REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO P, GATEMBU & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 12 OF 2019

BETWEEN

GEORGE MASEGHE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Voi (Kamau, J.) dated 22nd June 2017

in

H.C.CR.C. No. 12 of 2014)

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JUDGMENT OF THE COURT

In this first appeal ***the appellant, George Maseghe,*** challenges his conviction and sentence of death by the High Court at Voi ***(Kamau, J.)*** for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The information on the basis of which the appellant was prosecuted stated that on 27th April 2012, at ***Werugha Trading Centre*** in ***Taita Taveta County***, he murdered ***Mercy Mambori Mwasina (de-ceased)***.

The prosecution case, as readily deduced from the evidence adduced by its seven witnesses, was that the appellant was a barber at ***Kasse*** shopping centre. On the material day, ***Germalias Mwasina Kishagulu (PW2)***, the father of the deceased, requested the deceased to take her ailing younger sister, ***Dianasi Walove (PW3)***, to ***Makandenyi*** dispensary for treatment. On the way to the dispensary, the two stopped at Kasse shopping centre where the deceased left her cellphone with the appellant to charge it for her. At the Dispensary, the deceased left PW3 waiting for treatment, informing her that she was going to her aunt's house, where they agreed to meet later. However, upon treat-ment, PW3 proceeded to the aunt's house at about 1.30 pm but did not find anyone there.

The evidence of ***Nichodemus Masanju Manambo (PW5),*** a barber employed by the appellant, was that on the material day he was working with the appellant at the barbershop and that at about 3.00 pm the deceased arrived and retreated with the ap-pellant to his room at the back of the shop, where they locked the door. At about 5.30 pm the appellant called PW5 and informed him that he was leaving, but PW5 did not actually see him leave. Later the appellant called PW5 again and informed him that he was in ***Wundanyi***. He requested PW5 to check on the deceased, and upon doing so, PW5 informed the appellant that the de-ceased was sleeping. Shortly afterwards the police arrived and took the body of the deceased to ***Wesu mortuary***. According to the evidence of this witness, the appellant never came back to his room.

PC. David Masinde (PW7) testified that it was the appellant who reported the incident at ***Wundanyi Police Station***, where he claimed that the deceased, his girlfriend, had visited him and became unconscious after falling ill. Upon visiting the appellant's room at the back of the barbershop, PW7 found the deceased already dead. ***Dr. Naima Abdullahi (PW6)***, a medical doctor at Wesu hospital produced the deceased's postmortem report which showed that the cause of her death was cardio-pulmonary arrest second to asphyxia as a result of strangulation.

When put on his defence, the appellant gave sworn evidence in which he stated that the deceased was his girlfriend for about 5 years and that on the material day, she passed by his barber shop and informed him that she was taking her sister to hospital.

At about 3.00 pm the deceased visited the barbershop again but did not speak to the appellant. Later PW5 informed the appellant that the

deceased was resting in the appellant's room and the two proceeded to the room where they found the deceased sleeping, with a scratch mark on her neck. PW5 said that the deceased was dead and the appellant decided to report the matter to the Chief. After failing to find the chief, he reported the matter at Wundanyi Police Station where he was detained and ultimately charged with the murder of the deceased, which he had not committed.

In this appeal, the appellant, represented by ***Mr. Wamotsa,*** learned counsel, impugns the judgment of the High Court on seven grounds. In the first ground, it is contended that the de-ceased's post-mortem report was improperly admitted. Counsel submitted that the report produced by PW6 was made by ***Dr Macharia*** rather than by PW6 and that PW6 did not know Dr Macharia. He relied on ***section 77(2)*** of the ***Evidence Act*** and contended that the prosecution was obliged to lead evidence that PW6 was conversant with Dr Macharia's handwriting, which it failed to do. He added that no good reason was presented as to why the maker of the report did not himself produce it in court. Counsel suggested that no postmortem examination was actually conducted because the parents of the deceased did not witness the examination and the persons who identified her body were not called as witnesses.

In the second ground of appeal, counsel submitted that the postmortem report did not conclusively establish the cause of the death of the deceased because the body of the deceased was subjected to external examination only, with no internal examina-tion. It was counsel's view that asphyxiation could not be estab-lished by external examination alone, and that the doctor did not indicate the possible weapon that was used to strangle the de-ceased or "the part of the body that was strangled". He faulted the prosecution for failure produce the results of vaginal, blood, and urine swabs taken from the deceased's body, which he sub-mitted could have shown a different cause of death.

Turning to the third ground of appeal, counsel submitted that the scene of crime photographs were improperly admitted in evidence. He contended that the photos were generated from a compact disc (cd) without evidence of who took the photos or stored them in the cd and without a certificate under ***section 106B*** of the Evidence Act.

In the fourth ground, counsel faulted the prosecution for failure to call critical witnesses, among them the persons who witnessed the post-mortem examination, the Administrative Po-liceman mentioned as one of the first responders at the *locus in quo* and the neighbours of the appellant who advised him to re-port the incident to the chief. He contended that there was no reason given why these witnesses were never called and argued that the trial court erred by failing to infer that had these wit-nesses been called, they could have given evidence adverse to the prosecution.

Moving on to the fifth ground of appeal, counsel submitted that the learned judge erred by relying on the evidence of PW5 which was unsafe and unreliable. He contended that the court, having found that PW5 was not fully truthfully, it should have found he was not a credible witness and rejected his evidence. Next, counsel faulted the learned judge for ignoring the appel-lant's defence and basing her judgement on speculation, conjecture and opinions not supported by evidence. He added that the learned judge shifted the burden of proof to the appellant and concluded by submitting that the learned judge further erred by sentencing the appellant to death on the basis that the death sentence was the only prescribed sentence for the offence with which the appellant was charged. On the basis of the above grounds, counsel urged us to allow the appeal, quash the appellant's conviction and set him to liberty.

The respondent, represented by ***Mr. Fedha,*** opposed the ap-peal and submitted that the prosecution had proved its case against the appellant beyond reasonable doubt. Counsel urged us to find that the trial court had properly evaluated the evidence and that it came to the correct conclusion. He contended that the appellant was properly identified by PW1 who was well known to him as well by his employee, PW5. Counsel added that in his defence the appellant also placed himself at the scene of the of-fence at the material time. It was further submitted that the cause of death of the deceased was never in doubt and that the appellant was not truthful in his defence, which the trial court properly rejected.

We have carefully considered the grounds of appeal, the rec-ord of appeal, the judgment of the trial court and the submissions by both parties. In a first appeal like this, we are called upon to re-evaluate and reconsider afresh the evidence adduced in the trial court and arrive at our own independent decision. We are to weigh conflicting evidence and draw our own conclusion, but always making allowance for the fact that we do not have the ad-vantage of the trial court of seeing and hearing the witness as they testified. (See ***Kiilu & Another v. Republic [2005] KLR 174).***

On admission of the post-mortem report, the report dated 28th August 2012 was duly signed by a medical officer who PW6 identified as Dr. Macharia, on duty at the material time. The evidence of PW 7 on this issue was as follows:

> *"On 29th August 2012 at around 5.00 pm, I went to Wesu Hospital and witnessed the postmortem examination being carried out by Dr. Macharia. The deceased's family was also present. I had been with Dr. Macharia several times in Wun-danyi Law courts, so I know he was a doctor…After the post-mortem examination, Dr. Macharia completed the postmortem reporting concluded that the deceased died of strangulation."*

From the evidence on record, there is no basis for concluding that the postmortem report was fake as submitted by the appellant or that it was prepared by someone else other than Dr. Macharia.

We also note that the prosecution explained, before PW6 testified, that Dr. Macharia had been transferred from Wesu Hospital and applied to adduce his evidence under ***section 77*** of the Evidence Act through PW6. To that application, the appellant, who was represented by learned counsel, responded that he had no objec-tion, and as a result PW6 was allowed to testify. If the appellant had objected as he was entitled to do, and the court sustained the objection, no doubt the prosecution would have endeavoured to call Dr Macharia himself.

In ***Robert Onchiri Ogeto v. Republic [2004] eKLR***, this Court, in finding that a postmortem report was properly admitted in circumstances similar to those in this appeal, expressed itself thus:

> *"The postmortem on the body of the deceased was done by Dr. Ondigo Steven. The postmortem report was produced as exhibit at*

the trial by corporal Ambani under section 77 of the Evidence Act. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible…Section 77 (1) of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the post-mortem report under section 77(1) of the Evidence Act and the Court did not see it fit to summon Dr Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in ac-cordance with the law."

We respectfully agree with that reasoning.

We do not find any basis for the assertion that the de-ceased's body needed to be identified for post-mortem examina-tion by her parents. The evidence on record is that the father (PW2) did not attend the postmortem examination and that could be for a myriad of valid reasons. The postmortem report itself bears the names of the persons who identified the body of the deceased for post-mortem purposes, namely ***Gamaliel Mwasina*** and ***Felix Koronge***. In the circumstances of this appeal, we are satisfied that the first ground of appeal has no merit.

In the second ground of appeal, the appellant contends that the postmortem report was not conclusive on the cause of death of the deceased, because the doctor focused on external exami-nation of the body of the deceased, without any internal exami-nation, and further that the results of the virginal, blood and urine swabs were not presented. Contrary to the appellant's as sertions, medical opinion suggests that in cases of asphyxia, the cause of death may be accurately determined even in the absence of examination of internal organs.

The late ***Prof. Keith Simpson***, a renown forensic pathologist and professor of forensic medicine at Oxford Univer-sity, in the book, ***Forensic Medicine, 8th Edition***, ***page 91,*** discusses post-mortem features in asphyxia and explains that there are two outstanding features of all forms of asphyxia deaths. The first is intensive venous congestion and *cyanosis* with pronounced lividity. This refers to the bluish discolouration of the skin and mucous membranes due to low oxygen levels in the red blood cells. In what is described as *peripheral cyanosis*, the hands, fingertips or feet turn bluish in colour. The second feature is *petechial haemorrhage*, namely small red or purple spots on the skin or conjunctiva which are caused by broken ca-pillary blood cells arising from external means of obstructing the airwaves. The Professor concludes that the presence of these two features is essential to establish asphyxia and if they are not es-tablished the cause of death is certain to include other factors.

What is clear from his exposition is that these two features of asphyxia death may be conclusively established by external ex-amination of a body alone.

The evidence of PW6 was comprehensive and explained concisely why the Dr. Macharia concluded, from external examination of the body of the deceased, that her death was caused by cardio-pulmonary arrest secondary to asphyxia as a result of strangulation. This is what the witness stated:

"The external appearance of the body showed anterior next bruises and ecchymosis, which is a darkened circular patch, evidence of clotted blood under the skin. It was evidence of an injury, impact at the specific point. There was central cya-nosis of the tongue and the lips. This means that the tongue and lips were black due to lack of oxygen. There were periph-eral cyanosis of the upper extremities, which means that the hand, forearm and arm had darkened due to reduced circu-lation of blood and oxygenation…The doctor was of the opin-ion that the cause of death was cardio-pulmonary arrest sec-ondary to asphyxia as a result of strangulation. Asphyxia was the cutoff of oxygen and blood supply to the brain as a result of strangulation. The proof of asphyxiation and cardio-pulmonary arrest was the evidence of peripheral and central cyanosis."

Even without internal examination or the results of the vaginal, blood and urine swabs, there was cogent and credible medical evidence on record why Dr. Macharia concluded that the deceased's death was caused by cardio-pulmonary arrest secondary to asphyxia as a result of strangulation. That evidence dis-closed the two features needed to conclusively establish the cause of death as asphyxia. In addition, there were the bruises on the neck of the deceased which further point to strangulation.

We also find absolutely no merit in the incredible criticism that the doctor did not indicate which part of the deceased's body was strangled. It is as if there could really be any contestation which part of the body is strangled in a case of asphyxia by strangula-tion.

As regards admission of the scene of crime photographs, we do not think anything turns on it in this appeal because the learned judge did not rely on the photographs in convicting the appellant. In addition, neither the death of the deceased, nor that she had died in the appellant's room was ever in dispute. We

must also point out that although represented by counsel, again the appellant did not object to the production of the photographs as he should have. Even though the photographs were admitted irregularly, they did not make any difference in the prosecution case in the circumstances of this appeal.

On failure of the production to call critical witness, namely those that identified the body of the deceased, the Administration Policeman who was allegedly the first on the scene and the neighbours who advised the appellant to report the death of the de-ceased to the chief, we must reiterate the terms of ***section 143*** of the Evidence Act that in the absence of a provision of the law, no particular number of witness is required to prove a fact. In ***Donald Majiwa Achilwa & 2 Others v. Republic [2009] eKLR,*** this Court stated as follows:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses 'evi-dence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to es-tablish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his

evidence would have tended to be adverse to the prosecution case."

(See also ***Bukenya v. Uganda [1972] EA 549)***

In this appeal, the evidence adduced by the prosecution was cogent enough, even without the additional evidence of the witnesses the appellant argues should have been called. It was not the bare kind of evidence that would have justified the trial court to make an adverse inference against the prosecution.

On credibility of PW5, it is important to put the evidence of that witness into proper perspective. The trial court noted that the account that PW5 gave in court that the appellant called him before he left at about 5.30 pm and informed him that he would return later, was different from what he recorded in his statement to the police, namely that the appellant called and requested PW5 to check on the deceased, whom PW5, upon checking, thought was asleep. The learned judge, who saw the witness testify, con-sidered the two versions and preferred the written statement for the reason that it was recorded immediately after the incident when the matter was fresh in PW5's memory. Other than that, the learned judge found, correctly in our view, that any contra-dictions in PW5 evidence were not material. We do not perceive any error in how the learned judge treated the credibility and ev-idence of PW5.

We agree with the appellant that in a number of instances in the judgment, the learned judge put forward unnecessary questions and theories regarding the commission of the offence and the appellant's guilt. As was explained in ***Okeno v. Republic [1973] EA 31***, conviction should only be based on the weight of the evidence adduced and not on theories or attractive reasoning by the judge. In at least two instances, the learned judge also suggested that it was the obligation of the appellant to adduce evidence and demonstrate he was not the one who murdered the deceased. Of course, the appellant had no such duty; the onus being always on the prosecution to prove its case beyond reason-able doubt. But having carefully re-evaluated the evidence and considered it afresh, we are satisfied that those lapses by the learned judge cannot affect the final conclusion that the evidence adduced by the prosecution proved its case against the appellant, beyond reasonable doubt.

The evidence against the appellant was circumstantial. To convict on such evidence, the prosecution was obliged to estab-lish firmly and cogently the circumstances from which the infer-ence of guilty was to be drawn; those circumstances needed to unerringly point to the guilt of the appellant; taken cumulatively the circumstances must form a complete chain so that there was no escaping the conclusion that within all possible human prob-ability, the offence was committed by the appellant and no one else; and lastly that there were no other co-existing circum-stances which could weaken or destroy the inference of guilt against the appellant. (See ***Abanga alias Onyango v. Republic, Cr. App No. 32 of 1990, Sawe v. Republic [2003] eKLR, GMI v. Republic, Cr. Ap. No. 308 of 2011, Musoke v. R. [1958] EA 715, and Dhalay Singh v Republic, Cr App. No. 10 of 1997).***

The evidence of PW5 was that the deceased was last seen alive with the appellant, with whom she entered his room at the back of the barbershop, which they locked. No one saw the ap-pellant again, until he reported at Wundanyi Police Station, after which the deceased was discovered dead in the same room. The appellant told inconsistent stories to different people on what had happened to the deceased. To PW1, he stated that he and the deceased had been attacked by a man who strangled the de-ceased. To PW5, the appellant requested him to check on the deceased, whom the latter assumed was sleeping. Yet to PW7 the appellant reported that the deceased had become unconscious after falling ill. From his own defence, the appellant stated that he had confirmed that the deceased was dead before he reported to the police. In the same defence, he even suggested that the deceased was murdered by the police. These different and wildly inconsistent versions of the same event indicate that the appellate was untruthful and the court was entitled to find, from his conduct, corroboration that he is the one who committed the of fence. (See ***Alex Wafula v. Republic, Cr. App. No. 7 of 2008).***

We are accordingly satisfied that the circumstantial evidence on record points unerringly and definitely to the appellant, and only the appellant, as the person who murdered the appellant. The appeal against conviction has absolutely no merit.

As regards sentence, the appellant made a statement in mitigation, pleading for leniency. He was a first offender and he tes-tified about his aged parents and siblings who were dependent on him. The learned judge did not consider the mitigation, stating categorically that the sentence of death was the only sentence prescribed by law. This is how the Judge expressed herself:

> *"However, my hands are tied as section 204 of the Penal Code cap 63(Laws of Kenya) provides doe only one (1) sen-tence and that is death where a person is convicted for the offence of murder. I the circumstances foregoing, I hereby sen-tence the Accused person to death as prescribed by the law."*

In ***Francis Kariokor Muruatetu & Another v. Republic [2017] eKLR,*** the Supreme Court held that the law does not prescribe a mandatory sentence of death for the office of murder and that sentencing is at the discretion of the court, depending on the cir-cumstances of each case.

Taking all the foregoing into account, we allow the appeal against sentence, set aside the sentence of death and substitute therefor a sentence of imprisonment for 30 years from the date of conviction by the High Court. The appeal against conviction is dismissed in its entirety. It is so ordered.

Dated and delivered at NAIROBI this 29th day of January, 2021

W. OUKO, P.

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR