REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 84 of 2009

JULIUS JULAI CHRISTINA …….APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Njagi & Azangalala, JJ) dated 24th February, 2005

in

H.C.CR.A. NO. 41 OF 2005)

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JUDGMENT OF THE COURT

The appellant in this appeal ***Julius Julai Christina***, together with another, were charged in the Senior Resident Magistrates Court at Voi with the offence of robbery with violence, contrary to ***section 296 (2)*** of the Penal Code. The particulars were as follows:-

"1. Julius Julai Christina (2) Patrick Dida Mwangangi; On the 29th day of August 2004 at Gumba area Sagala in Taita Taveta District within Coast Province, jointly with others not before court, while being armed with a dangerous or offensive weapon namely a sisal rope, robbed Crispus Mwanda Mwamidi of a motor vehicle registration number KWJ 434 Toyota Station Wagon valued at Kshs.230,000 and at or immediately before or immediately after the time of such robbery killed the said Crispus Mwanda Mwanidi."

They pleaded not guilty to the charge but after full hearing, the learned Senior Resident Magistrate (K. Muneeni) found them guilty, convicted them and sentenced each of them to suffer death as by law prescribed. They were not satisfied and lodged appeal in the superior court. That court, in a lengthy judgment delivered on 24th February, 2009, allowed the appeal lodged by the appellant's co-accused, quashed his conviction and set him free but dismissed the appeal by this appellant. He is still not satisfied and has moved to this Court on second appeal challenging his conviction and the dismissal of his first appeal. He filed five grounds of appeal, which were adopted by Mr. Wabwoto, his learned counsel. These grounds were:-

"1. That the first appellate Judges erred in law and fact by not considering that the prosecution case was ridden (sic) with inconsistent and contradicting Evidence in violation of section 346 of the CPC and the provision of section 163 of the evidence Act under Cap 80 of the Laws of Kenya.

2. That the first appellate court Judges erred in law and fact in failing to consider that the case was based on circumstantial evidence failing to (sic) that the evidence of circumstantial (sic) must be narrow (sic) examined.

3. That the first appellate High Court Judges erred in law and fact by basing my conviction and sentence (sic) without proper finding that I was arrested with (sic) anything in connection to (sic) the offence so charged.

4. That the first appellate High Court Judges erred in law and fact by failing to note that the trial was not fair since the appellate (sic) was not granted an opportunity to give submission address to the court as expresses (sic) in section 213 of the PCP.

5. That the first appellate court further erred in law and fact by failing to give me the appellant defence adequate consideration."

As we have stated above, Mr. Wabwoto, the learned counsel for the appellant relied on the above grounds in his submissions before us except that he abandoned the last ground. He however treated the first ground as raising the issue of the identification of the appellant and addressed us on that issue although the record shows that the first ground of appeal was that the learned Judges of the superior court did not consider that the prosecution's case was full of inconsistencies and contradictions. Nonetheless, Mr. Wabwoto submitted that the appellant was not identified as the perpetrator of the offence as there was no such evidence at all. He further maintained that the conviction proceeded on the evidence of co-accused and that was not safe as the appellant and co-accused had differences that led to the prosecution seeking an order of the Court to have them put in separate cells in prison. Further, he contended that the appellant was not properly convicted as the ingredients of the charge were not proved, as no one saw the appellant commit the offence with which he was charged. Lastly Mr. Wabwoto submitted that the appellant's rights in law were breached as he was not given opportunity to make submissions in his defence. He urged us to allow the appeal.

Mr. Ondari, the learned Assistant Director of Public Prosecutions, was of a different view. He opposed the appeal, submitting that the appellant was convicted on circumstantial evidence which was overwhelming. He pointed out several instances that, he contended, completed the chain of evidence and pointed to the appellant as one of the people who committed the offence.

This is a second appeal. By dint of the provisions of ***section 361 (1) (a)*** of the Criminal Procedure Code, only matters of law fall for our consideration unless we are persuaded that the trial court and/or the first appellate court considered matters that they should not have considered or failed to consider matters they should have considered or that their findings on matters of facts were clearly perverse, in which case such aspects become matters of law. The trial court was of the view that the entire case depended on circumstantial evidence as no one saw the appellants committing the offence. The first appellate court confirmed that finding. We have considered the entire record and we are also of the same view.

The brief facts of the case may be stated.

The appellant was known to a number of witnesses as a pastor in Voi Township. In his own defence, he acknowledged this and said he was an evangelist with Healing Centre Church, Mishomoroni in Mombasa. The deceased Crispus Mwanda Mwamidi was a taxi driver in Voi and was driving Motor Vehicle registration number KWJ 434 Toyota station wagon. That vehicle belonged to James Mbugua Kamau (PW1) who had employed the deceased to operate it for him.

On 29th August 2004, the deceased was at Voi stage with his vehicle. Many other taxi operators such as Elvys Mawasi (PW6), Solomon Nyange (PW7), Samuel Mwarema Ngumbo (PW8), and Timothy Rongoma Mkalla (PW9) were carrying out their taxi work at the Voi stage. At 11.30 a.m. the deceased was at Voi stage that morning before Mbugua left for Nairobi on 29th August, 2004. Timothy said, the appellant opened his car. The appellant was with one James. Timothy had known the appellant before as

they went to school together and were in the same school till 1982 when the appellant left in standard four. They again met three months prior to 29th August 2004 and during that period, the appellant used to go to Timothy's car every now and then just to sit inside the vehicle. He asked Timothy to take him to Marapu to get his money from a person there. Timothy told the appellant that for that journey, Timothy would require Ksh.800/=. The appellant said he had Ksh.400/= and would pay the balances after the journey. The appellant was unable to pay and they went out of the vehicle. At 1.00 p.m., the same day the appellant went to Elvys Mawasi's vehicle. He asked Elvys to take him to Marapu. This time, the appellant was alone. Elvys refused to accede to the appellant's request and forced the appellant out of his taxi. The appellant was not deterred. He approached Solomon whose vehicle was next to that of Elvys at the stage. He made the same request but Solomon told him, that he (Solomon) had to inform the owner of the car. Another customer came and Solomon had to drop that customer. He returned after 10 minutes and he found the appellant in the deceased's taxi. The two i.e. the appellant and the deceased were talking. After a short time, the appellant left the deceased's taxi, and went to Samuel's car. Solomon thought they did not agree and so the appellant went back to the deceased's vehicle. Another person joined the appellant at the rear seat of the deceased car. The deceased, together with the appellant and that other man left. After 10 minutes, the deceased went back to the stage but he was alone in the vehicle. Solomon enquired from the deceased, why he returned alone. The deceased said his customers were at a video and he would go for them later. That was the last time Solomon saw the deceased alive. Samuel said the appellant approached him the same day for the same assignment and he told appellant to pay Ksh.1,000/=. The appellant said he had Ksh.800/= which Samuel refused to take and the appellant went back to the deceased's vehicle. According to Samuel, they left at 3.00 p.m. from the stage but came back later saying he had left the appellant and another elsewhere and would go for them later. The deceased came back and told Samuel he was leaving for Marapu. The deceased never returned. The next morning Samuel learnt the deceased's car was found at Mariakani. Samuel said he had warned the deceased against going with the appellant but the deceased said there was nothing to fear as appellant was his uncle.

It is clear to us, from the evidence of the taxi operators we have narrated hereinabove that the deceased left Voi stage with the appellant and others in the afternoon of 29th August, 2004. Patrick Gitonga Kimunyo (PW10) was running a shop in Voi town. On 29th August, 2004 at 3.30 p.m. a motor vehicle registration number KWJ 434 – Toyota station wagon, which was a taxi, approached his shop and stopped about 30 metres away. A person he later identified at an identification parade organized by IP John Kwasa (PW18) on 8th September 2004, as the appellant, came out of that taxi running. The appellant reached the shop and bought two sisal ropes worth Ksh.40 in total. The appellant then returned to the taxi and, as a council vehicle hooted seeking space, the taxi sped away with four occupants. At 5.00 p.m. the same day Mshamba Mwasi Kamulo (PW11) who came from the same village with the appellant and knew him well was at Kaloleni bridge in his lorry KAP 080W, picking sand. He saw the appellant carrying a container in a brown parcel –packet of maize. They exchanged greetings and parted but a few minutes later one James Mwandimu appeared carrying a 5 litre container which had petrol. Lazarus Makuma (PW4) was at his home in Sagala. On 29th August, 2004 at about 4.00 p.m. he saw a taxi car. On reaching his home it turned towards Voi to a kiosk belonging to his sister. There were four people in that vehicle and the appellant was among them. He knew the appellant as a pastor who had gone to his son's primary school in the area to preach the word of God that year. They asked for cigarettes and water. They were given water. They then said they would go to Voi for miti ni dawa and they drove off. Rashid Ndaikwa Marema (PW2) together with Jochom Mwafula Munyonga (PW3) and others were riding on their bicycles. At Ginuka Mackinnon he saw a taxi coming. It had four occupants, two in front and two at the back. The appellant's co-accused in the trial court who was known to Rashid gave a sign that the car was full. The car did not stop and Rashid and others continued on their journey. After going seven kilometers, they found the same car, this time stationary and facing them. Three doors were open. One man, shaved clean, was lying on his stomach near the car. Two people were seated in the car smoking bhang. Appellant was telling the man lying down to stand up. Rashid said he had seen appellant at Sofia in a crusade earlier that year. On Rashid asking why that man was lying down he was told the man was learning to smoke bhang and smoked much bhang. On Rashid challenging the man as to why he had smoked bhang stupid, the man rose and posed the question *"who are you calling a fool"* and he went into a slumber. Later Rashid learnt that the man who was lying down had been killed and thrown away. He also identified the appellant at identification parade conducted by IP John Kwasa, and saw the deceased at the mortuary. Jochom Mwafula Munyonga (PW3) confirmed the evidence of Rashid and added that the

man they saw lying down was carried back into the vehicle by the other occupants of the taxi. He went to the mortuary and confirmed that that man who was lying down was the deceased. On the same day, Lucas Mwangundi Kodi (PW5) was preparing charcoal along Voi – Nairobi road – off the road. A taxi yellow line passed very fast. He could not see the occupants. After 30-40 minutes the same taxi came back. It veered off the road going towards him, then it turned and made noise as if it had hit a tree. It stopped near Lucas and Lucas heard someone say in Kiswahili *"pindua pande hii."* The car engine was off. They tried to start it but it could not. Lucas went nearer. He heard someone say *"Guru guru, pindua pande hii mwizi mbona unataka kusumbua"* Someone came from the driver's seat and looked inside the car. Another man came from the upper door. He lifted the load and pulled it as the other man pushed. As they did so they were saying that was a thief. Lucas sought to go near but was told not to do so and told if he did so he would be arrested for nothing. They threw that *"load"* into some bushes. Lucas called neighbors, and two women responded. They then traced the route to where the *"load"* had been thrown. They first saw a shoe and later they found a body lying on the ground on its stomach. The body had a sisal rope on the neck. Lucas reported the matter to Voi Police Station as the body was in his shamba. Cpl Ezekiel Ombasi (PW19) and PC Mbugua, collected the body and took it to Voi District Hospital. Lucas could not identify the two men who were pulling and pushing the body. Benson Kangwima (PW12) was running a butchery and taxi services in Voi. On 29th August 2004 at 9.30 p.m. he was in town when he received information that Mbugua's taxi had been seen on the highway near Mackinnon. He went to Kariokor and informed Mbugua's wife about what he heard. The two of them called Mbugua on telephone and told him the same. Mbugua asked Benson to go and see the car. They took a pick up and went there. They found the vehicle off the road. It was motor vehicle KWJ 434. They left it there and reported the incident to Mackinnon Police Station. They were given two police officers with whom they returned to the scene. The car had a dent at the front and the front tyre was punctured. They removed the punctured tyre and replaced it with spare tyre which was in the boot. They saw in the vehicle a plastic container which was empty and an empty packet of maize meal. They took the car to Mackinnon police station. Next day they heard the driver had been killed. Sgt John Kiarie Nangi (PW13) was at the Mackinnon Police Post residence at 11.30 p.m. on the same date 29th August 2004. He was called to the post and together with PC Mbugua, they proceeded to the scene where the taxi was. They were together with those who had made the report about the vehicle. They found the motor vehicle KWJ 434 white Toyota. It had a tyre burst. They took the spare tyre from the boot and replaced the burst tyre. One of the reporters drove the car to the post. We think this evidence and that of Benson Kagwima leaves no doubt that the reporters who accompanied Sgt John and PC Mbugua to the scene and collected the vehicle must have been Benson and Mbugua's wife. Sgt John confirms that in the taxi was a jerrican. On 30th August 2004, DCIO IP Wachira, OCS and Cpl Ombati went to Voi Hospital Mortuary and saw the body. On the same day James Mbugua returned to Voi from Nairobi and learnt that his driver had been killed. He reported to police station at Voi. He saw the motor vehicle and noted that it had a dent in front, its spotlight was broken and one tyre had a puncture.

On the same day 30th August 2004, Justine Mwamidi Mwanda (PW16) the father of the deceased who was staying at Sofia in Voi got information that his son was dead. He was taken to the mortuary and he saw the body of the deceased. It had a rope on the neck. He identified the body to Dr. Julius Maneno Sango (PW20) who performed postmortem on the body on 2nd September 2004. Dr. Maneno's findings were that the body had bruises on the face; tongue was protruding, there were bruises on the nose, chest, arm, forearm and the right arm had linear bruises along the wrist and defence marks. He formed the opinion that the cause of death of the deceased was cardio vascular failure due to strangulation. Investigations commenced. On 31st August 2004 at about 5.00 p.m. IP Jackton Kieti (PW14) was then attached to Police Divisional Headquarters at Voi. He received a call through 999. On information received from the caller, he collected other police officers and they rushed to Maweni. They found the appellant in a house. Many people surrounded the house and they wanted to beat the appellant. IP Jackton picked the appellant and ran with him to their car which was waiting nearby. The appellant was booked at Voi police station. IP Nemesis Munyika (PW15) arrested the co-accused of the appellant on 1st September 2004. He was beaten by members of the public before IP Nemesis saved him. However, one other suspect was beaten to death. Cpl Michael Oduor (PW17) was attached to CID scenes of crime at Voi. He took 30 photographs of the body and other photographs of the vehicle. IP John Kwasa (PW18) conducted an identification parade at which Rashid identified the appellant as one of the people he saw in

a taxi with four occupants on 29th August 2004 at 4.30 p.m. and Patrick Gitonga also identified the appellant as the person who bought two sisal ropes from him on the same day at 3.30 p.m., one of the which ropes Gitonga identified as the rope found on the neck of the deceased.

After Cpl Ezekiel Ombasi (PW19) had carried out full investigations, the appellant, together with his co-accused were charged as stated above. On being put on his defence, the appellant's unsworn statement was rather confused, but what we make of it, is that he was not at the scene of the alleged robbery on 29th August 2004. He thus raised alibi. We will reproduce the important part of it. It was as follows:-

"I left for home in August 04 I was back from Mwatate on 1.09.04. I was seeing my grand father Christina. I alighted at Voi stage on 1.09.04. I went to a hotel to eat. The hotel was surrounded by members of the public. They were saying I had killed my uncle. Mwamidi. I was told I killed Mwamidi. I know nothing on this death. The story that I was seen by some witnesses is not true."

His co-accused stated in sworn evidence that he left the appellant and the deceased in the relevant vehicle along the road once he sensed that mischief a foot. That evidence though of accomplice was supported by that of Rashid.

From the above facts which we have endeavoured to set out in a narrative form, it will be clear that no one saw the appellant kill the deceased at the time or immediately before or after robbing him of the taxi. This is why we readily agreed with the subordinate court, the superior court and both learned counsel that the entire prosecutions case was based on circumstantial evidence. Before we go into considering whether that evidence could be considered sufficient to sustain a conviction, we need to dispose of the issue of identification of the appellant. This is necessary because, circumstantial evidence can only be relied on if it is shown that each link points to the appellant and to none other as will soon be apparent in this judgment. If the identity of the accused is in doubt then it may not be certain that the circumstances would lead to the suspect.

In this case; all the taxi drivers at Voi stage who were colleagues of the deceased and who gave evidence, namely, Elvys, Solomon, Samuel and Timothy said they knew the appellant well. Each gave his name as Julius. Each saw him on that fateful day as he approached each seeking to hire his taxi to take him to Marapu. Some refused outrightly, while some demanded amounts he could not afford and one told him he needed permission of the vehicle owner before he could oblige. He eventually settled for the deceased's vehicle. This was during broad day light between 11.30 a.m. and 3.00 p.m. The deceased also talked to some of these witnesses and told them he was taking the appellant to Marapu. The appellant's presence at the stage and his hovering between these taxi drivers on that day seeking to be taken to Marapu cannot be in doubt. He was, in our view, clearly identified beyond any doubt as the person who hired the deceased's vehicle and left with the deceased from Voi stage allegedly for Marapu. Timothy put it more succinctly. He said:-

> ***"The late Mwanda came to my car. I told him about Julius. He (deceased) talked to Julius (accused one). Accused one (Julius) wanted to go to Marapu. They disagreed. Accused one (Julius) came to me. He (accused one) asked me how much the fare was for going to Marapu. I told him it was Ksh.1,000. He (accused one) said he had Ksh.800/=. I refused. He went back to Mwanda's taxi. They left (I was worried after it reached 7.00 p.m.). They left at 3.00 p.m. for the stage …… He then came back and told me he was leaving for Marapu. He never came back. "***

We do agree with the trial court and the superior court that the appellant was properly identified as the person who hired the deceased's vehicle to Marapu and as the last person who left the stage with the deceased in that vehicle. As we have said, all the taxi operators' witnesses knew him well and saw him on that day. Timothy saw him leaving the stage with the deceased. That was not the end as far as identification of the appellant was concerned. Patrick, who was running a shop in Voi town, sold two sisal ropes to a person who was in a vehicle registration number KWJ 434 a taxi with yellow line. This was at

3.30 p.m. He identified that person as the appellant and confirmed that by pointing out the appellant at an identification parade which was conducted by IP John Kwasa on 8th September 2004. That identification was not in any way disputed and in our view it was beyond reproach. Then on the road, at 4.30 p.m. Rashid saw the appellant telling a man lying down near a taxi whose registration number he only partially remembered as KWJ and which had passed them and later they found stationary facing them to rise up. Rashid also, later identified the appellant at an identification parade. In our view, and in answer to Mr. Wambwoto's submissions on the question of identification, we entertain no doubt that the appellant was properly identified as the man who left with the deceased in the taxi KWJ 434 allegedly for Marapu. He is the person properly identified as having bought two ropes from Gitonga and went with the ropes into that same vehicle. He was the person seen by Rashid later in that vehicle with a person who was lying down.

We now turn to consider whether the circumstances established by the evidence on record pointed to none other than the appellant as one of the perpetrators of the offence i.e. whether the evidence established that the deceased was robbed of his vehicle and at the time or immediately before or immediately after the time of such robbery he was killed by the appellant either alone or jointly with others for that is the obtaining scenario in this case. The law as regards the principles that guide the court in considering a case based on circumstantial evidence is now well settled. In the case of ***Simon Musoke vs. Republic (1958) EA 715***, the predecessor to this Court stated:-

> ***"The learned Judge did not expressly direct himself that in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of guilt. As it is put in Taylor on evidence (11th Edition) 74:-***
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> ***"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."***

However, as was stated in ***Taper v Republic (2) (1952) AC 480*** at ***page 489,*** before that principle is applied the Court needs to look further and see if there are other co-existing circumstances that might weaken or destroy the inference of guilt. We quote it:-

> ***"It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

The trial court, having considered the evidence before it came to the conclusion that:-

"From all these pieces of evidence any reasonable man would presume not innocent but guilt on the part of the accused. I find the accused were among the persons who robbed the deceased of the taxi car motor vehicle registration No. KWJ 434. They killed the deceased at or immediately before or immediately after the said robbery."

And he convicted the appellant and his co-accused of the offence as charged. The superior court, after analyzing the evidence and evaluating it as is required in law – see ***Okeno v. Republic (1972) EA 32,*** concluded, as follows:-

"On the other hand, the 2nd appellant was one of the last people seen with the deceased, and the latter was found dead with a rope around his neck. And that rope was positively identified as one of those bought by 2nd appellant.

Although this evidence is purely circumstantial, it points an accusing finger at the 2nd appellant. And even though the evidence of the 1st appellant may be that of an accomplice, it was sufficiently corroborated by that of PW2."

We have on our own analysed the evidence as demonstrated above and we find ourselves in full agreement with the conclusions reached by the two courts. The appellant was the last person seen with the deceased. He was the person who bought the rope found on the deceased's neck. That rope was bought the same day the appellant hired the deceased to a journey that never was. Rashid and others together with the appellant's co-accused saw him with the deceased on the road.

Mshamba saw the appellant and another carrying a container and that container was recovered in the taxi. A body was removed from that taxi on the same day when apparently the taxi veered off the road, hit a tree and got punctured. Lucas saw it all. That body was later identified as that of the deceased and that vehicle was the subject taxi which Benson, Sgt John and PC Mbugua recovered from the road with a punctured tyre and took to Mackinnon Police Post after replacing the punctured tyre. It was the deceased's taxi which was identified by taxi operators as having taken the appellant to Marapu. The provisions of ***section 111*** of the Evidence Act required the appellant to explain what happened after he had been seen at all these stages with the deceased. He never offered any explanation. The evidence on record left no doubt whatsoever that the appellant was one of the perpetrators of this heinous offence. He cannot wriggle out of it.

The complaint that he was convicted on the evidence of co-accused has no merit. Under ***section 32*** of the Evidence Act, the courts were entitled to consider the co-accused's evidence and they only considered it as corroborative evidence and no more. Equally, the claim that the appellant was not allowed to submit in his defence has no merit. The record shows that the appellant had all the opportunity and was availed that opportunity to say something after the co-accused who was the second accused had closed his case. His response was *"Nil"*. This is clear at page 47 of the typed proceedings. We have no reason to disturb the decision of the two courts which we find were based on sound legal grounds.

The appeal has no merit. It is dismissed.

Made and delivered at Mombasa this 12th day of March, 2010.

P. K. TUNOI
……
JUDGE OF APPEAL

P. N. WAKI
……..
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR