



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 73 OF 2019

BETWEEN

JANE NAMBUYE MANYONGE....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi, (S. N. Mutuku, J) dated 30th May, 2017 in HC. CR. A. 114 OF 2017

JUDGMENT OF THE COURT

The appellant, **Jane Nambuye Manyonge** and **Francis Manyonge Mulumeti** “the deceased” were a couple. Whereas the deceased worked with the Ministry of Devolution, the appellant was a teacher at the Le Pic School in Dagoretti. The deceased and the appellant were the only people present in their apartment No. 22 in Riruta on the evening of 30th November, 2013. The plot had 35 apartments.

Jeremiah Asuku, (PW1) was manning the gate to the apartments that evening when he received a telephone call from the wife of Clinton Lagoon Obongo, (PW 10), a resident in the same apartments at about 11.30 p.m. He was informed that someone was knocking at PW10’s door. He went to check but found no one. Whilst at the door he noticed that the lights were on in the deceased’s house. He proceeded to the house and found the door ajar. He found the appellant who informed him that she was the one who had been knocking on the door of PW 10. She further told him that her husband, the deceased was very sick. PW1 entered the house and saw the deceased lying on the floor covered with a bed sheet. When asked what had happened, the appellant told him that the deceased had fallen on a stool and got injured. PW 10 ran a clinic situate 100 metres away and contacted Yuda Otieno Odego, (PW2) the administrator of the clinic. Together they proceeded to the appellant’s house and on arrival found the deceased lying on a mattress. PW2 noted a cut on the deceased’s chest. PW10 later joined PW1 and PW2 by which time the deceased had already succumbed to his injuries.

The appellant nonetheless insisted on having the deceased taken to the hospital. PW 10 called a taxi operated by Stephen Aggrey Odhiambo, (PW4). Upon arrival of the taxi, the deceased was carried down stairs. However instead of being taken to the hospital, the appellant used the taxi to go to Riruta police station to report the incident.

Cpl Elizabeth Wambui, (PW5), was the duty officer at the police station. At about 2.30 a.m. the appellant reported to her that she was at home at about 7.30 p.m. with the deceased; they had supper, whereupon the deceased complained of chest pains. She however noticed that he was bleeding from the chest. She administered first aid on him but he died in the process. After booking the report, she together with P.C. Too visited the scene. They found the body of the deceased lying on a mattress outside the apartment covered with a bed sheet. Both the mattress and the bed sheet were soaked in blood. Upon entering the apartment, she smelt human blood. Indeed she noticed blood stains all over the house. She found a kitchen knife on the floor that had blood stains as well. She also recovered a shirt that had blood stains.

PW5 became suspicious of the appellant when she compared the time the appellant said she had seen injuries on the deceased, that is 7.30 p.m. and the time she had taken to report the matter to the police, that is at 2.30 a.m. She immediately placed the appellant in custody pending further investigations and the body of the deceased was taken to the city mortuary to await post mortem.

Dr. Peter Muriuki Ndegwa, (PWII), conducted the post mortem on the body of the deceased on 6th December, 2013 having been identified to him by Isaac Ndalila Mulumeti, (PW6), a brother to the deceased and David Manyonge Saratuki, (PW7), an uncle. PW II found a penetrating stab wound on the left chest below the clavicle. The left lung had been perforated. He formed the opinion that the deceased died as a result of haemorrhage due to penetrating stab wound to the chest.

Subsequently, the High Court at Nairobi was on 2nd December, 2013 informed that the appellant had committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars being that on 30th November, 2013 at Riruta in Dagoretti within Nairobi County, he murdered the deceased. The appellant denied the charge and his trial ensued in earnest thereafter on the basis of the above evidence.

Put on her defence, the appellant elected to testify on oath. She stated that on the material day her music group in which she was the choir master attended a music festival at Shauri Moyo; Nairobi. She left her house at 8 a.m. and went to the church at Riruta for a practice session before heading for Shauri Moyo. That Reverend Ndungu, DW4, prayed for them before they left. The group spent the whole day at Shauri Moyo and left at sunset. When she arrived at home, she did not find the deceased. She prepared supper and ate her portion and preserved some for the deceased. The deceased came home at about 9 p.m. She heard a commotion and saw the deceased fall down with part of his body, the head inside the house and the legs outside the door. The deceased was holding a bottle of beer. She tried to take him inside the house but could not and noticed that his pulse was weak. She sought assistance from PW 10 to no avail. She tried to help him by administering mouth to mouth resuscitation but without much success. She then called PW1 who came and together they placed the deceased on a mattress and covered him with a bed sheet. After placing the deceased on the mattress, she noticed he had an injury on the chest and blood was oozing therefrom. After her attempt and that of PW2 and PW10 to save the life of the deceased failed, she went to report the incident at Riruta Police Station. She admitted that they had a difficult relationship with the deceased because he used to drink heavily and that lack of biological children and bed wetting problems took a heavy toll on him and affected his self-esteem. She however denied that she was responsible for the deceased's death.

Pauline Ogani, (DW2), was in the group that attended the music concert at Shauri Moyo. She confirmed attending the festival with the appellant on the material day and returned to Riruta Baptist Church at 8 p.m. Nicodemus Odhiambo, (DW3), a caretaker at the apartments saw the deceased leave his house at about 11 a.m. By the time he was signing off the deceased had not returned. DW4 on other hand confirmed praying for the appellant and her group as they left for Shauri Moyo music concert.

After evaluating the evidence tendered by both the prosecution and defence, the learned Judge (S. N. Mutuku) came to the conclusion that there was sufficient evidence that connected the appellant to the murder of the deceased. The learned Judge accordingly convicted the appellant for the offence and sentenced her to death.

Dissatisfied with the conviction and sentence, the appellant has lodged the instant appeal on eleven grounds to wit; that the learned trial Judge relied entirely on the prosecution evidence that was weak to convict the appellant, failed to take into consideration the defence evidence which removed the appellant from the scene of crime, failed to appreciate facts that pointed to the innocence of the appellant; that the prosecution case was not proved to the required standard; refused to appreciate the forensic evidence that was crucial; post mortem report did not corroborate the prosecution witnesses' oral accounts; the scene of crime had been interfered with so as to deliberately implicate the appellant; failed to appreciate the contradictions in the prosecution case; failed to consider and find that the conduct of PW 10 was suspicious and finally that the trial court was biased against the appellant.

The appellant canvassed the appeal by way of written submissions through Mr Kraido, learned counsel. On part of the Republic, Mr. O'mirera, learned Senior Assistant Director of Public Prosecutions orally submitted.

Mr. Kraido submitted that the evidence of prosecution witnesses and in particular PW1, PW5, PW8, PW10, PW12 and PW13 suffered many deficiencies most notable amongst them being the level of inconsistencies and contradictions in their testimonies and their statements to the police. There were inconsistencies with regard to the presence of blood stains in the house, whether the deceased's clothes were soiled with blood, whether there were 2 knives in the kitchen, and whether the deceased was wearing a shirt. According to the appellant the said contradictions and inconsistencies rendered the evidence of the prosecution so unreliable and devoid of merit as to found a conviction. To counsel those contradictions and inconsistencies ought to have been resolved in favour of the appellant. For this proposition, counsel relied on the Uganda case of **Uganda vs Nakato Perepetwa, Criminal case No. 255 of 2009 (Ur)**.

Counsel further submitted that the appellant's defence ought not to have been brushed aside simply because it looked weak or because it was not believable. It was the duty of the trial court to consider the defence and decide whether it raised reasonable doubt. Counsel further submitted that the appellant's defence of an alibi was corroborated by three witnesses but the investigating officer did not verify the alibi. According to counsel, it is trite that the burden of proving falsity if at all, of an accused defence of alibi lies with the prosecution. For this submission, counsel relied on the case of **Victor Mwendwa Mulinge vs Republic (2014) eKLR and Karanja vs Republic (1983) eKLR**.

It was further submitted on behalf of the appellant that she told the police that the deceased came home that fateful night drunk whilst holding a bottle of beer. To counsel this should have required further investigations to establish whether the deceased was drunk. On circumstantial evidence, counsel submitted that the circumstantial evidence relied on by the prosecution was so tenuous that it could not found a conviction. Counsel submitted that the learned Judge should have been satisfied that the circumstantial evidence tendered had taken the case out of the realm of conjecture and attained a degree of cogency that would permit only an inference of guilt. Counsel relied on the case of **Mwangi & Another vs Republic (2004) 2 KLR 32** for this submission. None of the evidence adduced connected the appellant to the murder to the exclusion of other persons according to counsel. Indeed counsel took the view that the appellant was only convicted on the basis of suspicion. But as stated in the case of **Sawe vs Republic (2003) eKLR**, suspicion however strong cannot form the basis for a conviction.

Counsel maintained that the ingredients for the offence of murder were not proved. Though it was not in dispute that the deceased died there was no proof by the prosecution that the appellant's acts if any, caused the death of the deceased, nor was there proof of malice aforethought. Regarding the post mortem, counsel submitted, that it did not contain all the vital information as some parts were left blank. To counsel, it would appear that the Pathologist had already formed an opinion on the basis of the information given to him by the investigating officer. The Pathologist for example failed to ascertain the height, age of the deceased and time of death nor did he examine the digestive system of the deceased to ascertain whether he was drunk or not. Finally, counsel submitted that the learned Judge failed to properly evaluate the evidence on record and so came to a wrong conclusion that the appellant was guilty of murder of the deceased.

In response, Mr. O'mirera submitted that the evidence against the appellant was overwhelming. That the High Court relied on circumstantial evidence to convict the appellant. Counsel submitted that circumstantial evidence led by the prosecution satisfied the necessary threshold as to found a conviction. Counsel went on to submit that the appellant did not explain how the deceased sustained the fatal injuries. That the evidence led by the prosecution placed the appellant at the scene of crime. Indeed the appellant admitted in her defence to having been with the deceased in the house at the time he sustained the fatal injuries; that the appellant's explanation that the deceased fell from a stool did not add up considering the injuries sustained by the deceased. Finally, counsel submitted that the injuries sustained by the deceased were not self-inflicted. They must have been inflicted by the appellant therefor.

This is a first appeal. Being so, we are mindful of our duty to subject the evidence tendered before the trial court to a fresh and exhaustive examination so as to reach our own independent conclusion, while appreciating the fact that we did not have the opportunity to observe the witnesses and assess their demeanour. See generally, **Okeno vs Republic (1972) E.A 32.**

We have considered the evidence and submissions by both parties. The issue for determination is whether the conviction of the appellant for the offence of murder should be upheld.

The appellant faults the conviction of the appellant on weak and contradictory prosecution evidence. He claims that there were several inconsistencies and contradictions in the evidence of PW1, PW5, PW8, PW10, PW12 and PW13 as to render such evidence unreliable. The inconsistencies have already been alluded to elsewhere in this Judgment and we need not revert to the same again. Suffice to state that in the case of **Uganda vs Nakato Perepetwa (Supra)**, It was held that *"inconsistencies and contradictions unless satisfactorily explained should benefit or be resolved in favour of the accused person"*. The trial court extensively considered the contradictions and inconsistencies in its Judgment and came to the conclusion that they were minor and did not go to the root or shake the strong prosecution case as presented. We agree. We think that the contradictions were not so fundamental as to prejudice the appellant. It is axiomatic that in every trial there are bound to be some contradictions and inconsistencies since witnesses see or perceive things differently. It is however the duty of the trial court or the 1st appellate court to determine whether the said contradictions and inconsistencies were so fundamental and material as to prejudice the accused or the appellant. This is the essence of section 382 of the Criminal Procedure Code. As stated in the case of **Joseph Maina Mwangi vs Republic, CA NO. 73 of 1992**, *"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence ..."* As already stated we are wholly in agreement with the trial court's conclusion that the contradictions and inconsistencies alluded to in the prosecution case were inconsequential and immaterial and did not affect the prosecution case materially.

The next line of attack was that the trial court deliberately failed to take into consideration the defence evidence that removed the appellant from the actual scene of crime and that the court also failed to appreciate all factors which pointed to the innocence of the appellant. The appellant's defence if we understood it correctly was not one of alibi. If anything, her defence placed her at the scene of crime. It was her evidence that on the fateful day she left the house in the morning for a music festival at Shauri Moyo and when she came back that night she did not find the deceased at home. The deceased later came home holding a bottle of beer and fell down with part of his body inside the house and the other outside. She tried to take the deceased inside the house but she was unable to do so as his pulse was weak. She tried administering first aid and also sought help from PW 10. It was her further evidence that after putting the deceased on the mattress with the help of PW1, she noticed that the deceased had an injury on the left side of the chest with blood oozing therefrom. After attempts by PW2 and PW 10 to save the deceased proved futile, she went to the police and reported the incident. She also claimed that whilst in the house the deceased fell from a stool and he sustained injuries. Yet again she claimed that having had supper, the deceased complained of chest pain and on examining him she noticed blood oozing from the chest. Do any of these defences really amount to an alibi and place the appellant away from the scene of crime? We do not think so. We think therefore that the trial court rightly rejected the alleged defences. We are only too aware and *"It is trite law that the burden of proving falsity if at all, of an accused defence of alibi lies on the prosecution"*. See **Victor Mwendwa Mulinge vs Republic (Supra)**. These defences do not place the appellant elsewhere other than the scene of crime. The trial court nonetheless went ahead to consider the defence as advanced by the appellant and found it not to add up; for the following reasons: According to PW1 he was on duty on 30th November, 2013 from 6 p.m. and never saw the appellant or the deceased come home that evening meaning that they had come much earlier. Further, it was on record that when the appellant reported to PW5 at Riruta Police Station at 2.30 a.m., she told her that she had been home with the deceased at 7.30 p.m. Further from the evidence of the appellant, she met PW1 going up the stairs. However, this was not true as according to PW1, as he was coming from PW 10's, house, he saw lights in the appellant's house and went there. He found the appellant at her door step and she showed him the deceased who was inside the house. Again from the appellant's evidence, the deceased did not enter the house but fell at the doorstep. If this be the case and as correctly observed by the trial court, what explains the blood stains on the walls of the house, the basin in the bathroom, on the sofa set and the floor of the bathroom, on the silver bowl and the deceased's shirt? The appellant also claimed that the deceased came home holding a bottle of beer. What happened to the bottle? There is no mention of the bottle by any of the witnesses. If indeed there was such a bottle, the witnesses who came to the scene would not have failed to see it. And if it had broken on impact, there would have been pieces of broken glasses at the scene. There were none. If the appellant's hypothesis was that the deceased fell on the bottle and in the process injured himself fatally, then obviously it just does not add up. How about the theory that the appellant fell from a stool and fatally injured himself or that after supper the deceased complained of chest pain and upon her examination noticed blood oozing from the chest. How do all these fit in this Jig saw puzzle? Finally, if by 7.30 p.m. both the appellant and deceased were at home as reported by the appellant to PW5, why did the appellant take so long to seek medical assistance?

All these unanswered questions are what led the trial court to disbelief the appellant's defence. We have no reason or basis to question that finding.

The appellant further complains that the prosecution failed to prove the case to the required standard to justify a conviction based on circumstantial evidence. For circumstantial evidence to found a conviction, according to counsel it must pass three tests; first, circumstances on inference of guilt ought to be cogently proved, secondly, circumstances must tend to erringly point to the deceased as the perpetrator of the crime and thirdly, such circumstances should form a strong chain pointing to the accused. For these propositions counsel relied on the case of **Ramreddy Rajesh Khanna Reddy vs State of A.P (2006) 10 172**, where the Indian Supreme Court stated:-

"It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the

pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis.”

He also made reference to the case of **Simon Musoke vs Republic (1958) E.A 715** in which it was held that *“It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference...”*

Counsel submitted that in the instant case the circumstances were not strong enough to complete the entire chain with reliable links to establish the case of the prosecution against the appellant beyond reasonable doubt. The inference that it is the appellant who stabbed and killed the deceased was not the only inference that could be reasonably drawn from the circumstantial evidence. That there were other factors in the evidence which stood in favour of the appellant including the contradictions in the prosecution case, the fact that the post mortem report did not contain all relevant information and which knife was the murder weapon.

With respect to counsel, we are unable to appreciate how the above can disturb the inference that the appellant killed the deceased. Those are minor and peripheral issues. What were the pieces of circumstantial evidence in this case? The appellant and the deceased were the only people in their house that evening. Secondly, the deceased is later found dead in the house. Thirdly, there are blood stains all over the house. Fourthly, a knife is found in the house with blood stains, Fifthly, the appellant’s contradictory statements on various issues; for instances, when asked by PW1 what had happened to the deceased, she told him that the deceased had fallen on a stool and hurt himself. To PW5 the appellant told her that the deceased had complained of chest pains after they had eaten supper. However to Urita Wanjala, (PW2), a neighbor who lived opposite their apartment, the appellant told her that the deceased had knocked himself on a stool and got injured. Sixthly, if indeed the deceased was injured elsewhere as the appellant wanted the trial court to believe, then at least there would have been a trail of blood on the staircase and or corridors leading to his apartment. Surprisingly, there was none. Further, there was an attempt to cover up the scene by cleaning it; and the deceased died as a result of haemorrhage due to penetrating stab wound according to Dr. Peter M. Ndegwa. These injuries rule out the possibility of the appellant falling from a stool, or on a bottle: All these pieces of circumstantial evidence taken together point erringly to the appellant as the person who murdered the deceased as the trial court correctly found and contrary to the submissions of the appellant.

The appellant questions whether the ingredients for the offence of murder were proved beyond reasonable doubt. These ingredients include the fact of death of the deceased, unlawfulness of the death, whether the death of the deceased was caused with malice aforethought and participation of the appellant in the unlawful killing of the deceased. The appellant does not dispute the fact that the deceased was killed and that his killing was unlawful. What is in contestation is the participation of the appellant in the killing of the deceased and whether the killing was with malice aforethought. However, as we have already determined, the circumstantial evidence tendered by the prosecution pointed irresistibly to the appellant and nobody else for the commission of the offence. This similarly was the finding of the trial court.

As regards malice aforethought, it is deemed to be established, under section 206 of the Penal Code, by evidence proving anyone or more of the following circumstances.

206. 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 one 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.`

A stab wound to the chest, executed so deeply that it punctured the left lung could only have been inflicted by a person bent on causing the death or grievous harm to the victim. As stated hereinabove, the prosecution proved beyond any reasonable doubt that the appellant was at the scene of crime, where the fatal injuries were inflicted upon the deceased. The explanation given by the appellant is not plausible and reasonable in the circumstances of this case. There are concurrent findings on the injuries and explanation given by the appellant. Both courts below rejected the explanation and defence of the appellant is untenable. Therein lies the malice aforethought.

From the foregoing, we are satisfied that the offence of murder was proved beyond reasonable doubt against the appellant and that the trial court properly directed itself in convicting the appellant. In the premises, the appeal against conviction fails.

As regards the sentence, Section 204 of the Penal Code provides that **“Any person convicted for murder shall be sentenced to death.”** The Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015,**

(Muruatetu’s case) held at para 69:

“Consequently, we find that section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”

In view of the decision in the Muruatetu case, we deem it fit to consider the circumstances of this case. We observe that the appellant was a first offender and the learned trial Judge stated that she had no discretion to vary the death penalty. In keeping with the recent jurisprudence, we hereby set aside the death sentence imposed on the appellant. In the circumstances, we find that a sentence of twenty (20) years imprisonment would meet the ends of justice.

The upshot of the above is that the appeal against conviction is dismissed and the appeal against sentence is allowed. Accordingly, the sentence of death is set aside and in substitution therefor the appellant is sentenced to twenty (20) years imprisonment with effect from 12th June, 2017 when she was sentenced.

Dated and delivered at Nairobi this 8th day of May, 2020.

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR