



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GITHINJI, J. MOHAMMED & KANTAL, J.J.A)**

**CRIMINAL APPEAL NO. 99 OF 2015**

**BETWEEN**

**JOHN AMBIA KHARISYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(An appeal from a Conviction and Sentence arising from the Judgment of the High Court of Kenya

at Kakamega (**Sitati, J.**) dated 24<sup>th</sup> June, 2015 in *H.C. Cr. A. NO. 12 OF 2009*)

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**JUDGMENT OF THE COURT**

[1] The appellant was convicted by the High Court at Kakamega (**Sitati, J**) for the offence of **murder** contrary to **section 203 as read with section 204** of the **Penal Code** and sentenced to 40 years imprisonment. His appeal is against the conviction and sentence.

[2] The charge stated that on 21<sup>st</sup> February, 2009 the appellant murdered **Caroline Andeka**. Four witnesses gave evidence at the trial in support of the charge namely; **Dr. Dickson Mchana Mwaludindi** (PW1), (Dr. Dickson Mchana) who produced the postmortem report on the body of the deceased performed on 24<sup>th</sup> February, 2009, **I.P Moses Kimong'o** (PW2) an administration police inspector, **Cpl. Danson Mwasho** (PW3) of Kakamega Police Station and **PC Peter Kebenei** (PW4), a scenes of crime officer at Kakamega.

[3] The evidence of **IP Moses Kimong'o** was that on 20<sup>th</sup> February, 2009 at 1.30 a.m. he got a report that a man had cut his wife at the neck. He proceeded to the scene; that he found the deceased's body lying on a bed; that the body had a cut on the neck; that the panga suspected to have been used was lying on the floor under the bed; that the suspect who was the deceased's husband was not in the house; that he called the Officer Commanding Police station (OCS), Kakamega; and that the appellant was later arrested in Kakamega forest. In his evidence in cross-examination by **Mr. Elung'ata**, the appellant's counsel, he testified that he found three children aged between 8 and 12 years asleep in the house and that the home had two houses but there were no people in the houses.

On his part, **Cpl. Danson Mwasho** testified that on the morning of 20<sup>th</sup> February, 2009 he was instructed by OCS to proceed to the scene and investigate the case; that he went to the scene accompanied by **David Auma**, a scenes of crime officer at 4.30 pm.; that he found the body of the deceased on the bed with a cut wound on the neck; that there was blood on the bed; that he recovered a blood stained panga near the bed; that the scene of crime officer took photographs; that he took the body to Kakamega Provincial Hospital for postmortem; and that he got information that the appellant who was arrested later was at home on the material day. He produced the panga as exhibit. The photographs taken at the scene by PC David Ouma and his report were also produced as exhibits by **PC Peter Kimulei Kebenei**.

[4] **Dr. Dickson Mchana** produced the postmortem report prepared by **Dr. Oreke** dated 24<sup>th</sup> February, 2009. According to the postmortem report, the deceased had a cut wound on the neck, the internal jugular vein, right artery and other veins and oesophagus were severed. **Dr. Oreke** formed the opinion that the cause of death was cardio-pulmonary arrest due to severe haemorrhage caused by severed neck vessels, secondary to cut wound on the neck.

[5] The appellant's sworn evidence at the trial was briefly as follows:

The deceased was his wife and they had seven children. He was employed by a company and had been at home for three weeks before 21<sup>st</sup> February, 2009. On the material day, he and the deceased were asleep in the bedroom and his three children, all girls, were asleep in another

bedroom. In the course of the night one child cried and he woke up the deceased and told her to go and find out why the child was crying. The deceased was not happy. After ten minutes, another child cried, and he again woke up the deceased. The deceased was not happy but she went to the children's bedroom. When the deceased returned to the bedroom, she did not sleep. He described what happened afterwards thus:

**“She quarreled me and pulled me until I fell down from the bed. We started fighting when I got hold of her hand. I touched a panga which she had. I took it and threw it away. It was dark in the house. When I tried to grab the panga from her hands it was not easy to do so at once. I ran out of the house and went to my brother's house and told him of our fracas. When I got outside I heard my wife screaming. My brother is Josephat Mulamula. He has not testified. Mulamula came out of his house and went to my house. I was still standing outside. From there, he went back to his house and told his wife what he had seen in my house. I was still standing outside. My brother's wife went and told the neighbours who came and wanted to lynch me. I ran away to my uncle's home which was about 2½ km away.”**

When shown the panga by his counsel he stated:

**“On the day before she had taken the panga for sharpening. It is the one which was used that night. I had no intention to kill my wife. If we had not quarreled this incident could not have occurred.”**

On cross-examination by a State Counsel he stated:

**“It is true that I am the one who cut my wife but it was not intentional”**

[6] The trial Judge after analysing the evidence made a finding thus:

**“As rightly put by the defence there is no direct evidence to link the accused person to the death of the deceased but the circumstances surrounding her death lead to the conclusion that the accused was involved.”**

The trial Judge then considered the evidence to find out if malice aforethought was proved, and made findings among others, that the deceased was slashed at a sensitive part of the body while she was asleep; that the appellant had prepared for the death of the deceased; and that the deceased was guilty of murder.

[7] The appellant states in the supplementary memorandum of appeal that the trial court failed to evaluate the evidence; disregarded the defence evidence; and that the prosecution failed to prove its case beyond reasonable doubt. The appellant's counsel in the written submissions submitted, among other things, that **Mulamula**, a critical witness was not called; that the evidence that the appellant had previously suffered a stroke which affected his brain resulting in short temper was not considered; that the appellant was provoked and acted in the heat of passion; and that the offence should be reduced to manslaughter. On the other hand, **Mr. Victor Mule** the prosecution counsel stated that there was sufficient circumstantial evidence that proved that the appellant is the only person who could have murdered the deceased and that malice aforethought was proved by the extent of injuries.

[8] We have re-considered the evidence. It is evident that the prosecution case was dependent on circumstantial evidence. Two police officers **IP Moses Kimong'o** and **Cpl. Danson Mwasho** described the scene. The deceased was lying on the bed. According to the scenes of crime report dated 9<sup>th</sup> March 2009, the upper body of the deceased was in a pool of blood while the lower part was covered with a blanket and the body was naked. The appellant testified that the deceased pulled him and he fell on the bed and that they started fighting in the course of which he touched the panga that the deceased had. He also stated that if they had not quarreled, the incident could not have occurred. Eventually, he admitted that he is the one who cut the deceased but claimed that it was not intentional. From the appellant's evidence, his brother **Mulamula** did not witness the incident and entered into the house after the incident and after the appellant had reported to him. Thus, failure to call him as a witness did not deprive the court of the evidence of the circumstances in which the deceased died. The appellant's children were in a separate bedroom and indeed **IP Moses Kimong'o** found them still asleep. The evidence of the appellant that the deceased died in the course of a fight was not credible as her naked body was found on the bed with the lower part covered with a blanket. The finding of the trial court that there was no evidence of a struggle and that the deceased was slashed with a panga while still asleep was supported by circumstantial evidence. It is also evident from the postmortem report that the cut on the neck severed the jugular vein, artery and other veins and oesophagus, thereby indicating that the deceased was cut on the neck with force. The blood stained panga was recovered under the bed and the appellant admitted that it was the panga that inflicted the injuries. The appellant was not in the house when the police went to the scene. He admitted that he ran away and the evidence of **IP Moses Kimong'o** was that the appellant was arrested at Kakamega forest.

[9] On our own re-evaluation of the evidence, we find that the totality of the circumstantial evidence coupled with appellant's admission that he cut the deceased with a panga proved beyond reasonable doubt that the appellant intentionally murdered the deceased and that he was properly convicted.

[10] As regards sentence, the maximum sentence for the offence of murder is death. The learned judge in her discretion sentenced the appellant to 40 years imprisonment. We have considered the mitigation proffered at the trial. Although we agree with the finding of the learned trial judge that the appellant behaved in a most barbaric manner, we find that the sentence was harsh and manifestly excessive. As provided in **section 333(2)** of the **Criminal Procedure Code**, the period of six years when the appellant was in custody should have been taken into account.

[11] For the foregoing reason, the appeal against conviction for the offence of murder is hereby dismissed. However, the appeal against sentence is allowed to the extent that the sentence of 40 years is reduced to 20 years imprisonment with effect from 24<sup>th</sup> June, 2015 when he was sentenced.

*Dated and delivered at Kisumu this 31<sup>st</sup> day of January, 2020.*

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR