IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, M'INOTI & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 87 OF 2019

BETWEEN

WKN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from a Judgment of the High Court of Kenya (Hon. R. Korir, J.) dated 15th October, 2015

in HC CR CASE No. 42 of 2011)

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JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Nairobi dated 15th October 2015 in Criminal Case No. 42 of 2011(**R. Korir, J**.).

The background to the appeal is that on 15th April 2011, PW4, **CPL Simon Ekeno** received a phone call from **MGN (the deceased)** reporting a threat to his life by his estranged wife, **the appellant**. On 16th and 20th of the same month, the deceased called PW4 promising to bring a witness to the threat, but he died before he could do so.

On the morning of 28th April 2011, PW2, **CMG**, received a phone call from a nephew informing him that the deceased had been murdered the previous night at his residence in Ruai. PW2 immediately left for the scene. On arrival, he found a large crowd gathered, among them police officers. On entering the house, he noticed blood splattered all over the walls and the floor.

The deceased's mutilated body lay in the bedroom with cuts and knife stabs all over the body. The body was removed to the city mortuary where it was identified to **Dr. Ndegwa** by PW2 and his uncle **G,** for postmortem (P.M report) which was carried out on 4th May 2011. The PM report was produced in evidence as an exhibit under **section 33** of the Evidence Act by PW6, **Dr. Dorothy Njeru** on behalf of **Dr. Ndegwa** as she was conversant with both his handwriting and signature. Findings on the body were *inter alia*, that, the clothes were bloodstained. Externally there were twelve (12) incised wounds. There was also intracranial haemorrhage. In **Dr. Ndegwa's** opinion the cause of death was head injury due to sharp trauma.

Investigations into the murder of the deceased commenced on 28th April 2011 led by **CPL Makokha,** assisted by **PW10, CPL Anthony Nyambu,** and **PW11, PC Peter Ngome,** among other police officers. Observations of the scene by PW2,10 and 11 were that there was blood splattered all over the walls and on the floor of the house. The deceased was dressed in a T-shirt and trouser, with a sandal on the right foot. There were deep cut wounds all over the body, bruises on the back, and hands. The police recovered a sack stuffed with blood stained clothing and beddings from underneath the bed. **PW10** photographed the scene and subsequently produced the photographs in evidence as exhibits.

The appellant was arrested on the same date as a suspect and taken to Ruai Police Station where she was searched by PW1, **PC Nancy Akinyi** who recovered a blood stained brazier that she was wearing. The next day, 29th April 2011, the appellant led the police investigators to a toilet 400 metres from the house where the deceased had been murdered, from where the police recovered 2 blood stained pangas and a broken kitchen knife. These exhibits together with those recovered from the appellant and at the scene of crime, and the blood samples taken from the deceased's body and from the appellant, were taken to the government chemist for analysis on 10th May 2011, by **No. 70865 CPL Makokha** of Ruai Police Station.

For the purpose of ***Section 77(1)*** of the ***Evidence Act Laws of Kenya***, the findings by Ann Wangechi Nderitu were as follows:

> *Item 1: Blood sample labelled 'MG' indicated as of the deceased, Muriuki Gicheru Njau*
>
> *Item 2: Blood Sample labelled 'WN' indicated as of the accused, Winrose Njeri Kamau*
>
> *Item 3: A panga labelled 'C-1'*
>
> *Item 4: A panga labelled 'C-2'*
>
> *Item 5: a broken knife labelled 'E'*
>
> *Item 6: A brassiere labelled 'F' indicated as found at Ruai Police Station*
>
> *Item 7: A pair of sandals labelled 'G' indicated as found at the scene*
>
> *Item 8: A trouser labelled 'H'*
>
> *Item 9: A bedcover labelled 'I'*
>
> **Report**
>
> *1. The blood sample (Item 1) indicated as of MG generated a partial DNA*
>
> *2. The profiles generated from the listed items above are tabulated and produced at the end of this report.*
>
> **Conclusion and Opinion**
>
> *1. The panga ('C-2') brassiere ('F'), trouser ('H') and bedcover ('I') all generated the same DNA profile of unknown male origin.*
>
> *2. The DNA profile generated from the blood stains on the panga ('C-I') generated a DNA profile of unknown male origin.*
>
> *3. The DNA profile generated from the blood stains on the knife ('E') was of an unknown male origin.*
>
> *4. The DNA profile generated from the blood stains on the sandals ('G' was of an unknown male origin.*

PW7's, response to questions put to her in a brief cross examination was that; DNA profile of the unknown male origin did not refer to the deceased; the DNA of the deceased was not complete. Neither did the deceased's DNA match any of the items she examined. The blood sample of the appellant did not also match any of the DNA samples examined by her.

PW9, **Dr. Zephania Kamau** examined and certified the appellant mentally fit to stand trial. PW5, **Lawrence Mutunga Mugala** who stated that he had been cohabiting with the appellant, recalled that on 27th April 2011 the appellant left the house saying she was going to attend to a sick child. She came back the next day at 3.00 a.m with muddy feet. He left for work at 5.00 a.m leaving her in the house only for him to receive a call during the day from her brother informing him that she had been arrested and was detained at Ruai Police Station for the murder of the deceased.

The appellant's alibi defence was that she and the deceased left their house at 4.00 p.m on 27th April 2011, each headed for their respective places of work. She worked at her pub till early next morning when she left for home, arriving home at 6.00 a.m only for her to find the deceased murdered. According to her, she called PW2 who came to the scene and thereafter accompanied her to Ruai Police Station to report the murder. She was therefore surprised when police arrested her and subsequently charged her with the murder of the deceased which she was not privy to.

At the conclusion of the trial, the learned trial Judge analyzed the evidence, reviewed the case of **Sawe vs. Republic [2003] KLR 364**, on the threshold for sustaining a conviction based on circumstantial evidence; the case of **Mutonyi vs. Republic [1982] KLR 203**; on the weight to be attached to an expert opinion; and also construed **section 48(1)** of the Evidence Act and applying the above threshold to the rival positions before the Court, made findings thereon as follows:

> ***31. What I find baffling, however is the finding that the blood sample of the deceased generated a partial DNA profile and that none of the blood samples collected at the scene matched with that of the deceased. This is so puzzling because the items were collected at the scene shortly after the offence was committed. From the evidence of the prosecution witnesses, the scene of crime was full of blood. This evidence is more vivid from the testimony of PW2 brother to the deceased and Cpl. Anthony Nyambu (PW7), who visited the scene and took photographs. PW2 testified that he saw blood spattered all over the sitting room and bedroom floors in the deceased's house. PW10 on the other hand told the Court that the carpet in the living room was soaked in blood while the walls were also spattered with blood. There was also blood inside one of the bedrooms, towards the door while under the bed there was luggage in a sack oozing with blood-like liquid which was found to contain blood-soaked items.***
>
> ***32. A study of the report submitted by the expert witness reveals that the blood sample from the deceased only revealed a profile***

of three loci out of the 11 identifiable loci, while one of the loci shows a partial profile. In my view, while a partial profile leads to a conclusive proof of absence of matching with the exhibited samples as correctly stated by the analyst, it cannot lead to conclusive proof that the blood on the exhibits did not come from the deceased. To the extent that the DNA generated from the blood sample said to belong to the deceased was partial, the expert could not with certainty rule out the possibility that the blood originated from him.

33. I note a further observation drawn from the finding that the panga ('C-2') brassiere ('F'), trouser ('H') and bedcover ('I') all generated the same DNA profile of unknown male origin. Clearly, this finding, as can be assessed from the report, reveals a perfect match of the samples, since all the loci obtained from the samples of the three items were a perfect match. The observation I can make out of this finding is that the blood sample from the brassiere, one panga and bedcover came from the same source, i.e of the unknown male origin.

34. A more critical observation is that this finding creates an undeniable link between the three items i.e the bedcover, the panga and the 1st accused who was wearing the blood stained brassiere. Even though the expert witness did not make a finding of a match with the blood of the deceased, I nevertheless find that the conclusion on the three items i.e that the blood originated from the same source, places the 1st accused at the scene. This is because, the bedcover was recovered in the deceased's house and the panga had been recovered near the scene.

On motive, the learned Judge opined that, the evidence of PW2 and 5 proved that the appellant had motive to eliminate the deceased as a means of resolving the property dispute between them.

On the appellant's alibi defence, the learned Judge weighed it against PW2, 5, and 11's evidence and found it not truthful and credible and concluded that the appellant's alibi defence had been displaced by the cumulative evidence of the prosecution.

On proof of malice aforethought against the appellant, the learned Judge took into consideration the elements of malice aforethought as set out in **section 206** of the **Penal Code** in light of the prosecution evidence and arrived at the conclusion that the evidence on the record irresistibly pointed to the conclusion that the appellant jointly with others caused the unlawful death of the deceased and on that account, found the appellant guilty of the offence charged and convicted her accordingly.

The appellant was aggrieved and filed this appeal raising five (5) grounds of appeal. It is the appellant's complaint that the learned Judge misdirected himself

by:

(i) Convicting her purely on circumstantial evidence while ignoring the principles governing circumstantial evidence which in this appeal did not irresistibly point towards her guilt;

(ii) Convicting her on the basis of the DNA evidence produced in court which was not linked to her.

(iii) Failing to take into account that the exhibits produced in court did not directly link her to the death of the deceased.

(iv) Convicting her without proof of all the elements of murder.

(v) Convicting her without taking into consideration that the prosecution had not proved its case beyond reasonable doubt.

The appeal was canvassed through the appellant's written submissions which were orally highlighted and supported by legal authorities, and oral submissions on behalf of the State. Learned counsel, **Seth Kamanza** appeared for the appellant while **Mr. O'Mirera**, the learned Senior Assistant Director of Public Prosecution (SADPP) appeared for the State.

Supporting ground 1, the appellant relied on **Moses Kabue Karuoya vs. Republic [2016] eKLR** on the definition of both direct and circumstantial evidence, with direct evidence defined as evidence directly perceived by a witness, and circumstantial evidence as evidence of circumstances from which an inference may be drawn.

The appellant also relied on **John Gachoki Ngilu vs. Republic [2018]eKLR** and **Abanga *alias* Onyango vs. Republic Cr. Appeal No. 32 of 1990 (UR)** wherein it was stated that the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established; that those circumstances should be of a definitive tendency, unerringly pointing towards the guilt of the accused and that the circumstances taken cumulatively should form a chain so complete that there is no escaping the conclusion that within all human probability, the crime was committed by the accused and no one else. In addition the judgment in **Simon Musoke vs. Republic [1958] EA** page **715**, was cited to the effect that:

> **"to act on circumstantial evidence to support a conviction, the evidence must point irresistibly to the accused persons' guilt to the exclusion of everybody else and that before drawing the inference of the accused persons' guilt from circumstantial evidence, the court must before that ensure that there are no other co-existing circumstances which would weaken or destroy that inference"**

Lastly, the appellant relied on **Mary Wanjiku Gichira vs. Republic [1998]eKLR** and submitted that suspicion alone, however strong, cannot form the basis of a conviction.

Supporting ground 2 and 3, the appellant relied on **Republic vs. Timothy Mwenda Gichuru & 2 Others [2017]eKLR** and submitted that it was erroneous for the learned judge to rely on the findings of the analyst to convict her. She contended that PW 7's evidence was that the blood sample that was examined was from an unknown male and not from the deceased.

On proof of the offence of murder, the appellant relied on **section 206** of the **Penal Code** on the elements of the offence and submitted that these were never proved and it was therefore erroneous for the trial Judge to convict her for the offence of murder.

On burden of proof in a criminal trial, the appellant relied on section 107 of the Evidence Act; the judgments in **Republic vs. Silas Magongo Onzere alias Fredrick Mamema [2017]eKLR** and **Republic vs. Savi Musingila [2018]eKLR** and submitted that the law in Kenya as entrenched in the Constitution under **Article 50(2)(a)** is that an accused person is presumed to be innocent until the contrary is proved. She added there is no duty on an accused person to prove anything in a criminal charge because the burden rests solely on the prosecution throughout the trial save in instances where there are admissions by an accused person, which was not the case in the instant appeal.

In rebuttal of the appellant's submissions, **Mr. O'Mirera** submitted that the evidence adduced by the prosecution proved beyond reasonable doubt that the death of the deceased occurred due to a trauma inflicted in his house with a sharp object. According to counsel the only issue in contest both at the trial and now on appeal is who caused the death of the deceased. While appreciating that there was no direct evidence linking the appellant to the murder of the deceased, counsel submitted that the evidence of PW 4 to the effect that the deceased reported threats to his life by the appellant and the DNA findings in the analyst report were credible and were sufficient proof of a link between the appellant and the death of the deceased.

Turning to the DNA findings, **Mr. O'Mirera**, submitted that the trial Judge rightly rejected the Analyst's report that the DNA detected was for an unknown male and therefore had no link to the deceased, because the evidence tendered by the prosecution was that blood samples had been taken from the deceased's body and no other blood sample, except that of the appellant, had been submitted to the Government analyst.

On circumstantial evidence, **Mr. O'Mirera** submitted that the learned judge correctly held that the circumstantial evidence relied upon by the prosecution satisfied the threshold for sustaining a conviction. Second, the learned judge properly evaluated the said evidence against the DNA report before arriving at the conclusion that the evidence placed the appellant at the scene of the murder beyond reasonable doubt.

In reply, **Mr. Kamanza** reiterated the earlier submissions that it was the duty of the prosecution to prove the case against the appellant beyond reasonable doubt which in his opinion they failed to do. He therefore contended that there was no basis to convict the appellant especially when the DNA evidence showed that the blood sample analyzed in comparison with the blood stains on the exhibits referred to an unknown male and not the deceased.

This is a first appeal. Our mandate is as was aptly set out in the case of **Okeno vs. Republic [1972] EA 32**, namely:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

We have considered the evidence in light of the above mandate, and the rival submissions set out above. The issues that fall for determination in are, whether:

> ***1. The circumstantial evidence relied upon by the learned Judge to convict the appellant proved her guilt beyond reasonable doubt.***
>
> ***2. Whether the learned Judge erred in convicting the appellant on the basis of inconclusive DNA findings by PW7.***

On the first issue, the learned judge properly stated that in order to convict the appellant, the prosecution had to prove beyond reasonable doubt the elements of murder as set out in **section 206** of the **Penal Code,** namely proof that:

> ***(i) Death of a human being occurred.***
>
> ***(ii) The death was caused by an unlawful act or omission by the accused person.***
>
> ***(iii) The accused in committing the unlawful act or omission possessed malice aforethought.***

Under section 206 of the Penal Code, malice aforethought may be proved by:

> ***(i) 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.***
>
> ***(ii) 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly***

(iii) An intent to commit a felony."

(See **Joseph Githua Njuguna vs. Republic [2016]eKLR).**

We are satisfied, like the trial Judge, that the evidence on record left no doubt that the deceased was murdered and that from the nature and extent of the multiple injuries inflicted on his body, the death was caused with malice aforethought.

On circumstantial evidence, it is often the best evidence of surrounding circumstances which by intensified examination is capable of accurately proving innocence or guilt. In order to justify a conviction founded on such evidence:

(i) The inculpatory facts must be incompatible with the innocence of the accused.

(ii) They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

(iii) There must be no other existing circumstances weakening or destroying the inference.

(iv) Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

(See Ndurya vs. Republic [2008] KLR 135; Sawe vs. Republic [2003] KLR 364; Wambua & 3 others vs. Republic [2008] KLR 142; Mwendwa vs. Republic [2006] 1KLR 137, Kipkering Arap Koskei & Kirire Arap Matetu [1949] EACA 135), **Peter Mugambi vs. Republic [2017] eKLR,** and ***Dorcas Jebet Ketter & Another vs. Republic*** *(supra)).*

The incriminating factors that the learned Judge took into consideration to place the appellant at the scene of the murder of the deceased are the recovery of a blood stained brassiere from the appellant by PW1 on the very day she was arrested; and the testimony of PW11 that on 29th April 2011, a day after the murder of the deceased, the appellant led police officers to a disused toilet about 400 metres from the scene of the murder from where they recovered two pangas and a broken knife, all blood stained. The learned Judge found the testimony of those two witnesses truthful and credible as they were not challenged on their assertion that they had no grudge against the appellant and therefore had no reason to fabricate evidence against her.

It was also the learned Judge's opinion and correctly so in our view, that the appellant would not have led police to the recovery of those items if she did not know of their presence at the place from where they were recovered. The learned Judge however correctly stated that the recovery of the exhibits was not *perse* conclusive proof of the appellant's guilt.

The learned Judge appreciated that the government analyst's report fell into the category of expert opinion evidence, in respect of which **section 48(1**) of the Evidence Act provides as follows:

"48(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

The learned Judge considered judicial authority to the effect that an expert opinion tendered to court as evidence is not binding on the court and after expressing herself in paragraphs 31, 32, 33 and 34 of the judgment, which we have already set out above, concluded that the appellant's alibi defence was displaced by the cumulative prosecution evidence which placed her at the scene of the murder. We find no error in the learned Judge's reasoning and therefore no basis for interfering with her conclusion because the learned judge was entitled to form her own independent opinion on the expert opinion, particularly when it was manifestly incongruent from the evidence on record. The learned Judge also correctly stated that an expert opinion was not conclusive proof of any fact in issue in a trial and that such findings have to be considered and or weighed against the totality of the evidence on the record before arriving at any conclusion on the issue under inquiry.

We are satisfied that the learned Judge's findings were well founded both in law and on the facts, for the following reasons. The samples taken from the deceased was labelled **'MG'** which stood for his name, **MG**. The analyst report indicates that only two blood samples were received at the government chemist for analysis, that of the deceased and that of the appellant labeled "**WN"** for **WN**. There was no other blood sample submitted to the Government analyst. The analysis of the samples is clearly indicated on the reverse of the analyst's report, which was produced as an exhibit. After considering the report, the learned judge observed that the panga, brassiere, trouser and bedcover all generated the same DNA profile of the alleged unknown male. She noted too that the report showed a perfect match of the samples and concluded that the blood samples from the brassiere, the panga and bedcover, which matched, came from the same source thus creating a link between the three items and placing the appellant at the scene of crime. As we have stated, the evidence on record shows that only the deceased was murdered in the house, and no blood sample of any other male person was submitted to the Government analyst. We are satisfied by the conclusion reached by the learned judge.

We may add too that this being a case resting on circumstantial evidence, motive was a relevant consideration and the prosecution adduced sufficient evidence of motive on the part of the appellant, namely serious property dispute leading to threats to the life of the deceased. In **Libambula v. Republic [2003] 1 KLR 683,** this Court stated as follows:

"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime." (Emphasis added).

The upshot is that there is sufficient circumstantial evidence as well as direct evidence from PW5 to support the learned judge's finding that appellant's alibi defence was completely displaced and that she was placed at the scene of the murder. We find no merit in this appeal, which is hereby dismissed.

This judgement is delivered pursuant to **Rule 32 (2)** of the Court of Appeal Rules. Kantai, JA has not signed it.

Dated and delivered at Nairobi this 20th day of November, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

K' M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR