IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 2 OF 2016

BETWEEN

CYRUS ONONO OMEGA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Migori, (Majanja J.) delivered on 16th *November 2015 in HC Cr. Case No. 62 of 2014)*

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JUDGMENT OF THE COURT

1. The appellant was charged with murder. The Information is that on 24th January 2014, at Oruba village Gor-Uriri sub-location within Migori County he murdered Rose Anjao Vulimu.

2. There were no eye witnesses to the crime. The prosecution's case was founded on circumstantial evidence particularly the testimony of PW4 Agnes Kageha Soga.

PW1, John Vulimu Omega, the husband to the deceased testified as follows:

> *On 24*th January 2014, I was at home. I worked at my shamba until about 1.00 pm. My wife called Rose Anjao Vulimu had left for the market in the morning. When I arrived, she was not there but she came. The children also came from school. She prepared lunch for us and we ate. She went to the posho mill after lunch while I went to take care of the cows. We did not meet later. When I returned home at 5.00 pm she was absent… I could hear she was just 50 metres away. I waited outside for her. I had bought two chicken and I went with them to a neighbours place. I was with my brother Timothy Majinga when I went to buy the chicken. He did not accompany me. Timothy called me to inform me that my wife was fighting with Cyrus and that she had collapsed. Before I could ask further he cut the call. I turned and went back to my home. When I arrived home, I met my uncle and aunt, Shadrack Soya and Agnes Kageha screaming. I found Rose at the door of my house. There was blood. She had injuries on her hands, shoulders and on the head. The injuries were deep cuts. I did not see the assailant there….. At the time I arrived, my wife was already dead…… Cyrus Onono is son to my sister.

3. PW2, William Onyaji Omega, testified that the appellant was his nephew and he lived in the same homestead with the deceased and PW1. That he saw the appellant on 23rd and 24th January 2014 in the morning. That the appellant had been having problems in the homestead since his grandmother died. The appellant wanted to burn charcoal for survival. He started chopping trees in the homestead and was stopped.

4. PW3, Dr. Vitalis Owuor Kogutu, testified as the medical doctor who conducted a post mortem on the deceased. In his post mortem report, the deceased had five deep cut wounds on the head in the middle of the skull running across about 4 cm; the neck had an 8 inch cut running across the neck and it cut through the cervical vertebra and spinal cord. She also had a 6cm cut wound on the left of the forearm running vertically on the posterior; she had a deep cut wound on the right shoulder running from the shoulder joint to shoulder blade running about 6 inches; she had cut wounds on the left hand, dorsal aspect of the last three fingers. Internally, the right jugular vessels were severed and there was a skull fracture. The brain was injured following the fracture. The spinal code was cut. PW4 concluded that the cause of death was the cut cervical spinal cord. That a person cannot survive a cut of the cervical spine. That the injuries were inflicted by a sharp object possibly a panga. PW4 produced the post mortem report as an exhibit.

5. The key witness in this matter was PW4, Agnes Kageha Soga, who testified as follows:

I recall on 24th January 2014 at about 4.00 pm. I was in the house and I saw two children running. They were my grandchildren. They were coming to my house. They called me and told me to go and see Rose. They said she had fallen down and was bleeding. Rose is my daughter in law…. They just told me to come and see…. I went towards the fence and saw a boy running away… I saw Manono Omega running away with a panga. He was running towards the sugar plantation. I reached Rose's place. I found her lying near the door. She was bleeding. She was already dead. I saw that she had been cut on the head, arms and the leg. There was nobody there. I decided to wail to alert people. So many people came…. The children who came to alert me did not tell me they saw anyone else. I saw Manono carrying a panga. He went and hid in the sugar cane plantation….

Manono is here in court. The children who came to call me are BO and DO.

6. When the appellant was put on his defence, he gave a sworn statement and testified as follows:

On 24th January 2014, I was working selling milk near the border of Rift Valley/Nyanza at Ogwedhi. On 24th January 2014, at about 11.00 am, I left Rabour Centre sourcing customers. I left and went to Pasi where I also serve customers. When I was serving a customer, I saw a motorbike pass me carrying a person called George. I knew him from home. George stopped on the way to greet me…

He asked me whether I knew what had happened back home. I told him I did not know as I had not been there for a long time. He told me my uncle's wife was dead. I was shocked by the news…. He told me rumours are that I am the one who killed her and ran away. I denied this. George called the assistant chief and other boda boda riders from the area telling them he had found me. People came. My jacket was removed and they started beating me…. I was charged with the offence of murder. I have nothing to do with it. I do not have any witnesses.

7. Upon considering the evidence tendered, the trial judge convicted the appellant for the offence of murder. In convicting the appellant, the judge expressed himself as follows:

14. The fact and cause of death is not in dispute. The deceased's lifeless body was found at her doorstep with several injuries……

15. The next question is who inflicted the injuries that led *to the death of the deceased. In this case, the evidence is clearly circumstantial as no one saw the accused cut the deceased. PW4 who lived close to the deceased's homestead testified that she saw the accused leaving the deceased's home carrying a panga immediately after her grandchildren called her to come and see what was happening. Although the accused stated in his defence that he had not been home for a long time and that he was carrying on business of selling milk in Ogwedhi, he was seen at least three days prior to the incident by PW1 and PW2. I have no reason to believe that PW4 was lying when she testified that she saw the accused within the vicinity of the murder carrying a panga. It was still day time and PW4 knew the accused very well hence there was no possibility of mistaken identity.*

18. The fact that the accused disappeared after the incident closes the chain of circumstantial evidence. The accused ordinarily lived with the deceased's family and would have been in mourning with them after the incident. He was found far away trying to escape. His defence that he lived in Ogwedhi area selling milk for a long time was clearly discredited by the testimony of PW1, PW2 and PW4 who all *stated that the accused was a resident at PW1's homestead and was residing there.*

19. The injuries inflicted on the deceased were multiple, vicious and aimed at parts of the body where the intention was clearly to kill the deceased. There are the kind of injuries inflicted with "an intention to cause death of or to do grievous harm to any person whether the person is actually killed or not" within the meaning of Section 206 (a) of the Penal Code. I therefore find that the prosecution proved that the injury was inflicted with malice aforethought.

20. Having considered all the evidence, I find the accused Cyrus Onono Omega, guilty of the murder of Rose Anjao Vulimu and I therefore convict him.

8. On 16th November 2015, after convicting the appellant, the trial judge in passing sentence stated *"The death penalty is the only sentence* prescribed for the offence of murder. I now hereby sentence Cyrus Onono Omega to death for the murder of Rose Vulimu Anjao."

9. Aggrieved by the conviction and sentence, the appellant has lodged the instant appeal citing the following grounds in his memorandum of appeal.

i. The judge erred in convicting the appellant based on evidence with glaring gaps.

ii. The judge shifted the burden of proof to the appellant.

iii. The judge erred in failing to find that the appellant was not sufficiently identified as the person who committed the offence.

iv. The judge erred in relying on circumstantial evidence whereas the nature of the case did not warrant it.

v. The judge failed to adequately evaluate all the material evidence adduced at trial.

vi. The prosecution did not prove its case beyond reasonable doubt.

vii. The judge erred in sentencing the appellant to death yet the death penalty has been held to be unconstitutional.

10. At the hearing of this appeal, the appellant was represented by learned counsel Mr. Alex Mbeka holding brief for Ms Darius Taremwa. The State was represented by the Prosecution Counsel, Mr Peter Muia.

APPELLANT'S SUBMISSIONS

11. Counsel submitted that the trial court did not properly interrogate the quality, if any, consistency and strength of the evidence adduced by the prosecution witnesses to establish the guilt of the appellant. That the evidence of PW1, PW2 and PW4 given in court was inconsistent with their statements to the police. That the prosecution did not produce any evidence or letter from the local administration to show that the appellant and the deceased family had a dispute. That the judge erred in relying on circumstantial evidence to infer malice aforethought. That the evidence relied upon in convicting the appellant was inconclusive, inconsistent and contradictory.

12. On the issue of sentence, the appellant cited the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** and submitted that the death sentence meted upon the appellant was unconstitutional. Counsel urged us to order a re-hearing on sentence or quash the appellant's conviction.

RESPONDENT'S SUBMISSIONS

13. The State filed its written submissions opposing the instant appeal. The prosecution submitted that all the ingredients for the offence of murder were proved. On identification, it was urged that the appellant was a person well known to PW4 and there was no question of mistaken identity. That from the circumstantial evidence tendered in court through the testimony of PW4, there was only one irresistible conclusion that it was the appellant who committed the offence.

It was submitted that malice aforethought was established in accordance with the provisions of **Section 206 (a) (b)** and **(c)** of the **Penal Code.** That taking into account the injuries inflicted on the deceased as proved vide the post-mortem report, the only logical inference is that the appellant intended to kill or cause grievous bodily harm to the deceased.

14. On the alleged inconsistency in the prosecution evidence, it was submitted that the evidence was consistent and sufficient to convict the appellant. Counsel reiterated that the appellant was the only person known to have a dispute with the deceased and his family; that the appellant did not give any other suggestion that could exonerate him from having committed the offence; that neither cross-examination of the prosecution witnesses nor the defence evidence cast doubt on the prosecution case.

15. On sentence, it was submitted that the offence was committed in a gruesome and heinous manner; that the appellant was and is not remorseful and has not provided any proof of rehabilitation. The respondent urged us to affirm the appellant's conviction and uphold the death sentence.

ANALYIS and DETERMINATION

16. This is a first appeal. In **Kariuki Karanja versus Republic [1986] KLR190** it was held *inter alia* that:

> "On a first appeal from a conviction by a Judge or a Magistrate, the appellant is entitled to have the appellate courts' own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to re-hear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."

17. In the instant matter, the appellant was charged and convicted of murder.

There is no dispute that the deceased was killed; there is no dispute as to the cause of death and the nature and extent of injuries occasioned to the deceased. It is also not in dispute that there were no eye witnesses to the murder.

18. The appellant contends that the trial judge erred in relying upon circumstantial evidence to convict him. In the absence of any eye witness to the offence, we find that the trial judge was entitled to come to the conclusion that it is only circumstantialevidence andsurrounding circumstances that was relevant for consideration by the court.

19. The law on circumstantial evidence is well settled. The parameters for considering such evidence were set out in the case of **Kipkering Arap Koske –v- R [1949] 16 EACA 135,** where it was stated that before convicting a person on circumstantial evidence:

a. The inculpatory facts must be incompatible with the innocence of the accused.

b. The facts must be capable of no other conclusion or explanation except the guilt of the accused.

20. In **Abanga alias Onyango – v- Rep Cr. A No.32 Of 1990 (UR)** this Court succinctly stated the principles which should be applied in order to test circumstantial evidence. It was stated:

> "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."

21. To sustain a conviction based on circumstantial evidence, it is essential that the circumstantial evidence presented must constitute an unbroken chain which leads one to a fair and reasonable conclusion pointing to the accused, to the exclusion of the others, as the guilty person. The circumstantial evidence must exclude the possibility that some other person has committed the crime.

22. In the instant matter, the testimony of PW4 provides the circumstantial evidence of recognition that place the appellant at the scene of crime and links him to the offence as charged. PW4 testified that when she was called by her grandchildren to go and see what had happened to Rose (the deceased), she saw the appellant running away from the scene carrying a panga. The appellant was a person well known to PW4 and there is no question of mistaken identity. The testimony by PW4 is evidence of recognition of the appellant. In this context, we are comforted with the dicta in **Anjononi & others - v - Republic [1980] KLR 57** where it was held:

"**…**; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."

23. Further, PW4 testified that when she arrived at the home of the deceased, there was nobody there. This item of evidence is germane as it excludes all other persons, except the appellant, from the scene of crime. We find that the evidence of PW4 places the appellant at the scene of crime. The recognition of the appellant by PW4 overwhelmingly outweigh any inconsistency in the evidence on record.

24. In his defence, the appellant stated that he was not at the scene of crime.

In effect, the appellant raised an alibi. We remind ourselves the decision in **Kiarie - v - Republic [1984] KLR** where this Court held that: -

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. (Emphasis supplied)

25. In this matter, the trial judge in considering the appellant's alibi found as a fact that the appellant was seen at the homestead of the deceased, the fact that the appellant disappeared after the incident closes the chain of circumstantial evidence; that the appellant's defence that he lived in Ogwedhi area selling milk for a long time was discredited by the testimony of PW1, PW2 and PW4 who all stated that the appellant wasresident at PW1's homestead and was residing there.

26. On our part, we have examined the record of appeal and find no evidence to fault the trial judge's conclusion that the appellant was placed at the scene of crime. The appellant was seen by PW2 at the scene of crime three days prior to the offence. We find that the appellant's assertion that he had been absent from the homestead (and scene of crime) for a long period of time was not true.

27. We further find the appellant's conduct of disappearing and running away from the scene of crime was a tell-tale sign of his guilt. His conduct in denying knowledge that the deceased had died when he was confronted by George is a further tell-tale sign. **Section 8 (2)** of the **Evidence Act** provides as follows:

2. The conduct of any party, or of any agent of a party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. (Emphasis supplied)

28. In **Republic -v- Douglas Ndumba [2016] eKLR,** it was persuasively and correctly observed that:

"Accused's conduct of running away when a search was ongoing for his own mother and nephew, and his disappearance for a period of over 4 years leaves no doubt in my mind that he was the perpetrator."

29. The appellant submitted that the trial judge erred in finding that malice aforethought based on circumstantial evidence had been proved. We have stated that the judge was correct in relying on circumstantial evidence because there were no eye witnesses to the crime. The testimony by PW4 on the nature and extent of cuts and wounds inflicted on the deceased by the appellant leave no doubt in our mind that the cuts were meant to kill or cause grievous bodily harm. The cuts inflicted on the deceased are confirmed by the post mortem report tendered in evidence by PW3. The post mortem report reveals gory external and internal injuries. The report shows that internally, the right jugular vessels of the deceased were severed and there was a skull fracture. The brain was injured following the fracture and the spinal code was cut.

30. The cutting and severing of the cervical vertebra was deliberate and shows an intention to kill or cause grievous bodily harm. The deliberate nature of the cuts and deep wounds is proof of malice aforethought. We are impelled to state that the appellant, using a *panga* could not have accidentally inflicted such well-placed injuries on the parts of the body of the deceased making them so deep. The deep cuts and wounds leave no room for doubt as to the appellant's intention when he inflicted these injuries. He must have reasonably known that with such injuries the victim had no chance of survival. Malice aforethought was proved. (See **Murungi Francis v Uganda ((Criminal Appeal No.5 of 2003)) [2010] UGCA 16 (23 April 2010)).**

31. On the whole, from the evidence on record, we are persuaded and satisfied that the trial judge did not err in convicting the appellant on circumstantial evidence. The testimony of PW4 coupled with the conduct of the appellant disappearing from the scene of crime and having been seen running with a *panga* all irresistibly point to the appellant as the person who committed the offence as charged. We

uphold the conviction of the appellant for the offence of murder.

32. On the issue of sentence, in **Bernard Kimani Gacheru – v- Republic, Cr App No. 188 of 2000** this Court stated thus:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist." (Emphasis supplied) *See also* ***Wanjema v. Republic [1971] E.A 493)*.**

33. Likewise, comparatively, in the Uganda case of **Kyalimpa Edward –v- Uganda, Criminal Appeal No.10 25 of 199**5, it was correctly stated:

> "an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: **Ogalo s/o Owoura vs. *R.* *(1954) 21 EA.C.A.270 and R.V Mohamedali Jamal (1948) 15 E.A.C.A 126."***

34. Despite the foregoing judicial decisions, we take cognizance of the decision by the Supreme Court in **Francis Karioko Muruatetu & another –v- Republic** *(supra)* where it was held that the mandatory nature of minimum sentences deprive the courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person.

We hasten to add that the appellant's submission that death sentence was declared unconstitutional vide the **Francis Karioko Muruatetu & another –v- Republic [2017] eKLR** is incorrect. What was declared unconstitutional is the mandatory nature of the death sentence.

35. Bearing in mind the decision in **Francis Karioko Muruatetu & another -v- Republic** *(supra)* we note that the trial judge in sentencing the appellant expressed that the death sentence was the only sentence provided for in law. This per se mean the trial judge considered his hands were tied in determining the appropriate sentence to be meted on the appellant. From the statement by the trial judge, we are obliged to intervene on sentence. The vicious attack on the deceased as captured in the post mortem report leads us to conclude that the appellant deserves a long custodial sentence. Accordingly, we set aside the death sentence meted upon the appellant and substitute in its place imprisonment for a period of thirty (30) years with effect from 16th November 2015 when the trial judge passed the sentence.

36. This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, JA passed on before he could sign the judgment.

Dated and delivered at Kisumu this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL