



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: MURGOR, SICHALE & KANTAL, JJ.A]**

**CRIMINAL APPEAL NO. 74 OF 2019**

**BETWEEN**

**EDWARD MURIUKI NYAGA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Nairobi (Wakiaga J.)*

*dated 2<sup>nd</sup> November, 2017 in H.C.C. No. 109 of 2009)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The facts of this appeal reveal an intricate murder of the deceased, **Patrick Ndung'u Kariuki**.

On **22<sup>nd</sup> July 2009**, **SP. Maxwell Otieno (P.W.15) (SP. Otieno)** received a report from **Grace Gathoni (P.W.2) (Grace)** (the deceased's wife/girlfriend) and **Jane Wanjiku (P.W.12) (Jane)** that **Patrick Ndungu Kariuki**, (the deceased) was missing. According to **Grace**, she had last seen the deceased on **21<sup>st</sup> July, 2009** at 6.30 p.m in Ngara estate when the deceased left her to go to town on account that his friend, **Hannington Mbaka alias Daudi** had called him requesting for bus fare to go to Embu. She had not seen the deceased since then and that all phone calls to the deceased were going unanswered. **Jane**, the deceased's associate in the sale of gemstones stated that she had called the deceased at around 8.30 p.m on **22<sup>nd</sup> July, 2009** but before they could converse the deceased informed her that he had been abducted by 3 people. The deceased later sent a text message to **Jane** informing her that he was at a police station and that marked the end of any further communication from the deceased.

**SP. Otieno** commenced investigations in earnest with the assistance of the deceased's family which led them to the deceased's bank account at Equity Bank Moi Avenue Branch where it was discovered that several cash withdrawals had been made from the deceased's account from an Automated Teller Machine (ATM). On **22<sup>nd</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Githurai; on **23<sup>rd</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Embu; on **24<sup>th</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Githurai; on **25<sup>th</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Tea Room; on **26<sup>th</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Tea Room and on **27<sup>th</sup> July 2009**, Kshs. **20,000/=** was withdrawn from an ATM in Ngara. The person captured on the bank's CCTV cameras withdrawing the aforementioned amounts of money was the appellant, **Edward Muriuki Nyaga** who was unknown to the family.

Equity bank blocked the deceased's account on **27<sup>th</sup> July 2009**, and on the same night the body of the deceased was found within Mwiho area of Kasarani and taken to city mortuary where he was identified by his family members including **Mwangi Ndungu (Mwangi)**, the deceased's son. At the request of Kasarani Police Station, **Dr. Njau Munami (P.W.7) (Dr. Njau)** carried out a post mortem examination and found that the deceased had multiple fractures on the face and the head, bruises on the chest and multiple stab wounds mainly on the neck. He opined that the cause of death was stab wounds.

Police investigations led to the location of the appellant's house in Kahawa Wendani where a search was conducted and military items recovered. The appellant was subsequently arrested and detained with the help of members of the public.

**Edith Njoki Muriuki (P.W.9) (Edith)** testified that she was well acquainted with the appellant who was a member of the armed forces as her husband was from the appellant's clan in Embu. She stated that in the year 2008, the appellant visited her father, **Joseph Njagi Kariragia (P.W.5) (Joseph)** at his home in a place called Nthagaiya in Embu. The appellant's mission was to find out if **Joseph** knew of

any mercury dealer; that two weeks later, **Joseph** was able to locate a mercury broker in Embu through his neighbor, **Emily Wanjiku Njeri, (P.W.6) (Emily)**. The mercury broker was called **Daudi** who introduced the appellant to the deceased who was said to be in the business of selling mercury. Consequently, the appellant's wife, one **Nelly Maitu Kundi (Nelly)** met with the deceased in Embu Town at a hotel called 'Mini'. **Daudi, Joseph, Emily** and **Edith** were present at this meeting. The deceased demanded a payment of Kshs. 150,000.00 for the mercury but the appellant's said wife had Kshs. 80,000.00 only. The deceased took the money (Kshs 80,000.00) and the appellant's wife promised to pay the balance (Kshs 70,000.00) once they arrive in Nairobi. They all parted ways and a year later, **Edith** received a phone-call allegedly from the appellant threatening to kill them all. **Edith** informed her father **Joseph**. Although **Edith** together with **Emily** and **Joseph** were arrested in connection with the deceased's murder, they were later released from Kasarani Police Station after recording their statements.

**Martin Wekesa (P.W.16) (Martin)**, a liaison officer with Safaricom investigated the issue of the deceased's sim card and discovered that the sim card had been used by the appellant on three different occasions after the deceased had reportedly gone missing, that is, on **19<sup>th</sup> August, 2009, 31<sup>st</sup> August 2009** and **2<sup>nd</sup> September 2009**. He also traced the deceased's phone handset to a shylock shop owned by **Samuel Ndungu Ngururi (P.W.14) (Samuel)** who informed him that one, **Hannington Mbaka** (alias **David**) had given him the handset, Nokia 1600 against a loan of Kshs. 1000.00 which he had borrowed from him but failed to collect the handset which he later sold to **Robert Njoya (P.W.13), (Robert)**.

The appellant was consequently charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the Information were that:

*“Between 26<sup>th</sup> and 27<sup>th</sup> day of July 2009 at mwihoko Estate in Nairobi North District within Nairobi Province murdered*

*PATRICK NDUNG’U KARIUKI.”*

The appellant pleaded not guilty to the charge and a trial ensued. In his sworn evidence, the appellant admitted that he knew **Hannington Mbaka alias Daudi**, who was his rural home neighbour. He stated that they met in **July 2009** at the Githurai stage and **Daudi** informed him that a relative of his had been arrested at Kasarani police station and that his relative's wife had given him an ATM card to withdraw money for him and he required his assistance to withdraw the money. He obliged and they went to Equity bank, where **Daudi** gave him the ATM card and the pin number. He withdrew Kshs. 20,000.00 and was given Kshs. 500.00 in return. The following day, they met again in Embu Town and **Daudi** told him that he was still looking for money for the same cause and the appellant performed a similar transaction, instructed **Daudi** on how to operate the ATM machine and was rewarded with another Kshs. 500.00 They parted ways and did not see each other again. The appellant denied knowing the deceased, communicating with him or engaging in the purchase of mercury from the deceased. He maintained that he was unmarried and hence, he did not know the lady (**Nelly**) who allegedly paid money to the deceased in exchange for the mercury and that he had no reason to kill the deceased.

In his judgment, **Wakiaga J.** found that the circumstantial evidence tendered before the court proved that the appellant either alone or with **Hannington Mbaka alias David**, who had not been traced, killed the deceased. The CCTV cameras at Equity branches showed the appellant withdrawing money using the deceased's ATM card. Further, that there was evidence that the appellant had inserted his sim card in the deceased's hand set. The appellant was sentenced to suffer death as by the law then prescribed.

The appellant was aggrieved by the outcome of his trial and is now before this Court on a first appeal and has listed 4 grounds of appeal which can be summarized as follows:

- (i) That the learned judge erred in law and in fact by failing to find the appellant not guilty given that his conviction was grounded on unsafe circumstantial evidence and that the case was poorly investigated;*
- (ii) That malice aforethought was not established to the threshold stipulated by law;*
- (iii) The learned judge erred by disregarding the appellant's defence; and that*
- (iv) The prosecution's evidence was full of gaps contradictions and discrepancies and created reasonable doubt as to the appellant's participation in the murder.*

At the virtual hearing of the appeal, **Mr. Njanja** for the appellant relied on the appellant's written submissions filed on **13<sup>th</sup> December 2019**. He submitted that the appellant's conviction was based on circumstantial evidence that did not meet the test laid down in the case of **Abanga alias Onyango v Republic. CR. A No. 32 of 1990 (UR)**; that the circumstances therein did not unerringly point to the guilt of the appellant and did not exclusively link the appellant to the murder. He contended that the court ignored the fact that **Daudi** was the last person in physical contact with the deceased; that **Samuel** testified that **Daudi** was the one who left the deceased's phone in his shop after taking a loan; that the appellant admitted that he withdrew money from the deceased's ATM on two occasions at the request of **Daudi**; that **Christopher Wafula (P.W.11) (Christopher)**, the bank security officer of Equity Bank was only able to show footage of the two transactions and not the 7 withdrawals done by the appellant as alleged by the prosecution and that the police were not interested in arresting **Daudi** nor did the prosecution secure the attendance of the appellant's alleged wife (**Nelly**).

Counsel further submitted that prudent investigations were not carried out by the prosecution and faulted the learned Judge for disregarding the appellant's defence, relying on the investigating officer's testimony which was unsupported by evidence and overlooking glaring contradictions in the prosecution's case which created reasonable doubt as to the participation of the appellant in the alleged murder such as

the lack of evidence of communication between the appellant and the deceased and the fact that there was proof of communication between the deceased and **Daudi** .

Lastly **Mr Njanja** submitted that malice aforethought was not established given that the alleged mercury deal having gone sour was not proved and there was no proof that the appellant made threatening calls to **Edith**. In his view, the police and the prosecution ignored crucial evidence in order to push a narrative that the appellant was the murderer while a plethora of evidence pointed elsewhere. He submitted that the prosecution's evidence did not dislodge the appellant's cogent defence that he was not involved in the murder of the deceased and urged us to overturn the conviction and sentence imposed on the appellant.

Appearing for the State, **Mr. Hassan**, Senior Assistant Director of Public Prosecution opposed the appeal. He submitted that there was sufficient circumstantial evidence to support the charge of murder. He contended that the appellant's image was captured on CCTV withdrawing money from the deceased's account and the appellant denied knowing the deceased yet, **Martin** produced data records proving that there was communication between the two. He submitted that the fact that **Daudi** was not apprehended did not exonerate the appellant and evidence produced indicated that he was responsible for the murder either alone or jointly with the said **Daudi**.

We have considered the record, the grounds of appeal, the rival submissions and the authorities relied upon. This being a first appeal, this court is obliged to re-analyze and re-evaluate the evidence of the trial court and come up with its own findings and conclusion (see **Okeno v. Republic [1972] E.A 32**). In our view, two issues stand out for our consideration: whether the circumstantial evidence relied upon by the prosecution and the court met the required threshold of proof beyond reasonable doubt and secondly, whether the prosecution established that the appellant, with malice aforethought, caused the death of the deceased.

It is common ground that there was no direct evidence as to the commission of the murder and consequently the prosecution's entire case laid out various events which amounted to circumstantial evidence connecting the appellant with the death of the deceased. It is trite that in order to justify a finding of guilt based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. In addition, there must be no other co-existing circumstances weakening the chain of circumstances relied on. This burden lies squarely on the prosecution and never shifts to the person accused (see **Rex Vs. Kipkering Arap Koskei & 2 others [1949] 16 EACA 135**). See also the case of **Neema Mwandaro Ndurya versus Republic, Criminal Appeal No.446 (2007) (UR)** where this Court reiterated that:-

***“It is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factors or circumstances which may weaken or destroy the inference of the guilt of the accused person”.***

The circumstantial evidence presented by the prosecution in support of the appellant's conviction is that first, the appellant used the deceased's ATM card after the deceased's disappearance to make withdrawals from the deceased's account at Equity bank. This was confirmed by **Wafula**, a security officer with Equity Bank who testified that the bank cameras captured the image of the appellant as the person who operated the account and he produced images of the appellant withdrawing money on **22<sup>nd</sup> July 2009** from an ATM in Githurai and on **23<sup>rd</sup> July 2009**, from an ATM in Embu. Secondly, the testimony of **Joseph, Emily and Edith** was that there was bad blood between the deceased and the appellant because a year earlier, the deceased had sold counterfeit red mercury to the appellant and his wife and conned them of a substantial amount of money, which angered the appellant. Then there was the incriminating data records from Safaricom which proved that the appellant had inserted his sim card into the deceased's handset on **19<sup>th</sup> August, 2009, 31<sup>st</sup> August 2009** and on **2<sup>nd</sup> September, 2009**.

On our own evaluation and analysis of the evidence on record, we harbour no doubt that the circumstantial evidence relied on by the trial judge cumulatively met the threshold of pointing irresistibly to the guilt of the appellant as the person who murdered the deceased and that no other conclusion, save for the guilt of the appellant could be arrived at. The appellant's defence that he had never met, interacted or called the deceased and that he only withdrew money using the deceased's ATM card under instructions of **Daudi** in Githurai and Embu is a mere denial. The Equity bank CCTV cameras captured the appellant withdrawing money from the deceased's account; and **Wafula** who viewed the images confirmed that it was indeed the appellant who was captured in the footage. The appellant admits having used the deceased's ATM card to withdraw money from the deceased's account, although he says this was only twice. Furthermore, the appellant in his testimony admitted that his telephone number in 2009 was **0720006458**. A perusal of the Safaricom data records produced before the court show that the deceased's handset which had an identifying number namely; **IMEI 357308019360520** was used by the appellant to insert his own sim card-telephone number 0720006458 on **24<sup>th</sup> August 2009 at 17:00:50**, on **30<sup>th</sup> August 2009 at 14:03:55**, on **31<sup>st</sup> August**

**2009 at 20:15:24** and on **1<sup>st</sup> September 2009 at 18:21:59**. Clearly the unavoidable inference from the above circumstances is that the appellant had been in the company of the deceased around the time of his disappearance, that the appellant took possession of the deceased's ATM card and made 6 withdrawals each of Kshs 20,000.00 and even after the deceased's death he had access to the deceased's cell-phone which had been in his possession from the time of the deceased's disappearance and the subsequent murder. This phone was later traced to **Samuel** who testified that it had been left with him by **Daudi**, the appellant's associate as a lien for a sum of Ksh 1,000.00 borrowed by **Daudi**. It does not matter that **Wafula** produced only two images of the CCTV cameras.

The last piece of evidence said to incriminate the appellant was that of motive, which formed the background to the circumstances leading up to deceased's death. In the case of **Choge vs Republic (1985) KLR 1**, this Court held as follows:-

***“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability.***

Even though the motive for committing a criminal offence is unnecessary in ascertaining criminal culpability, it becomes an important

element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. (See *Libambula vs. Republic [2003] KLR 683*). In the case before us, the learned Judge observed that **Joseph, Emily and Edith** attested to there being bad blood between the deceased and the appellant given that the deceased had conned the appellant by selling him fake red mercury and extorting a substantial amount of money from him which resulted in ill-will and which provoked the instant offence. We find no reason to doubt this version of events since it was the appellant who led the police to these witnesses in Embu during investigations and they had no reason to give a false account. Consequently we can safely draw an inference that: the appellant's motive for the offence was an attempt to recover the money swindled by the deceased; he lured the deceased, abducted him, took his ATM card and withdrew the stated amounts until the account was blocked by the bank at the request of his family and only then did he murder the deceased. We therefore fully concur with the learned Judge's conclusion:

***I find and hold that the circumstantial evidence tendered herein puts the accused with the deceased and it is clear that the accused held the deceased either alone or with one Mbaka Hannington alias Daudi who has not been traced to date in an attempt to recover the money he had lost when he was conned out of the same ."***

As for the issue of malice aforethought, it is our view that this ground of appeal has no merit because malice aforethought can readily be inferred from the circumstances of the case by the nature of the injuries inflicted on the deceased. **Dr. Njau** who carried out the post mortem examination found that the deceased had multiple fractures on the face and the head, bruises on the chest and multiple stab wounds mainly on the neck. In his view, the main cause of death was stab wounds and that the bruises were inflicted after he was stabbed to death. Clearly, the appellant had the intention to cause the death of the deceased.

In the end, we find that all elements of the offence of murder were proved to the required standard. Consequently, the appeal on conviction fails and is dismissed.

On sentence, we take note that a mandatory death sentence is not the only sentence available for the offence of murder in view of the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*, where the court held that a mandatory death sentence is unconstitutional. We must therefore consider the circumstances of each case, the mitigation provided if any, and impose an appropriate sentence including the death penalty where deserved. We note that the appellant was a 1<sup>st</sup> offender and had been in custody for almost 8 years prior to his sentencing. We have also taken into consideration the painful and torturous manner (from the postmortem conducted by **Dr. Njau**) in which the deceased met his death. Taking the totality of the circumstances into consideration, we set aside the sentence of death and substitute it with a sentence of thirty (30) years imprisonment with effect from **2<sup>nd</sup> November, 2017**, when the appellant was sentenced.

It is so ordered.

***Dated and Delivered at Nairobi this 23<sup>rd</sup> Day of October, 2020.***

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. Ole KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**