REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A.)

Criminal appeal 165 of 2004

BETWEEN

ISAAC WANGATU NJOROGE …….. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Lady Justice Lessit) dated 30th May, 2001

in

H.C.CR.C. NO. 43 OF 2001)

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JUDGMENT OF THE COURT

ISAACK WANGATU NJOROGE, the appellant herein, was after a lengthy trial covering a period of over two years convited of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and sentenced to death.

The information filed by the Attorney General on 9th April, 2002 stated that the appellant on the night of 1st and 2nd January, 2002, at Kabati Estate in Naivasha in Nakuru District of the Rift Valley Province murdered Ruth Wanjiku Mburu, the deceased.

The prosecution case rested on the following largely undisputed facts. The appellant and the deceased were friends and had variously cohabited for a period of about a year. During the fateful night the deceased was in the house of the appellant as from 7 p.m. At about 9. p.m. Naomi Wanjiku (PW1), who lived in the same plot with the appellant, heard him calling the deceased to open the door for him. However, there was no reply and the appellant walked away. Five minutes later, PW1 heard a person

whom she did not identify insert a key to the lock of the appellant's door and opened it. Soon thereafter she heard a movement of what sounded like a heavy object being pulled out of the door, dragged along the ground directly opposite PW1's door and out of the plot. Anyhow, she did not bother to check what was going on. The lifeless body of the deceased was discovered at about 3 a.m. by Stephen Mwangi (PW2) and Pastor Samwel Wanyoike (PW7), members of a neighbourhood security vigilante group, who were on patrol within the estate. The deceased had no shoes and it was visible that she had bled profusely from the mouth.

The postmortem conducted by Dr. David Kuria (PW4) revealed that the deceased had, among other grave injuries, suffered neck dislocation at C3 and C4 cervical levels. The cause of death was fracture and dislocation of the neck and fracture of the base of the skull.

The appellant told the trial court in his defence that he ran a construction company and had a wife and children. During the material night he did not sleep in his house as usual but in his store in the shopping centre as there was no taxi to take him to his house. It is worthy of note that police officers found him there at about 5 a.m. The appellant further testified that a watchman known as Ngige had some keys which could open the appellant's door. We note that Ngige did not testify in the trial. In convicting the appellant the learned Judge held:

> ***"In conclusion after considering the evidence in this case, all of which was circumstantial and the facts of the case, which facts I find are not separate aggregate inconclusive facts, but conclusive pointed facts, the doctors reports, the government chemists reports and the circumstances under which the accused was found and arrested, I have no doubt that the prosecution has proved this case beyond any reasonable doubt".***

In the appeal before us, which was ably and persuasively argued by Mr. L. M. Karanja, for the appellant, Mr. Gumo, the learned Assistant Deputy Public Prosecutor conceded the appeal and stated that he did not support the conviction because the guidelines laid down by the predecessor of this Court in Kipkering ***Arap Koske & Another v R [1949] EACA 135*** and cited with approval in S***imoni Musoke v Republic [1959] EA 715*** and have since remained the guiding principle in circumstantial evidence were not followed by the trial court. The directions laid down are:

> ***"In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".***

In the case before us the existence of other keys to the house in which the deceased was sleeping, could not rule out the possibility of other persons apart from the appellant gaining entry into the house. Thus, there were other co-existing circumstances which would weaken or destroy the inference of guilt of the appellant. In the result, we think that the conviction of the appellant is unsafe and should not be

upheld. We would, therefore, with respect, agree with Mr. Gumo that the conviction should not be allowed to stand.

The appeal is allowed, the conviction quashed and the sentence of death set aside.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 30th day of September, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR