IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 14 OF 2016

BETWEEN

SILAS OBONYO NUNDA ALIAS

MOSES ODUOR OMONDI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Homa Bay (D.S Majanja J), dated 06th *November, 2015*

in HCCR No. 17 of 2012)

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JUDGMENT OF THE COURT

On 15th January 2012, the remains of MBO (the deceased), a student at [Particulars Withheld] Secondary School, who had earlier been reported missing were discovered near Lake Victoria. As a result of investigations, the appellant Silas Obonyo Nunda alias Moses Oduor Omondi was arrested and arraigned before the High Court in Homa Bay and charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 28th day of December 2011 at Mbita Township in Mbita District within Homa Bay County in the Republic of Kenya, jointly with others not before the court, murdered the deceased.

The appellant denied the charge leading to a trial in which the prosecution called 8 witnesses in support of its case. Evidence was adduced that the deceased was a student, who used to live with his uncle Paul Kita **(PW5)** in Mbita during the school days. Also, the deceased would, from time to time operate a motorbike to conduct *boda boda* business in order to raise pocket money. On 28th December 2012, he borrowed a motor bike from Nicholas Okelo Owiti **(PW1)** as he wanted to go and pick his customer, who was also his friend, at Mbita Secondary School. The deceased was wearing a white shirt, a pair of track trousers, a jacket with a hood, his school shoes and socks as was described by Makwell Ochieng Mboya **(PW4).** That was the last time the deceased was seen alive and those were the clothes that were used to identify him when his remains were found.

PW4 gave the police the number of the customer that the deceased had gone to pick on the fateful day as 0711***949 that was later found to be registered to one Moses Oduor Omondi. The said mobile number was traced to the appellant by Police Corporal Adwin Nyongesa **(PW8).** Upon searching the appellant's house, PW8 discovered an identify card belonging to Moses Oduor Omondi and keys on a key holder that was later identified to have been the property of the deceased.

PW6, Dr Ayoma Ojwang, who conducted the post mortem noted that what remained of the deceased was a dismantled skeleton with no flesh. There were tattered clothes on the remains. Based on her professional observation, she concluded that the deceased died of asphyxia as a result of strangulation.

At the close of the prosecution's case, the learned judge found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied committing the offence, stating that he did not know the deceased. He claimed that his name was Silas Obonyo Nunda and not Moses Oduor Omondi, hence the mobile number, identity card and Mpesa registration details did not belong to him. He claimed these documents were taken from his neighbour's house and that he had nothing to do with the murder.

Majanja, J heard the case evaluated the evidence tendered before him and found the appellant guilty as charged. He then sentenced him to death.

Aggrieved by the judgment and sentence of the High Court, the appellant preferred the instant appeal, based on 5 grounds, which can be summarized that the judge erred in law and fact by;

a. Convicting the appellant based on insufficient circumstantial evidence.

b. Holding that the appellant used the persona Moses Oduor Omondi without sufficient proof.

c. Passing a harsh and excessive sentence.

During the hearing of the appeal, learned counsel **Mr Munuango** held brief for **Ms Imbaya** who was on record for the appellant while the respondent was represented by **Mr Muia**, the learned Prosecution Counsel. Both parties had filed written submissions and chose to rely on them entirely without orally highlighting.

It was submitted for the appellant that proof beyond reasonable was not established. Reliance was placed on the persuasive interpretation thereof by the Supreme Court of Nigeria in **BAKER V STATE 1985 2NWLR** to mean proof that does not admit plausible possibilities but rather a high degree of cogency consistent with an equally high degree of possibility. The learned judge was thus said to have erred by convicting the appellant based on evidence that had a lot of inconsistencies including how the mobile number of the appellant was obtained, as the mysterious customer; how many people went to arrest the appellant; what the deceased was wearing when he was last seen alive; and, the real identity of the appellant.

Counsel further urged that the law on circumstantial evidence has been well settled by this Court that inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than his guilt. To him, the evidence on record which is the recovery of the identification card; keys; key holder; and the phone number, does not suffice to link the appellant to the murder of the deceased. Furthermore, there was not sufficient proof to determine whether the appellant was using the alias Moses Oduor Omondi.

The learned judge was also criticized for holding that the fact that remains of the deceased were found near the appellant's house completed the circle of evidence pointing towards the guilt of the appellant. The appellant denied being the owner of that house, it was contended and the prosecution did not prefer any evidence to prove that indeed it belonged to him. In this case, the evidence raised more questions than answers about who really committed the crime.

On the identity of the appellant, Counsel contended that the learned judge erred by disregarding the certificate from the Registrar of Persons dated 27th October 2015 identifying the appellant as Silas Obonyo Nunda and proceeding to conclude that he used the alias Moses Oduor Omondi to commit the heinous act, to the detriment of the appellant.

Regarding the death sentence meted out on the appellant, Counsel relied on the holding in the now case of **FRANCIS KARIOKO MURUATETU V REPUBLIC [2017] eKLR** which declared mandatory sentences unconstitutional. The Court was urged to evaluate the appropriate sentence befitting the offence committed.

In opposing the appeal, the learned Prosecution Counsel submitted that the evidence of the prosecution was cogent and consistent in the material aspects such as; the appellant lived near where the body of the deceased was found; he was found with the belongings of the deceased and; the number that the deceased called prior to his death belonged to him.

The cause of death being strangulation points to the appellant's malice aforethought. Consequently, the essentials of the offence of murder were sufficiently proved by the prosecution. It was pointed out that the **Francis Muruatetu** case does not stop the courts from imposing the mandatory sentences on deserving cases. Looking at the gruesome nature of the offence, the prosecution believed that the appellant was deserving of the death sentence.

We have considered the record of appeal and the submissions made by the parties and have distilled the issues for determination being as whether the circumstantial evidence was sufficient to convict the appellant and whether he deserves a sentence reduction in line with **FRANCIS MURUATETU** case. In determining those issues we are aware of our role as a first appellate Court as was stated in **REUBEN OMBURA MUMA & ANOTHER - V - REPUBLIC [2018] eKLR**;

> **"This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."**

Courts are cautious in cases where the only evidence in a case is circumstantial. The only sure way to infer the guilt of an accused is to test whether all the circumstantial evidence taken together reaches the proper threshold expressed thus by this Court in **JOAN CHEBICHII SAWE V REPUBLIC [2003] eKLR**;

> **"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."**

The instant case, is solely based on circumstantial evidence and as a first appellate court we must to re-evaluate and re-analyse it in totality in order to determine whether considered together, it irresistibly point towards the guilt of the appellant.

The initial evidence to be considered is the whereabouts of the deceased after he was last seen. It was the testimony of PW1, a relative of the

deceased, that on 28th December 2012 while in Mbita town, the deceased requested him to lend him his motorbike so that he could go and pick his customer around Mbita Secondary School. The testimony was corroborated by Mary Opija **(PW3)** the deceased's mother, who explained that the deceased was in her house in Ndhiwa on 27th December 2011 when he received a call from someone he described as his friend and client who wanted to send him somewhere. According to PW3, the deceased left the house for Mbita based on that call. This is consistent with PW4's narrative that on the fateful day, the deceased informed him that he was going to pick his customer from Mbita Secondary School. The prosecution thus established, without a doubt, that the appellant was on his way to pick a customer when he was last seen alive.

Concerning the customer's phone number, PW1 testified that he obtained the appellant's number from a boy named Maxwell Ochieng Tom who was a friend of the deceased who confirmed that it was the number of the customer the deceased had gone to pick when he was last seen alive. The police recovered the appellant's Nokia phone, from him and found a Safaricom plate with the same phone number. Upon conducting a search they discovered that its Mpesa line was registered to one Moses Oduor Omondi. Further, **PW7**, Angeline Nunda, the sister of the appellant, confirmed that the same number that was obtained by **PW1** indeed belonged to the appellant. She also confirmed that his real name was Silas Obonyo Nunda. What led the police to conclude that the accused had an alias as Moses Oduor Omondi was the fact that they also recovered an identification card at the house of the appellant bearing that name.

The appellant contended that the prosecution did not prove his residence but according to PW5, they were given information on his whereabouts and found him at that house at around midnight in the company of a lady. They arrested him and took him to the police station. **PW8** confirmed that they went back to same house and conducted a search where they found the incriminatory evidence.

What put the last nail in the coffin of the appellant's protestations of innocence was the fact that the deceased belongings, which were identified by PW2, PW3, PW4 and PW5, were found where the appellant was residing. The deceased body was also found nearby. The manner in which the deceased was killed pointed towards malice aforethought of the appellant. **Section 206(b)** of the **Penal Code** provides that the manner in which an act is committed can attest to the accused's state of mind and the prosecution does not have to establish a separate or specific motive. All that is required is malice aforethought and as was held by this Court in **JOHN MUTUMA GATOBU V REPUBLIC [2015] eKLR**

> **"There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought. We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited."**

In the upshot we concur with the holding of the learned judge that the circumstantial evidence considered as a whole clearly implicated the appellant and he only, as the culprit. There were no co-existing circumstances that would weaken the inference of his guilt and room for the court to arrive at a conclusion of his innocence. His appeal against conviction lacks merit and is dismissed.

Lastly, the appellant complained and contended that the death sentence meted out on him was unconstitutional due to its mandatory nature. The Court was urged to evaluate the appropriate sentence befitting the offence committed. The Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC & 4 OTHERS (Supra)** held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine anappropriate sentence on a case by case basis. However, we note that by the time the impugned judgment was rendered, **MURUATETU** (supra) had not been decided. We cannot fault the learned judge for following the statute law then in existence.

From the circumstances surrounding the case and bearing in mind the fact that the appellant was a first time offender, we find that the mandatory sentence was too harsh. This Court has reduced sentences in various cases including **DANIEL GICHIMU GITHINJI & ANOTHER V REPUBLIC [2018] eKLR**, **JONATHAN LEMISO OLE KINI V REPUBLIC [2018] eKLR** and **CHARLES MWINZI MUKUNGU V REPUBLIC [2019] eKLR** and we are minded to do so in this appeal as well

In the upshot this appeal succeeds on the ground of the unconstitutionality of the sentence only. We accordingly set aside the sentence of death meted on the appellant by the High Court. In its place we order that the appellant shall serve a sentence of twenty-five (25) years in prison, as from 6th November 2015 when he was sentenced by the High Court.

This judgment is delivered under **Rule 32(2)** of the Court of Appeal Rules, our learned brother Odek JA having died before signing it.

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