IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MAKHANDIA, JJ.A)

CRIMINAL APPEAL NO. 23 OF 2017

BETWEEN

TITUS MUSYOKA MUTINDA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) delivered on 31st January 2017 ***in H.C.CR.C. No. 11 of 2015)***

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JUDGMENT OF THE COURT

1. This is an appeal by Titus Musyoka (appellant), against the conviction and sentence by the High Court sitting in Kajiado (R. Nyakundi, J.) for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Being a first appeal, as envisaged under **Section 379** of the Criminal Procedure Code and in conformity with **Okeno v. R (1972) EA 32**, this Court is enjoined to subject the entire evidence tendered before the Court to a fresh examination and come up with its own conclusions with the usual caveat that unlike the trial court, we do not have the advantage of having seen the witnesses as they testified and we must therefore give allowance for that. Therefore, it is paramount for us to summarize the events leading to appellant's arrest and arraignment in court.

2. The facts of this case reveal that the appellant was well known to the deceased, Shoilla Ngina Kaniki as they were lovers. On the fateful night of 13th September, 2011 at or about 12.30 a.m. the appellant and the deceased were quarrelling in the deceased's house. Humphrey Elmokosi (PW4), the deceased's son who is a two-year-old minor, and the only eyewitness was woken up from his sleep by the squabbles and he saw the appellant beating and stabbing the deceased with a knife and fleeing the scene.

3. On seeing this, PW4 screamed and raised an alarm causing the neighbours to come to the scene; the door had been locked from outside and was forced open by some of the neighbours. One Josephine Mwely (PW3) who was the deceased's immediate neighbour and one Mama Chiro who had alerted PW3 after hearing PW4's screams rushed to the scene and on arrival, they found the door wide open and PW4 who was dumbstruck emerged from the house in blood stained clothes. PW3 took PW4 into her custody.

4. Shortly after, Jackline Atieno (PW6), the Investigating Officer, in the company of her colleagues, IP Ongute and PC Maiyo arrived at the scene.

In the house, they found the deceased's lifeless body in a pool of blood with physical injuries, which included stab wounds on the neck and arm. They also recovered 1 small torch, a knife, and a white t-shirt which were all blood-stained. PW6 recorded PW4's statement and statements of some of the neighbours and set out to look for the appellant who was nowhere in sight. He was later arrested by administration police officers, among them APC Amos Kinyua Wachira (PW9) and APC Michael Kiringa, after getting wind that members of the public had seized him on allegations that he was a murder suspect. When they arrested him, he had a bandaged wound on his neck.

5. According to Damaris Aketch (PW5), the nurse on duty at Iseneti Dispensary on 13th September, 2011, the appellant had earlier that day visited the dispensary at or about 2.30 p.m. with a cut wound on his neck. The appellant claimed to have sustained the injuries from a fight with some men over a bag of sugar.

6. On 15th September, 2011 the deceased's brothers Benson Kooi (PW1) and Samar Oltalesoi (PW2), in the company of Police Constable Daniel Mwaura (PW7), identified the deceased's body at Loitokitok Hospital Mortuary and attended the post-mortem. Upon conducting the examination, the medical officer, Dr. Stephen Mutiso (PW8), established that the deceased had multiple stab wounds to the head, the back between the shoulder-blades, right side of the shoulder and an interior wound to the neck measuring 15 cm running from the left to the right

side. The doctor concluded that the cause of death was massive haemorrhage resulting from a total of 13 stab wounds with two fatal wounds passing through the neck anteriorly and exteriorly.

7. It was in the above circumstances that the appellant was arrested and arraigned before the High Court. Ultimately, the appellant was found to have a case to answer and was placed on his defence upon which he testified on oath and did not call any witness. In his defence, the appellant acknowledged that the deceased was known to him and that she was his girlfriend and not his wife. He denied living with her stating that he had never visited her at her house but that she visited him severally at his house with her two sons, both minors, who referred to him as "uncle". He denied having been with or seen the deceased on the material day raising an alibi that he had spent the whole day at his welding workshop with his assistant, one Wambua Mutua, and that he only left for his house at around 10.00 p.m. Further, that he had sustained the injuries after he had been assaulted by unknown people while coming from a grocery shop carrying sugar which he had bought with the intention of reselling. He stated that he only learnt of the deceased's demise when he was arrested.

8. After weighing the evidence before him, the trial Judge was satisfied that the prosecution had proved the offence of murder as against the appellant. Ultimately, the trial Judge concluded as follows;

> **"In my view the evidence before me taken in totality falls under the category of circumstantial evidence. The best exposition of which constitutes circumstantial evidence can be found in Sankar on Evidence 15th Edition Reprint 2004 at pg 66 – 68: …**
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> **Applying these principles to the case before me I find the testimony of PW1, PW2 and PW3 to be circumstantial in respect of accused relationship with the deceased. Secondly that prior to the 12/9/2011 accused stayed together in the house where deceased was murdered. That fact was admitted by the accused. PW4 knew the accused as uncle to the family. He appeared to know the accused as uncle hence the reason he did not know his actual name properly. The accused was part of the deceased family by virtue of the relationship they kept during the lifetime of the deceased. This 12/9/2011** (sic) **nothing has been shown to controvert the piece evidence that accused was not with the deceased prior to her death.**
>
> **From the evidence I am satisfied that the prosecution has discharged the burden of proof beyond reasonable doubt against the accused person. In my view the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code facing the accused with all the ingredients have been established. As a result there is ample evidence to support a verdict of guilty and conviction of the accused in respect of the offence of murder as charged."**

9. Upon conviction of the appellant through his counsel pleaded for leniency in mitigation but he was sentenced to death.

10. This conclusion triggered the instant appeal that is predicated on the grounds that the learned Judge erred in law and fact in: failing to find that there was no proper identification of the appellant was done by the prosecution; failing to find that the evidence before the trial Court was not conclusive to establish the offence of murder against the appellant beyond reasonable doubt; failing to make a finding that the circumstantial evidence tendered did not point irresistibly towards the guilt of the appellant and; passing a mandatory death sentence against the appellant.

11. Learned counsel for the appellant filed written submissions which he highlighted during the plenary hearing conducted through video link. Learned counsel for the State filed no submissions but opposed the appeal and responded to the appellant's submissions orally.

12. In his submission, counsel for the appellant faulted the trial Judge for finding that the prosecution had established its case yet the only eyewitness was PW4, a minor who gave unsworn evidence. He further argued that the circumstantial evidence was not enough to prove the appellant's guilt beyond reasonable doubt. Citing among others the case of **Ndurya v. Republic, Mombasa Criminal Appeal No. 446 of 2007** counsel submitted that the prosecution's case heavily relied on circumstantial evidence which was not conclusive enough to point irresistibly towards the appellant's guilt.

13. On sentencing, he cited the celebrated case of **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** in urging this Court to consider the appellant's mitigation before the trial Court and remit the case back to the High Court for re-sentencing.

14. In response, Ms Matiru learned Counsel for the State supported both conviction and sentence and urged the Court to dismiss the appeal.

While seemingly admitting that the evidence of PW4 on its own was insufficient to support a conviction, counsel opined that PW3's evidence to the effect that the appellant and the deceased used to live together offered corroboration to PW4's evidence. Moreover, submitted counsel, the fact that the appellant had gone into hiding after the offence was committed was evidence of guilt.

15. We have considered the evidence on record in its entirety along with the rival submissions by counsel and the law. This appeal revolves around circumstantial evidence, and the cardinal issue for our determination is whether the circumstantial evidence on record is sufficient to sustain the conviction.

16. The fact of the deceased's death is not disputed. From the nature of the injuries found on her body, it is also evident that whoever caused the death had the requisite malice aforethought. In our view therefore, there is only one issue calling for our determination, which is whether the evidence on record establishes beyond reasonable doubt that the appellant and no other person was responsible for the deceased's death.

17. The only direct evidence is that of the 2 - 3 years old boy. In order for this evidence to be relied upon to convict, it definitely needed corroboration by other material independent evidence. Before we even consider corroboration, we need to evaluate PW4's evidence and determine if it has any evidential value. We appreciate that the witness was a very young boy. In his evidence in chief he said he could not remember his mother's name; he could not remember his own name and did not even know the appellant's name. At first he said that his mother was cooking when the appellant stabbed her with a knife and ran away.

18. On cross examination, he changed his story and stated that there were 4 adult men inside the house and they were the ones who attacked his mother. He did not know their names, he said. At some point he said he was in the house with his sister, then he said he was alone with his mother. From what we can decipher from the proceedings, the child was clearly traumatised and there is a possibility that he could not remember anything. His testimony was to say the least incoherent and inconsistent and we do not attach any probative value to it whatsoever. It is evident that it is not capable of being corroborated by any other evidence.

19. Nonetheless, there is no requirement in law that the guilt of a person must be proved by direct evidence alone. Circumstantial evidence can also sufficiently buttress the establishment of the guilt of an accused person as was held in the case of **Musili Tulo v. Republic, Criminal Appeal No. 30 of 2013**, where this Court pronounced itself as follows:-

> **"[C]ircumstantial 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."**

20. It is trite that for circumstantial evidence to form the basis of a conviction, several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of all others. This test has previously been applied in many cases by this court for instance, in **Judith Achieng' Ochieng' v. Republic, Criminal Appeal 218 of 2006**,where the Court restated the law 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 the 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 the 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."**

21. Therefore, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any other reasonable hypothesis other than that of the accused's guilt. (See: **Teper v. The Queen (1952) Ac 480; Kipkering Arap Koskei & Another v. Republic (1949) 16 EACA 135** and **Ndurya v. Republic (2008) KLR 135**).

22. We will now consider whether the circumstantial evidence on record can pass muster to establish without doubt that the appellant killed the deceased. The so called circumstantial evidence on record is that the appellant had lived with the deceased for about a month prior to the killing; that the two had been seen together earlier that day; the appellant had presented himself to the clinic for treatment in the afternoon after the incident and that he had been arrested in the forest. We have nonetheless perused the record and none of the witnesses who allegedly arrested the appellant from the forest testified before the trial court. That evidence therefore remains hearsay evidence and hence inadmissible.

23. On his part, the appellant raised a defence of alibi stating that on the material day he had worked all day with his assistant at his welding workshop and that they stayed till around 10.00 p.m. when he left for his house. Therefore, that since he had not seen the deceased on the said day, there was a possibility that the crime had been committed by someone else other than him.

24. The law on the defence of alibi was succinctly restated by this Court in **Charles Anjare Mwamusi v. R, CR.A. No. 226 of 2002** thus:-

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."** (Emphasis supplied)

The onus to disprove the appellant's alibi therefore reposed with the prosecution. Did the prosecution discharge that burden? The appellant's alibi defence must be considered *vis a vis* the circumstantial evidence which we have analysed.

25. The appellant does not deny having a stab wound on his neck. He gave an explanation as to how he sustained the said injury. It behoved the prosecution to prove that the injury was related in some way or other to the deceased's death. There was no iota of evidence, not even from PW4 to the effect that the deceased had stabbed the appellant during the fight in the deceased's house. How that stab wound was sustained remained a mystery and the only explanation on record was the one proffered by the appellant.

26. Regrettably, there was no evidence availed to court to show that some of the blood found at the scene belonged to the appellant. We appreciate the hardship faced by the police in preservation of blood samples collected from the scene of crime for forensic testing by the Government analyst. This does not lessen the burden on the prosecution to match the blood types of the samples collected from the scene of crime with samples collected from either the deceased or the appellant.

27. Our analysis of the evidence on record leads us to the conclusion that the prosecution failed to place the appellant at the *locus in quo*. The prosecution also failed to dislodge the appellant's alibi evidence which was tendered on oath.

28. In as much as we sympathise with the deceased's family and in particular her children who were left destitute, the law enjoins us to uphold convictions only where the evidence on record proves beyond reasonable doubt that the appellant committed the offence he was charged with. There could have been good reason to suspect that the appellant was the perpetrator of the heinous act that took away the life

of a young mother, but we reiterate that suspicion however strong cannot form the basis of a conviction.

29. Based on the foregoing reasons, we make a finding that the charge against the appellant was not proved to the required standard. We find this appeal meritorious and allow it and order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

ASIKE - MAKHANDIA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR