



IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 97 OF 2002

WILSON WANJALA MKENDESHWO APPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from conviction and sentence of the High Court of Kenya at Kitale
(Nambuye, J) dated 26th February, 2002**

in

H.C.CR.C. NO.17 OF 1998)

JUDGMENT OF THE COURT

Following his trial with the aid of assessors, for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, respectively, Wilson Wanjala Mkendeswo alias Wilson Wanjala Mukendabwa, the appellant was found guilty, convicted and sentenced to the mandatory death penalty for that offence, whose particulars alleged thus:

"Wilson Wanjala Mukendabwa, on the 13th day of September, 1997 at Agricultural Development Corporation Farm Sabwani in Trans -Nzoia District of the Rift Valley Province, murdered Electina Nanjala."

The appellant was aggrieved and hence the present appeal. Five grounds have been preferred in support of the appeal, namely:

(1)No exhibits were found in the appellant's possession.

(2)The appellant's alibi defence was improperly rejected by the trial Judge who improperly shifted the burden of proving the same to him.

(3)The learned trial Judge erred in law when she failed to find that the appellant's case was not investigated as required by law.

(4)The learned trial Judge erred in law by acting on doubtful and insufficient evidence to convict the appellant.

(5)The case against the appellant was not proved beyond any reasonable doubt .

Electina Nanjala, the deceased, was the appellant's wife. Up to 13th September, 1997 they were living together as husband and wife within Kitale town. She was a business woman and used to sell maize near B.P. Petrol station within Kitale town. Jeniffer Nanjala (PW6), like the deceased, was a business woman at the same place along with several other people. She knew the deceased well as they had been doing business together for well over two years. She also knew her husband, the appellant herein, as he used to visit the deceased at her place of work from time to time. The appellant used to work at Bongo Hotel, Kitale, as a cook, but on 13th September, 1997, he was off duty.

The facts of the case as can be discerned from the evidence on record, are that on 13th September, 1997, the appellant went to the deceased's place of business, called her aside and after talking to him briefly, she returned to her business place, gave PW6 a leso and asked the later to keep it for her as she was going away shortly. She then joined her husband and they walked away together. The time was about 3 p.m. The deceased did not return and the next time she saw her was on 30th September, 1997. She was dead and her body was lying in the mortuary at Kitale District Hospital. The body had cut wounds on the head, hands and legs, among other places. It was partially decomposed.

The deceased's body was discovered at about 9.30 a.m. on 14th September, 1997 lying headlong at an isolated place at Sabwani Agricultural Development Corporation (A.D.C.) farm, about 500 or so metres from a nearby tarmac road. A Field Assistant Manager of the said farm discovered the body and caused a report about the presence of the body there to be made to the Police at Endebess Police station. The body was removed from the scene to the Kitale Hospital Mortuary, but it was not identified until 30th September, 1997. Among those who identified the body were PW6 and Beatrice Nasimiyu Mang'ara (PW8), a cousin of the deceased.

It was the prosecution case that on 13th September, 1997, the appellant went to a shop called Hira Traders, owned by Amos Musundi Lumeti (PW4), bought a panga and thereafter went to the deceased's place of business and asked her to accompany him. They went to an unknown destination where he cut her several times with the said panga, as a result of which she died due to haemorrhage from the multiple injuries she sustained.

In his defence the appellant denied the offence and, also, denied having taken the deceased along with him on the material date as was alleged by the prosecution. He admitted he passed by the deceased's place of business at 3 p.m. on the material date, talked to her, but that he thereafter left and went to a certain bar to drink beer leaving the deceased back at her place of business. He further stated that after his drink he went back home. The deceased did not return home that day, nor did she the following day. He was off duty, and resumed duty on 15th September, 1997. He did not take any steps to find out where the deceased was, but on or about 20th September, 1997, he sent word to her parent's home that she had not been seen or heard of since 13th September, 1997. He later made a report to the police about her disappearance and was issued with a police bond with instructions that he be reporting to the police daily. He denied he killed his wife.

The appellant was arrested on 30th September, 1997, and charged with the offence of murder. While in police custody he allegedly made a charge and caution statement admitting that he killed his wife. At his trial however, he denied making the statement and stated that he was tortured by the police and forced to sign a pre-recorded statement. The statement was however, admitted in evidence after a trial within a trial.

The appellant's case was heard by Nambuye J, with the aid of assessors. The evidence against the appellant was wholly circumstantial. The learned Judge quite properly so found. On the basis of that evidence she held that the appellant pre-meditated the killing of the deceased, had the opportunity to do so and that the chain of events taken as a whole pointed irresistibly to him to the exclusion of all other people as the person who killed the deceased.

This is a first appeal, and our duty is to re-evaluate the evidence, draw our own conclusions, without of course ignoring the findings and conclusions of the trial court. The law on circumstantial evidence in criminal cases is clearly and exhaustively enunciated in two well known and often cited cases of **Rex v. Kipkering Arap Koske and another** [1949] EACA 135, and **Simon Musoke v. R.** [1958] EA 715. In

order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt.

The appellant was not seen killing his wife. The evidence on record is clear, and in any case he himself testified, that at about 3 p.m. on 13th September, 1997, he was at the deceased's place of business. And although he denied it, there is acceptable evidence on record to the effect that when he left that place he went away with the deceased. The deceased was not seen alive thereafter. The trial Judge, and we too, accept PW6's testimony that the appellant left the deceased's place of business on the material date and time with her. In criminal cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt. As a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance **section 111** of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The said section is silent on what would happen if he fails to do so. But **section 119** of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact is rebuttable.

As we stated, earlier, the appellant denied he left the deceased's place of business with her. The learned trial Judge did not believe him. We do not believe him either. His conduct from the date the deceased disappeared until he was arrested provides the reason why he cannot be believed. It should be recalled that the appellant and the deceased were still living together as husband and wife. We have no evidence as to how their relationship as husband and wife was. What is clear, however, is that when the deceased did not return home on 13th September, 1997, the appellant did not appear disturbed. He never made any effort to look for her, either on that day, the next day or any other day until about 20th September, 1997 when he said he sent word to the deceased's parents to say that she had not been seen for several days. That he was not disturbed for such a long time raises a rebuttable presumption that he knew where she was. It was not suggested that the deceased did sometimes in the past fail to return home for several days. Why then would the appellant remain content and carried on with his work as a cook as if there was nothing amiss? Even when he went to report the deceased's disappearance to the police it was after six or so days, and he appears to have done so as a formality.

Moreover, there is the evidence of PW4, which the learned trial Judge accepted and acted upon, to the effect that an hour or so before the appellant went for the deceased, he bought a panga from the witness's shop. The panga was not recovered. Although the appellant denied he bought the panga from PW4, we do not believe him. He is the one who led the police to PW4's shop. The police could not have possibly known that the appellant or any other person bought a panga from PW4 on the material date. The appellant was working as a cook. He bought a panga a few minutes before his wife disappeared. She was found dead early the next day with several cut wounds. The interval between the time she was last seen alive by witnesses and the time her dead body was discovered was quite short. The appellant having not explained where he parted company with her a rebuttable presumption arises that he, or some other person he knows, was responsible for her death. In either case he would be a principal offender (see **section 21** of the Penal Code).

It was suggested by Mr. Matiri for the appellant that PW 4 did not properly identify the appellant as the person who had purchased a panga from him. The argument is untenable. The appellant is the one who led the police to PW4's shop. True PW4, without prompting, might not have identified the appellant. The appellant having volunteered to lead the police to PW4's shop removes any possible error in his identification.

Mr. Matiri also submitted that the prosecution did not prove motive for the killing. The failure to prove motive does not, per se, vitiate the appellant's conviction as by dint of the provisions of section 9 of the Penal Code, motive is not one of the elements of a criminal offence.

In view of what we have so far stated, the appellant's defence was properly rejected by the trial Judge. The circumstantial evidence not only irresistibly pointed to the appellant as the person who killed the deceased, but also excluded any co-existing circumstances which would weaken or destroy such inference. We would only add that in view of the fact that the appellant was found with injuries on his body, the charge and caution statement he allegedly made was improperly admitted in evidence. The learned trial Judge having held that even without it, the evidence against the appellant was sufficient to support a conviction against him on a charge of murder, no prejudice was caused against the appellant.

In the result we come to the conclusion that the appellant's conviction for the offence of murder contrary to section 203 as read with section 204 of the Penal Code was based on sound and sufficient evidence. His appeal, therefore fails and is dismissed in its entirety. It is so ordered.

Dated and delivered at Nakuru this 18th day of October,

2002.

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