IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 85 OF 2010

BETWEEN

JAPHET MORARA.....APPELLANT

AND

REPULIC .....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii, ***(Musinga, J.)*** *dated 2nd July, 2010*

in

HCCRC NO. 58 OF 2003)

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JUDGMENT OF THE COURT

[1] Japhet Morara, who is the appellant before us, was tried and convicted by the High Court (Musinga J), for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** He was sentenced to death and has now appealed against his conviction and sentence.

[2] In his petition of appeal drawn by his advocate **Mabale Bagada,** eight (8) grounds have been raised. The appellant faults the learned judge of the High Court; for failing to make a determination that the rights of the appellant to fair trial had been violated; in making a finding that malice aforethought had been proved by the prosecution; in making a finding that the prosecution had established circumstantial evidence linking the appellant to the murder of the deceased; in making a finding that the appellant had admitted the facts of the case to the prosecution witnesses; in making a finding that the appellant's actions of not going to the home of the deceased and running away amounted to a guilty mind; in concluding that there existed a misunderstanding between the appellant and the deceased; in finding that it is the appellant who inflicted the injuries on the deceased; and in failing to analyze the evidence and thereby arriving at a wrong decision.

[3] In arguing the appeal, Mr. Bagada pointed out that it was clear from the record that the appellant was arrested on 18th February, 2003; and that the learned judge did not properly address the violation of the appellant's right to a fair trial as it was clear that he was not brought to court within the required time.

[4] In regard to the circumstantial evidence, counsel faulted the learned judge for drawing an adverse inference from the appellant's failure to go to the deceased's home when an alarm was raised. He submitted that the appellant had to run away as the crowd was already baying for the appellant's blood; that the evidence adduced did not point to the appellant to the exclusion of any other person; that a window to the deceased's house was open and therefore there was the possibility of the deceased having been attacked by someone else.

[5] In regard to the purported admission by the appellant, counsel submitted that the admission was not elicited under appropriate circumstances; that the appellant was under threats and intimidation as the crowd wanted to attack him; and that there was a land dispute which provided a motive to frame the appellant.

[6] Mr. Sirtuny, Public Prosecuting counsel who appeared for the State opposed the appeal. He submitted that the alleged violation of the appellant's constitutional right could only entitle him to damages and not an acquittal for the criminal offence. Regarding the circumstantial evidence, Mr. Sirtuny maintained that it was sufficient to sustain a conviction. He noted that there was evidence of a quarrel between the

appellant and the deceased, over a parcel of land. He therefore urged the Court to dismiss the appeal.

[7] We have carefully considered this appeal. The first issue that we wish to address, is the alleged violation of the appellant's right to fair trial. The court record indicates, that this issue was only raised at the tail end of the trial. The evidence shows that the appellant was arrested on the morning of 18th February, 2003, when the body of the deceased was discovered. The original court record indicates, that he was produced in court on 2nd October, 2003, when the plea was taken before Wambilyanga J. There is no record of any proceedings before that date. We cannot however, rule out the possibility of previous committal proceedings having been conducted and the appellant charged thereafter. Had this matter been raised at the earliest opportunity, the court would have been able to carry out an appropriate inquiry into this matter.

[**8]** Be that as it may, as observed by the learned judge, the period between 18th February, 2003, and 2nd October, 2003, is a period of about seven and half (7½) months. This was an inordinately long period as **section 72(3)(b)** of the former Constitution required a person arrested for a capital offence to be arraigned in court within fourteen (14) days. The possibility of the appellant's constitutional rights having been violated cannot be ruled out. However, as the matter was not pursued, during the trial, we do not have sufficient evidence to make a definitive finding, nor is there any evidence that the appellant was prejudiced in his trial by the alleged delay. In any case, as observed by the learned judge, the appellant is still at liberty to pursue a claim for damages if indeed his constitutional rights were violated.

[9] In regard to the evidence, the appellant was alleged to have murdered his mother Clemencia Kemuma (herein the deceased). During the trial nine witnesses testified for the prosecution. These included Stephen Arika Otao (Otao), the deceased's son who is also the appellant's elder brother. Otao stated that together with the deceased, on 17th September, 2003, they proceeded to Nyamira Law Courts where they stood surety for the appellant and secured his release from remand. On their way home, the appellant assaulted Otao, questioning, why he had been left in remand for a long time. Each proceeded to his own house. The next morning, Otao went to the deceased's house and found the door to the house locked from inside but there was a window which was open.

[10] Dennis Nyawachi (Dennis) Otao's son, testified that at the request of his father he entered the house of the deceased through a window that was open. He found the deceased lying dead on the floor in the house. Dennis recalled that the previous night he had witnessed the appellant quarrel the deceased about a parcel of land and blaming the deceased for having failed to take care of his property. Dennis opened the door to the deceased's house. Upon entering the house, Otao saw the lifeless body of the deceased and raised an alarm. He noted that the body had injuries,

[11] Gwocha Kimori (Kimori), James Kongo Onyoni (Onyoni), and Joseph Nyamboka Arika (Joseph), who are the deceased's relatives and neighbours, all testified that they responded to the alarm, and saw the deceased's lifeless body. They noticed that the appellant whose house was not far from that of the deceased, did not respond to the alarm, but instead attempted to run away. He was followed by the witnesses and other people, and was apprehended a few kilometres away. The matter was reported to Andew Nyamanga Onduki, Assistant Chief of Mageri Sub location, Nyamira, and the appellant was escorted to Nyamira Police Station.

[12] PC Francis Kimemia, an officer then attached to Nyamira police station, testified that he visited the scene in the company of Cpl George Moteri who was the investigations officer. They took the body of the deceased to Nyamira District Mortuary. They also recovered a metal bar, a kitchen knife and a dark striped coat from the house of the deceased, as well as, a white T-shirt about 100 metres away from the appellant's house.

[13] Subsequently, a postmortem examination was carried out on the body of the deceased by Dr. Oduor, whose report was produced in evidence by Dr. Benjamin Wabwire, the Superintendent of Nyamira District Hospital. The post mortem report showed that the body of the deceased had bruises on the left side, cuts on the left knee and ankle joint, fracture of the ribs on the right side and lung collapse. The cause of death was indicated as severe blood loss, due to head injury and bilateral lung collapse. Dr. Wabwire also produced a P3 report confirming that the appellant was examined and found to be mentally stable.

[14] The appellant gave unsworn evidence in his defence, in which he denied having murdered the deceased. He stated that there was a land dispute between Otao and Nehemiah Motema Obwora (Nehemiah) and that Nehemiah who was against the appellant caused him to be arrested several times. The appellant was remanded in custody for several days, and was released on 17th February, 2003. The next day he went to visit his nephew, and when he came back, he learnt that his mother had been murdered. He denied having committed the offence, but was nevertheless taken to the police station and subsequently charged.

[15] From the evidence that was adduced before the trial court, it is clear that there was no eye witness to the commission of the murder, and that the evidence against the appellant was basically circumstantial. In his judgment, the learned judge rightly referred to **Mwangi vs Republic [1983] KLR 522**, wherein this Court held that:

> ***"In a case dependent exclusively on circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."***

[16] In **Abanga alias Onyango vs Republic,** Criminal Appeal No. 32 of 1990 (UR), this Court stated the test to be applied in addressing circumstantial evidence 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 an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances must be of a definite tendency unerringly pointing towards 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 that***

crime was committed by the accused and none else."

[17] In **Mwangi & another vs Republic [2004] 2 KLR 32**, this Court stated as follows:

> ***"It may be asked: Why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case dependent on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation or any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs Kipkering Arap Koskei & another [1949] 16 EACA 135."***

[18] From the evidence, that was before the trial court, the facts implicating the appellant included: the appellant having been released from prison the day before the murder; the appellant having engaged in a quarrel with the deceased on the night preceding the morning the deceased's body was discovered; the appellant having blamed the deceased during the quarrel of not having taken care of his property while he was in prison custody; the appellant having failed to go to the house of the deceased when the body was discovered and an alarm raised, even though the appellant's house was only 200 metres away from the deceased's house; the appellant having attempted to run away instead of responding to the alarm; and finally the appellant having admitted to witnesses that he had killed the deceased.

[19] Subjecting these facts to the principles stated in **Abanga vs Republic** (supra) and **Mwangi vs Republic** (supra), we have considered whether the alleged inculpatory facts were established. Otao, the appellant's elder brother testified and confirmed that he had accompanied the deceased to Nyamira Law Courts, where they stood surety for the appellant, and secured his release from remand a day before the murder. Otao also testified that as they travelled back from Nyamira, the deceased assaulted him expressing bitterness as to why he had been left in remand for ten days.

[20] The facts narrated by Otao confirmed that the deceased had an issue with members of his family. This was clear even from Otao's defence as he alluded to the issue of the land dispute. It is evident that despite his mother and brother having bailed him out of remand, the appellant was still bitter and held a grudge over the issue of the land and having been left in remand for a long time. This provided a probable motive.

[21] Otao's fifteen year old son Dennis Nyawachi (Dennis), who used to sleep in the deceased's house, also testified. He explained that on the night when the appellant returned, the appellant was in the deceased's house, quarrelling the deceased about a parcel of land, and Dennis was unable to sleep in the deceased's house because of the quarrel. Dennis's evidence provided corroboration of the appellant's bitterness. It is evident that the quarrel between the appellant and the deceased was so heated that Dennis could not sleep in the house. The circumstances were such that there was a high probability of the appellant having attacked and injured the deceased.

[22] Guocha Kimori, James Kongo Onyoni and Joseph Nyaboka Arika, all relatives and neighbours of the deceased and Otao, testified that instead of the appellant responding to the alarm, when the body of the deceased was discovered, the appellant took off and was only apprehended a few kilometres away and brought back to the scene. The appellant being a son to the deceased, and his house not being far from the deceased's house, one would have expected the appellant to have been one of the first people to respond to the alarm that was raised by Otao. In his defence, the appellant claimed that he was not in his house as he had gone to visit his nephew, the appellant has not identified this nephew. From the evidence of the neighbours and relatives who testified, it is clear that the appellant was actually in his house when the alarm was sounded, and that he took off instead of rushing to the deceased house to find out what had happened. The only reason that one can infer from the appellant's conduct, is that, he had a guilty conscience and feared the reaction from the public. That is why he attempted to run away. His *alibi* defence and alleged ignorance of the deceased's death, was therefore rightly rejected.

[23] It was alleged that when the appellant was apprehended and brought back to the deceased's house, he confessed to having committed the offence. The evidence of the prosecution witnesses showed, that the appellant was brought back by members of the public including his relatives, in a highly charged atmosphere, as a result of what had happened to the deceased. Under these circumstances, it cannot be said that whatever the appellant said regarding the death of the deceased was voluntary. It is apparent that the circumstances were such that there was great intimidation, pressure, and threats. Whatever the appellant stated was therefore, under fear, and could not therefore, be accepted as a voluntary confession that could be relied upon. For this reason, we find that the alleged confession ought to have been totally ignored. Indeed, the learned judge considered the facts established, in the absence of the confession, and still came to the conclusion that the circumstances pointed irresistibly to the appellant.

[24] On our part, we are satisfied that there was sufficient evidence to prove that the appellant was released from prison a day before the murder; that the appellant was bitter because of the land dispute and what he considered a long stay in remand; that he engaged in a quarrel with his brother and later with the deceased on the night preceding the morning the body of the deceased was discovered; and that the appellant attempted to flee when the alarm was raised instead of going to the house of the deceased to find out what had happened.

[25] Having analyzed and re-considered the inculpatory facts, we find that the facts established reveal a chain of events from which a reasonable hypothesis on the guilt of the appellant could be drawn. Both Otao and the appellant confirmed that there was a dispute concerning land, which the family had sold, and that the appellant was arrested and charged for allegedly interfering with the boundary. Evidence was adduced confirming that the appellant was bitter because of having been left in remand for ten days, and that he violently quarreled with the deceased.

[26] It is apparent that the land dispute pitched the appellant against the family. The appellant having been released from remand, he had the opportunity and motive to commit the murder. His conduct in attempting to run away, was consistent with a guilty conscience. The manner in which the deceased was killed, was such that there was clearly an intention to cause her death or to do grievous harm to her, and therefore malice aforethought can be inferred. In our view, the circumstances that have been established, point irresistibly to the appellant as having been the person who murdered the deceased. Accordingly, we find that the trial judge rightly convicted him of the charge.

[27] In sentencing the appellant to death, the learned judge did not exercise any discretion as he considered the sentence of death to be the

only sentence prescribed by law. In accordance with the Supreme Court decision in **Francis Karioko Muruatetu & others vs Republic & others, Petition No. 4 of 2015,** the mandatory nature of the death sentence as provided for under **section 204** of the **Penal Code** was declared unconstitutional. Thus, taking into account the circumstances of the case, the court has the discretion to impose a sentence other than death. The appellant was given an opportunity to mitigate but did not say anything other than reiterating that he did not murder the deceased. Given the circumstances of this case, we believe that had the learned judge exercised his discretion in sentencing, a sentence of twenty (20) years would have been appropriate.

[28] The upshot of the above is that we dismiss the appellant's appeal against his conviction, but allow the appeal against sentence, to the extent of setting aside the sentence of death that was imposed upon him by the trial court, and substituting thereto a sentence of twenty (20) years imprisonment to take effect from the date of the judgment of the High Court.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 31st day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.