REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL100 OF 2002

LOKWAMORU LODO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

Lokwamoru Lodo (the appellant) was charged with the offence of murder contrary to section 203 read with section 204 of the Penal Code. It was alleged that on 28th day of September, 1997 at Lokopel in Turkana District in Rift Valley Province he murdered James Espital Alongita (herein after called "the deceased"). The appellant was convicted and sentenced to death by Nambuye, J. He has now appealed against his conviction and sentence.

The prosecution's case was that on 28th September, 1997 at or about 9:30 p.m. David Kelele (P.W. 1), Enukani Echimoni (P.W. 2) and Emuri Remoitan (P.W. 3) heard gunshots and a woman screaming from the direction of a house in the neighbourhood. They all rushed to the scene to find out what was happening and upon reaching there they found the deceased and a young boy lying dead. The deceased appeared to have been shot in the chest while the boy had been shot in the abdomen. They did not find the attackers at the scene and since it was night they took no further action until the following morning.

The three witnesses followed footprints and bloodstains which led to a house where they found the appellant. They said the appellant sustained an arrow wound and was armed with an AK 47. They arrested the appellant and took him to the Police Station. He was then charged with murder and tried as we have already stated. The appellant did not deny the circumstances of his arrest though he denied being involved in the mAusr dtehre.re was no eye witness to the events of that night, the case against the appellant rested entirely on circumstantial evidence. The learned Judge appreciated this and held that since the trail of blood led from the scene of crime to the house where the appellant was found and as he had the AK 47 which he must have used to shoot the deceased and the boy, it was the appellant and no one else who had killed the two. With the greatest respect this finding did not take into account some serious omissions in the prosecution's case. There was evidence that the trail of blood led to the house where the appellant was found and apprehended. He was said to have been shot and wounded and the blood in the trail was presumably the appellant's. The sensible and simplest thing to do would have been to collect the sample of that blood and the appellant's blood and get it examined and classified. That examination would have revealed whether the blood on the trail belonged to the appellant. This was not done and yet the learned Judge believed that that was the appellant's blood.

Then there was the issue of the AK 47. No spent cartridges were retrieved from the scene and taken for ballistic examination and even the gun itself was not produced at the trial. The learned Judge tried to get over this serious flaw by simply saying that witnesses were summoned but failed to show up and testify. If that is what really happened then we would have thought that the benefit of that should have gone to the appellant and certainly not the prosecution upon whom the burden of proof lay throughout. The account of the three prosecution witnesses that they went to the scene and found two people lying dead and decided not to do anything until the following morning also appears incredible although the learned Judge did not comment on it. The reason they gave for not reporting the attack to the police immediately was not good enough.

The test to be applied where a conviction is based on circumstantial evidence was laid down in the case of Kipkering arap Koske v Rex, (1949) EACA 135 where the Court of Appeal for Eastern Africa said that in

order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

The case advanced against the appellant did not conclusively exclude the possibility that the murders could have been committed by persons other than the appellant. It was not proved that the gun he was found with was the same gun that was used to shoot the deceased. There was no proof that the blood on the trail was the appellant's blood. In these circumstances, we cannot but agree with Mr. Muthanwa, for the appellant, that the prosecution failed to prove its case against the appellant beyond any reasonable doubt.

Accordingly, we allow this appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 28th day of February, 2003.

R. O. KWACH .....

JUDGE OF APPEAL

A. B. SHAH .....

JUDGE OF APPEAL

E. OWUOR .....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR