



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MURGOR, J. MOHAMMED & KANTAI, J.J.A.)**

**CRIMINAL APPEAL NO. 92 OF 2018**

**BETWEEN**

**REDEMPTA NTHENYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Kajiado*

*(Nyakundi, J.) dated 15th August, 2017*

**in**

**HC. CR.C. No. 3 of 2016)**

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**JUDGMENT OF THE COURT**

This is a first appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) delivered on 15th August, 2017.

In the information presented before that court the appellant, **Redempta Nthenya** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, particulars being that on 23rd November, 2015 at Ongata Rongai area in Kajiado, jointly with others not before court murdered **Teresia Wacuka Maina**. Being a first appeal it is our duty to reappraise the record, re-evaluate the evidence, in effect, give the appellant a fresh trial – See, for the mandate of a first appellate court the oft-cited case of **Okeno v Republic [1972]** where that mandate was stated to be:

*“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 vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. SUNDAY POST [1958] E.A 424.”*

The prosecution called a total of 21 witnesses in support of the case where details of the grisly murder of **Teresia Wacuka Maina** (“the deceased”) were given.

On 24th November, 2015 (the day after the deceased went missing) the appellant presented herself at Ongata Rongai Police Station where it was recorded in the Occurrence Book that her friend, the deceased, had gone missing from home and had not reported to work. The appellant gave police the deceased’s telephone number and this assisted in police investigations that then began.

**Jane Karae Mwanzia (PW18- Mwanzia)** is the appellant’s mother. She testified that the appellant visited home in Machakos in November, 2015 where she left two mobile phones. Mwanzia took the two phones and inserted into one a Safaricom sim card and into the other an Airtel sim card and happily proceeded to use the phones to communicate until 29th December, 2015 when police officers visited her home and confiscated the phones. She explained to the police that it was her daughter, the appellant, who had visited and left the phones at home. The police took the phones and left but returned on 14th January, 2016 when they arrested Mwanzia. Mwanzia telephoned the appellant and

arranged her arrest and they were both booked at Ongata Rongai Police Station. Mwanzia further testified that the appellant had in November, 2015 sent to her money through M-Pesa in the sum of Kshs.25,000 and she identified the two mobile phones in court.

The testimony of **Monica Wanjiku Maina (PW2 – Wanjiku)**, mother of the deceased, and **Gabriel Gathecha (PW3-Gathecha)** related to the efforts made to trace the deceased after her disappearance. The latter also participated in identifying the decomposing body at the City Mortuary for post mortem.

**Sammy Mwangi Mugo (PW4 – Mugo)**, boyfriend to the deceased, received a telephone call from her on 22nd November, 2015 where she informed him that she had lost Kshs. 25,000 which had been transferred from her M-Pesa account on telephone 0703 758194. He advised her to report the loss to Safaricom. The deceased informed him, the next day, in a telephone conversation that Safaricom had confirmed to her that the lost money was "... with her friend". This is the last conversation he had with her. He visited the deceased's house at Ongata Rongai in the evening of 24th November, 2015 but found her house locked; she was not there; a situation that persisted when he visited again the next day 25th November, 2015. This worried him forcing him to visit the deceased's place of work but he was told that she had not reported to work for the last two days. He called her brother **John Njoroge Njuguna (PW5 - Njuguna)** and they decided to make a report to Ongata Rongai Police Station where, upon making the report, they were told that a similar report had already been made. Later, in January, 2016, in company of police they travelled to Machakos where Mwanzia was arrested and later, the appellant. He identified the deceased's body for purposes of post mortem. He identified a phone – **Samsung S/No. [Particulars Withheld]and S/No. RF/R2/F/[Particulars Withheld]** registered in his name which he had given his girlfriend, the deceased, to use. These were the phones recovered from Mwanzia in Machakos.

According to Njuguna, the appellant was the last person to be seen with the deceased and he and one Gathecha gave that information to police, information they had gathered from the deceased's neighbours. **Joseph Ruhiu Muigai (PW6-Muigai)** owned a plot at Ongata Rongai where there was a septic tank. It is at that septic tank that the body of the deceased was recovered by police.

**James Kyalo (PW8 - Kyalo)**, a **Certified Digital Forensic Examiner** based at the **Cyber Crime Directorate**, CID headquarters, received from **PC Douglas Chebii** a Samsung mobile phone and a sim card for Safaricom with "**Integrated Circuit Identity Number**" [Particulars Withheld]. From it he was required to establish whether that phone had received a message on 23rd November, 2015 at 1748 hours. He established that a message was indeed received from the subscriber to [Particulars Withheld] and the message was read. He prepared and signed a report which he produced in court as part of the evidence.

**SS Benson Kasyoki**, the **DCIO Ongata Rongai Police Station (PW10- the DCIO)**, on 14th January, 2016 received the appellant at about 8 p.m. She was accompanied by her brother **Michael Musyoki Mwanzia (PW19 - Musyoki)**.

He took a charge and cautionary statement from the appellant and recorded a statement for about 4 hours with a 1-hour break. He produced the statement as part of the evidence.

Meanwhile **Sgt. Richard Ekuton (PW11- Ekuton)** of Ongata Rongai Police Station had on 24th November, 2015 received a report of a missing person from the appellant. He carried out investigations which included tracing the location of the phones we have referred to through Safaricom. This led to tracing of the phones in Machakos in possession of Mwanzia. He produced the phones in court as part of the evidence and also an inventory of the same.

It was the testimony of **PC Lazarus Njuguna**, formerly of Ongata Rongai Police Station, that upon taking over investigations from another police officer he asked both Safaricom and Airtel mobile phone providers for help and this is how the two mobile phones and sim cards were recovered from Mwanzia in Machakos. He arrested both Mwanzia and the appellant. In the course of interrogating the appellant she alleged that she had taken the deceased to a clinic to procure an abortion and that the deceased had died in that process. He visited the clinic and arrested its owner (**Frank Kariuki Njue - PW14 – Njue**) and his Secretary **Carolyn Wambui Njeri (PW13 – Njeri)**. Upon perusing patient records at the clinic he did not find any evidence that the deceased had been attended to at that clinic. On further interrogation the appellant revealed the information that the body of the deceased was in a septic tank. Police proceeded to the scene led by the appellant and Njue was also brought to the scene. When the septic tank was opened the body of the deceased, in a white sack, and tied with rope was recovered. The scene was photographed by **PC John Ngeno (PW9)** of the scene police station and this latter officer produced various photographs of the body and the same as part of the evidence. PC Njuguna also produced various exhibits as part of the evidence.

Then there was the testimony of **Margaret Maina (PW7 – Maina)**, a **Senior Chemist at the Government Chemist, Nairobi**. She was familiar with the signature of her colleague, **Kiptoo Sang**, who had prepared a report after receiving a sample from the police on 20th January, 2016. On that day Maina and Sang reviewed samples of the mother of the deceased and they generated DNA profiles which confirmed that **Monica Wanjiku Maina (PW2)** was the biological mother of the deceased. She produced the report and an exhibit Memo form as part of the evidence.

**Njue** and his Secretary **Njeri** of Afya Frank Medical Clinic Laboratory and Dental Services testified how they were arrested after the appellant had alleged that she accompanied the deceased to their clinic to procure an abortion. They denied ever receiving the deceased or attending to her.

**Musyoki**, brother of the appellant, was present when charge and cautionary statement was made to his sister at Ongata Rongai Police Station.

Then there was evidence from Safaricom through its **Liason Officer, Martin Wekesa**, whose duties were to extract data pertaining to calls and Mpesa transactions and to analyze the same. Upon receipt of a letter dated 29th January 2015 (this must be 2016) from Ongata Rongai Police Station requesting for **International Mobile Equipment Identification (IME)** of \*\*\*\*\* he found that the line was using **IME \*\*\*\*** which was inserted on 23rd November, 2015. It also used **IME \*\*\*\*\*** on 24th August, 2015. Data showed that the line had used IME on 23rd November, 2015 at 6.57.36 hours and on 4th December, 2015 at 12.18.54 hours. It was paired with \*\*\*\*\*. He later received another letter from the same police station requesting call data for another mobile phone usage for the period 18th November, 2015 to 4th December, 2015. Data extracted showed that the IME was using \*\*\*\*\* and the location was Machakos. He later received a court order requiring

extraction of Mpesa transactions for a line **0716 703 874** which was registered in the appellant's name. Examination of the data showed that on 22nd November, 2015 at 11.57.47 hours the account holder had received Kshs.25,000 from \*\*\*\* registered in the deceased's name. He prepared data on the three lines \*\*\*\*\* showing messages exchanged and voice calls made. He produced the data and appropriate certificate and also a letter from **Ethics and Compliance Certificate** under **Section 65** of the **Evidence Act** showing that he was qualified to testify as an expert. He identified telephone line 0711 546 573 as registered in the name of **Sammy Mwangi Mugo (PW4)**; 0703 758 194 registered in the name of the deceased and 0716 703 874 registered in the name of the appellant.

**PC Douglas Chege** of Ongata Rongai Police Station upon instructions arrested Njue and Njeri on 14th January, 2016. He participated in retrieving the body of the deceased after being led to the scene by the appellant and was also present during post mortem. Upon confirming from doctors that there was no abortion as alleged by the appellant he decided to advise of the Director of Public Prosecutions, to release Njue, Njeri and Mwanzia who as we have seen, became prosecution witnesses. He produced various documents into evidence.

We now examine medical evidence.

**Edwin Walong (PW1)**, a **Consultant Specialist Pathologist and Lecturer** at the **School of Medicine, University of Nairobi** was called on 20th January, 2016 by his colleague **Dr. Ndegwa** to perform the autopsy on the body of the deceased. On examination they found a decomposed body with **"adipocere condition"** which change occurs, as per his testimony, when a body is submerged in water and mixed condition. There were marks on the neck 10 cm in length and there was also a 2cm mark at the middle of the cervical spine. Internal postmortem did not reveal any internal injury and there was no evidence of termination of pregnancy. The doctors took specimens for DNA and concluded that the deceased died of asphyxia due to strangulation. He produced the report as part of the evidence.

That was the case put forth by the prosecution and in answer the appellant gave an unsworn statement where she testified that she was a sales girl who knew the deceased as a close friend and that she did not meet the deceased on 23rd November, 2015. Further, that because the deceased had a problem with her mobile phone the two of them went to the City Centre where they bought two phones, one of which she (the appellant) gave to her mother Mwanzia.

The High Court reevaluated the whole case and found that the prosecution had proved to the required standard that the appellant had murdered the deceased for which she was sentenced to death.

It is those findings that provoked this appeal which is premised on a Supplementary Memorandum of Appeal drawn for the appellant by her lawyers **M/S E.B. Nyamongo & Company Advocates** where 6 grounds of appeal are taken. In sum, it is said that the case was not proved as required in law; that the Judge of the High Court erred in not finding that **Section 204** of the **Penal Code** had been declared unconstitutional by the Supreme Court; that circumstantial evidence led in the case did not meet the required standard in law; that the defence was not analysed and that the High Court should have found that there were inconsistencies in the case which should have been resolved in favour of the appellant. We are therefore asked to set aside conviction of the appellant and quash the sentence imposed by the High Court.

When the appeal came up for virtual hearing due to the prevailing COVID-19 pandemic the appellant was represented by learned counsel Mrs. Nyamongo while learned State Counsel Miss Margaret Matiru appeared for the Republic. Learned counsel for the appellant had filed written submissions and a list of authorities and in a highlight Mrs. Nyamongo submitted that the appellant was not accorded a fair hearing contrary to **Article 50** of the **Constitution** because the appellant did not understand the English language but understood the Kiswahili language. Counsel submitted further that the confession given by the appellant took over 4 hours which made it unfair to the appellant. According to counsel the post mortem report was not produced by the maker and should thus have been disregarded by the trial court. Finally, that the sentence of death imposed be set aside as it was unconstitutional.

It was then Miss Matiru's turn to reply.

In opposing the appeal it was counsel's submission that the charge sheet was read out in Kiswahili language and the proceedings thereafter showed that the appellant was represented by counsel throughout the trial. On the manner the confession was taken counsel pointed out from the record that all rights were explained to the appellant before the confession was taken in English language, a language chosen by the appellant. On the issue of production of post mortem report Miss Matiru submitted that two doctors participated in the post mortem and one of those doctors produced the report in court. On the prosecution evidence counsel submitted from the evidence of PW4 (Sammy Mwangi Mugo) that the appellant had transferred money from the deceased's mobile phone to her own phone and thereafter transferred it to her mother Mwanzi. Learned State Counsel supported the sentence imposed submitting that the family of the deceased had suffered anguish and torment; that the appellant did not care about what she had done and had even put her mother at risk when she took the stolen phones home.

We have considered the whole record and submissions made in support or opposition of the appeal and now re-evaluate the case in terms of the mandate we had identified as we began this judgment.

The first issue taken is that of language used in the trial, it being submitted on behalf of the appellant that her fair trial rights were violated because she did not understand English language, the language used in the trial.

The record shows that when plea was taken on 11th February, 2016 there was interpretation from English to Kiswahili language. The appellant took plea represented by a lawyer, **Mr. Sekento**, and the appellant was then represented by a lawyer throughout the trial. As correctly submitted by learned State Counsel, the appellant was accorded a fair trial as donated by **Article 50** of the **Constitution**. A further perusal of the record (page 163 and 164) shows that

when a confession was taken from the appellant she chose to use the English language; she chose that her brother **Mike Musyoki Mwanzia (PW19)** be present; she did not wish to have interpretation or representation by a lawyer; she had no medical complaint and she executed the necessary instrument confirming that all rights due to her had been accorded.

On the issue of production of post mortem report **Dr. Edwin Walong** who was the first prosecution witness testified that he with his colleague Dr. Ndegwa on 20th January, 2016 performed an autopsy on the body of the deceased. He produced the post mortem report without any objection by counsel for the appellant. He was qualified to produce the said report.

We shall address the issue of sentence raised on behalf of the appellant after speaking to the case made by the prosecution.

The prosecution case was essentially that the appellant murdered her close friend, the deceased, and thereafter hid her body in a septic tank to where she (the appellant) led the police, leading to recovery of the decomposing body of the deceased.

**Section 203** of the **Penal Code** provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder.

Malice aforethought is defined as follows in **Section 206** of the said **Code**:

*“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.....”*

There is no dispute that the deceased died on or about 23rd November, 2015 and her body was recovered from a septic tank on 14th January, 2016 where it had been concealed. This is how the trial judge concluded on the issue of the deceased’s death:

*“The conclusion I make from the evidence under this ingredient is that the person who killed the deceased had the intention to cause death. There is no doubt that the accused was a close friend to the deceased. There is no dispute that prior to the deceased disappearance from both her place of work and residence (sic). The accused has spent considerable of time with her. There is no dispute that the recovery of the body was only achieved through the direction and admission to the investigating officer by the accused who showed the location of the body. There is no dispute that the only person who was in the know as to the place and location of the body of the deceased is the accused. According to the evidence by the prosecution witnesses the only inference why the body was thrown into a septic tank is to facilitate decomposition and conceal the murder. The decomposition could have aided in complete destruction of traceable evidence as to the deceased being physically traced. All these matters were in the knowledge of the accused.”*

The Judge also found that the prosecution had established motive because it had been proved that money was transferred from the deceased’s mobile phone to the appellant’s phone who later transferred money to her mother, Mwanzia. It is true that the prosecution case was based on circumstantial evidence and as was held in the case of **R v Kipkereng Arap Koske & Anor 16 EACA 135**:

*“In order to justify the inference of guilt, the inculpatory facts must be compatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”*

In **Teper v R (2) AC 480** it was held, **“it is necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”** While **Taylor on Evidence (11th Edn.) page 74** state **“the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.”**

The circumstances were, in the case before the trial Judge that, money was transferred from the deceased’s mobile phone to that of the appellant who then transferred the money to her mother, Mwanzia. Martin Wekesa, the Liaison Officer at Safaricom Limited testified how that money was transferred, the time it was transferred and the recipients of the same. He identified the registered owners of the three mobile phones – one was registered in the name of Mugo

(PW4), one in the name of the deceased and the last one in the name of the appellant. Money was transferred from the deceased’s phone to that of the appellant on the same day that the deceased disappeared, never to be seen alive again until her body was recovered from a septic tank, a location where the appellant led police after her arrest.

Wekesa was qualified to give that evidence and there was compliance with the strict provisions of **Section 65** of the **Evidence Act** on production of such evidence.

The police did not believe the appellant’s allegation that she had taken the deceased to a clinic to procure an abortion and that she had died in that process. Njue and Njeri denied ever receiving the deceased at their clinic and Dr. Walong testified that upon conducting the post mortem he did not find any evidence that the deceased had procured an abortion.

We note that when the appellant made a report at Ongata Rongai Police Station (as recorded in the Occurrence Book of 24th November, 2015) she reported that the deceased had disappeared. She did not report that the deceased had died at the alleged clinic.

The circumstantial evidence proved to the required standard that the appellant murdered the deceased and put the body in a septic tank hoping that the body would decompose, never to be found.

The police used scientific means through Safaricom Limited to trace the mobile phones the appellant left at home in Machakos and through those means it was proved that the appellant did transfer money from the deceased's phone to her own and then to her mother, Mwanzia. Mwanzia gave a true account of how she came to have those phones.

In those circumstances the conviction was sound.

It is submitted that the death sentence imposed is unconstitutional. Counsel for the appellant did not however place any material or cite any case to the effect that the death sentence is unconstitutional. The death sentence is not unconstitutional at all as it is not outlawed by the Constitution of Kenya, 2010. The Supreme Court of Kenya did not outlaw the death sentence in **Francis Kariako Muruatetu & Others v Republic [2017] eKLR**. What that Court stated is that it was unconstitutional for Parliament to give the death sentence as a minimum sentence.

Considering the evidence given in the case, the gruesome manner in which the deceased died, the analysis by the trial Judge of impact of the death on the family of the deceased, the conduct of the appellant who murdered the deceased and then dumped the body in a septic tank believing that the body would never be found but would decompose, the fact that the appellant and the deceased were friends and the appellant violated that friendship by murdering her friend, we agree with the trial Judge that the proper sentence in the case was the death sentence.

The appeal has no merit and we dismiss it.

**Dated and delivered at Nairobi this 6th day of November, 2020.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**