Case Number:	Criminal Appeal 194 of 2002
Date Delivered:	28 Nov 2003
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Peter Obino Nyaundi v Republic [2003] eKLR
Advocates:	Mr Kabua for the Appellant
Case Summary:	**Peter Obino Nyaundi *v* Republic** Court of Appeal, at Kisumu November 28, 2003 Omolo, Githinji JJ A & Otieno-Onyango Ag JA Criminal Appeal No 194 of 2002 (Appeal from a conviction and sentence of the High Court at Kisii, Wambilyangah J dated 5th November 2002, in High Court Criminal case No 38 of 2000) ***Evidence*** *– circumstantial evidence - standard that such evidence must meet - inculpatory facts to be incompatible with innocence of the accused – where evidence adduced does not directly connect accused to the offence.* ***Evidence*** *– witness – where witness evidence forming basis of conviction is contradictory and insufficient to form basis of conviction.* The accused was convicted of murder on the

	strength of the evidence of one Mary, the main witness. The appeal judges re-examined her evidence and found significant contradictions in its substance. The court also found that the witness was inadequately cross-examined to establish the reasons for her perception of the “afraid” demeanour of the accused on the night of the murder. **Held:** 1. This court was not satisfied that the evidence of the only witness which the judge relied on to convict the appellant left no doubt in the entire case as to lead to a conclusion that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis other than that of guilt. 2. There was no proper evidence to conclude that the accused was carrying a *panga* with which he had killed the deceased. *Appeal allowed, conviction quashed, sentence set aside.* **Cases** *Musoke v R* [1958] EA 715 **Statutes** Penal Code (cap 63) sections 203, 204 **Advocates** *Mr Kabua* for the Appellant.
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed, conviction quashed, sentence set aside
History County:	-

Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Omolo, Githinji JJ A & Otieno-Onyango Ag JA)

CRIMINAL APPEAL NO 194 OF 2002

PETER OBINO NYAUNDI …….....…….. APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from a conviction and sentence of the High Court

at Kisii, Wambilyangah J dated 5th November 2002, in

High Court Criminal case No 38 of 2000)

JUDGMENT

The appellant, Peter Obino Nyaundi, was charged in the superior court with the offence of murder contrary to section 203 as read together with section 204 of the Penal code. The particulars were that on 11th day of May, 1999 at Bonyando sub-location in central Kisii district of Nyanza province he murdered Joseph Nyakeya Nyakeya. He pleaded not guilty but after a full hearing the leaned trial judge sitting with assessors, found him guilty of the offence as charged and sentenced him to death as prescribed by law. He has appealed against the same conviction and sentence and has preferred four grounds of appeal which he filed in person but during the hearing of the appeal, Mr Kabua appeared for him and adopted the same grounds of appeal.

On 11th May, 1999 between 2 pm and 3 pm, PW1, David Ongoro Mokumi (David) was to the home of his cousin Makario Akara. A woman called Mwango Akara called him and told him to go to the deceased's house.

They went to the scene at the deceased's house and found the deceased's body on the floor of his house. It had multiple cuts and had bled profusely. There were other people there including one, Thomas Atandi. David and Thomass Atandi (who died before the case was heard) reported the deceased's death at Kisii police station and the body was removed to Kisii district hospital mortuary. According to PW6, Dr Ondigo Stephen, who produced the post mortem report prepared by Dr Isura who could not be called, the deceased's body had fourteen multiple sharp cut wounds on the head, three cut wounds on the chest, two cut wounds on the leg and four cut wounds on the hands. All the wounds were caused by sharp weapon. There was haemothorax, and a compound fracture on the head with internal bleeding. The cause of death was cardio-pulmonary arrest secondary to multiple injuries caused by a sharp instrument.

In convicting the appellant, the learned judge stated as follows:

“I have already averted to the fact that the deceased was assaulted in his house. The accused was seen carrying the *panga* which he had killed the deceased. I find it easy to deduce that it was his *panga*. It means he had initially armed himself with the *panga* and proceeded to repeatedly inflict the 23 cut wounds on the man who did not resist at all. From the circumstances the inference that he set out to kill his debtor who failed to repay his 20/= is irresistible. That was a most foul murder. I accordingly convict him as charged”.

It is clear to us from the evidence that was availed in the Superior Court that the deceased was indeed brutally murdered as was rightly found by the learned judge. We also do agree that the prosecution case was mainly circumstantial as no witness saw the person who murdered the deceased.

The learned judge found that the same circumstantial evidence pointed to the appellant. The test to be applied before inferring guilt in a case based on circumstantial evidence is spelt out, *inter alia*, in the case of *Simon Musoke v Republic* [1958] EA page 715 and particularly at page 716 where it was held as follows among others:

“In a case depending exclusively upon 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 reasonable hypothesis than that of guilt”.

This is a first appeal and it is our duty to analyse evidence that was adduced in the Superior Court to see if that evidence could lead to no other conclusion than that of guilt of the appellant. We of course bear in mind that the learned judge had the advantage of seeing the witnesses and was in a better position to observe their demeanor. Six witnesses testified in the Superior Court. PW1, PW2, John Ongoro Nyangara, PW3, Mokua Nyakeya and PW4, PC Joseph Kuria did not witness the incident. PW6 was a doctor who testified on behalf of the doctor who carried out the post mortem and his evidence is reproduced hereinabove. That leaves only PW5, Mary Nyarangi Muruye, as the main witness upon whose evidence the learned Judge of the Superior Court relied for conviction. Her evidence in chief was that on 11th May, 1999 at 2.00 pm she was coming from the house of Josephine Kemunto and was going home. She saw the appellant. The appellant had a *panga*. Later she heard noise. She rushed to the scene where screams were coming from and noticed the deceased lying down on the ground. The deceased had four wounds on the face and he was dead. The spot where they met was 15 metres to the spot where the deceased was lying. She did not know why the two quarreled. In cross-examination she said she did not see bloodstains on the appellant’s clothes or on the *panga*. But the appellant looked afraid when he saw the witness. The appellant was walking on a footpath and was going away from the deceased’s house.

This evidence clearly does not on its own directly connect the appellant to the murder of the deceased. All it says is that the appellant was met by the witness on a footpath. He had a *panga* and he appeared afraid. The witness did not talk to the appellant and no questions were put to her to enable the Court to know as to what led the witness to conclude that the appellant was afraid. Be that as it may, if the witness and the appellant met only 15 metres to the place where the deceased’s body was then one is not certain as to why the witness only heard screams after the two had met. Further, the evidence of this witness is that she did not know the cause of the quarrel between the deceased and the appellant, yet David, in his evidence in cross-examination stated that this witness told him that the reason why the accused killed the deceased was because of a debt of 20/=. The learned judge in his judgment at first rejected this evidence terming it as being “all in the realm of hearsay” but later seemed to have reneged on the same and found it as evidence of the motive of the murder. We do also observe that John said in his evidence that he interrogated Mary Kasimiri and Joyce Kennedy who were at the scene and they told him that it was at 3 pm when the two women heard a man screaming for help and the two women said

they saw the appellant escaping while armed with a *panga* and the deceased was lying in a pool of blood. There may very well have been two other women who were not necessarily with Mary, but it is important that according to this witness PW 2, he was told the incident took place at 3 pm and not at 2.00 pm. If on the other hand the incident took place at 2.00 pm then Mary must have heard screams long after the murder and thus the evidence as to the distance between the place they met and the house of the deceased may not reflect the true position of what took place. The learned state counsel conceded the appeal submitting that Mary's evidence as to sequence of events is ambiguous.

With respect we agree. On our own analysis of the evidence available, we are not satisfied that the evidence of Mary who was the only witness whose evidence the learned judge relied on to convict the appellant left no doubt in the entire case so as to lead to a conclusion that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis than that of guilt. We also find no proper evidence to conclude, as the learned judge did, that the accused was "carrying the *panga* which he had killed the deceased". The evidence of Mary was that the *panga* the appellant carried had no blood stains. We feel if the learned judge had considered these aspects of the case, he might have come to different a decision. We note that two of the three assessors returned a verdict of not guilty.

In conclusion, we allow this appeal, quash the conviction and set aside the sentence. The appellant is released forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 28th day of November, 2003

R.S.C OMOLO

……

JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

……

Ag JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR