IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 13 OF 2016

BETWEEN

JOHN TEMBO NYAMOHANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori

(Majanja, J.) *dated 16th November, 2015*

in

HCCRC NO. 30 OF 2014)

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JUDGMENT OF THE COURT

This is a first appeal and on the authority of **Okeno v Republic [1972] E.A 32** amongst others and by dint of rule 29(1) of this Court's rules, we are statutorily bound to reconsider the evidence, re-evaluate it and come to our own independent conclusions but paying homage to the conclusions and findings reached by the trial court. In doing so, we must bear in mind however, that unlike the trial court, we did not have the advantage of seeing and hearing the witnesses testify and should therefore give due allowance for that fact

On 5th March 2012, the decapitated body of a four year old boy, **BKN** ("B") was found in a bush in [Particulars Withheld] village, Kuria West District of Migori County. B was the first-born son of **NM (PW3)** and **JBN (PW5)**. Before his death he was attending nursery school at [Particulars Withheld] Primary School. According to PW3, on 5th March 2012, he left home early in the morning to go and plough his farm and when he returned between 10.00am and 11.00am, his father, **Jomo Chacha, (PW4)** told him that B had not come back from school though other children had. He went looking for B at the school but on the way he met his sister, **NM** who told him that she had not seen B at the school. He turned to go back home when he immediately heard children screaming and claiming that they had found the remains of a child in the bush. He went to the bush and to his utter shock found that those remains were B's. His hands had been chopped off at the wrist whereas his legs had been chopped off at the ankles. He had also been strangled with a rope. He immediately raised alarm and members of the public came among them the appellant who stood at a distance.

PW5, the mother of the deceased confirmed that she woke up at 7.00am and prepared B for school. At about 8:00 a.m, she left B with his aunt, **N** who was also a pupil in the same Nursery School. She went back to do her chores. As she did so the appellant, who was her neighbour, passed by and talked to her about his lost telephone. He thereafter left and came back shortly thereafter and reminded her about the same telephone. He came back for a third time and told her that he had found the telephone. At about 11.00am, she went to her mother in law's place to collect water and found N. Since B used to go to school with her, she asked her what happened to B. She told her that B had not been to school. When she reached home she heard people including her husband wailing. She followed the screams and reached a thicket where she found B's body. She observed that he had been strangled by a rope and his hands and feet cut off. There were many people at the scene among them the appellant who soon thereafter disappeared. According to her the appellant looked restless. Two children **AW (PW1)** and **SA (PW2)** volunteered information that they had seen the appellant with B that morning whilst going to school.

According to PW1 a 10 year old, he was from home on the material day when at about 10.00am he saw the appellant holding B's hand as they were headed for school. Thereafter he never saw B at school. At lunch as he was going home for lunch with other pupils they heard screams and proceeded to where they were coming from only to be confronted with B's dismembered body.

PW2, then aged 12 on her part recalled that on 5th March 2012, as she was coming from school at about 10.00am she saw the appellant and B walking towards school. She greeted the appellant twice but he did not respond. At lunchtime she heard people screaming and with her schoolmates, they ran to where the screams were coming from only to find B's decapitated body.

PW4, the deceased's grandfather, confirmed that both PW1 and PW2 told him that when they left school they saw the appellant and B walking towards the school. After B's body was discovered, members of the public called police officers from Kehancha Police Station. **ASP Charles Kipchumba (PW8)**, received report at about 3.00pm and proceeded to the scene with other police officers. Upon arrival they noticed that both hands and feet of B had been amputated. He got information from members of the public that the deceased had been seen last with the appellant. Police officers removed B's body to Pastor Machage Memorial Hospital Mortuary where a postmortem was subsequently conducted by **Dr Vitalis Owour K'ogutu (PW6)** after his body was identified by PW4. He noted that B's upper and lower limbs had been cut just above the wrists and ankles. He also noticed that he had been strangulated. He formed the opinion that B had died from external bleeding secondary to assault as well as strangulation. He also concluded that the injuries were inflicted by a sharp object. **Dr Jacob Onditi (PW7)** examined the appellant on 15th March 2015 to determine whether he was mentally fit to stand trial. After examination he concluded that he was indeed mentally fit to stand trial.

PW8, who doubled as the investigating officer interviewed several witnesses and concluded that the appellant was the last person seen with B. He and other officers went to the appellant's house, which was about 200 metres from the scene but did not find him. The appellant was subsequently found on 13th March 2012 in Isebania where he was arrested. Thereafter PW8 informed the High Court at Kisii on 12th March, 2012 that the appellant had on 5th March, 2012 at [Partiulars Withheld] village, Kuria West District in Migori jointly with others not before court murdered B contrary to section 203 as read with 204 of the Penal Code.

The appellant denied the information and his trial ensued with the prosecution calling the aforesaid witnesses.

At the close of the prosecution case, the appellant opted to give sworn evidence in his defence. He denied that he had murdered B and maintained that he was not in [Particulars Withheld] village on the material day. He went on to state that on that day he left his home at about 5.00am and went to plough his farm in Boherera. At about 2.00pm, he was called by a neighbour from Masaba who told him that a body had been found with its hands and feet cut and that he was the suspect. He was told that his house had been burnt and the group of people were looking for him. The appellant believed he was being suspected because of his religious beliefs as he belonged to a religious sect which people suspected was involved in devil worship. He immediately left the farm and went to his father's home to hide but was confronted by boda boda riders with Administration Police officers (AP's) in tow. The AP's restrained the riders from attacking him. He was then arrested and later charged with the offence of murder in the High Court at Kisii. However, when the High Court was opened in Migori, the case was transferred thereat where it was heard and determined.

The trial court having carefully and exhaustively evaluated the evidence presented by the prosecution and defence was satisfied that the appellant had committed the offence of murder whereupon the appellant was convicted and sentenced to death. Aggrieved by the conviction and sentence, the appellant has lodged this appeal on two grounds to wit; that the trial court erred in fact and law by:- convicting and sentencing him in a case that did not meet the evidentiary threshold required in criminal cases and; secondly, sentencing him to a mandatory death sentence contrary to law.

Mr. Ogeto, learned counsel urged the appeal on behalf of the appellant. He submitted that the prosecution shifted the burden of proof to the appellant and failed to prove to the required evidentiary standard that the appellant committed the offence. Counsel conceded, however, that the deceased's death was not in dispute but what was in dispute is who caused it. There was no forensic evidence such as DNA to link the appellant to the crime, according to counsel. It was further submitted that the evidence led in support of the information was purely circumstantial which had several weak links such that it could not sustain a conviction.

On sentence, counsel submitted that the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu v Republic [2017] eKLR** had outlawed the mandatory nature of the death sentence imposed upon conviction for the offence of murder. That courts had now been freed to exercise discretion and not to impose the death sentence in appropriate cases. Counsel submitted that the trial court failed to factor in the mitigating circumstances proffered by the appellant and ended up imposing the sentence that was manifestly harsh and excessive. Counsel reiterated that the appellant was a first offender, had been in custody since conviction and sentence in 2015, had been adequately rehabilitated and remorseful, hence fit to be integrated back in the community. Counsel therefore prayed for a non-custodial sentence in the event that we upheld the appellant's conviction.

The appeal was opposed. **Mr. Muia**, learned Prosecution Counsel submitted that from the witnesses' testimony the identity of the appellant as the person who was in the company of B last cannot be questioned. Counsel further submitted that the evidence of the prosecution witnesses was consistent and that the essential ingredients of the offence of murder were met. It was further submitted that though the prosecution relied on circumstantial evidence to nail the appellant, that evidence met the criteria and necessary threshold. In support of this proposition, counsel referred us to **Nairobi Court of Appeal, Criminal Appeal No. 153 of 2015**, **Peter Mwangi Waithaka v Republic (ur)**.

On sentence, counsel submitted that death penalty was still a legal sentence in Kenya and can still be imposed in deserving cases. In the circumstances of this case counsel urged us not to interfere with the death sentence imposed as the appellant killed an innocent child for no apparent reason.

We have considered the record of appeal, submissions of respective counsel and the law. For the offence of murder to be committed the prosecution need to prove with cogent and credible evidence; the death of the deceased, cause of death, the identity of the killer and that the killing was with malice aforethought. In this case, the fact and cause of death of B are not disputed as correctly observed by the trial court. His mutilated remains were found in a bush. According to PW6, B died from external bleeding secondary to assault as well as strangulation. The appellant has not contested the death of B nor the cause thereof in this appeal either. His contestation is whether he was responsible.

There is no doubt at all that the conviction of the appellant turned on circumstantial evidence. The trial court appreciated this fact and warned

itself of the dangers of relying on such evidence. It restated the law on the issue, and rightly so in our view, thus ***"…the law in this regard has been restated many times by our courts and it is that in order to justify a conviction based on circumstantial evidence, 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. The circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on and that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. (See R v Kipkering Arap Koske & Another [1949] 16 EACA 135*** *and* ***Sawe v Republic CA Criminal Appeal No. 2 of 2002 [2003]eKLR)"***.

We may also add what this Court said in the case of **Peter Mwangi Waithaka v Republic** (supra) thus:-

> **"it follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusion, but also to ascertain whether the recorded evidence satisfies the following requirements:-**
>
> **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"**

The circumstantial pieces of evidence upon which the appellant's conviction turned is that the appellant was the last person seen with B alive. However, and within a short span of time he was found dead. Since the appellant was the last person seen with the deceased alive, common sense demanded that the he explains where and when he parted company with him. In ***Wilson***

Wanjala Mkendeshwo v Republic **NKU CA Crim App. No. 97 of 2002 [2002]eKLR**, the Court of Appeal stated as follows;

> *As a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The said section is silent on what would happen if he fails to do so. But section 119 of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact is rebuttable.*

It is therefore a legal imperative under sections 111 and 119 of the Evidence Act that an accused is bound to explain matters or facts which are peculiarly within his knowledge and if he fails to do so a rebuttable presumption of fact arises that the accused was responsible for the offence charged and in this case how the deceased met his death arises. The appellant in this case was in that precarious position. B was last seen with him. He was bound to explain whether or not he parted company with B before he met his death. He did not and the trial court was therefore right in invoking the above provisions of the Evidence Act in order to make a finding of guilt against the appellant. By so doing the trial court was not shifting the burden of proof to the appellant contrary to the submissions of the appellant. It was simply invoking a statutory requirement and applying it.

The testimony of PW1 and PW2 placed the appellant in [Particulars Withheld] village. Both of them saw the appellant with B as they were proceeding to school. The appellant was no stranger to PW1 and PW2 as he lived in the neighbourhood. He lived close to the children and close to the school as well. Both children knew him very well as he used to visit their homes. Nor was the appellant a stranger to B. Therefore it was highly unlikely that these witnesses would not recognize him. The testimony of these witnesses was consistent and was not shaken at all under cross-examination. Similarly the appellant was seen in the village by B's mother, PW 5, who testified that she encountered him three times at home as she went about her chores and they discussed about his missing telephone.

The appellant was seen with B at about 10.00am and his mutilated body was found at about 11.00am. PW 3 also testified that he saw the appellant from a distance when the deceased's body was discovered while PW5 stated that she saw the appellant briefly at the scene before he ran away. According to PW5, he appeared restless. Given the foregoing the circumstantial evidence was cogent, unerringly pointing to the guilt of the appellant and no one else. In view of this the trial court cannot be faulted for holding that the appellant was present in the village that morning he was the last person seen with B and within an hour B's mutilated body was found in a bush near the school. He was also seen in the vicinity of the deceased's body when the body was found. In his defence he stated that he was far away in Boherera village. He thus raised an alibi defence. However that defence cannot stand in light of the credible testimony of PW1, PW2, PW3 and PW5, who all saw him in the morning with B at the scene of crime and also when three times he talked to PW5 regarding his telephone.

Having carefully and painstakingly reviewed and re-evaluated the evidence tendered before the trial court as expected of us, we have come to the inevitable conclusion just as the trial court did, that the circumstantial evidence led by the prosecution pointed unerringly to the appellant as the person who committed the crime. Much as it may have been desirable for the prosecution to have led evidence of DNA profiling, that omission does not at all weaken the prosecution case nor does it advance a case for the innocence of the appellant.

As for malice aforethought there can be no clearer evidence than the cutting of the limbs of B and causing him to bleed to death. Such injuries can only be inflicted with, ***"****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,"* within the meaning of section 206 of the Penal Code.

Turning on sentence we are aware that the Supreme Court in **Muruatetu case** (supra) delivered itself thus:-

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."**

However and as correctly submitted by the respondent, the death penalty is still a legal sentence. At the time that the appellant was convicted and sentenced, it was the only available sentence for a person convicted of murder. It was only after the above Supreme Court decision was rendered that the courts were given discretion and latitude to impose other appropriate sentences other than death. That decision has immediate binding effect on all the courts below the Supreme Court. Since the instant appeal is on both conviction and sentence, we have jurisdiction to apply the **Muruatetu case**. Though counsel for the respondent vehemently urged us not to interfere with the sentence imposed because the appellant killed an innocent child, but having considered the mitigation on record, and those advanced by counsel for the appellant during the plenary hearing of the appeal, we are inclined to interfere with the same. We do so however while mindful of the innocence and tender age of the victim and the horrific mutilation he was subjected to. In lieu of the death sentence, the appellant will now serve imprisonment for the term of 30 years from the date of conviction and sentence. Otherwise the appeal on conviction is dismissed.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, J.A. 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