)

JUDGMENT OF THE COURT

PETER NYONGESA WANYONYI, SAMUEL WAFULA WANYONYI and RICHARD WANYONYI NABENDE , the 1st, 2nd and 3rd appellants respectively, were jointly convicted of murder by Nambuye, J. on 19th November, 2002 and were each sentenced to death. According to the information filed by the Attorney General at the High Court of Kenya at Kitale, the three appellants on the night of 19th and 20th May, 1998, at *Wehoya Farm, Waitaluk Location* in *Trans-Nzoia District* of the *Rift Valley Province* , jointly murdered **DAVID BUSOLO SIKATA** , the deceased.

The 3rd appellant is the father of the 1st and 2nd appellants. In or about 1976 *Mzee Herman Nabende* , the father of the 3rd appellant sold his land in *Wehoya Farm to Patrick Sikata* , the father of the deceased. *Mzee Herman* then moved away from the land but left behind the 3rd appellant still residing on the land. It was understood that the 3rd appellant would follow *Mzee Herman* so soon as a house had been put up for him in their new abode. However, the 3rd appellant and his family refused to move out

but continued to cultivate a portion of the land. **Patrick Sikata** died immediately thereafter and his widow **Margaret Naliaka (PW.4)**, also, the mother of the deceased and his brother **Jotham Lusweti Kusimba (PW.8)** sued the 3rd appellant for eviction before Waitaluk Land Disputes Tribunal. The Tribunal decreed the 3rd appellant's eviction and its decision was filed and confirmed by the Court. An eviction order was eventually issued. From the records before us it appears that the eviction exercise was carried out on 19th May, 1998 by the local District Officer and the Administration Police. PW.4 testified that when the 3rd appellant saw the eviction squad he fled. However, it is not in dispute that the eviction was carried out in the absence of the appellants. The eviction squad removed all household goods from the 3rd appellant's house and put them outside after which a padlock was placed on the door. The squad then left. It is also not in dispute and it has not been denied by the appellants that that same evening the appellants returned home and on finding their house securely locked and property scattered outside and the entire family out in the cold, proceeded to the house of the village elder, **Justo Wamalwa (PW.2)** to enquire what had happened. PW.2 testified:-

“Richard Wanyonyi Nabende came to my house and called out in a loud voice and he asked me if I knew whether askaris had been around. He knocked the door with force. I opened the door and lit a lamp, put on the table and stood at the door. He asked me if I was aware Askaris had come. He told me to go and bring the people from Margaret Sikata and bring them to guard his children. I told him to persevere until the next day..... He said “I will kill a person n ow”. On hearing that I closed the door and slept.”

The threat to **“kill a person”** uttered by the 3rd appellant and expressed to PW.2, the village elder, was also heard by **Robert Wamalwa (PW.6)**, the son of PW.2 who told the trial court that at about 10 p.m. on 19th May, 1998, while asleep in the neighbouring house he heard the 3rd appellant calling out the name of PW.2. PW.6 opened the door and saw the three appellants. PW.2, too, had opened his door but did not come out. PW.6 testified that the 3rd appellant after a brief questioning of PW.2 as to why his family had been evicted threatened PW.2:-

“If you have refused I am going and you will hear something”

The next day in the morning PW.4 did not see the deceased and she assumed that he had gone to his place of work. At about 1.00 p.m. when he had not returned she became worried and went to check in his hut. She saw blood stains on the floor and on the door. Her screams attracted some neighbours and passers-by including **Salome Nandokha (PW.3)** and **Stephen Ongeru (PW.7)**. They saw footprints and drops of blood along a path which led to a nearby stream. More bloodstains were seen by the banks of the stream and they assumed that the body had been thrown into the stream. They searched in the water but in vain. They then concluded that the deceased was dead and they went to make a report at Kitale Police Station.

P.C. Kimutai (PW.9), **Sgt. Isaboke (PW.11)** and the villagers made frantic but fruitless searches for the deceased from 21st May, 1998 upto 8th June, 1998 when the 2nd appellant who had run away to stay with his maternal uncle was arrested. On interrogation by Police, the 2nd appellant volunteered to take the Police to **Wehoya Farm** where he showed them the place where allegedly he and the other appellants had buried the deceased. The makeshift grave was uncovered and in it the deceased's body was visible. However, the police delayed the exhumation until the next day, 9th June, 1998.

The exhumation of the body of the deceased was done in the presence of the appellants and **Dr. Jason Amukanyu (PW.1)**. The body was clothed with a manila bag at the upper side towards the head. The postmortem report carried out at the scene revealed that the right ear and the upper part of the tongue had been chopped off. There were deep and long cuts on the occipital region and the hands. PW.1 concluded that the cause of death was due to head injuries and fractured skull secondary to brain haemorrhage. After the postmortem the appellants led the police team to their house where they handed over two jembes, an iron bar and a spade which they told PW.11 and other police officers that they had used the implements to kill the deceased, dig the grave and buried him.

On the same day, i.e. 9th June, 1998, at about 3 p.m. the 2nd appellant recorded a Statement Under Inquiry. In the statement the 2nd appellant narrated what he and the other appellants had been engaged in

during the fateful day. When they returned home at about 8 p.m. they found their house padlocked and all their household goods strewn within the homestead. Their father, the 3rd appellant, told them to accompany him to the home of the village elder, PW.2, to go and inquire of him (PW.2) as to what had happened at their home. On arrival at PW.2's house they knocked on the door and PW.2 on being asked whether he knew that the police had locked the 3rd appellant's family out of their house, denied knowledge of it. PW.2 however refused to accompany them to verify what had transpired during the day. The 2nd appellant further stated in his Statement Under Inquiry:

“My father got annoyed. On the way he told us that we should go to the home of Margaret Sikata and ask why they brought police to our home.

nd went home. On arrival while he was ahead of us, the lamp was still on at about 10. p.m. to 10.30 p.m. and he pushed the door of David Busolo (deceased) which was unlocked and entered, my brother Peter Nyongesa and then we followed. My father had a knife, my brother had crow Bar, and I had also an Iron bar. My father awoke the (deceased) and asked him what they did during the daytime. He was not answered. My brother then hit him once on the head with the bar and he fell without any scream . I then went out intending to run away but my brother called me back. I did not go back but stood outside and they carried him outside while completely unconscious. We then together carried him downwards through the maize plantation upto the nearby stream where we suggested on what to do since he was now dying. Before reaching near the stream, we rested three times because he was heavy. Near the stream I personally suggested that we bury him. We then left him near the stream and went and dug a grave in cassava plantation about 50 metres from our home. It took us about one hour to dig the grave . We then went back and carried the body and buried him after stripping him naked ”

The 2nd appellant concluded:-

“On 8th June, 1998, the police came and arrested me and took me to Moi's Bridge where I was locked in the cells.”

“I then led police to where we buried the body ”

On 14th June, 1998, the 2nd appellant made a charge and caution statement. In it he stated:-

“It is true I and Peter Nyongesa killed David Busolo Sikata .The motive for the killing was about land dispute. The deceased's father had evicted our family from the disputed farm through a Court Order. Our father was not with us.”

It is significant that during his trial the 2nd appellant, though represented by counsel, did not object to both his charge and caution statement and the Statement Under Inquiry and the two statements were duly admitted at the trial.

On or about 16th June, 1998, the three appellants were arraigned in Court on a charge of murder and after mesne and diverse appearances they were tried by the High Court on the information which is set out in the earlier part of this judgment.

In their respective defences, severally each appellant made an unsworn statement and denied participation in the commission of the crime charged. The 1st appellant put up a defence of alibi. He said that he was working at Nakuru Blankets when he received a message that he was required home. On 21st May, 1998, he asked for leave of absence and his employer gave him three days' leave. When he arrived home he found all the doors locked and household goods heaped outside and had been rained off. Shortly thereafter three people came and arrested him. He was bundled on to a vehicle which sped off to the Police Station where he was locked up for seven days. He was not given the reason for his detention. He was later charged with the killing of the deceased of which he denied.

The 2nd appellant's unsworn statement was brief. He arrived home on 19th May, 1998 and found their

houses locked. The members of his family were camping by the roadside. He decided to go to **Tongaren** to inform his clan members of what had befallen them. On arrival he fell sick until 8th June, 1998, when he was arrested and taken to the Police Station where he was beaten and forced to sign some papers whose contents he did not know. He repudiated the statement attributed to him.

The 3rd appellant outlined in detail the history of the land dispute between him and the husband of PW.4 and PW.8. On 19th May, 1998 he took his maize for sale at the market and did not return home as he spent the night in a rented room. The following day, 20th May, 1998, he went home for more maize for sale but was shocked to find that his entire family had been evicted and were camping at a roadside 100 metres away. He was informed that the Administration Police had carried out the eviction. Being dissatisfied with the explanation as he thought that the court process had not been exhausted, he went to seek explanation from the Chief. He got no assistance from him and he decided to approach the District Officer who was rather sympathetic. The D.O. gave him a letter addressed to the Area Chief directing him to get them back to their house. Shortly afterwards the police arrived and arrested him. He denied killing the deceased.

The prosecution's case was that the three appellants, with malice aforethought, caused the death of the deceased. As the prosecution could not produce any eye witness, it built the case against the appellants on the following material:-

a) The 2nd appellant's charge and caution statement;

b) The 2nd appellant's Statement Under Inquiry;

c) Circumstantial evidence;

and d) Implication in co -accused statement.

The trial of the appellants began at the High Court of Kenya at Kitale on 22nd March, 2000 and was concluded on 21st December, 2001. Judgment was reserved for 18th February, 2002 but for reasons not shown on the record was not delivered until 19th November, 2002. In our view, the delay in delivering judgment of well nigh a year www.kenyalawreports.or.ke Wwaaannnyyooonnyyyi ii && 222 ooot ttthe ee r rs ss vvv RRe eeppuubbl ll i iic cc [[222000000444]]] e eeKLLRR - 8 - without a reasonable explanation places an accused person in a state of anxiety and wild speculation; and indeed, does amount to a denial of natural justice and a breach of a constitutional right. This Court strongly deprecates such a situation as presenting itself in the appeal now before us. However, none of the appellants raised the issue of delay in delivering judgment and we believe that it did not in the circumstances occasion them a failure of justice.

The learned Judge held that it was a common ground that there was a longstanding dispute between the mother of the deceased and the 3rd appellant and that there was great animosity on the eviction followed by a serious physical threat. On the charge and caution statement and the Statement Under Inquiry the learned Judge first discussed, analyzed and held:-

“The statement has to meet certain qualifications before it can be acted upon to support a conviction and these are: -

1. It must be true. From the eviction above the statement was detailed to the extent that it is a true account of what happened. It has been fully corroborated and so it can only be true. All the important areas of this statement under inquiry have been fully corroborated.

2. It operates against the maker only. The maker is the second accused and the statement shows that he participated in the commission of the crime.

3. It can only be used against the other accused persons if there is corroboration for it from some other material and independent evidence which tends to confirm the allegation that those

named also participated in the commission of the crime. The persons named in this statement are the first and 3rd accused. There is no direct evidence confirming the allegation. However this Court finds corroboration by way of opportunity. The accused had an opportunity to commit the offence as the deceased was attacked while alone in the house and it was also at night.

4. There is also corroboration by conduct of the accused persons as they behaved as if nothing had happened and the 3rd accused uttered threat to the hearing of the village elder PW.2 that the 3rd accused will kill someone and that the next day the village elder will hear something.

5. The other test or ingredient the statement has to meet is that it must be voluntary. Both statements were not objected to and were admitted in evidence. They were challenged during the defence and in the courts view this was an afterthought.”

The assessors returned a unanimous verdict of guilty of murder and in her judgment the learned Judge was satisfied that the ingredients of the offence of murder had been proved. She rejected the defence of alibi. She thus convicted the appellants as charged.

All the three appellants had a common ground of appeal stating that the learned Judge misdirected herself in finding that the circumstantial evidence on record led to irresistible conclusion of guilt and was inconsistent with any finding to the contrary. The 1st and 3rd appellants faulted the learned judge in convicting them on the strength of the confession of the 2nd appellant without any or any adequate independent evidence or corroboration. The 2nd appellant contended that his confession should not have been accepted at all.

At the hearing of the appeal, the appellants were represented by counsel, Mr. Misoi, for the 1st appellant, Mr. Buluma for the 2nd appellant and Mr. Okara for 3rd appellant. The Principle State Counsel Mr. Omutelema represented the State.

We will deal first with the appeal of the 2nd appellant, **SAMUEL WAFULA WANYON YI**. He made two extra judicial statements – the charge and caution statement and the Statement Under Inquiry. In them he admitted that he and the 1st appellant killed the deceased, the motive being because the deceased’s mother had evicted his family from their land. There is ample evidence on record to support this. His part of the statement that the deceased was hit on the head with an iron bar is confirmed by the findings of the postmortem report and by the deceased’s mother, who though she slept in the nearby house, did not hear any screams during the fateful night. The assertion in the statement that the deceased was carried downwards towards the nearby stream was confirmed by PW.3, PW.4 and PW.7 who saw and retraced footprints and blood stains towards the stream. Further, the 2nd appellant described in the statements the grave where the body was eventually recovered. The charge and caution and the Statement Under Inquiry, in our view, amounted to a full confession of the 2nd appellant’s participation in the crime charged. Thus, the 2nd appellant in his confession admitted fully in terms the killing of the deceased and substantially all the facts which constitute the charge of murder. The learned Judge, as the record shows, was alive to the well-settled principle of law that it is a rule of practice, that it is not safe to act on an uncorroborated repudiated confession and she had to look for other credible independent evidence to supply corroboration before founding a conviction on it. We conclude, therefore that the 2nd appellant could and was properly convicted on the strength of either the charge and caution or the Statement of Inquiry or both.

The 1st appellant was implicated in the statement of the 2nd appellant. It was evidence of the weakest kind which can be taken into account under **Section 32** of the Evidence: See **Raphael Oduor Ngoya & 5 others vs. Republic : Criminal Appeal No. 136 of 1981** (unreported). Such evidence, nevertheless, lends assurance to an otherwise strong case against the accused. But, is there any other credible evidence to connect the 1st appellant with the commission of the crime charged? PW.2 and PW.4 appear not to be consistent in their testimony as to whether the 3rd appellant was accompanied by his two sons, the 1st and the 2nd appellant. PW.2 in his examination-in-chief testified:-

“Richard Wanyonyi came to me and called out in a loud voice --- -- he was accompanied by his

son”.

But in cross-examination he said:-

“Richard came to my place, he was with 2 children N yongesa and Wafula. They came to my house. They stood outside. It was dark there was no light. I talked with Richard alone.”

In our view, the evidence which we have reproduced above cannot be said to be cogent, consistent, positive or free from possible error. It is not reliable. In the circumstances, the benefit of doubt must be given to the 1st appellant.

The 3rd appellant did not sleep at **Wehoya Farm** on 19th May, 1998, this he unequivocally admits. He also admits of the existence of the land dispute and his unhappiness about the manner in which the eviction was effected. PW.2 and PW.6 testified that the 3rd appellant and his son(s) were at the home of PW2 at night where he uttered a threat *“that somebody must die and that PW.2 will hear something the next day”*. Also, the 3rd appellant’s conduct together with that of the 2nd appellant must be taken into account when considering the evidence against them in its totality. PW.3, PW.4 and PW.7 testified that the two appellants stood aloof when the villagers had gathered set to look for the deceased. PW.3 and PW.4 stated that the appellants menacingly followed them when they were about to approach the site where the grave was eventually discovered and as a result they diverted route. All this we have reproduced above was circumstantial evidence against the 3rd appellant.

An offence like murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed. It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; **PETER KUBUITA PAUL V. REPUBLIC Cr. Appeal NO. 71 of 1979** (unreported). In **SIMONI MUSOKE VS.R. [1958] EA 715** the predecessor of this Court said:

“It is also necessary before drawing the inference of th e accused’s

guilt from circumstantial evidence to be sure that there are no other

co-existing circumstances which would weaken or destroy the inference.”

See also **TEPER V. R (2), (1952) AC 480 at p. 489.**

The facts proved must be inconsistent with any other rational conclusion, for it is only on this hypothesis that the court can safely convict an accused on circumstantial evidence. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing. See **Taylor on Evidence (12th Edition) pp 66 and 67.**

The facts surrounding the land dispute, the threats uttered before PW2, (the village elder) and the 3rd appellant’s conduct after the killing of the deceased were incompatible with the 3rd appellant’s innocence and inconsistent with any other rational conclusion. We conclude, therefore, that the evidence against the 3rd appellant is sufficient to sustain a conviction either on the 2nd appellant’s repudiated confession which was corroborated by the circumstantial evidence or on the circumstantial evidence alone or both.

We have carefully considered the evidence presented during the trial of the three appellants. We are of the opinion that this is a case in which the learned Judge, properl - 13 - directing herself as she did, could not reasonably have come to any other conclusion than that **SAMUEL WAFULA WANYONYI** and **RICHARD WANYONYI NABENDE**, the 2nd and the 3rd appellants respectively, were guilty of murder. We uphold their convictions. We accordingly dismiss their appeals.

The appeal of the 1st appellant, **PETER NYONGESA WANYONYI** is hereby allowed, the conviction entered against him is quashed and the sentence imposed on him is set aside. He shall be entitled to his liberty forthwith unless otherwise lawfully held.

We would like to express our appreciation of the admirable submissions by Counsel.

DATED and delivered at ELDORET this 26 th in November, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR