IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 76 OF 2017

BETWEEN

MUSA ADIKA MUDAVILA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (S.N Mutuku, J.) dated 7thDecember, 2015

in

HC. CRA. No. 85 of 2013)

****

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Nairobi in Criminal Case No. 85 of 2013 (**Mutuku, J.)** delivered on 7th December, 2015. Being a first appeal it is our duty to re-evaluate, re-assess and re-analyse the evidence that was before the trial court and then arrive at our own conclusions and give reasons for reaching those conclusions. In a leading case in this respect – **Okeno v Republic [1972] E.A. 32** the predecessor of this Court stated of the duty of a first appellate court as follows:

> *"**An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS vs. SUNDAY POST [1958] E.A 424**."*

The background of the appeal is that the appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya.** The particulars of the offence were that on 28th December, 2012 at Kibera slums, within Nairobi County jointly with others not before Court the appellant murdered **Douglas Oloo Kimonge.**

The prosecution called ten (10) witnesses in support of its case. **Evan Juma Kimonge (PW1 – Kimonge)**, the brother to the deceased testified that he last spoke to the deceased on 24th December, 2012 on phone as he was headed to church at their home in Nyamaua, Kisii. After the church service, he tried calling the deceased again but the deceased did not pick up his phone. He tried several other times but his calls remained unanswered. He called the deceased's wife on 26th December, 2012 who stated that she had not seen him since 24th December, 2012.

On 29th December, 2012, Kimonge was called by his niece named Consolata who informed him that his brother had died. He travelled to Nairobi and on 30th December, 2012 went to the City Mortuary where he identified the body of the deceased. He observed that the body had panga cuts on the head and back, and the deceased's hands and legs were tied from behind with white rope and there was a cloth around the neck of the deceased.

Karen Ochere Kimonge (PW2 – Karen) last spoke to her brother on 24th December, 2012. On 26th December 2012, her cousin called Onsando called her and asked her whether she knew that her brother, the deceased had been missing. She joined the deceased's wife and

other relatives in looking for the deceased. They reported the matter at Kilimani Police Station where they were referred to Special Crimes Prevention Unit at Nairobi after being assigned one police officer; they went to several hospitals and eventually to the City Mortuary where they found the body of the deceased.

Carol Ogenga (PW 3 – Carol) (the wife of the deceased), testified that on 24th December 2012, after receiving information that her husband could not be reached on the phone was surprised to find his phone off. Her husband did not come home on that day and on subsequent days and a search for him eventually took this witness and others to City mortuary where they found the body of the deceased.

On 31st December, 2012, Carol went back to the mortuary and witnessed post mortem being conducted. She added that the motor vehicle owned by her husband, registration number KBR 440Z was later recovered in Webuye.

John Marira Michael (PW 4 – Marira), testified that the deceased sold a shop to him. At some point they disagreed but eventually settled scores and became friends. He stated that he heard that the deceased had been found dead and taken to the City Mortuary. He went to the Mortuary and identified his body.

PW5 was **PC Kennedy Onyango Otieno** he was directed by his superiors to travel to Webuye to pick a suspect and an exhibit and bring them to Nairobi. At the Webuye Police Station, he received from the Deputy DCIO, Oloo Robert the appellant herein and a motor vehicle registration number KBR 440Z, Toyota Succeed which was at the police parking yard and he brought them to Nairobi.

Sylvester Obonyo, (PW 6) was a colleague of the deceased in the taxi business for 2 years. On the day when the deceased went missing, on 24th December, 2012, the deceased had referred a client to him. The following day, 25th December, 2012, the taxi drivers noted that the deceased was missing. They went to different police stations to look for him. On 29th December, 2012, they found the deceased at the City Mortuary and he observed that his body had started decomposing.

PW 7, APC Hillary Alianda based in Bungoma East sub-county testified that on 24th January, 2013 he and his colleague **APC Geoffrey Kurgat** received a report from one Joseph Mugongolo (PW9) that a certain vehicle had been parked at his place and the people who had parked it there had not returned three days after parking the car. They went to the scene and found two people were opening the doors of the vehicle. He identified the appellant as one of the people who were opening the vehicle. He stated that upon realizing that the appellant and the other person neither had identity cards nor documents to show that the vehicle belonged to them, he took them to Webuye Police Station for further interrogation. This version of the events was confirmed by Geoffrey Kurgat.

The person called Joseph Mugongolo or Hussein Nyongesa Mukongolo (PW9) stated that he lives in Webuye and that on 22nd January, 2013, his friend Abubakar called him on phone and asked whether a motor vehicle could be parked in his compound, a request which he approved. He testified that he identified the appellant as the person who came with the vehicle, Toyota Probox white in colour. On the third day as the people who had parked the motor vehicle had not returned he reported the matter to the police who accompanied him to the scene. They found the appellant and Abubakar opening the doors of the motor vehicle and the 2 were arrested and escorted to Webuye Police Station.

The last witness was the Investigations Officer, (PW10) Thomas Simiyu, based at Kilimani Police Station at the time of the incident. On 28th December, 2012, he was informed by the OCS about a murder at Kichinjio opposite Makuna Primary School in Kibera. Upon arrival at the scene, there was a small house from which a foul smell was emanating from. They broke into the house and found a dead body lying down with legs and hands tied at the back. The body was completely covered. They uncovered it and noticed that the neck had a sheet tied around it and there was an injury on the head. The body was taken to the City Mortuary where the wife of the deceased identified it as that of the deceased. The Investigations officer established that the deceased was operating a taxi and the taxi had been stolen. He contacted the Flying Squad that deals with theft of motor vehicles. On 24th January, 2012, he was informed by the said office that the vehicle had been traced at Webuye and a suspect had been arrested. The appellant was brought from Webuye Police Station with documents that showed he had been charged with the offence of handling stolen property. The appellant was at first charged with the offence of robbery with violence at Kibera Law Courts but was later charged with the offence of murder.

That was the case for the prosecution which upon evaluation the trial court placed the appellant on his defence where he denied committing the offence and contended that he was merely framed. He testified that he was arrested on 24th December, 2012 at 2.30 a.m. at the Kakamega bus stage after he had arrived from Nairobi. Four police officers approached him and asked him where he was coming from and where he was headed. He explained that he had arrived from Nairobi and was going home to take doors and windows having been sent by his father. They took his wallet and phone and asked for the receipt of the windows and doors which he did not have. The Police officers called for a police vehicle and he was handcuffed and taken to Webuye Police Station where he was put in custody and later charged, first at Webuye Magistrates court and finally at the High Court in Nairobi. He claimed that in the course of interrogation he was tortured and his money, doors and windows taken from him.

In its determination, the trial Court found that the fact of unlawful death of the deceased was proved beyond reasonable doubt and that the cause of death had been confirmed by witnesses as asphyxia due to strangulation.

On whether the appellant was connected to the death, the trial Court observed that there was no direct evidence connecting the appellant to the disappearance and the eventual death of the deceased hence the prosecution case relied entirely on circumstantial evidence.

The trial Court held that the appellant was found in possession of the motor vehicle registration mark KBR 440Z, which was positively identified as the property of the deceased, and which had been recently stolen from the deceased. The trial Court therefore found that the doctrine of recent possession was applicable in the case and further found that the appellant was found in possession of the motor vehicle that had been stolen from the deceased about a month before the appellant was arrested. The court further found that there were no other co-existing circumstances which would weaken or destroy the inference of guilt in regard to the appellant. The appellant was accordingly convicted for the offence of murder and was sentenced to death.

The appellant was dissatisfied with those findings and filed this appeal through Supplementary Grounds of Appeal drawn for him by his lawyers, Ratemo Oira and Company Advocates where 10 grounds of appeal are taken. These may be summarized as follows: that the learned Judge erred in finding that there was proper identification when no identification parade had been conducted; that the evidence was inconclusive; that the prosecution evidence was not free from error and was unsafe; that the Judge erred by relying on circumstantial evidence without applying necessary principles on admission of such evidence; that exhibits were tampered with before their production in court and, finally, that the Judge erred by failing to consider the mitigating factors in pronouncing the death sentence. We are asked to consider the Supreme Court of Kenya decision in the **Petition No. 15 of 2015 Francis Karioko Muruatetu & Others v Republic** as regards sentence and quash conviction and set aside the sentence.

During hearing of the appeal **Mr. Ratemo Oira** learned counsel appeared for the appellant while **Mr. O'Mirera**, Senior Assistant Director of Public Prosecution appeared for the Republic.

Mr. Oira submitted that there was no direct evidence that the appellant drove the motor vehicle belonging to the deceased. According to counsel, the motor vehicle was not dusted for fingerprints and, for cases where circumstantial evidence is to be relied on, the same should not leave any doubt in the prosecution case. Counsel cited the cases of **Ndurya v Republic (Mombasa Criminal Appeal No. 446 of 2007)** and **Sawe v Republic [2003] eKLR** in support of the proposition that a court should only convict based on circumstantial evidence where there is no doubt that it is the accused and no other who committed the offence. Counsel had a submission in the alternative - should we uphold the conviction, we should interfere with the sentence by setting aside death sentence given by the trial Judge.

In opposing the appeal Mr. O'Mirera submitted that there was overwhelming evidence against the appellant through the evidence of PW3 (wife to the deceased) and PW1 (brother to the deceased); evidence of recovery of the stolen motor vehicle as narrated by PW9; arrest of the appellant by PW7 and 8 when he was found opening the doors of the stolen car. Counsel wondered why the appellant had not explained why he was found in possession of the stolen motor vehicle.

On sentence it was Mr. O'Mirera's submission that the deceased was strangled; his hands and legs had been tied at the back – that it was a cruel, gruesome murder where the death sentence was deserved.

The issue before us is whether the circumstantial evidence relied upon by the learned Judge to found a conviction against the appellant met the threshold of proof beyond reasonable doubt required in a case as the one before the trial Judge.

There was no eye witness to the murder. The prosecution relied on circumstantial evidence. In order to found a conviction based on circumstantial evidence that evidence must irresistibly point to the accused to the exclusion of all others. In the case of **R v Kipkering arap Koske & Another 16 EACA 135** it was held that:

> ***"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In addition, there must be no 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 innocence is on the prosecution, and always remains with the prosecution. It is a burden that never shifts to the party accused – See Sawe v Republic (supra)."***

In **Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990 (UR)** the Court set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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."***

It is also the case as this Court found in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic [2006] eKLR** that before a court of law can rely on the doctine of recent possesion as a basis of conviction in a criminal case the possession must be positively proved. There must be positive proof firstly, that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and, lastly, that the property was recently stolen from the complainant. The proof as to time will depend on the easiness with which the stolen property can move from one person to the other.

What were the facts before the trial judge that led to the conviction of the appellant for the offence of murder?

The judge found that the vehicle which had been stolen in Nairobi was found in Webuye. According to the evidence of Joseph Mukongolo (also called Hussein Nyongesa Mukongolo) (PW9) he was asked by his friend called Abubakar to allow Abubakar's friend to park a motor vehicle at his homestead. According to the witness Abubakar was accompanied by the appellant and he allowed them to park their vehicle at his homestead. When two or three days later the vehicle had not been collected Mukongolo decided to report the matter to police. Police officers **Hillary Alianda (PW7)** and **Geoffrey Kurgat (PW8)** received the report and they went to the scene and found the appellant and another person opening the doors of the car. The deceased's wife Carol Ogenda (PW3) identified the vehicle when it was driven to Nairobi from Webuye and produced documents in support. The fact of the motor vehicle belonging to the deceased was proved to the required standard. The trial court was satisfied that it was the appellant who was introduced by Abubakar to Mukongolo to allow them to park the car in Mukongolo's homestead. That vehicle and the deceased had gone missing on or about 24th December, 2012 and the deceased's dead body was found in Kibera on or about 28th December, 2012. It was proved to the required standard that the appellant was found in possession of the vehicle which had recently been stolen from the deceased in Nairobi.

The trial court found that the motor vehicle was stolen and that it was found with the appellant about one month after it was stolen. The trial

court found one month to be recent enough for purposes of satisfying the doctrine of recent possession. The trial court further found that the prosecution having proved recent possession the burden shifted to the appellant to offer an explanantion as to how he came by the motor vehicle. The appellant did not give any explanation. There was sufficient evidence given by Mukongolo that he allowed the appellant to park a motor vehicle at his home on or about 22nd January, 2013. It was proved that the vehicle belonged to the deceased and it had been stolen on or about 24th December, 2012. The appellant was found by police officers Alianda and Kurgat opening the doors of that vehicle on 22nd January, 2013.

Like the trial Judge we find the period from when the motor vehicle was stolen to the time when it was recovered (less than a month) to be recent for purposes of satisfying the doctrine of recent possession.

Section 111 (1) of the **Evidence Act** provides as follows:

> ***"When a person is accused of any offence, the burden of proving 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."***

What this means is that the appellant had a duty on 22nd January, 2013 and in subsequent days to give a reasonable explanation on how he came by the motor vehicle that had been stolen on or about 24th December, 2012. He did not give any explanation. His whole defence was a narration of events unrelated to the stolen motor vehicle and how he came to have it when he was arrested. It was proved to the required standard in the case before the trial court that the motor vehicle belonging to the deceased had been found in possession of the appellant less than one month after it was stolen. The appellant having not given any explanation on how he came to have the motor vehicle in his possession the Judge was right to find that the doctrine of recent possession applied in the case before him. The grounds of appeal raising issues of lack of an identification parade or inconclusive evidence have no relevance to the case that was before the trial court. That court properly analysed the evidence and applied the correct approach in finding the appellant guilty on the basis of being found in recent possession of the stolen motor vehicle. The law required the appellant to give a reasonable explanation on how he came to be in possession of the stolen motor vehicle and in the absence of any explanation the trial court reached the correct conclusion. The defence given by the appellant that he had been arrested in December 2012 was not there. He was arrested on 22nd January, 2013 by police officers from Webuye Police Station and thereafter transported to Nairobi with the stolen motor vehicle. He was then charged with the offence of murder.

By **Section 206** of the **Penal Code** it is necessary that the prosecution establish malice aforethought for an accused person to be convicted of the offence of murder. That Section provides:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances–***
>
> ***a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused on not, or by a wish that it may not be caused;***
>
> ***c) an intent to commit a felony;***
>
> ***d) ...."***

The prosecution in the case before the trial Judge established that the deceased was killed in a gruesome murder where his hands and legs were tied to the back and he was strangled. It was further established that the deceased's car was stolen during the robbery and macabre killing and that the appellant was found in recent possession of the stolen motor vehicle. Malice aforethought was thus established.

The appellant was convicted on the doctrine of recent possession. He was found with a vehicle which had been stolen from the deceased less than one month earlier. The body of the deceased was found strangled a few days after he went missing and his motor vehicle had also disappeared. Like the trial judge we find that all the ingredients to prove recent possession were met and in the absence of any explanation from the appellant on how he came by the stolen motor vehicle it was safe to convict him for the murder of the deceased who was killed either after or during the robbery of the vehicle. The circumstances of the case established to the required standard that the appellant killed the deceased. The learned trial Judge correctly applied the principles laid down in the case of **Musoke v Republic [1958] E.A. 715** where it was held that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The deceased was killed either during or after his vehicle had been robbed from him. The appellant was found in possession of that vehicle in the distant town of Webuye. And there was evidence before the trial court that the appellant was attempting to sell that vehicle. We find the conviction of the appellant to have been based on sound footing and the appeal against conviction is dismissed.

Then there is the issue of proof of death, although we note that this issue was not raised either in the High Court or before us by either side. We note that no post mortem report was produced before the trial court and no pathologist testified on the death of the deceased.

Kimonge (PW1) brother to the deceased testified that he visited City mortuary on 30th of December, 2012 when he recognised a body there as that of his brother. He identified the body to the pathologist for post mortem.

Karen (PW2) also visited the same mortuary on 29th December, 2012 and recognised the body of the deceased as that of the brother. She noted various injuries ion the body.

Carol (PW3) wife of the deceased identified her husband's body at the said mortuary on 29th December, 2012 and again on 31st December, 2012 identified the body for purposes of post mortem.

Marira (PW4) also identified the body of the deceased at the said mortuary.

Obonyo (PW6) also identified the body of the deceased and participated in the burial that took place in Kisii.

There was also the evidence of the police officers.

The totality of this evidence was that the deceased died after being strangled to death. The issue of whether medical evidence must be produced by the prosecution to found a conviction was one of the issues considered in a case of this Court **Ndungu v Republic [1985] KLR 487** where at page 492 the following passange appears thus:

> ***"Of course there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed where the cause of death is so obvious that the absence of a post mortem report would not necessarily be fatal."***

In another case **Dorcas Jebet Keter & Another v Republic [2013] eKLR** no medical evidence had been produced before the trial court. The trial judge notwithstanding the absence of the medical evidence as to the cause of death of the deceased as no post mortem report was produced to prove cause of death of the deceased nonetheless considered the other evidence that was before the court and found that it had been established beyond reasonable doubt that the deceased died from the act of the appellant. The trial judge found that it was safe to convict. That conviction was upheld by this Court and it was found in the appeal that each case must be decided on its own merit. But where evidence is overwhelming that the deceased has died on the hands of a suspect then even in the absence of a post mortem report the court can still convict. It was observed in the appeal:

> ***"We are certain such cases are very few and far between."***

In the case before the trial court Police Constable Thomas Simiyu testified that when they arrived at the house in Kibera they found a dead body lying down with legs and hands tied at the back. He saw injuries on the body to the head and the neck had been tied round with a sheet. The relatives of the deceased who included his wife, brother and sister and even a workmate of the deceased also testified on injuries they saw on observing the deceased's body at City mortuary. In the circumstances although there was no post mortem report produced proof of death was proved.

Counsel for the appellant requests us to interfere with the sentence of death awarded by the trial court. He cited the case of **Francis Muruatetu** (supra) where the Supreme Court found that imposing a minimum sentence was unconstitutitonal. The record shows at page 88 that after the appellant was convicted, his lawyer Miss Odembo informed the court:

> ***"We told the court we did not wish to mitigate."***

According to counsel for the Republic the deceased was strangled and underwent a cruel gruesome murder. We have considered the plea by the appellant that we reconsider the sentence. It is obvious that the deceased died in a cruel way where he was strangled to death. We note that the State Counsel told the High Court that the appellant was a first offender. In the circumstances we think that the death sentence was not deserved. We are therefore entitled to interfere with that part of the trial court's judgment. The appeal against conviction is dismissed. We set aside the death sentence imposed and substitute therefor a sentence of 30 (thirty) years imprisonment from the date of conviction.

Dated and delivered at Nairobi this 24th Day of April, 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.

Signed

DEPTY REGISTRAR