



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAL, JJ.A)

CRIMINAL APPEAL NO. 22 OF 2018

BETWEEN

BERNARD WAMUTI KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Ombija, J.) date 4th November, 2014

in

H. C. Cr. C. No. 5 of 2009)

JUDGMENT OF THE COURT

[1] **Bernard Wamuti Kamau**, the appellant herein, was tried before the High Court (Ombija, J.) where he was charged with the offence of murder of **FMM** (deceased), a girl child aged about 3 years, contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence being that on 5th January, 2009 at [particulars withheld] Estate in Kiambu District within Central Province, the appellant defiled and murdered **FMM**, a child aged 3 ½ years old. The appellant was tried and upon being found guilty, was convicted and sentenced to suffer death. He has appealed against both the conviction and sentence.

[2] The prosecution's case was primarily predicated on circumstantial evidence as none of the witnesses saw the appellant commit the murder. We will restate the facts pursuant to our mandate as a first appellate court to re-evaluate and re-appraise the evidence on record afresh by dint of the provisions of **Rule 29 (1) (a)** of the Court's Rules.

[3] By a cloak and dagger mystery, the lifeless body of the deceased was found in a coffee plantation on the morning of 6th January, 2009. The evidence that linked the appellant to the murder of deceased was given by eleven (11) prosecution witnesses among them **John Njoroge Kamau (PW1)** who was the younger brother of the appellant.

[4] **PW1** testified that on 5th day of January, 2009 he was hired to trim his neighbour's fence and while doing so, he saw the appellant at that neighbour's home at about 3:45 pm. The appellant borrowed a shaving machine and after he was shaved by another person called **Nganga**, he went away. The appellant used to work as a watchman and he used to share a room with **PW1**. He also used to leave for work at 5pm. **PW1** went on to testify that he left his work at the neighbour's house at around 6.30pm, and went to his home which was about 30 meters away. After a short while, he heard an announcement made through a loudspeaker that the deceased had gone missing. He joined a group of neighbours who had responded to the announcement and they started searching for the missing child the whole evening, but when they did not find the child, the search was called off for the night.

[5] The next morning, **PW1** heard people screaming from the coffee plantation called [particulars withheld]. He went there and saw the lifeless body of the deceased which was covered with a jacket. **PW1** testified that on 7th January, 2009 police officers came to the house which he used to share with the appellant and asked for the clothes which the appellant was seen wearing on 5th January, 2009. **PW1** showed the police the clothes which the appellant had hanged on a cloth-line inside the room that he shared with him. The clothes were a black stripped shirt and a green pair of trousers, which the police officers took away. At the time, the appellant was at his place of work where he used to work as a night watchman in Runda estate. **PW1** and his other brother, **Paul Gichuri Kamau (PW2)** were arrested but after being held in the police cells for fourteen (14) days, they were released without being charged.

[6] **PW2** also testified that he heard about the missing child (deceased) at around 6.30pm on the material day while on his way to the shops. He abandoned his mission and joined other neighbours to search for the missing child. They searched for the child from house to house and in the coffee plantation but the search was called off around 10pm when he went to sleep. The following day they resumed the search and found the body of the missing child in the coffee plantation at [particulars withheld] Estate. On the 7th January, 2009 police officers came to his home a two roomed house that he used to share with the appellant and **PW2** and started beating him. The police officers handcuffed him and told him to say who raped and killed the child. He was remanded at the police station for fourteen (14) days and later released without being charged. During cross-examination, **PW2** positively identified the green trousers as the ones which the appellant wore every day when he went to cut Napier grass for his cows.

[7] **JMM (PW3)** the father of the deceased testified that on the 5th January 2009, he arrived home from work at around 5.30pm and soon thereafter his wife also arrived home from work. However, they could not see or trace their last born child (**deceased**) around the homestead and his wife raised an alarm. Neighbours were quickly mobilized as it was announced through a public address system that the deceased was missing and a search begun in earnest from 6.30pm to about midnight when it was called off. The next morning, 6th January, 2009, **PW3** woke up his other older children and resumed the search. They went into the coffee plantation and that is where they found one of the deceased's pink sandal which **PW3** recognized. A further search revealed the deceased's lifeless body lying on her back. Her red T-shirt was stained with vomit and her shorts had been removed and were lying next to her. He also noticed that her body had bruises on the neck. **PW3** covered the body of the child and he immediately went to report the matter at Kiambu Police Station. The police led by the OCS visited the scene and took the body to the City Mortuary.

[8] **PW3** further testified that January, 2009 two neighbours on the day the deceased's body was found on 6th **Ann Mbithe (PW5)** and **Holida Mukami** told him that they suspected the appellant had murdered the deceased because on the material day, he was late to go to work and **PW5** had heard the appellant's sister **Nyambura** asking him why his clothes were so dirty and jokingly asked him whether he had raped someone. **PW3** reported this information to the OCS Kiambu Police Station and was assigned police officers to carry out investigations regarding the movement of the appellant on the material day. The police went to where the appellant used to work in Runda and when the appellant saw the police officers, he disappeared. That is when the police went to the appellant's home and arrested his brothers **PW1** and **PW2** for further interrogations. They also recovered some clothes that the appellant was said to have been wearing on the material day. **PW3** positively identified the clothes, being a black striped shirt & green trouser, as the ones taken from the appellant's room and that he used to see him wearing on many occasions when he went out to cut Napier grass. The appellant was arrested the next day when his employer called the police to alert them that he had reported to work.

[9] **SW (PW4)**, the deceased's mother, testified that when she came home from work at about 5.40pm, she opened the gate and called out for the deceased as she always did, as deceased was the last born and she would be carrying some goodies for her. Her eldest daughter told her the deceased was there a few minutes earlier but had left, and suggested that perhaps she was at her grandmother's house which was 50 meters away. **PW4** was unable to locate the deceased and informed her husband and went on to raise an alarm which was escalated through a public address system by their father who was a preacher. The search for the deceased begun in earnest but was fruitless that night although the following day the deceased's pink sandal was found in the coffee farm, 1 km away from the homestead. **PW4** was informed that her daughter had been defiled and murdered. In her testimony, **PW4** stated that she suspected the appellant because he fled from his workplace in Runda to avoid arrest. She also suspected him because he used to engage in unnatural acts with cows and goats and the deceased had once told her that the appellant had held her hand and made her uncomfortable. On cross-examination, **PW4** stated that the deceased was seen outside the appellant's house together with the deceased's cousin **HM**, on the fateful evening before she disappeared.

[10] **Hannah Mbithe Munene (PW5)** recounted how the deceased came to visit her on the material day and left a short while later saying she was going home. She stated that for the deceased to get home, she had to walk through the appellant's compound. **PW5** told the trial court that she later took a shortcut through the appellant's homestead on her way to the shop at around 5.30pm and she heard the appellant's sister, **Nyambura**, asking the appellant why he did not go to work that day; the appellant replied that his trousers were dirty. At around 7pm she joined other concerned relatives to search for the deceased which they did until 10pm when the search was called off. The next day she heard screams from the direction of [particulars withheld] Estate and when she went there, she found *the deceased's* lifeless body lying in the coffee plantation. **PW5** positively identified the striped shirt and green trousers as those she saw the appellant wearing on the material day.

[11] **PC Nicholas Mutinda (PW6)** prepared the exhibit memo on behalf of the investigating officer **PC Mwangela**. The exhibits consisted of one blood-stained green trouser, striped shirt stained with the victim's vomit, a bottle containing the deceased's blood sample, a khaki envelope containing soil sample collected at the scene, a bottle containing the deceased's vaginal swab, a bottle containing appellant's saliva sample and a bottle containing appellant's blood sample. The blood analysis report, prepared by the Government Analyst, **Stephen Makinde Joel Webe (PW8)** showed that the blood stains on the trouser and shirt both matched the blood group of the deceased (Group A). Government analyst **Catherine Serah Murambi (PW9)** also presented her findings regarding the muddy stains and vomit stains found on the appellant's pants and shirt. She compared the stains to the soil sample collected at the scene and found that the mud on the pants was chemically similar to the soil sample collected at the scene. However, the vomit substance collected at the scene did not match the vomit stains on the appellant's shirt.

[12] **Dr. Johansen Odiwuor (PW7)** performed the postmortem on the deceased's body at City Mortuary on 7th January 2009. He testified that there were multiple bruises on the deceased's chin, both cheeks and behind the left ear. There were more bruises on the loins and both thighs. There were also blood clots and tears in the vagina and the hymen was ruptured. It was his opinion that the cause of death was asphyxia due to manual strangulation and there were signs of defilement.

[13] **PC Barack Sila (PW10)**, was the investigating officer, he visited the scene of crime and testified that on the 6th [particulars withheld] Estate in Kiambu County. At the scene they found the deceased's body. It had visible injuries on the neck and vagina and that she had vomited at the scene. They also recovered the deceased's left sandal. The body was taken to the City Mortuary where **PW3** identified it for purposes of a postmortem examination. Upon receiving some lead information, **PW10** together with **PC Mwangi** of CID Division Kiambu, begun to carry out investigations. On the 7th January, 2009 they went to a place in Runda where the appellant used to work but failed to apprehend him as he took off upon seeing them. **PW3** led the police to the appellant's home where they conducted a search and arrested

PW1 and **PW2**. They also recovered a green trouser and stripped shirt which **PW1** positively identified as belonging to the appellant. The appellant was apprehended on 8th January, 2009 following a tip off from his employer and taken to Kiambu District Hospital where his blood sample was taken. **PW10** also requested for the deceased's vaginal swab and blood sample to be collected and handed them to **PC Mwenge (PW11)** of DCIO Kiambu who was the investigating officer Kiambu and who also identified the exhibit memo prepared by **PW6**. This witness identified the green trouser and stripped shirt, as well as the deceased's pink sandal which were produced as exhibits.

[14] After evaluating the evidence, the learned trial Judge was satisfied that a *prima facie* case was established requiring the appellant to give his defense. The appellant gave sworn evidence and did not call any witness. He testified that on 5th January, 2009 he left for his night duty at 5pm and walked to Runda where he stayed overnight until 6am the following morning. On his way home he was told that a small girl had been found dead in a coffee plantation near his home. The appellant denied having committed the offence. Nonetheless on cross-examination, he admitted that he wore the green trousers and stripped shirt on 5th January, 2009 but claimed that he did not know how they came to be stained with blood or vomit. He also agreed during cross examination that none of his two brothers could have worn his clothes and neither of them was the source of the blood.

[15] After weighing the evidence, the learned trial Judge was satisfied that the prosecution had proved its case beyond reasonable doubt based on the circumstantial evidence that linked the appellant to the murder of the deceased. The appellant was consequently convicted and sentenced to suffer death. It is that decision that provoked this appeal. The appeal is predicated on some nine (9) grounds which are somehow prolix and repetitive, we will therefore summarize them to avoid repetition. That the learned trial judge erred in law and fact in that; no identification parade was carried out to identify the appellant; that the evidence did not conclusively point at the appellant as the perpetrator of the heinous crime; that the learned Judge did not evaluate the evidence properly; that the Judge admitted evidence of character of the appellant that was inadmissible under the **Evidence Act**; that the Judge did not warn himself on the dangers of convicting the appellant based on circumstantial evidence and finally that the Judge relied on exhibits to support the conclusions when such exhibits were tampered with.

[16] During the plenary hearing, **Mr. Oira**, learned counsel for the appellant made some oral submissions in furtherance of the aforementioned supplementary grounds of appeal, by emphasizing that the evidence before the High Court was entirely circumstantial and did not meet the threshold required before convicting the appellant. He challenged the blood analysis report arguing that there was no DNA test done, to positively eliminate **PW1** and **PW2** from commission of the crime. It was counsel's prayer that the appeal be allowed but in the event the conviction was upheld, the sentence of death be overturned to comply with the Supreme Courts' decision in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**

[17] Opposing the appeal on both conviction and sentence, **Mr. O'miera** learned Senior Assistant Director of Public Prosecution, stressed that the circumstances under which the deceased met her death were particularly gruesome; that the soil and blood samples taken from the appellant's clothes matched what was found at the scene of crime. The appellant did not offer any explanation as to how the deceased blood came to be on his clothes. Also the soil sample found in the clothes that the appellant was seen wearing on the day the deceased went missing matched the soil at the scene. Similarly the appellant did not offer an explanation as to what he was doing at the scene of crime. According to **Mr. O'mirera**, there was no other plausible explanation of how the deceased's blood got on the clothes the appellant was wearing on 5th January, 2009 other than that he was at the crime scene and took part in the death of the deceased. Responding to the argument that the trial court failed to properly evaluate the circumstantial evidence in that there was no DNA testing, counsel argued that there was no need for DNA testing to eliminate **PW1** and **PW2** as the blood and soil sample coupled with the fact that the deceased was seen by **PW5** walking back to her home through a route that passed by the house where the appellant used to live, was sufficient to warrant a safe conviction. On the issue of sentencing, learned Counsel argued that the deceased was aged about 4 years old, an innocent child who met her death in the most grotesque and grisly manner, after she was subjected to defilement and accordingly, this was an aggravated crime of murder deserving a death sentence.

[18] In a brief rejoinder, **Mr. Oira** stated that the prosecution had failed to prove with certainty that the blood stained clothes were worn by the appellant since he shared the house with his brothers.

[19] We have considered the record of appeal, the supplementary grounds, and deliberated on the submissions by counsel and the law. This being a first appeal we are called upon to re-evaluate the evidence tendered at the trial court and make our own conclusions with the obvious caution that we have not had the advantage, which the learned Judge had, of hearing and seeing the witnesses and give allowance for that (see **Okeno vs. Republic (1972) E. A 32** and **Mwangi vs. Republic (2006) 2 KLR 28.**)

[20] We appreciate that the evidence that linked the appellant to the offence he was charged with was solely circumstantial evidence as there was no eye-witness account on how the deceased was defiled and murdered. The prosecution relied on a series of circumstances to establish the guilt of the appellant which were accepted by the learned trial Judge as he posited in some pertinent portion of the judgment as follows:

“On the totality of the circumstantial evidence presented before me, it is clear as daylight that the accused was at the scene of the crime on the 5th day of January, 2009 past 6.00 pm in the evening. The accused then left for work. On the evidence of Anne Mbithe (PW5), who was in the company of Holida Mukami, the accused was late for work that evening and the sister to the accused even questioned him why he was late. On seeing his green soiled trouser at the knees Anne Mbithe and Holida Mukami even teased him that he had defiled and/raped somebody. When the room he was sharing with his brother Njoroge was searched the green soiled trouser and the yellow black stripped shirt were recovered. When examined in the Government Laboratory, the soil on both knees of the trouser matched the soil at the scene. The blood on the green trouser and yellow/black stripped shirt matched the blood of the deceased (group A). During cross examination, the accused was unable to explain how the blood of the deceased (group A) got into contact with his green trouser, a fact established by the government analyst. Accused equally acknowledged that his yellow/black striped shirt also had blood of group A which matched that of the deceased. But he was unable to explain how the said blood group happened to be on his clothes yet his blood group is B. in my judgment, based on circumstantial evidence, it is the accused who lured the deceased to the coffee plantation on the fateful day and defiled her. In the process he manually strangled the deceased who vomited and died of asphyxia. This finding is supported by the presence of deceased's blood (group

A) on the accused green trouser. This finding is further supported by the presence of blood (group A) on the yellow/black striped shirt of the accused which was similar to the blood group of the deceased. Last but not least, this finding is supported by the post-mortem report...”

[21] Did the evidence before the trial Judge meet the threshold of proving that it was only the appellant and none other had the opportunity of killing the deceased? In **Sawe vs. Republic (2003) KLR 364**, this Court held: -

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”(See also **Musili Tulo v R [2014] eKLR** and **Mwita vs. Republic (2004) 2 KLR 6**).

[22] We have re-evaluated the evidence before the trial court as captured in the summary of the preceding paragraphs against the established principles on admissibility of circumstantial evidence. What connected the appellant with the offence was the presence of blood and soil sample that were found in his clothes that matched the blood of the deceased and the soil at the scene of crime. In his defence the appellant admitted that he was at his house which was about 100 meters away from the home of the deceased. The evidence by **PW1** and **PW5** that the appellant was at home at the material time just about the time the deceased went missing was not at all shaken. Also the appellant did not deny that the two pieces of clothing were his; indeed he said those were the clothes he used to wear every day while working in his shamba. This is what the appellant stated in his own evidence while under cross-examination: -

“My two brothers Njoroge and Gichuru are younger than me. We are not of the same size at the waist. They would not therefore fit my trouser. On the 5/1/ 2009 I was at home. Njoroge was cutting the fence at the neighbors place. I do not know what kind or colour of trouser he was wearing. I do not know how the blood of the deceased came to be on my trouser. But I confirm I wore the green trouser. The soil on the green trouser came from the soil in the shamba. My black striped T-Shirt had vomit. But I do not know where the vomit came from...”

[23] Apart from admitting that the clothes were his, the appellant did not offer any explanation as to how the deceased’s blood came into contact with his clothes which he was seen wearing by other witnesses. His defence of *alibi* that he left his home at 5pm arriving at his place of work at 7pm where he stayed overnight could not pass the test of credibility in the face of the strong prosecution evidence that placed the appellant at the place and at a time when the deceased went missing coupled with the forensic examination of the clothes that linked him with the blood of the deceased. Given the circumstances, the burden of proving how the deceased’s blood was found on his clothes under **Section 111(1)** of the Evidence Act fell on the appellant: -

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: -

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt to the guilt of the accused person in respect of that offence.”

In **Douglas Thiongo Kibocha vs. Republic [2009] eKLR** the court

had this to say: -

“When Parliament enacted section 111(1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111 (1), above places an evidential burden on an accused to explain those matters which are especially within his knowledge. It may happen that the explanation may be in the nature of an admission of a material fact.”

In light of the above threshold we are satisfied that these evidence proved that it was the appellant and none other who murdered the deceased. We therefore find that he was properly convicted and the appeal on conviction is without merit.

[24] Upon conviction, the trial court sentenced the appellant to death for the reason that death sentence was at the time mandatory for the offence of murder. **Section 204** of the Penal Code provides: -

“Any person convicted for murder shall be sentenced to death.”

We are alive to the emerging jurisprudence from the Supreme Court’s decision in the case of **Muruatetu** (supra) where it was held that although death sentence was constitutional, the mandatory nature was unconstitutional thereby freeing the courts to determine an appropriate

sentence depending on the circumstances of each case while bearing in mind that each case must be considered according to its own peculiarity. In line thereto, we have to address the issue of sentencing. In this regard, courts still have the discretion to impose the death sentence in appropriate cases after considering the mitigating circumstances. By way of mitigation, the appellant pleaded for leniency on the basis that he was a first offender, that he was remorseful and that he was willing to reform.

[25] We have taken into account the nature of the offence committed, and the level of violence that was visited on the deceased, an innocent and defenceless child of about 3 years. The defilement, which was heinous enough to begin with, was compounded by murder through strangulation. On the whole therefore, we find this is one case that deserved the sentence that was meted by the trial Judge. We find no reason to interfere with it. For the aforesaid reasons we find all the grounds of appeal lacking and we order it dismissed with the result that the death sentence imposed by the trial Judge is upheld.

Dated and delivered at Nairobi this 6th day of March, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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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