IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 198 OF 2014

BETWEEN

KELVIN MASIKA WASIKE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court of Kenya at Bungoma

(Muchemi, J.) dated 27th July, 2010

in

HCCRA NO. 21 OF 2007)

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JUDGMENT OF THE COURT

[1] On 27th July, 2010, following a trial in the High Court at Bungoma, **Kelvin Masika Wasike** (appellant) was convicted for the offence of murder, contrary to **section 203** as read with **section 204** of the **Penal Code.** The victim of the offence was eight-year-old **KW** (herein deceased).

[2] During the trial, seven witnesses testified in proof of the prosecution case. These were: **Erick Wanjoya Kolio (Erick),** who is the father to the deceased, **Caroline Nasimiyu Wanjoya (Caroline)** who is the wife to Erick and step mother to the deceased; **Dr. Isaac Obore Omeri (Dr. Omeri),** who was at the material time a medical officer at Bungoma District Hospital; **Salome Waliaula (Salome),** who is mother to Caroline and grandmother to the deceased; **Clare Simiyu (Clare),** who is a daughter in-law to Salome; **Silvanus Wasike Kinyonzi (Kinyonzi),** who was then a village elder at Matoni village and **PC Wycliffe Khisa (PC Khisa)**, who was at the material time stationed at Bungoma Police Station.

[3] Briefly, the prosecution evidence was that the deceased who was sired by Erick and one N was brought up by Erick and his wife Caroline. This was because the deceased's mother N had given up the child to Erick, at the tender age of seven months. The deceased grew up together with two other siblings who were sired by Erick and Caroline.

[4] On the morning of 29th May, 2007, the deceased left home together with his two siblings to go to school. His two siblings later came back home, but the deceased did not. Erick went to the school to look for the deceased but did not find him. Two days later, Erick got information pursuant to which he proceeded to the home of Salome, accompanied by the appellant who was his worker. Erick found the deceased at the home of Salome. Erick was not happy with the deceased who wanted to continue staying at the home of Salome. Erick insisted that the deceased goes back home with him, and together with the appellant, set off with the deceased on their way back home.

[5] Before they arrived at Erick's home, Erick stopped to buy some vegetables, while the appellant and the deceased proceeded on. After buying the vegetables, Erick continued with his journey. When he reached outside his house, he heard the deceased screaming loudly. Upon entering the house, he found the appellant and the deceased in the sitting room. The appellant was holding the deceased with one hand, and had a whip in the other hand. The appellant released the deceased, and Erick noted that the boy was in great pain and very weak. The appellant then left to go to his home. Erick asked the deceased what had happened, and the deceased told him that the appellant had beaten him with a whip.

[6] Erick noted that the deceased had injuries on the ribs, his back and the head. He also had whip marks on the legs and arms. Erick went to the home of one Munialo a neighbour to seek for help in taking the deceased to Hospital, but when he came back with the neighbour, they found the deceased already dead. Erick and his brother proceeded to the home of the appellant, and confronted the appellant who explained that he had hit the deceased with his fist as he had dreamt that he was being attacked by people with rungus.

[7] Caroline explained that the deceased liked to stay with her mother (Salome) and had gone there on a few occasions and this did not please Erick. This was confirmed by Salome and Clare both of whom confirmed that the deceased preferred staying with Salome and was happy taking care of Salome's cattle.

[8] The matter was reported to Kinyonzi the village elder by one Bob Wanjoya a brother to Erick (who was not a witness). Kinyonzi proceeded to the home of Erick where he found Erick and the appellant. Upon asking Erick why he had killed his son, Erick responded that it was the appellant who had killed the boy. On his part the appellant explained to the village elder that it was Erick who wanted him to discipline the deceased. The village elder took both Erick and the appellant to Kababii police post where they were both detained.

[9] Erick and the appellant were later interrogated by PC Khisa, who also took the body of the deceased to Bungoma District Hospital. One Dr Alwanga performed a post mortem examination on the body of the deceased and established that the deceased died as a result of cardio respiratory failure due to multiple injuries caused by assault. The report of Dr Alwanga was produced in evidence by Dr Omieri who was familiar with Dr Alwanga's writing and signature. This was because Dr Alwanga was at the material time no longer working at Bungoma District Hospital.

[10] In his defence, the appellant gave sworn evidence and called his brother one Hosea Wafula Wekesa as a witness. The appellant explained that Erick had requested him to accompany him somewhere. It turned out to be Erick's in law's home (Salome) where the deceased had disappeared to as he wanted to stay with Salome, his grandmother. Erick and the appellant found the deceased at the home. They left the home with the deceased having been warned not to beat the boy as the boy had complained of frequent beating. On the way, they parted ways on the road as the appellant proceeded to his home and Erick and the boy also proceeded to their home.

[11] Sometime at midnight when the appellant was at his home, Erick arrived at his home and asked him to go and help take Erick's wife who was sick to hospital. When they arrived at Erick's home, they found the deceased dead and Erick's wife informed them that the deceased had complained that he was beaten by his father. At that stage, Erick claimed it was the appellant who had beaten the boy. Notwithstanding, the appellant's protestations, he was taken to the police station and later charged with the offence.

[12] The appellant's witness **Hosea Wafula Wekesa** confirmed that Erick had gone to the appellant's house at midnight as Erick claimed that he needed help to take his wife who was sick to hospital. The next day he learnt that his brother had been arrested for the murder of the deceased. Subsequently, the appellant was charged, tried and convicted.

[13] In his judgment, the learned judge of the High Court (Muchemi J), found that although the evidence was basically circumstantial, there was sufficient evidence pointing irresistibly to the appellant having committed the offence. She therefore rejected the appellant's defence, found him guilty as charged, and sentenced him to death.

[14] The appellant is aggrieved by the judgment of the High Court and has lodged this appeal before us. In his amended memorandum of appeal, that was filed in person, the appellant raised twelve grounds, two of which were abandoned during the hearing of the appeal. In summary, the appellant faulted the trial judge in failing to find that the ingredients of the offence of murder were not proved to the required standard; in failing to note that the evidence of Erick was that of an accomplice and hence worthless to base a conviction on; in failing to note that the evidence relied upon by the prosecution was circumstantial evidence which ought to have been treated with scrupulous circumspection given the bad blood that Erick had towards the deceased; in misdirecting himself by accepting alleged evidence of confession contrary to **section 49(1)(d)** of the Constitution; in failing to note that the investigation of the capital offence by PC Khisa was irregular; in misapprehending the evidence of Kinyonzi and PC Khisa who failed to inform the appellant of his true reasons for his arrest; in disregarding the fact that there was no malice aforethought established; in allowing or admitting written submissions without the same being stated in open court, in misdirecting himself in managing the case for the prosecution; in failing to note that material witnesses were not called in court; in failing to note that the evidence regarding the murder weapon was not established; and in failing to consider or re-evaluate the appellant's alibi defence.

[15] In arguing the appeal, **Mr. Okoyo Omondi**, learned counsel who appeared for the appellant, highlighted the written submissions which were filed by the appellant. He pointed out that the three requirements of circumstantial evidence were not met as the evidence was not cogent, nor did it unerringly point to the appellant, nor form a chain showing that the offence was committed by the appellant. Counsel submitted that the appellant gave a sworn statement that he left the deceased with his father, and that he was later called at night to take the step mother of the deceased to hospital; that the evidence of the appellant was supported by the evidence of PW6; that there were allegations made by witnesses that it was Erick who assaulted the deceased; that these allegations were not taken into account; that the trial judge did not establish the cause of death; and that **Section 25A** of the **Evidence Act** was contravened as there was no cautionary statement administered. The appellant urged the Court to allow his appeal or in the alternative, to exercise its discretion in sentencing.

[16] Mr. Tumaini Wafula, who appeared for the State relied entirely on the written submissions that was filed by the Director of Public Prosecutions. In the submissions it was maintained that the learned judge properly evaluated the evidence that was adduced by the prosecution; and that there was sufficient evidence implicating the appellant. In regard to malice aforethought, it was maintained that this was established under **section 206(a)(b)&(c)** of the **Penal Code** given the extent of the injuries that were inflicted upon the deceased as revealed by the post mortem examination; that the evidence of Erick and that of his wife Caroline, established that the appellant was the person who was in the company of the deceased and who assaulted him; that the evidence of the prosecution witnesses was consistent in material respect; that all the ingredients of the offence of murder were established; that an inference of the appellant's guilt can be drawn from the totality of the circumstances established; that there were no co-existing circumstances which could weaken or destroy the inference; and that the prosecution case was proved to the required standard.

[17] In regard to the appellant's defence, it was submitted that the prosecution evidence established that the appellant was with the deceased in the home of Erick and Caroline; that the prosecution evidence was sufficient to displace the appellant's defence contending that he was in his house; that the appellant's alibi was properly rejected as the defence of the appellant was weighed against the evidence of the prosecution and found untenable; and that the evidence against the appellant was credible and overwhelming.

[18] In regard to the confession, it was submitted that no confession was relied upon as the prosecution witnesses gave oral evidence of what the witnesses directly saw and heard, as opposed to a confession; that under **section 62** and **63** of the **Evidence Act**, such oral evidence was admissible. With regard to the alleged failure to inform the appellant the reasons for his arrest, it was submitted that the appellant did not raise this ground at the earliest opportunity and therefore the ground was a mere afterthought. Relying on **Stephen Gitau Njoki v Republic** Nairobi Criminal Appeal No. 17 of 2017, in which this Court rejected such submissions, the Court was urged to dismiss the appeal.

[19] We have considered this appeal. Being a first appeal from the judgment of the High Court, we have a duty to reconsider and evaluate the evidence that was adduced before the trial court and come to our own conclusion taking into account the fact that the trial court had the advantage of seeing and assessing the demeanour of the witnesses. This duty was succinctly stated in ***Okeno v. Republic 1972 EA 32***; and ***Muthoka and Another v. Republic [2008] KLR 297***

[20] The main issues before us is whether considering all the evidence that was adduced before the trial court, the elements of the charge against the appellant was proved and whether the appellant's defence was properly considered.

[21] From the facts already set out above, it was not disputed that the deceased disappeared from home for a few days; that following information received by Erick, the appellant and Erick collected the deceased from the home of Salome; that apart from having a burn wound on his arm, the deceased left the home of Salome in good health; and that by the time the deceased arrived back home he had several injuries on his body; and that the deceased died shortly thereafter. The issue is how did the deceased sustain his injuries? Tied to that question is, who between the appellant and Erick arrived home with the deceased. This is in light of the contradictions between Erick's evidence maintaining that he stopped to buy vegetables as the appellant and the deceased proceeded home; and the appellant's evidence maintaining that he parted ways with Erick and the deceased before they reached Erick's house.

[22] It is evident that there was no witness who testified to seeing the appellant assault the deceased. The evidence against the appellant was therefore purely circumstantial. In **ABANGA alias ONYANGO V. REP CR. App NO.32 of 1990(UR)** this Court summarized the test to be applied in considering the adequacy of 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 should 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 the crime was committed by the accused and none else."**

[23] Applying the above test, the question that we must consider is what are the circumstances from which the inference of the appellant's guilt is to be drawn? Have these circumstances been cogently established? Do these circumstances point irresistibly to the guilt of the appellant? Do the circumstances form a complete chain leading to the conclusion that the crime was committed by the appellant and no one else?

[24] In this regard the trial judge stated as follows in her judgment:

> ***"The evidence in this case is circumstantial. None of the witnesses saw the accused inflict the injury which resulted in the death of the deceased. However, facts analysed above point guilt more than innocence at the accused person. The accused person escorted deceased from his grandmother's home to his parent's home. At the time the deceased left, he was in good health but reached home in a poor state of health. He could not walk by himself. On arrival at his parent's home, the accused was still with the deceased. He supported him by one hand while the other held a whip. PW 2 confirmed that the deceased on arrival had a swollen head and bruises all over the body. The deceased died a few hours later of the injuries inflicted on him as confirmed by the Doctor.***
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> ***The Accused told PW6 that he was disciplining the child and handed over a piece of broken stick to the witness. PW1 confirmed that the deceased was in the custody of the accused for the last part of the journey from Tunya to his home..***
>
> ***From these facts I find that the accused was responsible for the death of the deceased. The circumstantial evidence is so clear and overwhelming against the accused person. The defence did not in any way dislodge this cogent evidence. I found the prosecution witnesses credible. I am satisfied that the prosecution have proved beyond reasonable doubt that the accused person fatally injured the deceased."***

[25] With respect, the above extract of the judgment shows that the trial judge did not apply the test as stated in **ABANGA alias ONYANGO V. REP** (supra). In concluding that the facts analysed point guilt more than innocence on the part of the deceased, the trial judge recognized that there was an element of doubt. In addition, the question as to whether the facts pointed irresistibly to the appellant to the exclusion of any one else was not addressed.

[26] An analysis of the evidence shows that the appellant was implicated by Erick who was also a suspect. Erick's evidence that when he arrived outside the house, he heard the deceased crying loudly was contradicted by Caroline who stated in cross examination that the deceased was inside the house groaning as he arrived in the house in a critical condition and had to be carried into the house by the appellant. This also contradicts Erick's evidence that the deceased informed him that the appellant had beaten him with a whip. The evidence on record does not therefore support the conclusion that all the prosecution witnesses were credible witnesses as Erick was not a credible witness

[27] Caroline also admitted that she asked her husband why they had beaten the deceased as she assumed Erick and the appellant had beaten the child. This was consistent with the evidence of Salome who testified that Erick used to beat the deceased whenever the deceased went to her place. Furthermore, the evidence of Kinyonzi the village elder, is telling. He received the report of the deceased's death from Erick's brother, Bob Wanjoya who implicated Erick. Bob Wanjoya was not called as a prosecution witness even though it was apparent that Erick called him on the material night, and that upon confirming that the deceased was dead, Bob Wanjoya accompanied Erick to the house of the appellant. In the circumstances of this case, an adverse inference must be drawn from the prosecution's failure to call Bob Wanjoya as a witness, that his evidence would have been adverse to the prosecution case.

[28] It is instructive that Kinyonzi questioned both the appellant and Erick and each was shifting blame to the other. Kinyonzi therefore arrested both Erick and the appellant and handed them over to Kababii police station. PC Khisa who later released Erick explained:

> ***"I interrogated the two suspects who told me that it is Kelvin Wasike the accused who killed the minor. The accused said he used a guava dry stick to discipline the deceased."***

[29] There was no evidence that any statement was properly obtained from any of the suspects in accordance with the Evidence Act. Any admission was therefore improperly obtained and ought not to have been acted upon or admitted in evidence. Both Erick and the appellant ought to have been charged as it was not clear who had assaulted the deceased and inflicted the fatal injuries. In light of the above it cannot be said that the inculpatory facts pointed irresistibly to the appellant and no one else, or that they formed a complete chain from which a conclusion can be drawn that the crime was committed by the appellant and no one else. Indeed, it is Erick who had a reason for disciplining his son. The appellant was a mere employee of Erick and would have had no reason for disciplining the deceased. The evidence of Erick against the appellant accomplice evidence which was not corroborated

[30] For the above reasons we came to the conclusion that the appellant's conviction was not safe as the circumstantial evidence adduced was not sufficient to prove the case against him to the exclusion of all others. Accordingly, we allow this appeal quash the appellant's conviction and set aside the sentence imposed upon him. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Kisumu this 27th day of June, 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