IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 57 OF 2019

BETWEEN

BEN NJIOKA KASOA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(***Being an appeal from the judgment of the High Court of Kenya at Machakos (Kemei, J.) dated 26th July, 2018***

in

H.C. CR C. No. 60 of 2009)

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JUDGMENT OF THE COURT

[1] ***Domitila Mumbua Mule***, the (deceased) was last seen alive by her daughter on the wee hours of 2nd October, 2009. By a cloak and dagger mystery, the deceased's lifeless body was found buried under a sand bed of the river Thwake a few hours later. The deceased had established a daily routine of waking up early at 5 am, driving her donkey to river Thwake to fetch water. Apparently, the river whose water sustained the life of the deceased seems to have given an opportunity to those who took away her life for reasons that no one could comprehend other than a threat that had been issued to the deceased's daughter and some evidence that was slovenly given by the police that the appellant had admitted to have murdered the deceased and led them to a place where they recovered some murder weapons.

[2] The rest of the evidence to unravel the mysterious murder of the deceased was pieced up from a total of twelve (12) witnesses. ***Mary Ndunge Sila*** (PW4) (Mary) deceased daughter testified that on this fateful day, the deceased had woken up to her usual routine of going to the river to fetch water with her donkey. She however delayed in returning home as was the practice. This caused concern to ***Mary*** who was home with her husband whom she referred to as ***Albanus***. ***Mary*** requested her husband to go to the river and find out what had happened to the deceased. On the way to the river**,** ***Albanus*** met with two ladies ***Jemima Kalendi*** who testified as **PW2** (Jemima) and ***Beth Kaluki Mule*** (PW3) (Beth). The two ladies had also gone to fetch water at the same river at about 7 am. On the way to the river they saw a donkey carrying water jerrycans, which they recognized belonged to the deceased, however the deceased was nowhere to be seen.

[3] As ***Beth*** and ***Jemimah*** were walking back with the donkey, they met with ***Albanus*** who was surprised to see them walking with the deceased's donkey in her absence. ***Albanus*** asked the two ladies whether they had seen the deceased but they answered in the negative, he drove the donkey home and reported to ***Mary*** that the deceased could not be seen and also reported the matter at Kalawa Police Station. ***Mary*** had received threats sometimes in September, 2009 from some strangers warning her that the deceased and her

husband would "*see danger*". Then two or three days later, a person by the name ***Peter*** also threatened her but this was because the deceased's fencing posts that had gone missing and they were recovered at ***Peter's*** compound. It appears from the record of proceedings this person called *Peter* was the 2nd accused person before the trial court and he was acquitted after the prosecution closed its case and the Judge ruled that they had failed to connect him with the murder.

[4] Immediately the matter was reported to the police, they seem to have swung into action as they proceeded to Thwake river where they were joined by members of the public. They combed the area around Thwake River and discovered the body of deceased buried in a shallow grave by the river bank. According to the testimony of ***PC Charles Makayeba*** (PW12), upon receiving a report about the disappearance of the deceased, he went to the scene at the river where the donkey was found. They saw blood and following its trail which led them to a sand bed and upon digging, they discovered the body of the deceased which was badly mutilated. **PW12** alerted the Officer Commanding the Station (OCS) and he immediately dispatched ***Cpl Silvester Mwanza*** (PW7) who was at the time attached at CID Makueni to help carry out the investigations. The police took the body of the deceased to Makueni Hospital Mortuary.

[5] Following information that PW1 was found trying to break into the house of the deceased, he was arrested by members of public and taken to the police station. The appellant was arrested on 8th October, 2009 when he surrendered himself to the Police. According to PW7 and PW8, after they interrogated the appellant, he confessed/admitted to have murdered the deceased and he led the police to Thwake river on or about the 13th day of October, 2009 where the body of the deceased was found. The body was found a short distance of about 10 meters from the river where the people used to fetch water and where they spotted a trail of blood. The police recovered a piece of wood buried in the sand with blood stains. They also recovered a metal rod in the middle part of the river. The piece of wood was taken to the Government Chemists for forensic analysis together with a blood sample taken from the deceased. The forensic analysis was done by ***Paul Kangethe Waweru*** who had by the time the matter came up for hearing retired from Government Chemist. The report of the analysis was produced in court by ***Christine Matindi*** (PW9) on behalf of her colleague under the provisions of ***section 77*** of the **Evidence Act**. The report showed that the blood sample on the piece of wood matched that of the deceased.

[6] The body of the deceased was identified for purposes of a post mortem examination by her husband ***Richard Mulele Mulinge*** (PW10) on 16th October, 2015. He had been called on the fateful day by a neighbor while on his way to Taita Taveta and informed that his wife had been murdered and her body found buried in the sand at Thwake river. The report of the post mortem examination was produced by ***Dr. Kathrine Kilonzo*** (PW11). The body of the deceased was covered with sand particles and it had been inflicted with eight wounds on the head, neck, hip and her hands were also fractured. The doctor formed the opinion that the cause of death was cardiopulmonary failure due to intracranial hemorrhage as a result of the said injuries.

[7] Based on the aforesaid evidence the appellant and ***Peter Kyalo Kasusu*** the 2nd accused, were charged with the offence of murder contrary to ***section 203*** and ***204*** of the **Penal Code**. The particulars of the charge being that on the 2nd day of October, 2009 at Mbukoni village, Kalawa location in Makueni county, they jointly murdered ***Domitila Mumbua Mule***. The hearing of this matter passed through the hands of many Judges without mentioning **Leonaola, J.** (as he then was) **Waweru, J.** and **Kihara Kariuki, J.** (as he then was) who were involved with taking plea and other preliminaries. The hearing started before **Dulu, J**. on 30th May, 2012 he heard the evidence of four (4) witnesses. On 28th August, 2013, the hearing of the matter proceeded before **Mutende, J**. who took the evidence of the next six (6) witnesses. Then came **Mureithi, J.** who heard the evidence of the last two (2) prosecution witnesses. After the close of the prosecution's case, he rendered a ruling that found the appellant had a case to answer while the 2nd accused was acquitted under ***section 306 (2)*** of the **Criminal Procedure Code**.

[8] Upon transfer or whatever movement of **Mureithi, J.** from the High Court Machakos**,** in came **Kemei, J.** who heard the defence evidence by the appellant. The appellant gave sworn evidence denying generally having killed the deceased. He claimed that he was arrested at Kalawa Police Station where he had gone to give ***Cpl. Maina*** some money being a bribe for having been accused of brewing illicit drinks. Upon arrest, he was taken to Makueni Police Station and then to river Thwake although he was not given any reasons and he remained in the police vehicle when he saw the same police officers return with some weapons. He alleged that he was framed up with the murder charges because he refused to give sufficient money to the police officers which they were demanding from him for brewing illicit drinks for business.

[9] The learned Judge does not seem to have considered this defence as it is not at all mentioned in the judgment. He however considered the evidence by the prosecution witnesses and the detailed submissions made by counsel for the appellant and also by the prosecution. Upon re-visiting the evidence and the submissions this is what the learned Judge concluded in a pertinent portion of the said judgment;

"In a murder case, the burden lies with the prosecution to prove that death has occurred, that the death was caused by an unlawful act or omission by the accused person and that the accused person had malice aforethought in committing the unlawful act or omission. In the case at hand, death was confirmed by the prosecution witnesses to have occurred. What is left for determination is whether or not the said death was occasioned by the accused person and whether or not he had malice aforethought to cause the death. It is clear from the evidence on record that none of the witnesses witnessed the killing of the deceased. What is on record is the evidence of PW7 who stated that the accused led him to the place where the murder weapons were hidden and made a confession of the killing. As to the issue of confession, I find and hold that there was no confession since no properly recorded confession was produced in court.

I also acknowledge the fact that the accused person's finger prints were not found to be on the murder weapons, however, PW7's evidence corroborated by PW8 that the accused led the police to the murder weapons infers that he was involved in the murder. Section 206 of the Penal Code defines malice aforethought as follows:-

"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 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."

In view of the above definition and the link of the accused to the murder weapons, I find that the prosecution proved the case against the accused beyond reasonable doubt. In the circumstances, I find the accused guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal code and I convict him accordingly."

[10] The sentencing proceedings show the appellant offered lengthy mitigation seeking leniency as he had been in custody for nine (9) years awaiting trial. The Judge also considered a pre-sentence report which was presented in court by the county Probation Officer and sentenced the appellant to twenty (20) years imprisonment.

[11] Aggrieved by both the conviction and sentence, the appellant has appealed relying on the grounds and supplementary grounds of appeal that mainly challenges the quality of evidence that was relied on to convict him. That the evidence did not prove to the required standard that it was the appellant who murdered the deceased. Although the police officers stated that the appellant had confessed/admitted to have murdered the deceased, there was no evidence of confession that was adduced but the police merely stated in passing that the appellant admitted the offence. The evidence that the appellant led the police to the place where the murder weapons were recovered without more was not conclusive evidence as there was no finger print or blood samples that were taken from the appellant so as to link him with the said weapons. There was also no evidence adduced to show that the weapons belonged to the appellant.

[12] During the plenary hearing conducted virtually via go to meeting platform under the Court's Practice Directions due to the prevailing COVID 19 Pandemic, ***Mr. Oira*** learned counsel appearing for the appellant relied on the supplementary grounds of appeal and made some oral highlights. Counsel emphasized that the entire evidence left some doubts as to who murdered the deceased as the circumstantial evidence relied on did not point to the appellant as the only one who had an opportunity to murder the deceased. Apart from there having had no motive demonstrated by the evidence whatsoever, the allegation made by PW7 that the appellant had confessed to the murder was not supported by any evidence at all; even if the appellant took the police officers to the scene where the weapons were recovered, that alone without any other collaborative evidence to link the appellant with the offence is not sufficient as the appellant stated in his defence that he remained in the vehicle when the police combed the area and returned with the weapons. Moreover no one saw the appellant murder the deceased and he had no grudge with the deceased. After all the appellant's fingerprints or blood was not subjected to forensic or DNA examination to link him with the said weapons. Counsel urged us to allow the appeal.

[13] Opposing the appeal, was ***Ms. Wang'ele*** learned counsel for the prosecution. She relied on her skeleton submissions that extensively cited the Supreme Court case of **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR** where the difference between a confession and admission to police officers which leads to investigations and discovery of evidence as to the commission of a crime was given. That the evidence of admission leading to further investigation is admissible and it is different from a confession. The Supreme Court provided an

interpretation to provisions of ***section 25A, 111(1)*** and ***119*** of the **Evidence Act**.

[14] Counsel for the respondent submitted that on interrogation by the police, the appellant volunteered to show the police where the murder weapons were hidden. The blood-stained wooden club that contained blood that matched that of the deceased and a rod were recovered and were produced as exhibits in court. It is this evidence that formed the basis of the conviction because the trial Judge found and rightly so that it was the appellant who committed the murder. After all, if the appellant claimed that the weapons were planted on him, it was within his special knowledge of how he came to be associated with weapons that had been used to murder the deceased and therefore he had a duty to offer an explanation. That in the absence of any explanation, the court was left with no option but to pass a guilty verdict. Counsel urged us not to interfere with the sentence granted that mitigation and a victim's impact assessment was conducted and the Judge duly took into consideration the period that the appellant was in custody in sentencing him to twenty (20) years.

[15] We have considered the record of appeal and submissions by both counsel for the appellant and respondent. This being a first appeal this Court is required to conduct a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, the Court must weigh conflicting evidence, make its own findings and draw its own independent conclusion. (See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005] KLR 174).** In re-appraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. (See ***Joseph Kariuki Ndungu vs. Republic Cr. App. Nos. 183 & 186 Of 2006).***

[16] It is common ground that the evidence against the appellant that led to his conviction was the fact that he took the police to a place where they recovered a blood-stained club and a metal rod being the murder weapons. No one saw the appellant kill the deceased so it was taken that the circumstances under which he came to know of where the murder weapons were, established that it was him who murdered the deceased. The prosecution did not adduce any other direct or indirect evidence that connected the appellant with the murder of the deceased. Nonetheless, it has been stated time and again, that circumstantial evidence in itself is not valueless, because, subject to satisfying well-known conditions, it is as good as any other evidence as it can prove a case with the accuracy of mathematics. At times, it is deemed the best evidence ever. (See **Musili Tulo vs. Republic, Cr. App. No. 30 Of 2013).** In **Sawe vs. Republic (2003) KLR 364,** this Court stated that to pass muster, circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances.

[17] That said, we have a duty to determine whether the Judge erred by concluding that the evidence by the two investigating officers, PW7 and PW8 that it is the appellant who led them to Thwake river where they discovered the murder weapons established beyond reasonable doubt that it was the appellant and no other had an opportunity to murder the deceased. We need to point out at the outset that this was not a confession as no evidence in compliance with the provisions of ***section 25 A*** of the **Evidence Act** which defines a confession was adduced. A confession is defined in the following terms;

> **"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."**

While **Black's Law Dictionary**, defines a *confession* as:

> **"A criminal suspect's oral or written acknowledgement of guilt, often including details about the crime."**

In addition, learned author **John H. Wigmore**, defined a confession as:

> "**… an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or some essential part of it**."

[18] Did the appellant admit that he committed the murder, the Supreme Court in the case of **Republic vs. Ahmad Mohammed** (supra) stated as follows in regard to evidence of admission made to police officers in the course of investigations;

> **"[48] We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects' commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that "*information from an accused person leading to discovery of evidence is not admissible outside a confession….*", the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession."**

[19] The facts in the instant case and the above case are distinguishable because apart from the fact that the accused persons in the Supreme Court case led the police to the place where the RDX explosives were recovered, there was very strong and independent evidence by witnesses who saw the accused persons on two occasions at the scene of crime which was at Mombasa golf club. This evidence was taken in addition to the fact that it was the accused persons after interrogation by police who led the police to a scene where the RDX explosives were recovered. That aside, being in possession of the RDX explosives is a cognizable criminal offence as opposed to knowing where a wooden club and metal rod are which is what happened to the appellant in this case. Being in possession of a wooden club and metal rod without more is not a criminal offence. What has caused us some considerable anxiety in the instant matter is the fact that the police carried out the investigations so slovenly. If they knew they were relying on the sole evidence of the appellant having been the one who led them to where they recovered the murder weapons, what was so difficult in extracting DNA samples from the appellant for forensic examination when they did the same to the body of the deceased?

[20] As matters stood, it was only the evidence of the police officers who carried out investigations implicating the appellant with the offence of murder after interrogating him from the 8th day to 13th October, 2009. In this case we find this evidence alone that the appellant led the police to recovery of murder weapons cannot form a basis of a safe conviction without credible collaboration. This is what the Supreme Court stated in the **Ahmad's** case (supra)

> **"[49] The Court of Appeal noted, quite aptly, that it was never the appellant's case that the respondents had confessed to committing the offences that they were charged with. This appeal therefore, cannot turn on Section 25A of the Evidence Act because the respondents did not make a confession in terms of sections 25 and 25A of the Evidence Act. As such, we disagree with the appellant's contention and the Court of Appeal decisions in (*Douglas Thiongo Kibocha v Republic* [2009] eKLR and *Milton Kabulit & Others v. Republic* [2015] eKLR) that there is an apparent conflict between Sections 25A(1) and 111(1) of the Evidence Act. The two sections relate to different scenarios and result in different effects. <u>While, as stated, a confession can of itself found a conviction, when a court is confronted with an admission, which does not amount to a confession under Section 25A of the Evidence Act, it should not base its conviction solely on such an admission.</u>**

<u>Instead, it should look for clear and credible corroboration of such an admission</u>. (Emphasis ours).

[21] We think we need not say more as the Supreme Court's decision is clear that an admission by an accused person to a police investigator cannot be a basis for a conviction without other evidence. It is obvious that the learned Judge erred by basing the conviction of the appellant on the sole evidence that he admitted or led the police to where the murder weapons were recovered without any other evidence. This is evidence that only creates suspicion against the appellant but as has been infinitely held by this Court, suspicion however strong cannot on its own form the basis for conviction. The suspicion against the appellant required to be corroborated.

[22] For the aforesaid reasons, the appeal has merit and it is allowed. Accordingly, the conviction of the appellant is quashed and the sentence is set aside. The appellant is set free forthwith unless otherwise lawfully held

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR