



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, SICHALE & J. MOHAMMED J.J.A)

CRIMINAL APPEAL NO. 69 OF 2017

BETWEEN

GODFREY MAINA MUIRURI1ST APPELLANT

JOSEPH MURIMI KANIARU2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi, (L. Kimaru, J) dated 17th May, 2016 IN H.C.CR.C NO. 31 OF 2010)

JUDGMENT OF THE COURT

On 4th June, 2010 the High Court at Nairobi was informed that the appellants, **Godfrey Maina Muiruri** and **Joseph Murimi Kaniaru** together with others not before court had murdered Badira Amina Mohamed, “**the deceased**” contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 21st May, 2010 at Kibera Laini Saba in Nairobi County, the appellants murdered the deceased. They denied the information and soon thereafter their trial commenced in the High Court of Kenya at Nairobi. In a bid to prove its case against the appellants the prosecution called a total of 10 witnesses. The prosecution case in brief was as follows:

The 1st appellant’s family and that of the deceased lived within walking distance of each other at Kibera Laini Saba. The 1st appellant’s son, **Simo** had an affair with the deceased. The deceased as a result got pregnant and gave birth to a baby girl. She was staying with her parents; PW1, **Zuleha Ibrahim** and PW4, **Bakit Mohamed Sadala**. A custody dispute arose between the two families with regard to the child and as a result, a strained relationship developed with the death of the deceased being the game.

According to PW1, Simo went to her home on 5th February, 2010 and took away the baby in the absence of the deceased. The deceased reported the abduction of the child from her custody at Kilimani Police Station but she was not assisted. She learnt from Simo however, that the child was with his mother and so on 16th April, 2010 she went to Simo’s mother to look for her child only to be informed that the child had died. Later she learnt that the child was alive and well. This prompted the deceased to double her quest to find her child. On 17th May, 2010 the deceased went back to Kilimani Police Station and made report about the child. This time round, Simo was asked to hand over the child to the deceased and PW1, which he obliged. Simo’s sisters were not happy with the developments and on 21st May, 2010 when the deceased and her sister Leila were returning home from hospital they were assaulted by the 1st appellant’s daughter named Serah. As would be expected, PW1 confronted Serah and her mother over the assault and some harsh words were exchanged causing a further discord in the already strained relationship between the two families. That evening at about 7:00pm the appellants, Simo and other men went to PW1’s home accompanied by two police officers who arrested PW1.

PW2, **Kassim Mohamed Bakit**, who is a son to PW1 and brother to the deceased, arrived home on the material date at about 7:30pm to the news that his mother had been arrested. He went to Kilimani police station where he found the deceased and was informed that PW1 had been charged with resisting arrest and malicious damage to property. The deceased and PW2 were advised by the police to return the following day. On their way home PW2 who was blind realized that he had lost contact with the deceased and so he proceeded home alone. The deceased later came to the house crying and stated that she had been beaten up by the 1st appellant, Simo and one Njeru. He called PW4

asking him to take action but before long a neighbor, Phyllis, called and informed him that the 1st appellant, Simo and Njeru had taken the deceased away. He then called PW4 again only to be informed that the deceased was no more. He acknowledged that there was a dispute between the two families over custody of the child born of the deceased by Simo.

PW3, **Ismael Mohamed Bakit**, the deceased's older brother had known the 1st appellant for about a year prior to the incident. On 21st May, 2010 he went home at about 8:30pm. He found the deceased crying. She informed him of PW1's arrest and complained of being beaten by Simo and his friends. He escorted her to the AP camp to report the matter. They were advised to go to hospital and obtain a P3 but since they did not have money, they returned home. He went to look for the 2nd appellant with a view to resolve the issue surrounding PW1's arrest. The 2nd appellant promised to look into the matter and have PW1 released the following day. On leaving the 2nd appellant's house, he went to buy credit but before he got to the shop, he was attracted to something that was lying on the road. He flashed his torch and alas, it was the deceased's body. The deceased was bleeding from the nose and had an injury on the left eye. The appellants, Simo, Simo's mother and one Nduta were about 3metres from the body. When he asked what had happened, they all walked away without uttering a word. He informed PW4 of the incident and together they reported the matter at the AP camp.

PW4 was at home when he was informed of the deceased's death by PW3. He rushed to the scene. He lit a matchstick and was able to identify his daughter's face. He reported to the AP camp and also subsequently identified the body for post mortem the following day.

PW5, **Hajira Yusuf Mohamed** lived with PW1. On the material day on her way home from school she passed by the deceased's house where she stayed for a while before going to her house. Later that evening PW1 was arrested and the deceased accompanied her to the police station. When the deceased came back her clothes were all muddy. The deceased told her that the 1st appellant, Simo, Nduta, Chiru, Chiku and Jaymo had assaulted her. The deceased requested for water to clean herself and while she was at it, the appellants and others still at large came and took her away. One Nduta warned her not to follow them. Shortly thereafter PW4 informed her that the deceased had been killed.

PW7, **PC Joram Karani** arrived at the scene of crime at about 2:00am. He saw the deceased's body which had multiple injuries on the head. While at the scene he saw the 1st appellant and a woman being chased and beaten by members of the public on suspicion that they were involved in the death of the deceased. He rescued the 1st appellant and took him to Kilimani Police Station. He called PW8, **Kupchor Kipsamo**, a scenes of crime officer from Buruburu, who visited the scene and took photographs of the scene of crime and the lifeless body of the deceased.

PW9, **Inspector Pauline Njeri Kamau** conducted an identification parade on 14th September, 2010 in which PW5 identified the 2nd appellant as one of those responsible for the death of the deceased.

Lastly, the prosecution called PW10, **PC James Mamai**, the investigating officer. He conducted investigations into the circumstances surrounding the case and came to the conclusion that the deceased was killed by the appellants and other family members still at large due to a custody battle/ dispute between Simo and the deceased over the child. That his investigations revealed that the appellants picked the deceased from her house and took her away before they killed her. The post mortem report prepared by Dr. Oduor showed that the deceased had multiple facial and scalp contusions and lacerations, swollen upper lip and was bleeding from the ears, nose and mouth. He formed the opinion that the cause of death was head injury as a result of blunt trauma.

Put to their respective defences, the appellants gave sworn testimony. They both denied any involvement in the death of the deceased. The 1st appellant stated that they had a long standing dispute with the deceased's family and strained relationship between the deceased and Simo over child custody. He alleged to have been harassed and assaulted by the deceased's family and the situation was so bad that he had planned to relocate. The 2nd appellant simply maintained his innocence and denied any involvement in the crime. He alleged to have been framed by the deceased's family for her murder.

In the impugned judgment, the learned Judge upon evaluation of the evidence adduced observed that PW2, PW3 and PW5 gave evidence linking the appellants to the death of the deceased. Referring to the post mortem report, the court formed the impression that multiple injuries on the deceased's head were inflicted soon after she had been taken away from her home by the appellants and other people still at large. That the appellants were identified among the people who took the deceased away from her home. The appellants were well known to PW2, PW3 and PW5 prior to the incident as neighbours. That although no one saw the appellants actually assault the deceased, the court took into account the evidence of PW2 and PW5 whom the deceased had prior to her death told them that she had been assaulted by the 1st appellant's family twice on the material day. Relying on circumstantial evidence, the court held that the evidence adduced pointed irresistibly to the appellants and members of their family as the persons who killed the deceased. PW2, PW3 and PW5 placed the appellants at the scene. The trial court was not persuaded by the

appellants' defence as it was clear to the court that the appellants were the aggressors and the police had taken sides in the dispute. Accordingly, the court held that the prosecution had proved its case beyond any reasonable doubt that the appellants in company of others still at large had murdered the deceased. They were accordingly convicted and sentenced to death.

Aggrieved by the conviction and sentence, the appellants lodged the present appeal on six (6) grounds to wit that the learned Judge erred in law by; convicting them while relying on suspicious circumstantial evidence of PW2 and PW5 which was contradictory and unsafe to sustain a conviction; convicting them without proper *mens rea* being established; allowing the investigation officer to produce a post mortem report instead of its author; concluding trial without making sure the Occurrence Book "OB" they had requested for was tendered in evidence; taking over the case from his predecessor without complying with the provisions of Section 200(3) of the Criminal Procedure Code; and therefore, according to them, an unfair trial contrary to Article 50(2) of the Constitution.

At the plenary hearing of the appeal, **Mr. Oira**, learned counsel appeared for the appellants while **Mr. O'Mirera**, senior assistant prosecution counsel appeared for the respondent.

Mr. Oira relied on his written submissions and submitted that there was no direct evidence linking the death of the deceased to the appellants. The prosecution case revolved around circumstantial evidence. He contended that the evidence leading to the conviction of the appellants was all hearsay and not sufficient to sustain a conviction. To him, the evidence was not corroborated either. He however acknowledged that there existed a dispute between the families of the deceased and the appellants over child custody. He impugned the evidence of PW5 as being contradictory and inconsistent. Counsel urged that there was a possibility that the deceased could have been killed by other people and that identification by recognition of the appellants was not properly evaluated.

Opposing the appeal, Mr. O'Mirera pointed out that the circumstantial evidence adduced placed the appellants in the hands of the deceased. They were the last persons to be seen with the deceased alive. They took away the deceased and about 150 meters from her home she was found dead. Hence the appellants had a duty to explain what had happened to the deceased. That the trial court was justified in believing the evidence of PW2, PW3 and PW5. He urged this Court to re-evaluate the evidence afresh and find that the evidence of PW3 and PW10 supported the circumstantial evidence adduced. That the alleged inconsistencies in the prosecution, if at all, did not vitiate the strong prosecution case. The deceased had earlier complained to PW3 that he had been assaulted by the appellants.

This being a first appeal this Court is as a matter of law enjoined to analyze and re-evaluate afresh all the evidence adduced before the trial Court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In **David Njuguna Wairimu v Republic [2010] eKLR** this Court rendered itself thus:

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

We have perused the record of appeal, submissions by counsel and the law. The issues for determination are whether the prosecution case was proved beyond any reasonable doubt bearing in mind that it was based solely on circumstantial evidence and secondly, sentence.

For a conviction on the information of murder to be sustained, it is vital to prove the death of the deceased, that the death was caused by the accused, and that he had malice aforethought in committing the murder. These three essential ingredients must be proved beyond any reasonable doubt. The essential ingredients of murder were reiterated in the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR** as follows:

"...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought." Emphasis ours.

It is common ground that the deceased died as correctly held by the trial court. PW3 was walking to the shops when he stumbled upon the deceased's body. He flashed his torch and realized that the deceased was dead. He called PW4 who came and on lighting a matchstick confirmed that the deceased was dead before reporting the matter to the police. He also identified the body during post mortem. PW7 arrived at the scene and saw the deceased's body with multiple head injuries and PW8 took photos of the scene including the deceased. Post mortem was conducted by Dr. Oduor who confirmed the fact of the death of the deceased. Accordingly, the death of the deceased cannot be disputed as the trial court correctly held.

Did the appellants commit the offence? The deceased had complained to PW2 prior to her death, that the appellants' family had assaulted her. This evidence was corroborated by that of PW3 who took her to the AP camp to report and that of PW5 who gave the deceased water to clean up after the assault. PW2 also testified to the fact that his neighbor Phyllis informed him that the deceased was being taken away by the appellants and a few other members of their family. This was corroborated by the evidence of PW5 who witnessed the deceased being taken

away and was even threatened by one Nduta not to follow them. The post mortem report produced by PW10 indicated that the deceased had died as a result of head injury due to blunt trauma. PW3 on stumbling upon the deceased body also saw the appellants and their family members standing a few meters from where the deceased was lying. There is no doubt therefore that the appellants were placed at the scene of crime, as correctly found by the trial court.

The appellants contest their identification by recognition. The 2nd appellant was identified by PW5 at an identification parade which is not disputed. PW7 while at the scene saw members of the public chasing the 1st appellant on suspicion of being involved in the murder of the deceased. He rescued him and took him to the police station. The appellants were well known to the deceased's family and were very familiar with each other. We do not therefore think that identification parade was necessary in the circumstances. In any event, the trial court did not place much reliance on that evidence.

As regards contradictions and inconsistencies in the testimonies of some of the prosecution witnesses, the said inconsistencies were not pointed out to us and even if there were, the said contradictions and inconsistencies would be minor and not so material as to prejudice the appellants. In any event, every trial is bound to have contradictions and inconsistencies as witnesses appreciate facts and things differently. However, it is the duty of the trial court and indeed the 1st appellant court, to determine whether the said contradictions and inconsistencies, if at all, were prejudicial to the appellants' case. In the case of **Joseph Maina Mwangi v Republic, CA. No. 73 of 1992** this Court observed correctly that:

“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, the contradictions and inconsistencies, if at all, were minor and of no consequence.

It is common ground that none of the prosecution witnesses saw the appellants kill the deceased. Thus, the prosecution case was solely anchored on the circumstantial evidence. The trial court considered the chain of events and came to the conclusion that they linked firmly and completely with the guilt of the appellants. The appellants while in the company of others not before court attacked the deceased on her way home from the police station. She went back home only for the group including the appellants to come and take her away. Moments later, she was found dead by PW3 and the appellants were at the scene a fact they have not disputed. For the deceased to be found dead shortly after being taken away by the appellants who were clearly not happy with her due to the turn of events in the child custody battle, there can be no co-existing circumstances to weaken the chain of events leading to the death of the deceased. Just like the trial court, we entertain no doubt that these circumstances formed a complete chain that pointed directly to the appellants to the commission of the offence and leaving no room for the possibility of the offence having been committed by any other person. In **Erick Odhiambo Okumu v Republic [2015] eKLR**, this Court addressing the issue of circumstantial evidence stated as follows:

“Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra): ‘Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.’ But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows: ‘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’.”
(Emphasis ours.)

The circumstantial evidence led in this case fitted firmly with the above requirements.

As regards malice aforethought, Section 206 of the Penal Code provides that:

“(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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a

wish that it may not be caused.

c. An intention to commit a felony.

d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony.”

This Court has in the case Republic v Tubere s/o Ochen [1945] 12 EACA 63 acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

The post mortem report showed that the deceased died as a result of head injury due to blunt trauma. Her head being one of the most vital parts of the body was targeted. The deceased had earlier on been assaulted by the appellants. They did not relent in their quest to see her dead. When she survived and went back home, they came to her again and took her away to make sure that she did not live to see another day. The appellants did not attempt to dislodge these facts. In the course of assaulting the deceased, the appellants ought to have known that their actions would cause her death or grievous harm. The evidence adduced was sufficient to establish malice aforethought. We are therefore satisfied that all the ingredients of murder in this case were present. Therefore, the prosecution case was proved beyond any reasonable doubt as correctly held by the trial court.

As regards sentence, Section 204 of the Penal Code provides that **“Any person convicted for murder shall be sentenced to death.”** The Supreme Court in Francis Karioko Muruatetu & another v Republic (2016) eKLR, however stated:

“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.” Emphasis ours.

The Supreme Court did not outlaw the death sentence, in deciding whether or not to impose death sentence it was held in Bachan Singh v The State of Punjab (Bachan Singh), Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, a decision cited in the Muruatetu case (supra) that:

“It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence.”

Similarly cited was the decision of the Privy Council in Spence v The Queen; Hughes v the Queen (Spence & Hughes) (unreported, 2 April 2001) where Byron CJ was of the view that:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.” Emphasis ours.

In the present case, we find that the manner in which the appellants committed the offence was heinous and gruesome. The appellants together with their family members mercilessly beat up the deceased not once but on two different occasions on the same day. They did not rest or give up until the deceased died. No human being deserves this kind of torture and inhuman treatment. In the circumstances therefore, we are averse and not inclined to exercise our discretion in favour of the appellants to review the imposed sentence downwards. The sentence of death was deserved for each of the appellants in the circumstances.

For the foregoing reasons we find no reason to interfere with the trial court’s conviction and sentence. The appeal is therefore bereft of merit and is accordingly dismissed.

Dated and delivered at Nairobi this 5th day of June, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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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