



IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 53 OF 2017

BETWEEN

L W W.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against a judgment from the High Court of Kenya

at Eldoret (Kimondo, J.) dated 2nd July, 2015

in

HCCRC NO. 33 OF 2008)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the High Court for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and sentenced to death. This appeal is against conviction and sentence.

[2] The particulars of the charge stated in part that the appellant murdered **JM (deceased)** on the night of 23rd September, 2008. The deceased was aged about 1½ years. He was the son of the appellant. The appellant was the husband of **JA (J)** who was the 1st prosecution witness. The appellant and Jane had been married for three years. They begot two children a son and a daughter but they separated after three years because of family disagreements. Jane left the matrimonial home with the two children of the marriage. J testified at the trial that on 23rd September, 2008, the appellant sent **Olivia** and **Everlyne** to get the deceased; that the two told her that the appellant wanted the deceased; that she took the deceased to the home of the appellant, found the appellant alone; handed over the deceased to the appellant and thereafter went to Kitale to visit her mother. According to her evidence, she was informed on the following day that the child had been killed.

[3] **Pamela Shivona Misy (Pamela)** testified at the trial that on 23rd September, 2008 at 8.p.m., she was going to the shops which are near the house of the appellant when she found the deceased outside the house of the appellant; that the deceased was about five metres from the house of the appellant; that the appellant came out from his house with a torch; that she told the appellant not to leave the child outside as it was cold; that she took the child to J whose house is next to that of the appellant and who is a wife of the appellant's brother; that Jacklyne declined to take the child; that she gave the deceased to the appellant; that the house of J is a metre away from the house of the appellant; that on the following day, she was informed that a dead child was lying on the road; that she went there and found the deceased dead with a swollen neck. **RB (PW4) (R)**, a child of Pamela, gave similar evidence to that of Pamela, **Irene Busieka (PW3) (Irene)**, a neighbor of the appellant testified that on 24th September, 2008 at about 6 a.m. she was going to collect milk when she found the body of the deceased lying by the roadside and that she screamed and neighbours went to the scene.

According to the evidence of **Jacklyne Mami (PW5) (Jacklyne)**, on 23rd September, 2008 at 3p.m. she saw the deceased standing alone near a neighbour's house; that at about 8p.m. Pamela took the deceased to her house but she told Pamela to take the deceased to the appellant's house as she had given birth to twins two days earlier and that on the next day, the deceased was found dead next to the road.

CPL Joash Nyachiro (PW7) conducted investigations assisted by PC Julius Otando.

[4] **Dr. Inwanyi Nicholas (PW9)** produced the post-mortem report prepared by **Dr. S. K. Ngigi** on the body of the deceased. According to the report, the deceased had bruises on the neck and head; a fracture of the cervical spine bone C1 and C2. The cause of death was cardio pulmonary arrest due to severe asphaxia suffocation secondary to upper airway traction secondary to strangulation with blunt object.

[5] The appellant's testimony at the trial was briefly as follows:-

On 24th September, 2008 at 10p.m. he arrived home from work. His father called him and told him that the mother of the deceased had brought the deceased and left him with a neighbor. Thereafter Jacklyne took the deceased to his house and told him that the mother of the deceased had told them that she had already remarried and the appellant should look after the child. As Jacklyne spoke to him, the deceased asked for food and the appellant left the deceased in his house and went to the market to buy food. When he returned he found the door of his house was not locked and there was nobody in the house. He reported to his father who told him that the issue would be discussed in the morning. In the morning he was awakened by a neighbor who asked him to accompany him to the road. They walked for ten metres and found the dead body of the deceased. The neighbor was instructed by police to take the body of the deceased to his house. He stated that he did not kill the deceased; that he did not demand that the deceased be taken to him; that it is Jacklyne who took the deceased to his house and not Pamela and that it is Pamela who took the deceased to Jacklyne but Jacklyne declined to take the deceased.

[6] Upon evaluating the evidence, the trial judge made findings of fact that it is the appellant who sent for the deceased; that the deceased was delivered into the custody of the appellant by J on 23rd September, 2008; the deceased was well at the time he was handed over to the appellant; that after the child was found outside the house at 8 p.m. he was delivered to the appellant in his house; that the evidence of the appellant that he left the deceased with Jacklyne was untruthful; there was uncontroverted evidence that the deceased was in the custody of the appellant when he was last seen alive; that the deceased suffered both external and internal injuries and the ultimate cause of death was strangulation; that the person who inflicted the injuries intended to cause death of the deceased; that the defence of appellant dissociating himself from the knowledge about the whereabouts of the deceased does not hold any water; and that the appellant was the only person who could have caused the unlawful death of the deceased.

[7] The memorandum of appeal contains six grounds of appeal. However, **Mr. Angu**, learned counsel for the appellant abandoned three grounds and argued three grounds only to the effect that the prosecution case was not proved beyond reasonable doubt; that motive, malice aforethought and intention were not established; and that the appellant's defence was not considered.

[8] This being a first appeal, the Court has a duty to reconsider, re-evaluate the evidence and arrive at its independent findings. The prosecution case was dependent on circumstantial evidence. The trial judge recognized this and evaluated the evidence including the evidence of the appellant but ultimately arrived at the conclusion that circumstantial evidence proved that it is the appellant who caused the unlawful death of the deceased.

[9] Most of the primary facts were proved by uncontroverted evidence.

The deceased was a child of the appellant and was at the home of the appellant at the material night. On the following day his dead body was found at the roadside not far from the house of the appellant. The appellant stated that the body was at a distance of about ten metres from his house. The body had external and internal injuries on the neck and head. There was fracture of cervical spine and the cause of death was associated with strangulation.

Although the appellant denied that he is the one who had sent for the deceased and that the deceased was not delivered to him by J and later by Pamela, he admitted that Jacklyne, a close neighbor and wife of his brother took the deceased to his house when he arrived home at about 10p.m. However, he stated that he left Jacklyne and the deceased in his house and went to buy food and that when he returned, he did not find any of them in the house. His evidence shows that after reporting their absence to his father, he simply went to sleep.

According to the evidence of Pamela, Rael and Jacklyne, it is Pamela who directly took the deceased inside the house of the appellant and personally handed over the deceased to the appellant. The trial judge believed the evidence of those three witnesses and disbelieved the evidence of the appellant. There was no reason why Jacklyne, Pamela and Rael who are closely related to the appellant could have given false testimony about the person who handed over the deceased to the appellant. The credible evidence which the trial judge believed is that the deceased was in the physical custody of the appellant on the material night before his body was found at the nearby roadside on the following morning. The appellant's counsel did not in his submissions identify which particular aspect of the evidence was not considered.

We have considered the evidence and find that the findings of the learned judge were based on credible evidence. It was not necessary to prove motive. However, the appellant denied that he had asked Jane to release the deceased to his custody. The circumstances of the case including the fact that the deceased was left outside at night seem to indicate that Jane took the deceased to the home of the appellant against the appellant's wish and that the appellant did not wish to assume parental responsibility over the deceased.

[10] The learned judge considered the circumstantial evidence against the appellant. We are satisfied that the circumstantial evidence was strong and irresistibly proved the appellant to be the person who strangled the deceased to death and dumped his body by the roadside.

[11] As regards sentence, the appellant tendered mitigation at the trial. The court considered that the appellant was a first offender and that he had been in custody for a long time. However, the court made a finding that the law provides for a mandatory death sentence and that the hands of the court were tied.

The Supreme Court has recently in **Francis Kariko Muruatetu & another vs Republic & 5 others**, Petition No. 15 of 2015, held in essence that death sentence is not a mandatory sentence. The record shows that the appellant was in custody for nearly seven years before he was sentenced.

In the circumstances, a sentence of 20 years imprisonment would serve the end of justice.

For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and substituted with a sentence of twenty (20) years imprisonment to take effect from 24th June, 2015 when the appellant was sentenced.

It is so ordered.

DATED and delivered at Eldoret this 6th Day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I hereby certify that this is a true

copy of the original.

DEPUTY REGISTRAR