IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 46 OF 2015

BETWEEN

FELIX MUCHITI .....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 18th February 2015 in

HCCRA No. 5 of 2010)

JUDGMENT OF THE COURT

Felix Muchiti, ***the appellant,*** was charged with the offence of murder of ***Ibrahim Muchiti, the deceased,*** contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars as set out in the information before the High Court at Homabay were that on 29th December 2009 at Shiavige Village, Kakamega South District within the former Western Province, the appellant murdered the deceased. The appellant denied the charges.

After hearing the evidence and the submissions of the parties, the trial court found the appellant guilty as charged and sentenced him to death as by law prescribed.

The appellant was aggrieved by the conviction and sentence, and appealed against that decision on the grounds that;

> *1.The learned judge erred in convicting the appellant on the basis of circumstantial evidence and in the absence of direct evidence did so without warning himself of the dangers of relying on circumstantial evidence;*
>
> *2.The learned judge wrongly convicted the appellant on the basis of uncorroborated evidence;*
>
> *3.The learned judge erred by wrongly rejecting the appellant's alibi evidence; and*
>
> *4. The learned judge wrongly imposed the death sentence which is unconstitutional, instead of remitting the case back to the trial court for retrial.*

Both ***Mr. M.M. Omondi***, learned counsel for the appellant, and learned counsel for the State, ***Mr. Kakoi,*** filed written submission, and briefly highlighted their submissions in Court.

Submitting orally, ***Mr. Omondi*** stated that the trial court convicted the appellant on the basis of insufficient circumstantial evidence, in that, the court wrongly relied on suspicion by taking into account that the appellant must have been responsible for the murder of the deceased since they lived together, and because he was the last person to have been seen with the deceased; that furthermore, the trial court was wrong to rely on the evidence of ***Washington Asutsi Madegwa, PW1,*** *(Washington)* that the deceased had told him that the appellant had beaten him the whole night, yet the prosecution did not produce any evidence to prove that this had led to the deceased's death.

With respect to the appellant's alibi, counsel asserted that the learned judge disregarded the appellant's evidence that he went out to work in Elunya,and returned home at 6.00 p.m. where he found the deceased lying under the bed, and that the prosecution failed to rebut this evidence.

Counsel's next issue was that the prosecution failed to establish all the ingredients for the offence of murder; that further, the *mens rea* applied to this case was in respect of a different incident which rendered the conviction unsafe.

Finally, it was submitted that the death sentenced imposed on the appellant was harsh and excessive, and on the basis of the Supreme Court decision in the case of ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015,*** we were urged to set aside the death sentence and substitute it with a custodial sentence of 10 years.

Responding to the appellant's submissions, ***Mr. Kakoi*** stated that all the ingredients of murder were established. It was argued that, though the conviction was based on circumstantial evidence, the nature of the injuries that the deceased sustained, which injuries Dr. Nyukuli, who performed the post mortem concluded were the cause of death, all pointed to the appellant as being responsible, particularly as he lived alone with the deceased and did not proffer any explanation as to how the deceased sustained them.

This being a first appeal, our mandate is as set out in ***rule 29(1)*** of this Court's Rules and is to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant. In the case of ***Kariuki Karanja vs 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 Court's 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***."

As such, the issues for consideration are;

1. *Whether the learned judge convicted the appellant on the basis of insufficient circumstantial evidence;*

2. *Whether the learned judge wrongly convicted the appellant on the basis of uncorroborated evidence;*

3. *Whether the learned judge wrongly rejected the appellant's alibi evidence; and*

4. *Whether the death sentence was unconstitutional and therefore the case ought to have been remitted back to the trial court for retrial.*

As is our duty we will begin by setting out the evidence, and thereafter to re-evaluate it so as to arrive at our own independent conclusion as to whether the prosecution proved beyond reasonable doubt that the appellant murdered the deceased.

It was Washington's evidence that at about 5.00 p.m. on 29th December 2009, he saw the appellant, who is his uncle, walking towards the house of Cosmos Asutsi, his grandfather. Thereafter, accompanied by his grandmother, ***Angeline Asutsi, PW2,*** *(Angeline)* they came towards him and told him to, "… *come and see Mzee has fallen."* He followed the appellant and Angeline to the deceased's house where they found the deceased lying on the bed with a broken right leg. He was unable to talk. Washington told Angelina that earlier, at about 8.00 a.m, the deceased had confided in him that the appellant had beaten him all night, and that he (Washington) had informed Angeline's husband, Cosmas, of the injury. At 10.00 p.m, he heard the appellant calling out to Dan Muyonga to, *"…wake up as the old man has died".* Augustine had informed Washington that the appellant had told him that the deceased had died, and together, with Washington's wife, Metrine Khangu, they went to the deceased's house and found him dead. They stayed there until 2.00 a.m because it was raining, and in the morning they reported the death to the Assistant Chief, Fredrick Mugaizi, who came with police officers who took the deceased's body away. On 31st December 2009 he attended the postmortem.

