REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R, MWONGO, J

CRIMINAL APPEAL NO. 25 0F 2017

DANIEL NJUGUNA WAITHERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being and appeal from the Judgment of Hon. P Gesora in Naivasha CM CR: Case No. 613 of 2015)

JUDGMENT

Background

1. The Appellant was charged with manslaughter contrary to **section 202(1)** as read with **section 205** of the **Penal Code**. The particulars of the offence state that on 9th April, 2015 in Naivasha, he unlawfully killed J W K. The lower court found him guilty of the offence and sentenced him to life imprisonment.

2. Dissatisfied with his conviction, the appellant has brought an appeal to the High Court on the following grounds;

1. Prosecution burden of proof discharged was not beyond reasonable doubt.

2. No element of malice afterthought or aspect of heat of passion provoked on record.

3. Right to fair trial was violated as entire conviction was fatally based on suspicion

4. Wrong interpretation of applicant's language of choice c/s 198(1) of Criminal Procedure code.

3. The appellant expounded upon his grounds of appeal by pointing out that:

a. That it wasn't proved that he was with the deceased during that night, neither did the child (PW3) prove that the person who was trying to open the door at night was the mother.

b. That no one had seen the deceased with the appellant on that night, and that the deceased's shoes found in his house were there because, as a cobbler, he was repairing them.

c. That he was not given an interpreter and that the court did not sought his language of choice. The exact language of reading and interpreting charges is not known.

4. Briefly, the facts were as follows. Ten year old G W (PW3), a standard four pupil at [particulars withheld] Primary School, lived at [particulars withheld] with her mother (the deceased) and two brothers. According to her evidence on record, on 8th February, 2015, she went to school as usual and when she returned in the evening, found her mother washing clothes. Later her mother prepared supper for the family, then went out locking the door behind her.

5. The children slept, until they were woken up late at night by sounds of people running within the plot. PW3 heard her mother trying to open the door like someone was chasing her, but she was not able to open it. When they woke up in the morning, PW3 saw her mother's body lying at the doorstep, dressed up but missing her shoes. In cross examination, she said the police took her mother's body away, and later recovered the shoes.

6. The next morning, the deceased's brother J MPW1 heard of the incident and went to the deceased's house, where he saw her body on the doorstep before the police took it away. He called his brother J N (PW2) who came and saw the body after it was taken to Naivasha District Mortuary. PW2 later met his late sister's friend, one Maggie, who gave him the telephone number of one of the deceased's friends who worked at Three Ways Hotel in Naivasha.

7. PW2 called the telephone number, found that the man was called Dan, and they met. Dan appeared confused, told them he had sent the deceased Kshs 500 via mpesa at 1.00pm at night, and he appeared to be trembling. He also had fresh scratch marks on his face. They parted, agreeing to meet later that evening, and PW2 went to the police and informed them what he had discovered. PW2 was assigned two police officers, who went and arrested Dan, the accused. The officers were directed by the accused to his house where they collected a pair of shoes and a photograph of the deceased.

8. PW5 the investigating officer testified that he received a call that a woman's body had been found at [particulars withheld] Estate. He went there with colleagues and found the deceased's body bleeding from the mouth and ears. After taking the body to the mortuary he investigated and found that *"the accused herein was her (deceased's) lover"*, who had been *"spotted at the house the previous day"*. After PW 2 informed them of his meeting with the accused, they went to him and confirmed the scratches he had. They also recovered the deceased's shoes from his house, which he told them he *"was repairing as he is a cobbler"*. In addition, the investigator escorted the accused to hospital where his blood samples were taken. He took samples of the deceased's nails for testing to see if they had blood, and the accused's telephone was taken for investigation as to the communications made.

9. PW5 gave further evidence that the deceased's phone No [particulars withheld] had received Kshs 500 from the accused via mpesa at 1.51am and he tabled the data as PExh 4. In addition safaricom data showed that the accused had communicated with the deceased at 1.49am and produced PExb 5. The accused's phone was produced as PExb 7, postmortem report as PExb 10, the recovered shoes as Pexb 11 and deceased's photograph as P Exb 12. Connecting all these to the information he had received from witnesses including PW3, he concluded that the accused killed the deceased and preferred charges.

10. The issues for determination are as follows:

> **a. Whether the appellant was properly convicted based on circumstantial evidence alone.**
>
> **b. Whether the plea and charges and proceedings were conducted in a language that the accused understood as it is not stated in particular which language was used.**

Whether the appellant was properly convicted based on circumstantial evidence.

11. On circumstantial evidence, the appellant asserted that the rule as to such evidence is that it must be such that to be explainable, appeal for investigation and prevail upon the hypothesis of the accused's guilt, being incompatible with any other innocent explanation. To that extent, the appellant's argument is that the prosecution's case against him was purely circumstantial in that none of the witnesses who testified witnessed how or by whose act the deceased had died.

12. It is notable that the trial court in this case appreciated that the evidence against the appellant was circumstantial when it delivered itself as follows:

> **"It is clear from the evidence on record that no one was seen committing the offence herein. It is the circumstances surrounding her death that the investigator relied on to prefer the charges herein. There was communication between the two on the night in question. Accused sent deceased money via mpesa money transfer services. This was after they talked. Deceased pair of shoes were recovered from the accused's house a fact that the accused conceded to. This is clear indicator that the two met on the fateful night. Accused did not offer explanation as to how deceased shoes were left in his house. He also did not explain at what point the two parted ways. It was a few hours later that deceased's body was recovered which implies that she was killed elsewhere and dumped at her doorstep. The defence raised confirms that accused was the last person to be in contact with deceased before she met her death. Circumstances surrounding her death clearly point at accused having killed deceased with mathematical exactitude. Accused is guilty and convicted as charged."**

13. It is trite that the guilt of an accused person need not be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. In the case of ***Musili Tulo v Republic, Cr. App. No. 30 Of 2013*** *this court stated*

> **"Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."**

14. However, for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions. Those conditions are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. This Court in ***Abanga Alias Onyango v Republic, Cr. App. No 32 Of 1990*** set out the conditions of circumstantial evidence that must be satisfied, as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, <u>should form a chain so complete that there is no escape from the conclusion that within all human probability</u>**

the crime was committed by the accused and none else.” (emphasis supplied).

15. For the inference of guilt to be drawn by a court from circumstantial evidence, a court must also satisfy itself that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. In ***Dhalay Singh v Republic, Cr. App. No. 10 Of 1997*** this Court reiterated this principle as follows:

> **“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”**

16. In this case, the facts constituting the circumstantial evidence which the trial court relied on were: the fact that the appellant and the deceased called one another several times on the fateful night; that the appellant sent money via mpesa to the deceased that night; and that the appellant was found with the deceased’s shoes under his bed. Do these facts unerringly point to the accused person? Do they “*form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”? Are there circumstances which would weaken or destroy the inference of guilt?*

17. The trial magistrate’s finding that “**Accused sent deceased money via mpesa money transfer services, this was after they talked. Deceased pair of shoes were recovered from accused’s house a fact that accused conceded to. This is a clear indicator that the two met on the fateful night.”** This does not, however, explain certain evidential gaps explained hereafter. As such, I do not see how the trial court concluded from the available evidence that the two met that night, unless the court was able to determine that the shoes found were the ones the deceased wore that night.

18. PW5 testified that he got information that the accused and the deceased were lovers; the telephone call printouts show they communicated regularly. PW5 also testified that the accused was spotted in the compound the previous day. However, he did not investigate this further to ascertain whether it was on the night of the killing, nor was the person who gave that evidence called to testify. PW5 further testified that the accused explained the presence of the deceased’s shoes in his house by the fact that he was a cobbler and had them for repair. Accused did not deny they belonged to the deceased, and it is clear that the photograph only confirmed the fact that they belonged to her, not that she was wearing them that night. The investigating officer did not follow this line of information to confirm whether or not the accused was a cobbler, whether he had any other shoes for repair, or whether he even run such a business. The evidence of PW4, the deceased’s neighbour, was that she was not aware that the accused and deceased had any differences.

19. In my view, when relying on circumstantial evidence, other loopholes of information must be sealed if the circumstantial evidence is to hold. The complete chain of evidence here would have been that the accused was the last person seen in the vicinity where the deceased was; that the death, which according to the post mortem report was caused by asphyxiation due to strangulation could be connected to the accused. The accused was not taken for medical testing until three days after he was arrested, and by then he was clothed in prison clothes according to the Medical report. As such evidence of blood stains on his clothes could not be taken.

20. There are also unanswered questions. From 6.21pm on the night of 8th April to 1.49 am on the morning of 9th April, 2015, on the night of her death, the deceased and the accused called one another no less than sixteen times or exchanged messages; also, the accused transferred shs 500/= to deceased at 1.51am according to the Exhibit 4 and safaricom records produced. These exchanges do not suggest that the two were together at around that time, although they may well have been together thereafter. The investigator did not follow this line of information to identify where the accused was at the time and where the deceased was at the time. No records from the deceased’s telephone were availed in evidence to show who else she was in communication with so as to complete the story

21. All in all, I am not satisfied that the circumstantial evidence was sufficient to pin the killing of the deceased beyond reasonable doubt on the appellant. He may have been a conspirator or an accomplice. There is no saying. There are too many gaps in the evidence. It was unsafe for the trial court to convict on the said evidence.

22. Accordingly, the appeal succeeds on this point.

Whether the Accused was prejudiced by the language used at the trial

23. The appellant alleges that the trial court contravened **section 198** of the **Criminal Procedure Code** in not availing a translator to translate language not known to the accused.

24. Article 50 (2) (m) of the **Constitution** provides that:

> **“Every accused person has the right to a fair trial which includes the right (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”**

25. From the proceedings there is no record as to whether or not there was interpretation. This is despite the fact that there was a Court clerk present. Also, it is on record that each of the witnesses was sworn in Swahili language. However, there is every indication that the appellant understood the language used, followed the proceedings and gave a defence to the evidence tendered. He even cross-examined PW2, PW3 and PW4. He appears to be seeking to take advantage of a procedural error in the fact that the language of the proceedings was not indicated.

26. In **Munyasia Mutisya v Republic 2015 eKLR** this court stated:

"The subsequent hearing date do not have any indication of the language used wither by the court or by the witnesses.

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however, note that the appellant participated fully in the trial by cross examining witnesses. He cross-examined P.W. 1. He cross-examined P.W.2. He cross examined P.W. 4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not allege on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."

27. From this decision, it is clear that a party may indicate a language which he prefers to use in Court, or to complain if he does not understand any language used. Where proceedings go on and he participates, it cannot be assumed that he does not understand the language used or would prefer any other language. Under **Article 50** the Court is obliged to ask for an interpreter if the accused cannot understand the language used. This can be at the instance of the accused, or if the trial court realizes that the appellant does not understand the language. There is nothing on record to show that the appellant did not understand the language. Indeed there is every appearance that he fully understood the proceedings and actively participated not only in cross examination, his unsworn statement, and in mitigation, but on other occasions during trial such as on:

"03/08/18 - Accused: Present. I am ok but please waive bond;

13/12/16 - Accused I have suffered;

28/3/17 - Accused: I have no problem if the investigating officer produces the post-mortem report"

28. Having not complained about the language used, the trial court was justified in assuming he could follow the proceedings. This second ground of appeal fails.

29. Given that the first ground of appeal succeeds, I allow the appeal and quash the conviction and sentence meted. The Appellant shall be set at liberty forthwith, unless otherwise lawfully held.

30. Orders accordingly.

Dated and Delivered at Naivasha this 22nd Day of November, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Daniel Njuguna Waithera - Appellant in person.

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu.