



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 25 OF 1992

BETWEEN

SAMUEL NGUGI NDINGURIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal against the conviction and sentence of the High Court (Justice Mango J) dated 14th April 1992

in

H.C.CR.C. No.18 of 1991)

JUDGMENT OF THE COURT

Samuel Ngugi Ndunguri, the appellant, was convicted after a trial, of murder contrary to section 203 as read with section 204 of the Penal Code, and was thereafter sentenced to the mandatory death sentence. His conviction was based solely on circumstantial evidence, which evidence, according to the authorities, must point irresistibly to the guilt of the accused and exclude any other reasonable hypothesis than that of guilt, and also, exclude co-existing circumstances which tend to weaken or destroy such inference (Musoke v. R. 1958 EA).

The deceased in the case, Francis K. Githinji, a resident of Gathuya Village, Kiambu, was killed between the period 18th July, 1990 to 25th July, 1990, and his body was thrown into a latrine which was within the appellant's homestead. It was then covered with some soil. It was recovered from there on 25th July, 1990, along with a crowbar, which apparently was the murder weapon. The deceased was last seen alive on 18th July, 1990, when, according to the evidence, he left his home at about 2 p.m., to go to Limuru in the company of the appellant. It was on the basis of that evidence that the appellant was arrested on 20th July 1990, as a suspect in connection with the latter's disappearance.

This is a first appeal, and that being so we are obliged to assess and critically evaluate the evidence and make our own findings and draw our own conclusions without of course overlooking the findings of the trial court.

The facts of the case as can be gleaned from the proceedings of the trial court are as follows: The deceased was desirous of buying a motor vehicle for his own use. He learnt that the appellant could assist him to get one. On 17th July 1990, the appellant came to see the deceased to arrange with him as to when he would take the latter to see the car, and they mutually agreed that they would go to Limuru the next day for that purpose. The deceased did not apparently have all the money he needed for the motor vehicle, so he asked his wife, Mary Kanini Gitau (PW6), to top it up.

She gave him Kshs.6,800/= on 17th July 1990. The deceased and the appellant left together on 18th July 1990 on the understanding that they were going to Limuru to see the motor vehicle the deceased wanted to buy. Charles Lala (PW9), who worked for the deceased in a garage the latter was operating at Gathuya Village, overheard the two talking about going to see the motor vehicle, and he saw them walking together towards the bus stage for Limuru bound public service vehicles. That was the last time, according to the evidence on record, the deceased was seen alive.

PW9 saw the appellant at about 4 p.m. on 19th July 1990, in Gathuya Village but without the deceased. His hand was bandaged, and when PW6 went to see him to inquire about her husband he denied he had any knowledge as to his whereabouts or having left with the deceased on 18th July 1990. On 20th July 1990, the appellant told the police he had left the deceased at Whispers Bar. The police however, doubted him and had him arrested. He was placed in cells and kept there while investigations progressed to locate the deceased.

The appellant's home was visited and searched on 25th July 1990 by the police. Wilfred Wamae (PW4), a police corporal was in the search party which was led by Christopher Namiti (PW5), an inspector of police, who was then stationed at Kiambu Police Station. On the other hand PW4 was stationed at Lari Police Station. On 19th July, 1990, PW4 received a report from the appellant of an attempted robbery on him by unknown persons, which report he recorded in the station's Occurrence Book. At the time the appellant made the report he was bleeding from his right thumb. That is the wound we believe PW6 saw bandaged when she saw the appellant later on the same day. The appellant alleged that the wound had been inflicted by his attackers.

The search party recovered a mattress, two beds and two blankets, all new, from the appellant's house, and inside a latrine within the appellant's homestead the deceased's body was found. PW5 was driven to look inside the latrine because of the condition in which the floor of the latrine appeared. The floor was wooden. The timber pieces for the floor were nailed on one side but not the other, and appeared to have been recently interfered with. The floor was opened up, and the deceased's body was found inside the latrine covered with freshly dug soil. It was in early stages of decomposition. P.W.6 and the deceased's brother, John Kahuhia Githinji (PW7) were present when the body was recovered. Both of them, and also PW4 and PW5 testified that they heard the appellant say that apart from the deceased's body, there were several other bodies buried inside the latrine. Only a crowbar, with human hair at its tip, was immediately recovered with the body. The deceased's body must have been thrown into the latrine headlong as it was found lying head downwards. It had two distinct wounds, one on the head and the other on the lower back. It had socks on both feet, but only one shoe. It also had clothes on but they were not the same clothes the deceased was wearing when he was last seen alive.

On 26th July 1990, John Githinji (PW12), a chief inspector of police, returned to the appellant's home and caused further excavation to be carried out in the latrine to check on the other human bodies the appellant had said were buried therein. Some bones, clothes, identity card, some keys, shoes and a wedding ring were among the items he recovered. Those, together with some soil which had earlier been taken from the scene, the appellant's blood sample, the hair which was on the tip of the crowbar and some blood samples which had been taken from stains at the said latrine, were taken to the government analyst for analysis. Tom Muturi Mwangi analysed the items and found, inter alia, that the blood groups of the appellant and the deceased were both of group "B" and the hair on the crowbar matched that of the deceased. But none of the findings specifically implicated the appellant as the possible killer of the deceased.

Dr. Samuel Odero Ywaya (PW3), carried out the post mortem examination on the body of the

deceased, which was identified to him by his brother, Francis Kinoo Githinji. Apart from the two wounds we mentioned earlier, the body had another cut wound on the right side ear. It also had multiple fractured ribs. He found massive bleeding in the chest cavity and over the brain. A blunt object was, in his view, used to inflict the injuries he detected.