According to ***Augustine Muyonga, PW3,*** *(Augustine)* on 29th December 2009 at 10.00 p.m, the appellant knocked at his door and told him that, "*Mzee is dead. Tell Washington".* Augustine said he refused to do so, but as the appellant was insistent, he informed Washington and his wife, and together they went to the appellant's house where they remained until 2 a.m. Augustine saw the deceased lying on the bed. His leg was broken and slightly bleeding. The appellant was not at his home, and only returned the next day at 11.00 a.m, whereupon police officers came and arrested him.

Alfred Mukhisi, PW 6, the Assistant Chief of Makhokho sub location, testified that he had known the appellant for the last 15 years, that when he went to the appellant's house he found the deceased had died and his right leg was broken, and his neck swollen. He stated that the deceased and the appellant had not lived peacefully, and that the appellant had been brought to his office on 29th September 2009 after assaulting the deceased and attempting to throw him into a toilet. He stated that, after the deceased died the appellant had gone to the mosque to obtain a burial permit to bury his father.

Angelina testified that on 29th December 2009 at about 6.00 p.m, when she checked on the appellant's father, she found that the deceased was not breathing or talking, and when she informed the appellant who was with her that his father was not breathing, he did not answer and instead turned away and left. She followed him to find out what had happened, as he lived alone with the deceased, and he had told her that he did not know. She started to cry and went to call Washington to inform him of what she had seen. Washington reported the matter to the Assistant Chief.

Senior Sergeant Jackson Muraya, PW 9, testified that on the material day at about 6.00 p.m, he received a report from the area chief that someone had been killed and that the suspect was his son. Accompanied by Cpl. Echesa, APC Mkai and APC Dulo, they went to the scene where they arrested the appellant. ***Sergeant Stephen Kimulu, PW 8,*** was the investigating officer. He informed the court that none of the witnesses testified as to having witnessed the incident, and that none of the neighbours were willing to speak to them.

Dr. Dickson Muchana, PW4, a pathologist who testified on behalf of Dr. Nyikuli who had performed the postmortem, stated that the results

showed that the deceased had external bruising on the chest, and a fracture of the right thigh bone. Internally, the second neck bone had been dislocated, and the spinal cord was injured. He concluded that Dr. Nyikuli has formed the opinion that the cause of death was severe neck injury.

The appellant denied murdering his father the deceased, on 29th December 2009. He confirmed that before his father's demise he had lived with his father peacefully at their home; that he had left his father at home praying at about 5.00 a.m that morning and had gone to work at a construction site. After offloading materials because of rain, he went to the market to look for cow peas seeds. Thereafter he went to Elunya and returned home after 6.00 p.m.

On his return home at about 7.00 p.m he found the rear door open, which was not normal, and on entering the house he called out to his father because he had not seen him. His father did not respond. When he went to his bedroom, he found him lying face down under the bed. Though he was still breathing, he was unable to speak. He lifted him up onto the bed, and then went out to call his Uncle Cosmos, but he was not at home. Angelina, Cosmos' wife, was outside her house, and when he told her that all was not well at their home and that his father was in a bad way, Angelina accompanied him back to the house. The appellant stated that he also went to inform his uncle Charles and explained the situation. Charles told him to return to his home. He returned home to find his father still struggling to breathe, he went back to Angelina's house but this time found the door was locked, with Angelina informing him from inside the house that Washington had warned her against getting involved in the matter.

The appellant said that he did not get any help to take his father to the hospital, and at about 10.00 p.m that night his father died in his hands. Thereafter, he informed Washington who came to the house, shone his torch on his father and then went back to his home. The appellant said he remained in the house with his father until 5.00 a.m. and then went to the mosque to inform the Imam of his father's death.

The appellant was charged with the offence of murder where certain essential ingredients require to be proved beyond reasonable doubt. ***Section 203*** of the ***Penal Code*** specifies that the ingredients are; (i) the death and cause of death of the deceased; (ii) whether the appellants unlawful act was responsible for death of the deceased; (iii) and whether in so doing malice aforethought in accordance with ***section 206*** of the ***Penal Code*** was established.

As to whether the prosecution proved the deceased's death, Alfred Mukhisi, the Assistant chief, testified that when he went to the deceased's house he found that he was already dead. This was after the appellant had himself called out to Dan Muyonga to wake up as the old man has died. Dan thereafter informed Washington that the old man had died, after they proceeded to the old man's house and found that he had indeed died. The next morning, his death was reported to the Assistant chief Fredrick, after which police officers took the deceased's body to the hospital. There was also the evidence of Dr. Muchana and the postmortem report which also confirmed the deceased's death. In effect, there can be no doubt that the deceased had died on 29th December 2009.

On the question of how the deceased died and whether the appellant was responsible for his death, according to the investigating officer, none of the witnesses who testified saw the appellant kill the deceased. In this regard the learned judge had this to say;

> ***"I find that since the accused and the deceased lived in the same house all by themselves, and the accused being the last person to have seen the deceased alive on the fateful day, I am satisfied that he is the one who inflicted the right leg and neck injuries on the deceased".***

Essentially, the learned judge relied on circumstantial evidence, to reach a finding that it was the appellant who had killed the deceased. The judge concluded that since the appellant lived in the same house as the deceased, and was the last person to have seen him alive, then it could only have been the appellant who inflicted the right leg and neck injuries on the deceased.

In ***Mwangi vs Republic [2004] 2 KLR 28*** when relying upon circumstantial evidence, this Court stated that;

> ***"It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example*** *Rex vs Kipkering Arap Koskei & Another (1949) 16 EACA 135."*

In the well-known case of ***Republic vs Kipkering Arap Koske and another(supra)*** it was held inter alia that:

> ***"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."***

In the case of ***Omar Mzungu Chimera vs R. Criminal Appeal No. 56 of 1998***, the Court stated that;

> ***"It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:***
>
> ***(i) the circumstances from which an inference of guilty is 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."

See also the decision of the House of Lords in ***Teper vs. R. [1952] AC 480.***

In this case, did the circumstances or facts before the court point to the appellant as having been responsible for the deceased's death? By the time the deceased died, his right leg had been broken, and he was lying on the bed unable to speak. This was confirmed by Angelina, Washington, and Augustine. Furthermore, the pathologist's report also showed that the cause of death was dislocation of the C2, and laceration of the spinal cord at the same level. With the appellant having admitted that the deceased died in his hands, the onus was upon him to explain how the deceased sustained the broken leg, and the severe injuries to the neck and spinal cord.

Section 111 of the ***Evidence Act,***

> ***"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 within which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him".***

In other words, with the circumstantial evidence relied upon by the prosecution leading to a compelling inference of the appellant's guilt, as the deceased lived alone with the appellant, the evidential burden shifted to him to offer a reasonable explanation as to how the deceased sustained the severe neck injuries that led to his death. Without that explanation, the appellant did not discharge the burden placed upon him by ***section 111*** of the ***Evidence Act.***

In his defence and in cross examination the appellant failed to discharge this burden. As the last person to have been seen with the deceased, and having admitted that the deceased died in his hands, he did not provide any explanation as to the cause of the broken leg or the neck injuries. As such, the inference of guilt was not discharged, and the circumstances taken cumulatively formed a chain so complete so that there was no *"…escape from the conclusion that within all human probability the crime was committed by the accused and none else."* See ***Musili Tulo vs R [2014] eKLR.***

As concerns the appellant's alibi, where he stated that he was not in the house on the material day, the learned judge had this to say;

> ***"It may be true that the accused went to work, but I do not believe that he left his father in a good stead health wise."***

It is not disputed that the appellant lived alone with the deceased. The appellant's defence is that he left his father praying in the morning, yet according to Washington who saw the deceased at 8.00 a.m that morning, he was lying on the bed with a broken leg unable to speak. This would mean that by the time the appellant left for work, the deceased was already in a bad condition. We therefore agree with the learned judge that the alibi evidence was not relevant to the circumstances surrounding the death of the deceased, and the complaint that the learned judge disregarded it is not merited.

Turning to whether malice aforethought was present in the manner in which the deceased died, ***Section 206*** of the ***Penal Code*** defines malice afore thought as; (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 or not, or by a wish that it may not be caused; (c) An intent to commit a felony; (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. Based on the foregoing, there has to be an intent to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person.

Having established, as we have, that the appellant was responsible for the injuries that led to the deceased's demise, we are satisfied that the appellant ought to have known that a dislocation of the deceased's neck, and lacerating his spinal cord, would have led to the deceased's death. The position is further compounded by the fact that despite being aware of the deceased's critical condition prior to his demise, the appellant took no steps to seek urgent medical treatment or to have him hospitalized. In the circumstances, as did the learned judge, we too are satisfied that malice aforethought was present.

The totality of the circumstances having been taken into account, we come to the conclusion that the prosecution proved the offence to the required standard that the appellant murdered the deceased. We would add that, contrary to the appellant's assertion that the learned judge was wrong to rely on uncorroborated evidence, we are satisfied that not only was there sufficient corroborative evidence which pointed to the appellant's guilt, there were no other co-existing circumstances that weakened or destroyed the inference of guilt.

On the death sentence imposed, the appellant's counsel complained that, since the death sentence was unconstitutional, the trial court ought not to have meted it out on the appellant, but instead ought to have remitted the case back to the trial court for retrial.

In addressing this issue, we would begin by stating that the Supreme Court in its decision in ***Francis Muruatetu & Another (supra)*** found the mandatory nature of the death penalty to be unconstitutional and not the death penalty in itself. The death penalty remains lawful, but the decision empowers a court at its discretion to impose a sentence other than death.

The trial court was constrained to impose the death sentence prescribed by the Act which was mandatory at the time. However, on the basis of the Supreme Court decision, we would substitute the death sentence with a custodial sentence. But since the record does not disclose that the appellant had an opportunity to plead in mitigation, we would remit the case back to the High Court for resentencing.

Accordingly, we dismiss the appeal against the conviction, but allow the appeal against sentence. To that extent only, this appeal is hereby allowed. The case to be remitted back to the High Court for re-sentencing.

It is so ordered.

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

D.K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL