



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: OMOLO, SHAH & BOSIRE, J.J.A.

CRIMINAL APPEAL NO. 24 OF 2001

BETWEEN

EVANS KANAI KARANJA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction & sentence of the High Court of

Kenya at Nakuru (Rimita J) dated 10th January, 2001

in

H.C.CR.C. NO. 26 OF 1999)

JUDGMENT OF THE COURT

Though the State Counsel Mr Onderi strenuously supported the conviction of the appellant on the charge of murder contrary to ***Section 203 as read with Section 204 of the Penal Code***, we are ourselves not satisfied with the circumstantial evidence upon which his conviction was based was:

"... complete, and incapable of explanation on any other hypothesis than that of the guilt of the accused.

....." - See **OMAR MZUNGU CHIMERA V REP** , ***Criminal Appeal No. 56 of 1998 (unreported)*** .

The circumstances upon which the prosecution relied to establish the guilt of the appellant was, first, that Julius Gikonyo Njoroge, the deceased, had left his place of work to go and look for a car battery which he had mistakenly released to the appellant. The prosecution then relied on the evidence of Peter Kairu Kiarie (PW3) who was one of the appellant's brothers. Peter's evidence as set out in the judgment of the superior court, (Rimita, J.) was that:

"The accused [appellant] came home at 5 p.m. He was in company of another young man I did not know. Evans Kanai Karanja [the appellant] is my brother. They asked me to show them my battery. I showed them.

They said that that is not the one they wanted.

They were looking for a missing battery but they said mine was not the one. They left at 5.30 p.m. I had not seen the young man in the company of the accused before."

From this evidence the prosecution asked the learned trial Judge to draw the inference, and the learned Judge did do so, that since the deceased had left his place of work to go and look for a battery which the deceased had, by mistake, released to the appellant and since Peter saw the appellant with "another young man" , and they were looking for a battery, the young man with the appellant must have been the deceased.

That was probably a reasonable presumption, except that the appellant said the young man with him was a Turkana called Ekai. None of the witnesses at the deceased's place of work described the deceased as "a young man". Again as Mr Karanja Mbugua, counsel for the appellant pointed out, despite the fact that Peter saw the "young man" for some thirty minutes, when the body of the deceased was recovered, it was never shown to Peter to observe it so as to see if there was any resemblance between the body and the young man he had seen. Mr Onderi told us that it would have served no useful purpose because it would have been difficult for Peter to tell whether the dead body was that of the young man he had seen. With respect to Mr Onderi, that is not the point. The point is that had Peter been shown the body, he might have said the body was not that of the young man he had seen.

Secondly, the Republic had relied on the fact that a pair of shoes identified as belonging to the deceased was found in the house of the appellant. The finding was, however, in the absence of the appellant and the key to the house was found either in the possession of his other brother John Karanja Kiarie (PW 4) or PW 4's wife. The fact that the key to the house where the shoes were found was found either with John or his wife shows one thing: that the house was not in the exclusive control of the appellant. The evidence on record is that at the time of his arrest, the appellant was found in his house. No search was carried out in the house during the arrest of the appellant and no explanation was given as to why no search was then conducted in the house. By the time Police Constable Stephen Onchari (PW 8) left Naivasha Police Station to go and search the appellant's house, the appellant was in police custody at Naivasha. No explanation was given as to why the appellant was left behind when his house was to be searched.

These lapses must of necessity create a reasonable doubt on the chain of evidence brought by the prosecution. Mr Onderi did concede that there was a "doubt" but he contended that the doubt was not sufficient to create a complete break in the chain of evidence. We do not understand what he meant by that, but applying the usual principles applicable in criminal cases, we find that there was a reasonable doubt on the evidence of the prosecution. The benefit of that doubt ought to have been given to the appellant. We must do so now, with the result that we quash the conviction recorded against the appellant, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nakuru this 19th day of February, 2002.

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR