



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI**

Criminal Appeal 110 of 2000

STEPHEN MUTHEE MACHERU Alias KAIRU
APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from conviction and sentence of the High Court of
Kenya at Nyeri (Mr. Justice Juma) dated 29th January, 1999**

in

H.C. CR. CASE NO. 5 OF 1997)

JUDGMENT OF THE COURT

Stephen Muthee Macheru (herein after called the appellant) was tried, convicted and sentenced to death on a murder charge contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya, by the resident Judge, Nyeri, on 29th January, 1999.

The particulars of the charge were as follows:-

"On divers dates between 14th September, 1994 and 20th September, 1994 at Mucharage village Chinga location in Nyeri district within the Central Province murdered JETHA WANJIKU GATHINJI".

Following his conviction and sentence the appellant has now appealed to this Court against the decision of the trial Judge. His advocate, Mr. Mahan, in his petition of appeal and submissions before us, took only one point set out in the petition as follows:-

"The Honourable learned Judge erred in law in relying on circumstantial evidence and burden of proof".

The deceased was an old lady aged about 80 years. She had employed the appellant as a shamba boy, four to five months before her death. She gave the appellant a room in which to live within her compound. Evidence was given that this room was more or less attached to the deceased's main house.

Despite her age, the deceased was, apparently, still active and was engaged in peasant farming which included domestic animals like cows and goats which she kept in her homestead.

It was in evidence that the deceased had several grown up children including married women and men. One of them was Joseph Waitara Gathinji who gave evidence in the High Court as PW1 and will hereinafter be referred to accordingly (PW1). He had his own homestead which, from the evidence, does not appear to have been so far away from the deceased's home. One of the deceased's daughters would appear to have been married and lived in a place called Gichichi.

Obviously from the proceeds of her farming, the deceased had opened and was operating a bank account although, the evidence does not establish the bank and the place where the bank was. Nevertheless, it was in evidence that whenever she wanted to go to the bank to withdraw money, she would be escorted by her son, PW1. Thus, on 13th September, 1994 the deceased was escorted by PW1 to her bank and withdrew Kshs.10,000/= which she gave to PW1 to carry for her. From the bank the two went to a nearby hotel where PW1 gave the money to the deceased. She gave PW1 Kshs.1,500/= to buy fertilizer for her and also sent him for sundry purchases so that, eventually, out of the Kshs.10,000/= she had withdrawn, the deceased remained with a balance of Kshs.7,400/= which she carried to her home. It is not absolutely clear from the evidence whether PW1 escorted the deceased back to her home. But PW1 stated in his evidence that the following day, 14th September, 1994 while at his home, he saw the deceased at her own home.

On 15th September, 1994 PW1 said in evidence that he had a school committee meeting and therefore did not see the deceased. However, after the said meeting PW1 saw the appellant at a local bar later that evening and enquired about the deceased from the appellant. According to PW1 the appellant answered that the deceased had gone to Gichichi to see PW1's sister, who, as we said earlier, was married and lived there.

On 16th September, 1994, according to PW1, he met the appellant again and enquired of him about the deceased whereupon the appellant replied as follows:-

"Didn't I tell you that she went to Gichichi?"

On 17th September, 1994 PW1 does not appear to have seen the deceased or to have gone to her home. Similarly there is no evidence that PW1 met the appellant on this day.

On 18th September, 1994 PW1 went to the deceased's home. He does not say whether he met the appellant there or otherwise. However, he says he checked the deceased's store and found that fertilizer, tobacco and maize were missing. As a result of this he became suspicious and sent a son of his to Gichichi to find out if the deceased was there, and apparently, the result was negative. He sent the same son to another place called Kirima for the same purpose and the result was the same. Lastly, PW1 said he sent somebody to Athi River and the result was the same.

Thus, by 20th September, 1994, PW1 had not seen the deceased, having last seen her on 14th September, 1994. She was not at Gichichi, Kirima or Athi River where she would, occasionally, go to visit her married daughters. Because of these factors PW1 decided to make a report to the local Assistant Chief whom he found and both of them went to Othaya Police Station. While the two were at the Police Station, it was PW1's evidence that the appellant was brought to the station by members of the public that he had stolen tobacco and fertilizer. It would appear that the appellant was arrested by police from this moment, kept in custody and eventually charged with the murder of the deceased, leading to his trial, conviction and sentence as we earlier stated.

Mary Nyagute Waitara, who gave evidence in the High Court as PW2, and will be referred to in this judgment accordingly (PW2), was PW1's daughter. She testified that on the 16th September, 1994 she was picking tea in PW1's home which, as we stated earlier, was not far from the deceased's home. Apparently PW2 saw and talked with the appellant. She asked the appellant about the deceased and the appellant told her that the deceased had gone to Nakuru. PW2 further gave evidence that while picking

tea, he saw the appellant carrying cowdung from the deceased's cattle boma towards the deceased's house. According to her the appellant did this five times. Later PW2 came to learn that the deceased had disappeared and when she went to the deceased's home along with others, she found the deceased buried in cowdung near the deceased's granary. According to this witness cowdung was not found anywhere else apart from the grave where the deceased was buried.

Esther Wamaitha Wachira was the wife of one of the deceased's sons who had, apparently, died before the deceased. She (Esther Wamaitha Wachira), gave evidence in the High Court as PW3 and will be referred to accordingly in this judgment (PW3). She knew the appellant as an employee of the deceased.

On 16th September, 1994 PW3 was also picking tea and, according to her, she could see the deceased's homestead quite clearly. It was her evidence that she saw the appellant carrying manure (cowdung), from the deceased's cattle boma and taking it towards the deceased's house. She saw the appellant doing this three times. Later when the deceased's disappearance became known, she went along with others to the deceased's home and found her covered with manure near the store.

Two other civilian witnesses called by the prosecution in the High Court were Lucy Muthoni Kanyori (PW4) and Milka Wangechi King'ori (PW7). They will be referred to in this judgment as PW4 and PW7 respectively.

PW4 gave evidence that the deceased went to her home on 13th September, 1994 in the evening to buy fertilizer and they agreed on a price of seven hundred shillings per bag. The deceased said she would bring the money later. Next day, 14th September, 1994 PW4 went to the deceased's home and the deceased paid her Kshs.1,000/= leaving a balance of Kshs.400/=. Apparently, the deceased wanted two bags of fertilizer and the two ladies agreed that the balance would be paid by the deceased to PW4 upon delivery of the two bags to the deceased. According to PW4, the appellant was present on 13th September, 1994 when she visited the deceased's home and the transaction described herein took place.

On 15th September, 1994 PW4 carried one bag of fertilizer to deliver to the deceased's home. On the way she met the appellant who told her that the deceased was not at home, having gone on a safari. The appellant further advised PW4 to take the fertilizer to the deceased's home and keep it in the goats' pen. This, PW4 declined to do since there was nobody in the deceased's home. The appellant then advised PW4 to take the fertilizer to PW7's house which PW4 did and left the fertilizer there.

On 17th September, 1994 at about 7.00 p.m. the appellant came to PW4's house accompanied by another person. The appellant asked for the remaining bag of fertilizer, telling the witness that he had been sent by the deceased. The witness refused to release the remaining bag of fertilizer because the appellant had not brought the remaining balance of Kshs.400/=.

PW7 substantially confirmed the evidence of PW4 in regard to the bag of fertilizer which PW4 took and kept at her house on the appellant's advice. PW7 further testified, that on the 16th September, 1994, the appellant, accompanied by another person unknown to her, went to her house and collected the bag of fertilizer. The same day in the evening, PW7 went to PW1's home and told him what had happened over the bag of fertilizer.

Inspector Joseph Gitonga who gave evidence in the High Court as PW8 was the investigating officer of this case. He said in his evidence that on 20th September, 1994 he received a report that there was murder at Chinga Location, Gachurere village. He went to the scene and found the deceased buried in a shallow pit behind the granary in the homestead. He later obtained a court order for exhumation and looked for a doctor to accompany him back to the deceased's home to carry out the exhumation.

The doctor brought by PW8 was one Dr. John Pius Okulo of Provincial General Hospital Nyeri who gave evidence in the High Court as PW6. Together with the Investigating Officer (PW8), the doctor visited the scene on 23rd September, 1994. Exhumation was carried out and the doctor performed post mortem examination on the deceased's body at the scene. He said, from his examination, that the deceased was aged about 80 years. The head was swollen especially the face. There was haemorrhage on

the face, under the skin. The tongue was protruding outside and blood was oozing from the mouth and nostril. Both eyelids were swollen and there was bleeding under the cover of the eyebrow. There was a fracture of part of the throat and the spine at the level on the neck was also fractured. As a result of these findings, the doctor concluded that death was due to acute asphyxia due to strangulation.

At the close of the prosecution case, the learned trial Judge found that there was a prima facie case established against the appellant and placed the appellant on his defence. The appellant gave sworn evidence and was cross-examined by the prosecuting counsel. He denied killing the deceased. He confirmed however, that he had been employed by the deceased since June, 1994 and had been living with her in her homestead. He was doing general duties as a shamba boy. He was with the deceased on 13th September, 1994 and he was aware of a land problem between the deceased and PW1 and PW3. On the same date 13th September, 1994 PW1 and the deceased went somewhere which the appellant himself did not know.

Next day, 14th September, 1994 the deceased told the appellant she was not feeling well. Nevertheless, they went to her shamba and they planted beans. She returned to the house earlier and left the appellant at the shamba. The appellant returned from the shamba at about lunch time and found the deceased resting in her room. Later that evening the deceased told the appellant that since she was not feeling well, she would go to Gichichi hospital for treatment the following day.

On 15th September, 1994, the appellant saw the deceased in her house with some three people including PW1, who had come to see her. At about 2.00 p.m. that afternoon PW1 told the appellant that the deceased had gone to the hospital. For the rest of that day the appellant did not see the deceased.

On 16th September, 1994 the appellant still did not see the deceased. PW1 came to the deceased's home and told the appellant not to worry. PW2 also came and asked the appellant for eggs and he gave her two eggs.

On 17th, 18th and 19th September, 1994 the appellant still continued with his daily duties without seeing the deceased.

The appellant denied talking to Lucy Muthoni Kanyori (PW4). On 20th September, 1994 the appellant was still on his duties in the deceased's home and had not seen the deceased. Later, he went to the nearby trading centre where he was arrested by members of public, tied with ropes and taken to Othaya Police Station as he had allegedly stolen fertilizer and tobacco. Later he learnt that he would be charged with the murder of the deceased and he was charged accordingly and he denied the charge.

On conclusion of the evidence for both sides, the learned trial Judge summed up the case to the assessors as required of him by law. This is what he said in part.

"Conduct of accused - carrying of cowdung - PW2 and PW3. Accused's explanation of whereabouts of deceased - Gichichi - Nakuru - collection of bags of fertilizer, evidence of PW4 and PW7. PW1 sending someone to Gichichi, Karima and Athi River to look for deceased. Discovery of deceased buried in cowdung".

All the three assessors found the appellant guilty of murder as charged.

On 29th January, 1999 the learned trial Judge delivered his judgment and this is what he said in part:-

"From the evidence and it is also conceded by the learned Provincial State Counsel that nobody actually saw the accused kill the deceased. The state relied on circumstantial evidence. Such evidence must be such that it irresistibly points to the accused.

Is there such evidence in this case?"

After direction to himself in the judgment as indicated above, the learned trial Judge proceeded to

analyse the circumstantial evidence led and eventually agreed with the unanimous opinion of the three assessors and convicted the appellant of murder as charged and passed on him the mandatory death sentence.

Before us on appeal, Mr. Mahan argued that the circumstantial evidence on which the prosecution relied and the court convicted the appellant, was not strong enough and did not meet the standard of proof required in a case dependent solely on circumstantial evidence. He referred to the conduct of the appellant, the evidence of the cowdung, and the alleged conversation about the deceased between the appellant and PW1 and PW2, and submitted that all these were isolated incidents which, either on their own, or cumulatively together, did not meet the required standard. He also submitted that, at best, there was suspicion against the appellant, but, suspicion alone, however strong, would not suffice for a conviction on a criminal charge.

Mr. Mahan went on to submit that there was no motive proved by the prosecution why the appellant would kill the deceased. There were many people who had access to the deceased's home including her own son PW1 and anyone of them could have been the subject of suspicion. Mr. Mahan further emphasised that if the appellant was the killer, he would have taken steps to flee from the deceased's home and go into hiding. There was evidence, according to Mr. Mahan, that the appellant was present and continued with his daily work in the deceased's home throughout the period the deceased went missing up to 20th September, 1994 when the appellant was arrested, not for killing the deceased, but for alleged theft of fertilizer and tobacco. The continuous presence of the appellant in the deceased's home, Mr. Mahan submitted, was consistent with the appellant's innocence and not guilt.

Finally, Mr. Mahan referred to the summing up by the learned trial Judge to the assessors. This, Mr. Mahan said, was a case of circumstantial evidence, and the learned trial Judge should have expressly directed the assessors on the test to be applied and should have explained to them the meaning and effects of that test in the light of the evidence led. This, according to Mr. Mahan, the learned trial Judge did not do, and his failure to do so, was a serious non-direction or misdirection which resulted in prejudice to the appellant. Mr. Mahan said that, if there had been proper direction and explanation on the test to be applied, the assessors would not have come to the decision which they did in the light of the evidence on record.

There was also another point which Mr. Mahan referred to upon his attention being drawn to it by us. This was in relation to a passage in the judgment of the learned trial Judge where he stated as follows:-

"If the deceased had been killed by somebody else then, the accused would have noticed that the cowdung he had carried was missing. The accused never gave any explanation about the cowdung".

Mr. Mahan submitted that in the above passage, the learned trial Judge placed the onus on the appellant to disprove the prosecution case or to explain the prosecution evidence. This, coupled with the non-direction to the assessors on circumstantial evidence, resulted, according to Mr. Mahan, in grave prejudice to the appellant.

On the other hand, Mr. Oluoch, Principal State Counsel for the Republic supported the conviction and sentence against the appellant. He started by referring to Mr. Mahan's complaint that there was no proper direction by the learned trial Judge to the assessors on circumstantial evidence. Referring to the passage we quoted earlier in this judgment, Mr. Oluoch submitted that this was sufficient direction. He further submitted that there was no need for the learned trial Judge to give his direction in express terms and to include the same into his notes on summing up.

In any event, Mr. Oluoch further submitted, even on proper direction, the assessors would still have come to the same conclusion because, according to him, there was strong circumstantial evidence to show that nobody but the appellant could have killed the deceased.

Mr. Oluoch then referred us to four specific aspects in the case which he submitted were, in their cumulative effect, capable of proving the case beyond reasonable doubt according to the test required on

circumstantial evidence. These four aspects which Mr. Oluoch highlighted and expounded upon were:-

"a. Appellant's explanation or answers to PW1 and PW2 on the whereabouts of the deceased. To PW1 the appellant said the deceased had gone to Gichichi while to PW2 he said the deceased had gone to Nakuru.

b. The evidence of cowdung. PW2 saw the appellant carrying cowdung five times from the cowshed towards the direction of the deceased's house. PW 3 saw the appellant do the same three times. Eventually the deceased was found buried in cowdung near her house.

c. The evidence of fertilizer. Mr. Oluoch emphasized the testimony of PW4 and PW7 in this respect. He also referred to the evidence of the investigating officer (PW8), to show that the fertilizer was recovered from the room where the appellant used to sleep.

d. The appellant and the deceased were the only two people living in the deceased's homestead. Nobody would come from outside, kill the deceased, dig a grave and bury her, without the appellant noticing what was happening, unless it was the appellant himself who did so or somebody else with the appellant's participation".

On the above four aspects, Mr. Oluoch emphasized that the evidence must be taken together and, according to him, the four aspects fully met and satisfied the standard of proof required in a case of circumstantial evidence.

There is no doubt that this was wholly a case of circumstantial evidence. The prosecution realised so and approached their case on that basis. The learned trial Judge appreciated the same and said so in his judgment in the passage we have quoted earlier on.

Before us, both counsel repeatedly mentioned the test required in cases dependent on circumstantial evidence. Though not quoted to us by either counsel, that test was admirably set out in the well known case of REX V KIPKERING ARAP KOSKE & KIMURE ARAP MATATU [1949] 16 E.A.C.A 135 where it was emphatically stated as follows:-

"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 above passage has been quoted with approval and restated in various ways in many cases by this Court and other courts over the years. It is a sound legal test on circumstantial evidence which has withstood the passage of time. It sets out, not only the test to be applied, but also, lays down where the burden of proof lies, namely, "on the prosecution and never shifts to the accused".

We are of the opinion that a case resting on circumstantial evidence must be approached with circumspection. Although, as has been stated in other cases, circumstantial evidence is, quite often, the best evidence which proves the guilt of the accused with the accuracy of mathematics, the circumstances must be clearly analysed and the test set out clearly to the assessors and explained to them in simple and ordinary language which they will understand with ease. Unless this is done there is always the danger of the assessors failing to appreciate the significance of the circumstances relied on by the prosecution.

We have carefully examined the summing up by the learned trial Judge to the assessors and we have, earlier in this judgment, quoted what he said and what, Mr. Oluoch for the Republic, relied on. With profound respect, we are of the opinion that the summing up fell below what would be expected to be put to the assessors in a case of circumstantial evidence. Broadly speaking, we are of the opinion that the summing up must cover two areas. First, the test must be put and explained expressly and clearly to the assessors in simple and ordinary language. Secondly, the circumstances put before the court by the

prosecution in evidence, must also be highlighted and summarized to the assessors.

In this case the learned trial Judge only referred to the circumstances put in evidence by the prosecution. There is nothing in the summing up to show that the learned trial Judge mentioned and explained what the test was in simple and ordinary language which the assessors would understand whilst they considered the evidence before them.

Failing to set out the test as aforesaid, in our considered opinion, was a serious non-direction which, we agree with Mr. Mahan, resulted in prejudice to the appellant in the particular circumstances of this case where the evidence relied upon was not overwhelming.

Mr. Oluoch submitted that even on a proper direction the same result would have followed and the assessors would have come to the same conclusion. In other words, Mr. Oluoch was saying that failure by the learned trial Judge to set out in his summing up to the assessors, the test to be applied, did not occasion any prejudice to the appellant. Such submission could normally find favour in a case of overwhelming circumstantial evidence. That however, was not the position in this case and we are unable therefore, to uphold Mr. Oluoch's submission in this regard.

We have given due and careful attention to the four aspects of evidence which Mr. Oluoch submitted to us. We have considered them along side Mr. Mahan's submission to the effect that if the appellant was the killer, he would have immediately taken flight from the deceased's home and that his continued presence in that home was consistent with his innocence rather than his guilt.

For a case resting on circumstantial evidence the prosecution must prove that there is nothing that can reasonably be explained on the innocence of the accused. The onus is on the prosecution and not on the accused so to prove.

In this case, we are satisfied that the appellant's continued presence in the home of the deceased is a matter that was wholly consistent with his innocence rather than his guilt. It breaks down the whole chain of circumstantial evidence in the case.

That brings us, lastly, to the passage in the judgment of the learned trial Judge where Mr. Mahan complained that the Judge had placed the onus of proof or explanation on the appellant. We had earlier quoted the passage in this judgment. We have considered the said passage carefully and we are in agreement with Mr. Mahan that, indeed, the passage appeared to shift the onus of proof or explanation to the appellant. If that is so, it certainly runs contrary to what was held in Kipkering Arap Koske's case as we quoted earlier in this judgment to the effect that the burden of proof is on the prosecution throughout and never shifts to the accused.

For all the reasons in this judgment and after careful consideration of everything submitted to us by both counsel, we arrive at the conclusion that the conviction entered by the learned trial Judge against the appellant was unsafe on the evidence on record. Accordingly, we hereby allow the appeal, quash the conviction, set aside the sentence, and order the immediate release of the appellant unless otherwise lawfully detained.

Dated and delivered at Nyeri this 17th day of May, 2001.

B. CHUNGA

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CHIEF JUSTICE

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR