



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

Criminal Appeal 196 of 2006

**1. CHENGO PEVU MAKAU
2. YAA KITI YAA.....APPELLANT**

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction & sentence of the High Court of Kenya
at Mombasa (Khaminwa, J) dated 10th July 2006
in**

H.C.CR. C. NO 29 OF 2003

JUDGMENT OF THE COURT

Chengo Pevu Makau (1st appellant) and **Yaa Kiti Yaa** (2nd appellant) were tried with the aid of assessors by the High Court, at Mombasa, upon an information charging them with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and at the close of the trial they were both found guilty, were convicted as charged, and were thereafter sentenced to the mandatory death penalty. They were aggrieved and hence these consolidated appeals.

In their respective memoranda of appeal they have raised 7 identical grounds. However, when the appeals came up before us for hearing, Mr Okanga, counsel appointed by the court to represent both appellants, abandoned grounds 1, 3, 4 and 6 and argued the remaining grounds together. Those were

“ (2) That the learned trial High Court Judge erred in law and fact by arriving to (sic) conclusion that the appellant was guilty of the offence without discreetly bearing in her judicial mind that there was not any prosecution witness who pointed a finger of guilt whether I was seen killing the deceased.

(5) That the learned trial High Court Judge erred in law and fact by not evaluating the prosecution evidence and find that the whole of the prosecution case was not proved beyond any shadow of doubt to borne (sic) safe conviction.

(6) That the learned trial high court Judge erred in law and fact by not adequately considering my defence which impaired the prosecution evidence hence the benefit of doubt ought to have been given to the appellant.”

This being a first appeal, we are duty bound to consider all the evidence which was adduced before the

trial court, re-evaluate and analyse it and come to our own independent conclusions, without overlooking the conclusions of the trial court, and at the same time bearing in mind that unlike the trial court, we do not have the benefit of seeing and hearing witnesses testify as to be able to fully assess their credibility. (**Okeno V R [1972] EA 32**). The appellants are entitled to such re-evaluation and analysis. The deceased in this matter was Kambi Muyu. According to the evidence on record, he was the brother of the 1st appellant. The deceased disappeared on or about the night of 14th February 2003. On or about 19th February 2003, his naked body was found floating on water in a dam near his home. He was dead. His clothes were recovered near the dam. No one testified having witnessed his killing.

The prosecution case against the appellants was based on circumstantial evidence. Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts, that such evidence may in some cases prove a fact with the accuracy of mathematics. (see **R v Taylor, Weaver and Donovan (1928) 21 Cr. App R 20**)

What were the circumstances the prosecution relied upon? On the material day the deceased disappeared, he had been drinking with, among other people, Chinzi Kenga (PW2), and the 1st appellant. The latter and the deceased were brothers. Also present was Njevu Yaa (Njevu). Njevu, a widow with 10 children, was apparently a lover of both the deceased and the 1st appellant. PW2 testified that after these people had drunk their brews for some time, the 1st appellant, the deceased, the 2nd appellant with his wife and Njevu, left together. Njevu carried some brew with her. Njevu testified that she had agreed with the deceased that they would meet at nearby shops, which they did. Njevu regarded the deceased as her unofficial husband. They went together and later settled along a path and there continued their drinking. As stated earlier she had carried some brew in two bottles. It was her evidence that after the drink they would make love. Njevu testified, further that while they were drinking their brew, three young men confronted the deceased. The three were both appellants, and one Kazungu, who is alleged to have told Njevu that the deceased had made her “ proud”. Njevu testified that Kazungu stood close to her and she was therefore able to recognize him. He was a person she knew well. She likewise, knew both appellants quite well. The three young men attacked the deceased with sticks and beat him thoroughly. Njevu, ran away for fear that the three would also assault her. That was the last time the deceased was seen alive.

Kalundi Jimla (PW1) is one of the people who saw the deceased’s body floating on water in a dam. She saw the body a few days after his disappearance because on the day she saw it, it was decomposing. Ronald Beja Muniyika (PW6), the assistant Chief of the area witnessed the recovery of the body. The 1st appellant and one Kahindi Jimba, removed the body out of the water. The body, according to CPL. Geoffrey Juma (PW8) had no visible external injuries. Both PW6 and PW8 testified that both the 1st appellant and Kahindi Jimba requested that the body be not taken to the mortuary in Mombasa and instead it be released to them for burial, because, one, they did not suspect foul play as they believed the deceased who, according to them, was a drunkard, had accidentally fallen into the dam and drowned; and two, because they wanted to cut down burial expenses. The deceased’s body was released to the two who later organized a burial. No post mortem examination was conducted on the body, and so it cannot be ascertained whether the body had any external or internal injuries. Later the body was exhumed, but by that time it had decomposed. The exhumation was conducted more than a month after burial. Dr. K. Mandalya, a Pathologist, testified that it was difficult to assess the cause of the deceased’s death due to extensive decomposition of his body.

A decision to exhume the deceased’s body was made because there were rumours rife in the area that the deceased had been killed by both appellants. No one, however witnessed the killing. Apart from what Njevu said, that she witnessed both appellants and another, beat the deceased, no one else testified having seen the appellants assault the deceased.

At the close of the prosecution case, the trial Judge (Khaminwa, J) ruled that both appellants had a case to answer. In their defence both appellants gave unsworn statements. The 1st appellant stated that school children informed him about the presence of the deceased’s body in the dam. He confirmed that fact when he went there with three other people. It was his case that he requested for the body on the instructions of the deceased’s father. He admitted he was among the people who were drinking at PW 2’s house, but was silent on whether he met Njevu and the deceased by the roadside drinking.

The 2nd appellant, denied any knowledge of how the deceased met his death. The remainder of his evidence related to his arrest.

There is no doubt that the deceased died. The issues the trial court was called upon to determine were, firstly, whether the deceased was killed or whether he fell into the dam and drowned. If he was killed, whether the appellants alone or with other persons caused his death. Lastly, whether the killing was with the necessary malice aforethought, to constitute murder. The trial Judge, in a short judgment agreed with the assessors' opinion that the appellants were guilty of murder and thus found both appellants guilty of murder and convicted them. Thereafter she sentenced them to death.

We earlier set out the grounds upon which both the appellants base their respective appeals. The crux of their complaint is that they do not think the evidence on record is sufficient to sustain a conviction for the offence of murder. Mr. Okanga, who appeared for both appellants, submitted before us that the prosecution case has gaps, and that since it was based on circumstantial evidence, the inculpatory facts do not exclude co-existing hypothesis regarding the cause of the deceased's death.

The prosecution's key witness was Njevu. She was the deceased's lover. It would also appear that the 1st appellant had an interest in her. Njevu's credibility was attacked by Mr. Okanga that she was not a witness of truth. Mr. Okanga in coming to that conclusion was relying on what he made out of her conduct on the day the deceased disappeared. It was her evidence that when both appellants set on the deceased she ran away, went to her house, warmed for a short time and thereafter went for a dance. According to Mr. Okanga she did not inform anybody about the assault of the deceased.

In her evidence, however, Njevu stated that on her way to her house, she met two people, namely Karisa Kazungu and Juma Mrisa, and requested them to go and assist the deceased, but the two refused. Later she said she met the 1st appellant at the dance and inquired from him where the deceased was. The 1st appellant allegedly denied any knowledge of his whereabouts, and actually warned the witness not to raise that issue again or else he would kill her.

The trial Judge believed Njevu. We believe her too. Her evidence was straight forward. She was the deceased's lover. She witnessed the appellant and his co-accused beating the deceased. The reason for doing so, apparently, was because his association with Njevu had allegedly made the latter proud. It would appear to us, as there is no clear evidence on this that the 1st appellant wanted Njevu, but he could not get her because she apparently preferred the deceased. PW2's evidence does support her in certain respects. Both appellants, Njevu, the deceased and others left the drinking place together. It was about 8.00 pm. on the same night the deceased disappeared. Both appellants later joined Njevu and others at a dance. Njevu inquired from the 1st appellant where he and his companions had left the deceased. Apart from 1st appellant being the deceased's brother, he was a village elder. It is noteworthy that, in her evidence Njevu was not ashamed to state in her evidence that on the material night the deceased disappeared the latter and herself had planned to have sex by the road side, and they would have done so were it not that they were interrupted by the appellants.

We also believe Njevu because of the 1st appellant's conduct when the deceased's body was found. He was anxious to have it disposed of without a post mortem examination. It may be true that the cost of transporting the body from a mortuary in Mombasa to deceased's home would have been high. However, the 1st appellant appeared to be anxious and was intent in avoiding a post mortem examination. He gave the police a theory that the deceased might have fallen into the dam while in a drunken state. But the deceased's body was naked when it was retrieved from the dam. The circumstances were such that the 1st appellant appeared to be concealing something.

We stated earlier that both appellants were the last people seen with the deceased alive. That is why Njevu wanted to know from the 1st appellant of his whereabouts. This was a matter peculiarly within their knowledge. The law placed an evidential burden on them to explain how and where they parted company or what happened after Njevu escaped leaving them behind with the deceased.

Njevu's testimony on that aspect, was that both appellants and another person set on the deceased and assaulted him with sticks. At the time she escaped they were still assaulting the deceased. At the appellants' trial they were represented by one Obara. He cross-examined Njevu on the question of her identification of the appellants. Her evidence was clear she had been with them at a drinking spree. Thereafter they met at a nearby shopping centre. She had gone there to meet the deceased so that as pre-arranged they would go together to a certain place where they would make love. She was therefore able to observe the appellants. When the appellants met her with the deceased they spoke to them. There was moonlight. Njevu was able to see them clearly. She stated that they were a metre away and stood face to face with them. Besides, these are people she knew well.

Lastly, Njevu testified that the 1st appellant later threatened her with death when she inquired from

him about the whereabouts of the deceased. He told her to say nothing about the issue or else he would kill her.

Section 111 of the Evidence Act, Cap 80 Laws of Kenya, as material provides thus:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Both appellants did not explain how they parted with the deceased. A rebuttable presumption arises that they were either the people who killed the deceased or that they know how he met his death. Mr. Okanga in his submission urged us to find that the cause of death could have been as a result of drowning. The circumstances earlier on set out in this judgment exclude that possibility. The deceased’s body was naked. His clothes were recovered near the dam where the body was found. These circumstances exclude accidental drowning.

In the foregoing circumstances we agree with Mr. Monda, Senior State Counsel, that the trial court properly found as fact that both appellants killed the deceased. Mr. Monda did not however, think the offence of murder was proved. In his view the trial court should have but did not deal with the issue of the appellants’ drunkenness.

In his view the appellants should have been convicted of the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code as they were possibly drunk when they attacked the deceased and thus lacked the requisite malice aforethought.

It is true the trial, court did not express any opinion on the question of the appellants’ drunkenness. It was not the appellants’ respective cases that they killed the deceased but that when they did so they were drunk. However, there is evidence on record which the trial court accepted that they had been drinking. Besides it is apparent from the evidence that there was a love triangle between the deceased, the 1st appellant and Njevu. These were circumstances which, had the trial Judge considered with particularity, she would have probably come to the conclusion that the appellants’ was not a case of murder, but manslaughter. We give the benefit of the doubt to the appellants with the result that we quash the appellants’ respective convictions for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, set aside the sentence of death imposed, and substitute therefor a conviction for the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code.

The appellants have been in custody since February 2003. They were first offenders. They were convicted in July 2006. We bear in mind that a life was lost by their senseless act. In the circumstances we sentence each appellant to 15 years imprisonment to run from the date of conviction namely, 11th July, 2006. It is so ordered.

Dated and delivered at Mombasa this 22nd day of January, 2010.

S. E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

