



**IN THE COURT OF APPEAL**

**AT KISUMU**

**[CORAM: NAMBUYE, OKWENGU & SICHALE JJ. A]**

**CRIMINAL APPEAL NO. 95 OF 2016**

**BETWEEN**

**JOEL ODONGO OCHIENG.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Homa Bay*

*(Majanja, J) dated 26<sup>th</sup> August, 2015*

in

**H.C.CR.C No. 44 of 2013)**

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**JUDGMENT OF THE COURT**

The appellant, **Joel Odongo Ochieng** was charged and convicted of the murder of his wife, **Caroline Anyango Okeyo** (the deceased) which occurred on **17<sup>th</sup> May 2013** at Kasunga Central Sub-Location in Gembe West Location in Mbita District within Homa Bay County contrary to **Section 203** as read with **Section 204** of the Penal Code.

In a trial conducted partially by **E.N. Maina. J** and finalized by **Majanja, J.**, the prosecution called eight witnesses who adduced evidence that at about 7. 00 p.m. on **17<sup>th</sup> May 2013**, the appellant's cousin **Richard Ouma Ochieng** (PW3), was on his way to his house when he heard a noise emanating from the appellant's house. He went to investigate and found the deceased lying outside the house on the ground crying while the appellant sat on a chair inside the house near the door looking very angry. The appellant and his wife were alone in the homestead. Upon inquiring from the appellant what had transpired, the appellant instructed him to ask the deceased. The deceased who did not speak pointed to her chest in tears. PW3 proceeded to call **Paul Ochieng** (PW4) and **Hezron Odhiambo** (PW1) a motorcycle operator for help. PW4 arrived first, found the deceased lying mute and unresponsive outside the house without any visible injuries. He tried to talk to the appellant who was seated inside the house but he instructed him to direct his questions to the deceased. PW1 subsequently arrived with a motorbike, placed the deceased on it with PW4's help and they headed to the hospital, leaving the appellant behind. Unfortunately, whilst enroute to the hospital, they realised the deceased had passed away. PW1 then called PW2 **Beatrice Irene Atieno**, the chairperson of the beach Management unit in Gambwe who alerted the police. According to PW2, the news of the deceased's death whom she was well acquainted with greatly surprised her as she seemed well earlier that morning when they met at the beach.

PW8, **Sergeant David Wangila Simiyu**, the then Deputy DCIO Mbita and PW7, **PC Christopher Chalulot** who was the investigating officer arrived at the scene at about 10.30 p.m and found the deceased's body lying along the road with notable bruises on her face. With the help of people in the crowd, they were shown the deceased's home which was about a kilometre away where they went and found the appellant absent. PW7 noted stones outside the appellant's house. They later took the body of the deceased to Homabay District Hospital mortuary.

**Dr. Ayoma Ojuang**, (PW7) carried out a post-mortem on the body of the deceased on **31<sup>st</sup> May, 2013**. He found that the deceased had bruises on her face and haematoma formation in the same area. Her spleen was completely fractured causing internal bleeding thus, leading to her death. He was of the view that the type of weapon used to inflict the injuries was blunt.

When put on his defence, the appellant gave a sworn statement and denied the charge. He narrated that on the morning of her death, the

deceased had complained of stomach problems and that he gave her Kshs. 200 to see a traditional doctor. He proceeded to the lake to fish as usual but when he came back home at 8.30 p.m, he found the deceased lying outside next to the door. He went inside and his children informed him that the deceased had not eaten and was in pain. He then sat down on a chair near the door to remove his wet clothes when PW3 passed by his house, found the deceased by the door step and tried to talk to her. When she did not respond, the appellant explained to PW3 that she had been unwell in the morning and her condition had worsened. He then instructed PW3 to call a motorbike to take the deceased to Mbita Hospital while he looked for funds from his boss. When he arrived at the hospital he was informed that they had not received a female patient. He went back home and found a crowd mourning his wife. It is PW4 who informed him that his wife had passed away. He denied a suggestion that his late wife was quarrelsome. He maintained that he never used to have fights with her.

Having considered all the evidence, the learned judge (**Majanja, J**) found the appellant guilty of murder and sentenced him to death. Aggrieved, the appellant has lodged the instant appeal against his conviction and sentence vide a memorandum of appeal dated **16<sup>th</sup> September 2019**, wherein the appellant raised six grounds of appeal which can be summarised as follows: relying on insufficient evidence; shifting the burden of proof to him and finally, relying on hearsay evidence of PW7 concerning a fight between the deceased and the appellant.

When the appeal came up before us for plenary hearing on **17<sup>th</sup> November 2020**, learned counsel for the appellant, **Mr. Odhiambo** relied on the appellant's submissions dated **22<sup>nd</sup> October 2019**. He submitted that there was no evidence of a fight between the deceased and the appellant and that the inference that the appellant assaulted the deceased leading to her death was unfounded. In addition, counsel submitted, no weapon was recovered at the scene that would have caused fatal injuries suffered by the deceased and consequently, the appellant's version of events that his wife had an ailment was more plausible. Citing the case of **Teper V. R [1952] ALL ER 480 and Erick Odhiambo Okumu V Republic [2015] eKLR**, counsel emphasized that the court was obliged to ensure that there were no other existing circumstances which would weaken or destroy an inference of the appellant's guilt. In the oral submissions before us, counsel asked us to reconsider the sentence in light of the Supreme Court decision of **Francis Karioko Muruatetu & Another v. Republic, Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015**, in the event that we find that the conviction was proper.

Opposing the appeal, **Mr. Kakoi**, learned Senior Prosecuting counsel relied on the respondent's written submissions dated **24<sup>th</sup> February 2020** and submitted that the evidence adduced left no doubt that the appellant killed the deceased. The post-mortem report which was tendered in evidence enumerated the extent of the injuries suffered by the deceased thus, establishing malice aforethought. Further, that the circumstantial evidence relied on by the prosecution placed the appellant at the scene of the crime at the time the injuries were inflicted on the deceased. Finally, it was **Mr. Kakoi's** contention that the sentence of death was befitting. He was however, quick to point out that should we be inclined to interfere with the sentence, then a sentence of twenty (20) years should be the minimum.

We have considered the record, the rival submissions by counsel and the law. Being a first appeal, this Court is duty bound to subject the evidence recorded by the trial court to a fresh examination, make its own independent findings, draw its own conclusions thereon and decide whether the trial court's findings should be upheld or set aside while bearing in mind that it did not have the advantage of hearing and seeing the witnesses first hand. (**See: Okeno V. R (1972) E.A. 32.**)

There are three elements which must be proved beyond reasonable doubt to secure a conviction for the offence of murder. These are: the death of the deceased and the cause of death; that the appellant committed the unlawful act which caused the death of the deceased and thirdly, that the appellant had malice aforethought (see **Nyambura & others versus Republic [2001] KLR 355**).

In the instant case, the undisputed evidence of **Dr. Ojuang (PW 7)** who produced a post-mortem report of the deceased established that the deceased had bruises on the face and that the cause of death was internal bleeding caused by a ruptured spleen. There was therefore ample evidence which proved to the required degree that the deceased died as a result of injuries inflicted on her. The question which we must now consider is whether the appellant caused the fatal injuries and if so, whether he harboured any malice aforethought as found by the learned trial judge.

It is clear that the appellant's conviction proceeded on circumstantial evidence. The principles governing reliance on circumstantial evidence to convict an accused person are well settled. In **Rex. v. Kipkering Arap Koske & Another, [1949] EACA 135** the following was stated:

***“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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”***

It is an undisputed fact that no one witnessed any fight between the deceased and the appellant or knew exactly how the deceased came about the fatal injuries she sustained. However, PW3 came to the appellant's home upon hearing some commotion in the appellant's house. The deceased was sprawled outside on the ground crying while pointing to her chest and the appellant who seemed angry, was seated on a chair inside the house. PW 3 and later PW 4 sought to find out from the appellant what had happened to the deceased, but the appellant said nothing, opting to ask the duo to find out from the deceased herself.

At his trial, the appellant's defence was that the deceased had complained of stomach pains on the morning of her death and that he had given her money to see a traditional doctor before proceeding to work. In his view the deceased's condition had worsened as he found her lying outside their home upon his return. This evidence was rebutted by PW2, who had been at Gambwe beach earlier that morning with the deceased who was well enough to go to the beach to sell omena and was left at the beach even after PW2 closed her office. According to her testimony ***“when I met Caroline at the beach we spoke. She was carrying omena. I left them at the beach after closing my office”***. At the time of being boarded on the motor cycle, the deceased was so frail and she needed to be supported as they rode on the motor cycle. The appellant's conduct of not helping the deceased to board the motor-cycle and /or accompanying her to hospital but leaving PW 3 and PW 4 to carry her on the motor bike is telling.

In rendering his judgment, **Majanja J.** found that the central issue for determination was whether the appellant inflicted the injuries that led to the death of the deceased with a blunt object and concluded as follows:

***“Since the accused and deceased were alone at their home and the deceased was found with serious internal injuries, what could have happened to the deceased was a matter within the accused’s knowledge ... In proffering an explanation as to what happened, the accused in his defence, stated that his wife had been sick that morning suggesting that his wife died as a result of the stomach problem she had complained to him about. As I have held the post-mortem examination performed by PW 7 disproves this fact and fact that the deceased was seen earlier that morning by PW 2.***

***Even assuming that his wife was sick, his conduct was inconsistent with his innocence. He found his wife is (sic) grave pain that evening yet he did not call for assistance or help immediately. Since no other person could have inflicted the injury on the deceased, it is only the accused who would have done so. I therefore find and hold that the accused is the person who inflicted the injury upon the deceased.”***

We agree. The appellant’s conduct was inconsistent with his innocence. It is unusual, to say the least for a husband who claims to have known his wife was unwell in the morning, to come home find her unresponsive, sprawled on the ground outside their home in pain yet make the unexpected decision to walk past her into the house and then sit down to remove his wet clothes without calling for assistance. When PW 3 and PW 4 inquired from the appellant what had befallen the deceased whom they found in pain outside the house, the appellant offered no explanation. He did not tell PW 3 and PW 4 that his wife had been ailing. Instead, he asked P.W.3 and P.W.4 to find out from the deceased. The evidence of the doctor (PW 7) was that the deceased died of internal bleeding as a result of a fractured spleen. In our view, the circumstantial evidence not only irresistibly pointed to the appellant as the person who caused the deceased’s injuries, but it also excluded any co-existing circumstances which would weaken or destroy such inference. We are satisfied that the conviction of the appellant was proper.

However, as regards sentence, the appellant’s counsel urged us to reconsider it in view of the Supreme Court decision of **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015** which has since outlawed the mandatory nature of a sentence.

We note that indeed on **26<sup>th</sup> August, 2015**, the appellant’s mitigation was that: ***“I request court to consider that I was left with young school going children upto date their school has been interfered with. Other children of tender age were dependent on me. I pray for leniency so that I can attend to the lives of the children”***

The learned Judge in sentencing the appellant stated that his hands are ‘*tied*’. This was the position as at then (**26<sup>th</sup> August, 2015**). As pointed out by the appellant’s counsel, the mandatory nature of a sentence of death has since been found to be unconstitutional.

Accordingly, in exercising our discretion and noting the appellant’s mitigation, we set aside the death sentence and substitute it with a sentence of twenty (20) years imprisonment from the date of conviction (**26<sup>th</sup> August, 2015**).

It is so ordered.

**Dated and Delivered at Nairobi this 5<sup>th</sup> day of March, 2021.**

**R.N. NAMBUYE**

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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**