



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO, (P), OKWENGU & SICHALE, J.J.A)**

**CRIMINAL APPEAL NO. 145 OF 2016**

**BETWEEN**

**ETM.....1<sup>ST</sup> APPELLANT**

**JAO.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the Judgment and conviction by the High Court of Kenya at Kakamega (**Ruth N. Sitati, J**) dated on 15th March, 2016 in **HCCC No. 27 of 2014**)

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**JUDGMENT OF THE COURT**

[1] On 15th March, 2016 the High Court, (Sitati J.) convicted **ETM** (1st appellant) and **JAO** (2nd appellant), of the murder of **PNM** (deceased), and condemned each to death.

[2] The appellants were convicted on the evidence of five prosecution witnesses who were the deceased's two daughters, **S M (S)** and **SM (S)**, the deceased's brother, **GO (G)**, **PC Jackson Langat** (PC Langat) of Mumias Police station and **Dr. John Khawala Ogola (Dr. Ogola)**.

[3] In brief, the evidence before the trial court was as follows. The 2nd appellant was the wife the deceased. The 1st appellant, a sister to the 2nd appellant had at the material time visited her sister and the deceased at their matrimonial home at [particulars withheld] village, Nanyeni Sub County in Matungu District of Kakamega County. On the morning of 25th April, 2011 at around 6.00 am, the deceased was found hanging outside the rear door frame of his house. The deceased's two daughters, **S** aged 17 years and **S** aged 14 years, who were with him the previous night gave conflicting versions about the events of that night.

[4] According to **S**, they ate dinner with their father and went to sleep. The 2nd appellant and 1st appellant had gone to a funeral and had not come back. The deceased who had complained of pain in his arm also went to his bedroom. The two appellants later came back, and **S** recognizing her mother's voice, opened the door and the 2nd appellant went into her bedroom which she was sharing with the deceased, while the 1st appellant slept in the sitting room. The next morning her sister **S** was looking for her uniform when she found the rear door locked from outside. When they went round to the back of the house, they found the body of the deceased hanging on a belt on the frame of the back door.

[5] According to **S**, on the material night, they were all at home with the deceased, the 1st and 2nd appellant, and her siblings. Their mother (2nd appellant) prepared dinner and they ate. The deceased then said he wanted to go out and have a drink. This witness did not finish testifying as she was stood down to be given time to refresh her mind, but she was never recalled to the witness box.

[6] The other witnesses were **G**, a brother to the deceased and **PC Langat** of Mumias Police station, both of whom were called to the scene after the deceased's body was found hanging outside the door frame to his house, and **Dr. Ogola** who produced the postmortem examination report on the body of the deceased which was prepared by **Dr. Kipsang**. This means that there was no eye witness to the murder.

[7] The two appellants each gave sworn evidence in which they each denied having murdered the deceased. In a nutshell, the 1st appellant swore that on the material night, they took supper together after which the children went to sleep, while she remained with the 2nd appellant and the deceased. The 1st appellant then went to sleep in a separate bedroom while the 2nd appellant and the deceased went to sleep in their bedroom. She was only woken up at 5.00 a.m. by screams from the 2nd appellant that the deceased had committed suicide.

[8] The 2nd appellant on her part explained that they went sleep with the deceased in their bedroom, and that at about 4.00 a.m. the deceased went out as if going to the toilet. She remained in bed and the deceased stayed out for about an hour. At around 5.00 am, she woke up the children to prepare for school and when she opened the door she found the deceased hanging on the door, with a belt around his neck which was fastened to the door frame.

[9] In her judgment, the learned Judge having addressed the law on circumstantial evidence, concluded as follows:

**“In my considered view the circumstances surrounding the death of the deceased placed the two accused persons at the scene as they were the last persons to be seen with the deceased before he was found dead in the morning apparently by way of suicide. I do not think that there were any intervening circumstances that broke the chain of circumstantial evidence in this case. I have carefully considered the testimonies by PW1 and PW2 and find that there was no reason why the two should have lied against their mother and the first accused. I have also carefully considered the accused persons’ defences and what I can say is that those defences are concoctions of the accused persons while they waited for trial.**

**I have carefully considered the theory of the suicide against the medical evidence and I find such evidence impossible to believe. According to Dr. Ogola, PW5, who produced the Post Mortem report on behalf of Dr. Kipsang, the deceased had bruises around the right shoulder area in addition to subcutaneous and right anterior, chest wall bleeding. The doctor testified that though the conclusion as to cause of death was asphyxia due to strangulation, the same was not conclusive as a third party could have put the belt around the deceased’s neck. Further, the evidence by the Investigating Officer was to the effect that the deceased’s legs were touching the ground while the belt was hanging from a point on the door frame. This kind of scenario in my considered view, defeats the suicide theory as it appears highly unlikely that the deceased inflicted upon himself the injuries on his right shoulder area and the chest.**

**It is therefore my finding that the two accused persons are the ones who killed the deceased by strangulation and then took him outside the house and put the belt around his neck and stood him against the door. I also find it strange that the 2nd accused would have remained so unconcerned if indeed the deceased went out of the house, injured as he was and did not return to the house for a long time.”**

[10] In their memorandum of appeal, the appellants have raised five grounds faulting the learned Judge: in finding against the weight of evidence that the prosecution had proved that the appellants had murdered the deceased by strangulation, and hanged his body outside; in failing to properly direct her mind on the law relating to circumstantial evidence; in failing to find that the prosecution did not prove any malice aforethought against the appellants; in transferring the onus of proof to the appellants; and in imposing a sentence that was harsh and excessive.

[11] We have carefully considered the record of appeal, the rival written submissions filed by the appellants and the respondent, and the authorities cited. This being a first appeal, our obligation is to reconsider and evaluate the evidence which was adduced before the trial court being mindful of the fact that we have not had the advantage that the trial court had of assessing the demeanor of the witnesses. (See Okeno vs Republic [1972] EA 32).

[12] It is not disputed that the deceased was found hanging by the door frame with a belt around his neck. Both appellants denied having strangled the deceased. The only evidence that implicated them was that they had spent the night in the same house with the deceased and were the last persons to have been with the deceased. [13] The general rule regarding circumstantial evidence was set out in the old case of R vs. Kipkerring Arap Koske & another [1949] 16 EACA 135, in which the following quote from WILLS ON CIRCUMSTANTIAL EVIDENCE (6<sup>th</sup> Edition) at P311 was adopted:

**“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

[14] In the same case of R. v Kipkerring Arap Koske (supra), it was held that the burden of proving facts will justify drawing the inference of guilt from circumstantial evidence to the exclusion of any reasonable hypothesis of innocence, is always on the prosecution and never shifts to the accused.

[15] In Abanga alias Onyango v Republic, Criminal Appeal No. 32 of 1990 (UR), this Court restated the threshold of proof in circumstantial evidence as follows:

**“...such circumstantial evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency and unerringly pointing towards guilt of the accused; (3) the circumstances taken cumulatively should 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.”**

[16] In our view, the evidence that was adduced before the trial court was not at all incompatible with the innocence of the appellants. First, the learned Judge relied on the evidence of S alone. The evidence of S was completely ignored. Although S was stood down, and was not recalled to testify, her evidence was still on record, and this evidence was not consistent with that of S. For instance, contrary to S evidence that the two appellants were not in when they had dinner, S stated that they were all in the house and had dinner together. S also stated that her father who had a broken arm and was complaining of pain, wanted to go out and look for a drink and cigarettes. It is clear that S was stood down as witness because her evidence was not advancing the prosecution case.

[17] According to S, the 1st appellant slept in the sitting room, but the 1st appellant maintained that she slept in a room by herself. There was nothing to contradict the evidence of the 1st appellant. To the contrary, the evidence of S was rather doubtful, given the apparent

contradiction with S evidence.

[18] It was not disputed that the 2nd appellant slept in the same room with the deceased. She explained that the deceased went out at about 4.00 a.m. and that she assumed he was going to the toilet. The learned Judge found it:

**“...strange that the 2nd accused would have remained so unconcerned if indeed the deceased went out of the house, injured as he was and he did not return to the house for a long long time”.**

[19] In our view, the fact that the 2nd appellant did not raise any alarm, is not sufficient to infer guilt on her part. The 2nd appellant was still in bed and the possibility that she could have drifted off to sleep and may not have realized that the deceased had been gone for a long time, cannot be overlooked. The 2nd appellant may also not have been alarmed by the deceased’s absence, seeing that it was getting on to day break. Moreover, the circumstances as testified to before the trial court do not form a chain of circumstances that led directly to the appellants as having killed the deceased. The possibility of the deceased having been strangled by a third party or that he hanged himself remained a reality.

[20] In addition, there was no reason given as to why the 2nd appellant would have killed her husband of 19 years. It is only PC Langat who testified that he was informed by S that the relationship between the 2nd appellant and the deceased was not good. However, this was contradicted by S, who under cross-examination said she was not aware of any dispute between the 2nd appellant and the deceased.

[21] Under section 203 of the Penal Code, murder occurs where a person who has malice aforethought causes the death of another person by an unlawful act or omission. No evidence at all was adduced before the trial court regarding malice aforethought in regard to either of the appellants, nor did the learned Judge consider this factor.

[22] The doctor who examined the deceased’s body and prepared a postmortem report was of the opinion that his cause of death was asphyxia, secondary to strangulation. Dr. Ogolla who produced the medical report in evidence stated under cross-examination that the injuries and conclusion were consistent with a person who commits suicide. But in re-examination, he conceded that the conclusion reached that the deceased had committed suicide was not fully conclusive, as somebody else could have put the belt around the deceased’s neck. In our view, the evidence regarding the deceased’s cause of death was not conclusive as there was the possibility of both suicide and strangulation by a third party. The theory held by the learned Judge that the possibility of the deceased having committed suicide was highly unlikely, was not supported by the evidence. Suicide remained a possibility and this provided coexisting circumstances that weakened the inference of guilt on the appellants. [23] We find that there was no evidence that the deceased was strangled by a third party, and even if that theory was to be accepted, there was no evidence leading directly and unerringly to any of the appellants as the person or persons who strangled the deceased.

[24] We come to the conclusion that the offence of murder was not proved, as neither the *actus reus* nor *mens rea* was established against any of the appellants. In addition, the evidence adduced did not meet the threshold of conviction in regard to circumstantial evidence. For these reasons, we find that the conviction of both appellants was not safe. We allow the appeal. The convictions are accordingly quashed and the sentence of death imposed on each appellant set aside. Both appellants shall be released forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**