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| Case Number: | Criminal Appeal 331 of 2010 |
| Date Delivered: | 15 Mar 2012 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Malindi |
| Case Action: | Judgment |
| Judge: | Emmanuel Okello O'Kubasu, David Kenani Maraga, Martha Karambu Koome |
| Citation: | Jeffa Mohamed Charo v Republic [2012] eKLR |
| Advocates: | Mushelle for the appellant, Ondari for the Respondent |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Kilifi |
| Docket Number: | - |
| History Docket Number: | H.C.Cr.A. 309 of 2008 |
| Case Outcome: | Appeal Allowed |
| History County: | Mombasa |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**COURT OF APPEAL**

**AT MALINDI**

**CRIMINAL APPEAL 331 OF 2010**

**BETWEEN**

**JEFFA MOHAMED CHARO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala, and Odero, JJ) dated 27th April 2009)**

**IN**

**H.C.CR.A. NO. 309 OF 2008)**

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**JUDGMENT OF THE COURT**

***JEFFA MOHAMED CHARO*** (appellant) was charged before the Senior Resident Magistrate's Court in Mombasa with the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code***. The particulars of the charge stated:

*"On the 26th day of July, 2007 at Njuki Enterprises Mikindani in Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed DAVID KINGORI MUTHONI cash Kshs.40,000/=, video camera valued at Kshs.40,000/= and mobile phone Nokia make 160 valued at Kshs.4500/=, the total value Kshs.84,500/= and at or immediately before or immediately after the time of such robbery shot dead JAMES OBIERO MIYOGE."*

The appellant was tried, found guilty, convicted and sentenced to death. On appeal, the superior court arrived at a concurrent finding with the subordinate court and dismissed his appeal.

The appellant has now filed this second appeal which is on points of law. From the appellant's self-home-made memorandum of appeal, we identify three principal grounds of appeal which were also urged by **Mr Mushelle,** learned counsel for the appellant. The decision by the superior court was challenged for relying on circumstantial evidence, when the facts of the case did not point at the appellant exclusively. Both Courts below heavily relied on the evidence of **Mwarua Chindanga (Mwarua) (PW2)** who was an accomplice. The defence evidence alluded to a grudge that existed between the appellant and ***Mwarua*** which was not considered thus the evidence did not prove beyond reasonable doubt that it was the appellant who committed the offence.

On the part of the Respondent this appeal was opposed; although the State had conceded to the appeal before the superior court. Mr***. Ondari*** the Assistant Director of Public Prosecution submitted that he had changed his position after considering the matter afresh. He argued that the appellant was convicted on the basis of sound circumstantial evidence that linked him with the offence. Both courts below found the appellant was the one who tricked ***Mwarua*** (PW2) to give him the motor vehicle which was used to commit the robbery and when the vehicle was recovered, some of the stolen items were recovered inside.

***Mr. Ondari*** further submitted that after the robbery, and when the appellant knew he was being looked for in connection with the offence, he went underground. Also, the evidence of an accomplice can be received under the provisions of ***Section 141 of the Evidence Act***. The issue of a grudge between the appellant and Mwarua was properly interrogated by the superior court and the learned Judges found it had no merit for reasons that it was the appellant's father who could possibly have rejected the marriage of his daughter to ***Mwarua*** and not the appellant.

In order to determine the issues of law that are raised in this appeal, regarding the correctness of the circumstantial evidence, and the reliance on the evidence of ***Mwarua*** who was also a suspect. We will briefly restate the prosecution's case. On 26th July, 2007, **David *Kingori Muthoni*** (David)(PW 3) who was also the complainant before the Subordinate Court, testified that at the material time, when the offence was committed he was at his shop at Mikindani in Mombasa. At about 1 pm, David had just parked his car and was talking on telephone. He saw about three people alight from a motor vehicle although he did not notice the Vehicle's number plate.

Suddenly David heard a gunshot and he saw somebody run out of his shop screaming. The assailants shot at ***David*** but he managed to dodge and the bullet missed his ear as he fell down and was ordered by the thugs to lie down. Inside the shop was ***Juliet Wanjiru Njenga*** (Juliet) (PW5) who was the wife of David. The robbers ordered everybody in the shop to lie down as they emptied the cash box of Kshs.42,000/=. The thugs also stole a video camera, a Nokia phone and Juliet's pouch. As the thugs were leaving, they shot another person who was working as a watchman; this person succumbed to death immediately.

Soon after the thugs boarded the vehicle they were driven in, David with another colleague decided to pursue them in his vehicle. They caught up with the thugs' vehicle after about 200 meters from the scene. David alerted the police of the motor vehicle registration number that was being driven by the thugs towards the direction of the Refinery area. David kept a distance of about 300 meters between his vehicle and the one that was being driven by the thugs. The police drove towards the same direction. The thugs entered a side path and at one time, David and his colleague lost sight of them. They, however, kept following until they found the motor vehicle the thugs were driving parked by the roadside. There was no one in the vehicle but David's video camera and his wife's pouch were inside.

The police also arrived immediately and upon inspection of the vehicle, it was discovered that a false number plate had been mounted over the actual number plates of the motor vehicle which was registration number KAW 952 N. This motor vehicle belonged to ***Joseph Maneno*** (PW 1), who had employed **Mwarua Chindanga** as a driver. The vehicle was being used as a taxi along Likoni area and near Shelly Beach.

It was Mwarua's evidence that connected the appellant with this offence. All the witnesses did not identify the assailants and no identification parade was conducted. According to ***Mwarua***, he was requested by the appellant to hire out the vehicle so that the appellant could use it to transport a customer. The customer was supposed to be picked up at the Port. Thus Mwarua left for the Port as instructed by the appellant to pick the passenger, along the way he picked the appellant who was in the company of another person.

The appellant, Mwarua and the other person all drove to the gate of the Port where they were supposed to pick the passenger. While at the gate to the Port, the appellant tricked Mwarua to give him the vehicle because he had a gate pass so he drove it inside the Port ostensibly to pick the passenger. No evidence was adduced from the people who were manning the Port gate to show that this vehicle entered the Port and Mwarua did not give evidence why he gave the vehicle without the authority of the owner and remained outside instead of seeking for the necessary pass to enter the Port with the appellant. We shall however revisit this aspect later in the judgment.

According to Mwarua, the appellant took long and he kept on calling him to find out what was happening. Eventually the appellant told him he had used another gate due to traffic jam so Mwarua decided to go and wait for the appellant near Mwembe Tayari. While he was at Mwembe Tayari, somebody rang and told him that the motor vehicle had been recovered at Mikindani after it had been used to commit a robbery and was at the Changamwe Police Station.

Mwarua testified that he was arrested when he reported at the police station and later at night, he took police to the house of the appellant, but they found the appellant had vacated from the house. Mwarua was released from police custody but was requested by the police to report to them if he came across the appellant. On 4th September, 2009, that is, about six weeks after the robbery; Mwarua was informed that the appellant was seen at a local shopping Centre. The appellant was apprehended by Chiganzo Kidanya Mwarua (PW 7), a brother of Mwarua. PW 7 told the trial court that he spotted the appellant and after exchanging greetings, the appellant attempted to run away but he was apprehended by members of the public and handed over to the police.

It is common ground that the appellant's conviction was based on circumstantial evidence and this is clearly borne out of the judgments of the two courts. The other piece of evidence that was relied on was the fact that the appellant went missing after the robbery. This weighed heavily against him as the learned Judges reasoned that pointed to his guilt. In the judgment of the High Court, the learned Judges made the following observations:

*"The crucial question is whether proof that the Appellant had in his possession the vehicle used in the commission of the robbery amounts to proof of his active involvement and/or participation in the crime. As we have stated earlier, there is no evidence placing the Appellant at the scene of the robbery. Similarly none of the recovered items was found in the possession of the Appellant. The vehicle was not recovered in the possession of the Appellant – it was found abandoned by the roadside. The evidence linking the appellant to this offence was largely circumstantial. Circumstantial evidence has been described as indirect evidence linking the suspect to the offence. In the case of* ***JAMES MWANGI –VS- REPUBLIC [1983] KLR 327****, the Court of Appeal in defining circumstantial evidence held as*

*follows*:

*"In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

*It could be argued and indeed Mr Magolo for the appellant did argue that in the absence of direct evidence linking the Appellant to the said robbery, the trial magistrate erred in convicting him. We have ourselves carefully and anxiously analysed the available evidence. The fact that the Appellant went missing after the robbery is very telling. If the Appellant had encountered a problem after the vehicle came into his possession, then he would not have hesitated to inform PW 2 of this. The behaviour of the Appellant in misleading PW 2 about his whereabouts after he drove into the port ostensibly to pick up the customer is also very telling. Did he pick up the said customer or not" If not, why did he not then immediately return the vehicle to PW 3" The Appellant offers no explanation as to how the vehicle left his hands. The Appellants loud silence on what he happened after he took possession of the vehicle from PW 2 is very suspicious. The Appellant could not be traced from 26th July, 2007 to 4th September, 2007 the date when he was eventually arrested. This is a period of almost two [2] months. The Appellant offers no explanation for this whereabouts all this time. All these facts combine to prove a guilty mind on the part of the Appellant. He was clearly hiding something."*

We agree with the two courts below that circumstantial evidence is often the best evidence. It is the evidence of surrounding circumstances which connects or points to a suspect as the only person who had an opportunity to commit the offence.

In ***R V TAYLOR WEAVER AND DONOVAN [1928] 21 CR APP R. 20***, the principle as regards the application of circumstantial evidence was also set out succinctly in these words:

*"Circumstantial evidence is very often the best experience. It is evidence of surrounding circumstances which by intensified examination is capable of providing the preposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."*

The evidence of Mwarua who connects the appellant with the offence needs to be subjected to further analysis in this appeal which turns on the issue of whether the two Courts should have treated his evidence with caution for reasons that he was also a suspect.We have considered this aspect with caution because the prosecution did not adduce evidence from the workers at the Kenya Ports Authority gate where the appellant is said to have driven through. We understand from the evidence of ***Mwarua*** the reason why he was not allowed to drive into the Port is because he did not have a gate pass. This presupposes that the Port gate is manned by security and they maintain a record of the visitors who are issued with a gate pass. It follows that the evidence of Mwarua could not have been deemed as water tight unless it was corroborated by the people who were manning security at the Port.

As we see the circumstantial evidence, it was clearly the word of ***Mwarua*** who had the custody of the motor vehicle that was used to commit the robbery as against that of the appellant. ***Mwarua*** too was arrested by police, but for reasons that he was able to point out the house where the appellant used to live, he was released but he was told by police to inform them if he spotted the appellant. Clearly the evidence of ***Mwarua*** is that of an accomplice. In the case of ***R VS KIPKERING ARAP KOSKE & 2 OTHERS (1949) EACA 135***, the Court of Appeal for East Africa had the following to say regarding circumstantial evidence and evidence of an accomplice:

*".....2(a) That in the present case, as witness Chepkown was an accomplice, it would be wholly*

*unsafe to accept his evidence without corroboration, and corroboration could only remove the taint of suspicion as to his credibility from an otherwise credible witness."*

What taints the evidence of ***Mwarua*** is the fact that it was he who was entrusted with the motor vehicle that was used to commit the robbery. That taint could only have been removed by very cogent evidence to show that he surrendered the motor vehicle to the appellant through trickery. There is a gap in the prosecution's evidence, thus the chain of events does not lead to an inference that it was the appellant alone who had the opportunity of committing the offence. Mwarua or another had an opportunity to also commit the offence.

We now wish to comment on the evidence of ***Chingazo*** who was instrumental in the arrest of the appellant. This arrest took place after about 6 weeks after the robbery; we have gone through the evidence especially by the police officers who were involved in the investigations of this matter. None of them testified that the appellant had escaped from his home during this period. This is therefore a stand-alone piece of evidence by ***Chingazo***, a brother of Mwarua, that the appellant must have tried to escape because he knew he was being looked for in connection with an offence. Thus the appellant's alleged attempt to escape was taken as an indication of his guilt conscience. We find this finding alone cannot be relied upon to sustain a safe conviction.

We think we have said enough in this judgment to show that had the learned Judges considered the gap in the chain of events that linked the appellant to the offence, they would probably have arrived at a different conclusion.

For the aforesaid reasons, we are satisfied that the circumstantial evidence that was heavily relied on in this case was not safe to sustain the conviction. We accordingly allow the appeal, quash the conviction and set aside the death sentence. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

**Dated and delivered at Mombasa this 15th day of March, 2012.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**