The appellant was formally charged with the murder of the deceased, on 2nd August 1990. A charge and caution statement was recorded from him then, but which he later denied having made. He however admitted he signed some papers on 26th July 1990, after being tortured by PW4 and PW12. However, neither of them, according to the evidence, recorded the statement from the appellant. Evanson Kamotho (PW8) an inspector of police, testified that he is the one who recorded the charge and caution statement from the appellant, but according to the latter PW8 merely read the statement to him which had been pre-recorded. In his defence, however, he stated that he was forced to sign a statement on 2nd August 1990, by an inspector of police inside an office. Obviously the two versions cannot possibly be true.

The appellant denied he ever saw the deceased on 17th and 18th July, 1990, or that he killed him and dumped his body inside a latrine. He stated that the charge was trumped up against him. He denied he knew the deceased, and that any human body was ever recovered from inside his latrine.

In his judgment the late Mr Justice Mango, who heard the appellant's case found as fact that the appellant and the deceased left together on 18th July 1990; they were seen by among other people, PW9; that the appellant knew the deceased well before that date; that the home of the appellant was a long distance away from that of the deceased; that the deceased's body was recovered from the appellant's latrine on 25th July, 1990; that it was not by coincidence that the body was there in view of the long distance between their respective homes; that the injuries found on the deceased's body showed clearly that whoever inflicted them intended, at the very least, to cause grievous bodily harm and that the injuries alone were evidence of malice aforethought; that whoever killed the deceased intended to steal some money from him, and that all the circumstances pointed to the irresistible conclusion that the appellant, and no other person, killed the deceased. In his view there was nothing in the evidence before him to weaken that inference. He believed that the appellant voluntarily made the charge and caution statement but held that it was given in a slanted manner. In the statement the appellant admits having killed a member of a gang of robbers that had invaded his home on the night of 18th /19th July, 1990, and dumped his body in his latrine.

In his home made memorandum of appeal, the appellant has raised eleven grounds which his counsel, Mr Mogikoyo, argued together. In his submissions before us, Mr Mogikoyo urged that the case against the appellant which was solely based on circumstantial evidence, was not proved beyond any reasonable doubt. In his view there are several lacunae which weaken the inference of guilt. For instance, he submitted that because the extra judicial statement allegedly made by the appellant did not lead to the discovery of the deceased's body, and considering that there was no direct evidence of the appellant's involvement in the killing, there was no material to connect the appellant with the offence.

Mr Okumu, a Senior Principal State Counsel, for the Republic, was of a contrary view. He submitted before us that the chain of events and the appellant's conduct before and after the disappearance of the deceased, clearly shows that the appellant and no other person killed the deceased.

We remind ourselves that as a first appellate court we are duty bound to reconsider the evidence, evaluate it and draw our own conclusions in deciding whether or not the judgment of the trial court should stand (see *Okeno v. Republic* [1972]EA 32). In doing so we are obliged to bear in mind the conclusions of that court in this matter and also that unlike that court we did not have the advantage of seeing and hearing witnesses testify. Such matters are important in the assessment of the credibility of witnesses. In view of that fact we can only interfere with the findings of fact of the trial court in clear cases.

There is evidence on record which the trial Judge accepted and acted upon, that the appellant left with the deceased at about 2 p.m. on 18th July 1990. They were going to Limuru where the appellant was expected to show the deceased a motor vehicle he was desirous of buying. PW9 and Erastos Nthiga Nzuki

(PW10) knew of that trip and PW9 actually saw them leaving together. The deceased carried some money to pay for the motor vehicle, part of which money he had got from his wife (PW6). As we stated earlier, she was also aware her husband wanted to buy a motor vehicle which, according to her testimony, the appellant had promised he would show him. There is also evidence on record that the respective places of work of the appellant and the deceased were close to each other and that they knew each other well, a fact PW9 knew of and testified about. In view of that the appellant's denial that he knew the deceased person cannot be believed, and has only been mentioned to be rejected.

Besides, PW4, PW5, PW6 and PW7 testified that they witnessed the recovery of the deceased's body from inside the appellant's latrine. The appellant's denial of that fact is as ridiculous as it is outrageous. These witnesses, in broad daylight, witnessed the demolition of the said latrine, and the pulling out of the body. Besides it was not suggested to any of the witnesses during cross-examination that what they said on the matter was not true. We believe the denial by the appellant that the deceased's body was recovered in his latrine was only a mischievous attempt to mislead the court and to avoid the onus which fell squarely on him to explain when, where and how he and the deceased parted company on 18th July 1990., when the deceased was last seen alive. Common sense demanded that the appellant explain where he parted company with the deceased on the material date, since that was a matter which was peculiarly within his knowledge and only him could be expected to know and explain it (Section 111(1) Evidence Act) and because he did not do so, a rebuttable presumption arises that he knew under what circumstances the deceased was killed. It is a presumption of fact which a court is entitled to make under the provisions of Section 119 of the Evidence Act, Cap 80 Laws of Kenya. Coupled with that the body of the deceased was recovered from inside a latrine within the appellant's homestead. In view of that evidence, is it believable that a person or persons other than the appellant might have killed the deceased? And, is it believable that the deceased was killed in the course of an attempted robbery on the appellant? These are facts and circumstances which counsel for the appellant, might have had in mind when he submitted before us that the circumstantial evidence on record does not exclude other possible explanations as to how the deceased died. However, in our view, the circumstances we outlined earlier leave no doubt as to the guilt of the appellant. Whoever dumped his body in the latrine from where it was recovered must have spent along time opening up and closing the floor of the said latrine. He could not, in our view, do so without being noticed, or without attracting attention, unless it was the appellant or some other person with the appellant's knowledge and approval which would then make him a principal offender.

In view of what we have stated the appellant's appeal lacks merits. In the result it is dismissed in its entirety.

Dated and delivered at Nairobi this 13th day of October, 2000.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR