IN THE COURT OF APPEAL

AT MOMBASA

CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 58 OF 2017

BETWEEN

SYLVESTER MWACHARO MWAKIDUO.....1ST APPELLANT

CECILIA WAKESHO MWAMBURI…….....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence of the High Court at Mombasa (M. Muya, J) dated 15th May 2014

in

H.C.CR.C. NO. 58 OF 2012)

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JUDGMENT OF THE COURT

1. The 1st and 2nd appellants, **Silvester Mwacharo Mwakidua** and **Cecilia Wakesho Mwamburi** were tried before the High Court on information that charged them with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge were that on a day between 16th of September, 2012 and 19th of September, 2012 at Manoa village Mwachabo location within Taita-Taveta County, they murdered **JW** (hereinafter referred to as the deceased). They denied the charge and the matter proceeded to full trial at the conclusion of which they were found guilty of murder, convicted and sentenced to death.

2. This being a first appeal, it behoves us to abide by our mandate as succinctly spelt out by the predecessor of this Court in the case of **Okeno V. Republic [1972] EA.32** as follows:

> **"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 versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [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 findings, and conclusions. It must make its own finding 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 had the advantage of hearing and seeing the witnesses."**
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> **See also: Peters versus Sunday Post [1958] EA424 wherein it was held, inter alia, that:-**
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> > **"Whilst an appellate Court had jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion; or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to so decide."**

3. With that in mind, we recapitulate the evidence adduced before the High Court as hereunder with a view of reconsidering the same afresh. The deceased, a girl aged four years was a daughter of the two appellants who were husband and wife. On the 20th of September, 2012 the deceased's body was found buried in a shallow grave about 200 meters from her parents' home. **Luciano Malemba (PW1)** was on the

material date grazing cattle near the appellants' farm when he saw some unusual freshly dug rectangular holes in the appellants' shamba. Although the holes roused his curiosity, he did not give the issue much thought, but the following day when he went back to graze his cattle at the same spot, he found the holes having been filled up with soil. When he went home he shared that information with his father, PW2.

4. The following day PW2, in the company of one **Kadenge Msagha, (PW3),** proceeded to the scene and after seeing the freshly dug and covered holes,they thought something was amiss. They confronted the 1st appellant who alleged that it was his grandmother who had instructed him to cover the holes with soil and that there was nothing concealed inside.

5. Unconvinced, they reported the matter to the area village elders, the assistant chief and the police. The appellants were questioned as to the whereabouts of their child who was not at home then. According to the Assistant Chief, (PW5), when he enquired about the whereabouts of the child he was informed that the child had been sent to visit her aunt. A phone call was made to the said aunt but she said she had not seen the child. The appellants then changed their story and said they had sent the child to Bura station.

6. The team realized that the appellants were covering up something. They therefore decided to dig up the holes. The deceased's decomposing body was recovered from the one of the holes. Her clothes which had been put in a sack were also recovered from the hole. The police were informed and they proceeded to the scene, accompanied by scenes of crime personnel. Photographs taken at the scene were produced as exhibit before the trial court. After investigations both appellants were charged with the offence of murder which they both denied.

7. After considering the evidence of the eleven witnesses called by the state, the court placed the appellants on their defence. They both made brief unsworn statements denying the charge. According to the 1st appellant, he had sent the deceased to visit her grandmother at Mwatate and that they only became aware of her demise when her body was retrieved from the crime scene. The second appellant testified in similar vein and denied having killed the deceased.

8. The learned trial Judge after considering the entire evidence placed before the court appreciated that there was no direct evidence linking the appellants with the offence and relied on the circumstantial evidence on record. He found that the photographic evidence revealed a rectangular grave measuring approximately 2.4 feet deep; that the grave had clear clean rectangular sides which may be construed to have been dug with no apparent haste and; that the holes were filled up a day after they had been discovered.

9. Further, the appellants on interrogation by the assistant chief claimed that the deceased was away at an aunt's place, a fact that was denied by the area chief who was a relative to the deceased. He also found that the doctor who carried out the postmortem examination found no obvious external injuries and concluded that the cause of death was cardio respiratory arrest due to suffocation. According to the learned Judge death by suffocation demonstrated malice aforethought, as the act of suffocation is deliberate and aimed at taking away the victim's life.

10. The trial Judge also drew an inference of guilt from the conduct of the appellants. Based on the fact that the appellants had initially stated that they had sent the deceased to her grandmother's home in Mwatate and when confronted about the questionable holes in the compound the 1st appellant alleged that he had been ordered to cover the hole by his grandmother only for the deceased's body to be recovered from the same hole. Furthermore, if in fact the appellants had been concerned about the deceased's where abouts they would have been the first ones to report her disappearance and subsequently the suspicious holes in their compound.

11. The learned Judge also found the witnesses truthful and credible and therefore attached considerable weight to their evidence. According to the learned Judge, the deceased was a young child under the parental custody of the appellants and they therefore had the access and opportunity to kill her and conceal her body. In any event they had not bothered to find out if the deceased had ever arrived at her grand mother's place where they alleged to have sent her. Additionally, the body was also recovered in their farm. The learned Judge concluded that the defence proffered by the appellants lacked merit. Ultimately, the court found the charge of murder proved beyond reasonable doubt, convicted the appellants and sentenced them to death.

12. Being aggrieved by this decision the appellants have now preferred this first appeal against their conviction and sentence on four grounds contained in their supplementary grounds of appeal filed on 7th March, 2019 faulting the learned Judge for erring in law and fact by: finding that the prosecution proved the offence of murder beyond reasonable doubt; finding that the circumstantial evidence met the required threshold; basing his decision solely on suspicion which cannot be a basis for a conviction and for passing a mandatory death sentence against the appellants.

13. At the plenary hearing before us, the appellants were represented by learned counsel Mr. Okoth Odera, while the State was represented by Japheth Isaboke, Senior Prosecution Counsel. In support of the appeal, Mr. Odera urged that neither PW1 nor PW2 saw the persons who dug the holes or covered them up. Further that none of the prosecution witnesses saw the child being killed. Placing reliance on the case of **Joseph Kimani Njau v. Republic Nyeri Civil Appeal No. 375 of 2011** he urged that the prosecution failed to prove both *actus reus* and *mens rea* hence failing to prove that the appellants were guilty of the murder of the deceased.

14. Relying on the case of **Erick Odhiambo Okumu v. Republic**, **Mombasa Civil Appeal No. 84 of 2014** he contended that the Judge convicted the appellant based on circumstantial evidence that failed to meet the required threshold by law. Further, he cited the case of **GMI v. Republic Nyeri Civil Appeal No. 308 of 2011** arguing that the evidence relied on was just a culmination of suspicions and no matter how strong, it ought not to have been a basis for conviction. On the issue of sentence he relied on the case of **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** arguing that the mandatory nature of the death sentence as passed against the appellants was unconstitutional. He urged the court to allow the appeal.

15. On his part, Mr. Isaboke, opposed the appeal and supported the conviction and sentence stating that the case involved the murder of the appellants' own child hence the sentence passed was lawful and that the prosecution witnesses gave clear and cogent evidence that could not be deemed to amount to mere suspicion but overwhelming evidence of the appellants' guilt. He urged the Court to dismiss the appeal.

16. We have carefully considered the totality of the evidence on record, the grounds of appeal, rival submissions of counsel and the law. As stated earlier, the law enjoins us to re-assess this evidence afresh and come to our own conclusion as to whether or not the conviction against the appellants was safe. The facts surrounding the case are largely undisputed. It is common ground that the conviction herein was based on circumstantial evidence as there was no eye witness who saw the appellants suffocate their child to death.

17. From the foregoing, the only issue that falls for our determination is whether the circumstantial evidence on record was sufficient to support conviction. However, 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:-

> ***"Circumstantial 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."***

18. Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. 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 others. This test has previously been applied by this Court in a myriad of cases for instance in the case of **Judith Achieng' Ochieng' v. Republic, Criminal Appeal 218 of 2006**, this Court stated the law as follows:-

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-***
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> ***i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.***
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> ***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.***
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> ***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."***

In other words, 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.**

19. It is within these parameters that we must reconsider the evidence as we have summarized above. It is true that nobody saw the appellants commit the offence they are charged with. It is equally true that nobody saw the person who dug the holes, one of which turned out later to be the grave from which the deceased's body was exhumed. These holes had been dug in the appellants' plot. When PW1 and his sister went back to the scene the following morning, they found the holes having been covered at night. This naturally roused their curiosity and so they informed their parents. PW2 reported the matter to PW3, a community policing member who then joined PW1 at the scene. When the 1st appellant spotted them at the scene, he went to find out what they were doing there. On being questioned about the holes, the 1st appellant is said to have informed the witnesses that his grandmother had asked him to cover up the holes. He did not therefore disown the holes. When the soil was scooped out, the deceased's decomposing was found interred there.

20. We remind ourselves at this point that the trial court had opportunity to see these witnesses and observe their demeanor and concluded they were truthful and credible. We have no reason to doubt or impugn the trial court's findings on that issue. That being so, if indeed the 1st appellant said he was the one who filled up the holes, then common logic dictates that he must be the person who buried his daughter in the hole. This, coupled with the fact that the appellants lied about the whereabouts of the deceased leads to only one conclusion, that they are the ones who killed the deceased and buried her body in the hole they had dug in their shamba.

21. Section **Sections 111 (1)** and **119** of the Evidence Act also come into play. They provide:-

> ***"111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.***
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> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.***
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> ***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."***
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> ***"119 The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

As parents of the deceased, who were in charge of her care and protection, they had the onus of explaining her whereabouts and what had happened to her. They did not. Instead, they lied about having sent her to visit her grandmother, and later changed the story and said that they had taken the child to Bura station.

22. In our considered view, there was no possibility of any other person killing and burying the deceased in her parents' property. There was no other inference that can be drawn from these circumstances other than that of the appellants' guilt. We agree with the learned Judge on his findings to that effect and find the charge against the appellants having been proved beyond reasonable doubt. Resultantly, we dismiss the appeal against conviction for being devoid of merit.

23. On the issue of sentence, we note that the death sentence still remains lawful and can be meted out where the circumstances of a case call for the same. It is only the mandatory aspect of the sentence that was declared unconstitutional by the Supreme Court in the **Francis Karioko Muruatetu & Another v. Republic** (supra). The Shackles that bound the courts in sentencing in murder trials were nonetheless removed and the courts now have discretion to impose any sentence other that death depending on the circumstances of each case. We note that the appellants had tendered mitigation before the trial court and although learned counsel for the state proposes a sentence of 40 years imprisonment, having considered the circumstances of the case and the said mitigation, we are of the view that a lesser sentence is justified. In the circumstances, we set aside the death sentence and substitute thereof a sentence of 20 years imprisonment.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR