IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI. JJ.A)

CRIMINAL APPEAL NO. 74 OF 2016

BETWEEN

DANIEL ANYANGO OMOTO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

***Kakamega, (R.N. Sitati, J) dated 29th September, 2015* in HCCRC NO. 2 OF 2012)**

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JUDGMENT OF THE COURT

The appellant, **Daniel Anyango Omoto** was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that between the 1st and 6th day of January, 2010 at Ebukwala Village, Wambilishe Sub-Location, Kisa Central Location in Khwisero District within Kakamega County with others not before court, he murdered **Judith Ekaliche Oure**. He denied the information and soon thereafter his trial ensued. The prosecution in a bid to prove their case lined up a total of 10 witnesses.

The prosecution case in brief was as follows: **PW1**, **Frida Atieno Ambaisi Ikhuli** was the deceased's sister in-law. On 1st January, 2010 at about 3.00pm she was on her way to the shopping Centre when she met the deceased in the company of her boyfriend **Stephen Nyangweso (PW2).** The deceased and PW2 went out and came back three times before parting ways and the deceased left for the disco with the appellant. However, when she went to the deceased's home the following day she was informed by the mother of the deceased Mary Nyamwala Ougo (PW3) that the deceased had not come home the previous day. She later learnt of the deceased's death on 6th January, 2010.

According to **PW2**, on 1st January, 2010 at about 2.00pm he was told by the appellant that the deceased wanted to see him and so he went to meet the deceased outside **Cosmos Bar** within Wambilishe Sub-Location. After the meeting he left for Luanda market with his brother in-law to buy beers for his bar business. He left the deceased in the company of the appellant. On 7th January, 2010, he learned that the deceased had not been seen at home since the day they had parted and that she was deceased. He went to the scene where the deceased's body was found. He saw the jeans trouser and shoes which the appellant was wearing on 1st January, 2010. He later received information that the deceased's identity card had been picked on the road. He went to the nearby SDA church and recovered the deceased's ID from the church's secretary and took it to at the police and also reported the matter to the area Assistant Chief, the AP's and Khwisero police station. He went with the deceased's mother to the mortuary on 8th January, 2010 and observed that one of the deceased's hands had been severed while her clothes had been pulled up. The appellant thereafter disappeared from his homestead after the deceased's death until he was arrested a year later. He had known the appellant and the deceased for 6 and 5 years respectively.

PW3, Mary Nyamwala Ougo was the deceased's mother. According to her the deceased left home at about 1.00pm on 1st January, 2010 for Emulwanda market to withdraw some money from M-pesa. At about 7.00pm the deceased had not come back home and so she tried to reach her on phone but the deceased could not answer. On 6th January, 2010, she was alerted of the discovery of a woman's body and on 7th January, 2010 she was taken by police to the scene where she saw some hair, a long trouser, shoes and a sweater. Later she accompanied PW2 to Mbale mortuary where she identified the body of the deceased to the Doctor for post mortem purposes. After the post mortem the body was released to her for burial. Although she did not know the appellant prior to the incident, she was however aware that he disappeared from home for about one year after the deceased's death.

Morris Oyondi, (PW4) who was the village elder, was on 6th January, 2010 informed by **Fanice Amboka** about the presence of a dead body of a woman within the village. He visited the scene and reported to the chief and later to the police who went and collected the same. He also saw a jeans long trouser and some shoes lying on the ground a short distance from the body. He also testified that the deceased did not have any clothes on her body and the palm of one hand was cut off.

According to **John Ambuka Amukoya**, (**PW5)**, he was herding his cows on 6th January, 2010 when he encountered a foul smell. He was overcome with curiosity and went to check only to find the dead body of a woman. He was shocked and ran home to inform his wife, Fanice Amboka who then went and reported to PW4. He also saw some clothes and shoes at the scene.

PW6, **Alfred Katechi** was called by PW3, his sister in-law on 6th January, 2010 and informed of the deceased's disappearance. He also identified the deceased's body at the mortuary for post mortem purposes. Apparently, the deceased was her niece.

Deborah Mwarika Omoto, (**PW7)**, on 31st December, 2009, went to church and heard that someone had been killed. On 1st January, 2010 her son, the appellant came home. He prepared food for her and himself at about 9:00am and they ate. The appellant was arrested one year later following the murder as he had gone in search of employment in Nairobi so that he could build his own house. According to her, the appellant's arrest was due to the disagreement between him and some boy who had taken firewood from the family land.

PW8, Inspector Jackson Matheke who was in-charge of Khwisero Police Post at the time gave evidence that whilst on duty on 6th January, 2012 at about 1:00pm received a report of the death of the deceased. He booked the report in the OB proceeded to the scene and took the body to Mbale Hospital Mortuary and thereafter commenced investigations which included tracing the deceased's movements prior to her death. According to the investigations the deceased was last seen at Emulwanda in the company of the appellant.

Dr. Masika Collins, (**PW9)** conducted the post mortem examination on the body of the deceased on 11th January, 2010. The body had a visible cut wound on the right thigh. The right hand was cut off and there were bruises on the neck and her private parts were mutilated. Internally, the genital system had mutilation and the private parts and cervical system also had injuries. He formed the opinion that the cause of death was respiratory arrest secondary to strangulation.

PW10, Augustine Ndakala Alutei, the area Assistant Chief received a phone call from PW4 informing him of the discovery of the body of the deceased. He advised him to report at Khwisero police station. On 7th July, 2010, he was in the office when the deceased's ID was brought to him. It had been picked on the road near where the body of the deceased had been discovered. He also accompanied the police in taking PW3 to the scene where the deceased's body was found together with some clothes, a pair of jeans and some open shoes. The clothes were identified by PW2 as belonging to the appellant.

Put on his defence, the appellant in his sworn evidence denied the offence and stated that on 1st January, 2010 he was at home building his house and preparing land to plant maize. That after he had planted maize he left for Nairobi until 2012 when his mother called him back home to build his house. He travelled from Nairobi and on the evening of 8th January, 2012 he was arrested. He denied ever knowing the deceased or her death. He also denied running away to Nairobi after the deceased had been killed and that the clothes that were produced as exhibits did not belong to him. He maintained that PW2 was his neighbor who held a grudge against him because he did not want him to construct his house.

The learned Judge **(Sitati, J.)**, in her considered judgment observed that there was no direct evidence on record regarding events leading to the death of the deceased hence the only evidence tendered was purely circumstantial. The circumstantial evidence in this case did not disclose a lingering possibility that the offence may have been committed by a person other than the appellant. Both PW1 and PW2 saw the deceased in the company of the appellant between 3.00 pm and 6.00 p.m. on 1st January, 2010 and the deceased was not heard of again until her body was discovered in a thicket on 6th January, 2010. It is then that the learned Judge arrived at the conclusion that the appellant was the only person who knew what happened to the deceased between the times he was with her on 1st January, 2010 and when her body was discovered on 6th January, 2010 in a semi-decomposed state. She was satisfied that the appellant knew what happened to the deceased on the fateful day.

While considering the appellant's alibi defence and the allegation that he and PW2 had a dispute over land and that PW2 did not want him to build a house, the Judge took the view that the defence in its entirety was an afterthought. The appellant had failed to cross examine prosecution witnesses on those issues.

On whether malice aforethought was proved, the learned Judge had no doubt in her mind that anyone inflicting such serious injuries as explained by PW9 intended either to kill or to cause grievous harm to the deceased. The deceased died after her right hand was chopped off, part of her right thigh inflicted with a wound and finally strangled. In the premises, the appellant must have known that what he did to the deceased would probably cause her death, cause grievous harm to her, although such knowledge may have been accompanied by indifference whether death or grievous bodily harm would result. Subsequently, the appellant was convicted of murder and sentenced to death.

Dissatisfied with the conviction and sentence, the appellant filed the present appeal in which he raised two grounds to wit that the learned Judge erred in law in finding that the case against the appellant was proved beyond reasonable doubt; and secondly, that the appellant was seeking refuge in the provisions of Article 165 (3) (a) (b), 159 (2) (a) (b) and 22 (4) of the Constitution bearing in mind the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (2017) eKLR.**

At the hearing of the appeal, **Mr. Ariho,** learned counsel appeared for the appellant while **Ms. Lubanga,** learned counsel holding brief for **Mr. Mule,** principal prosecution counsel represented the respondent. Counsel relied on their written submissions and opted not to highlight.

The appellant submitted that there was no eye witness who saw the appellant kill the deceased and the trial Court was correct in noting that

only circumstantial evidence sufficed but erred in failing to find that the deceased could have been in the company of other people other than the appellant. Counsel further contended that the chain of evidence in the circumstances was broken and not corroborated, and *mens rea* too was not proved. Thus the appellant's conviction based on circumstantial evidence was not safe. It was further submitted that the prosecution had failed to rebut the appellant's alibi defence as no evidence was tendered to show who the deceased was having a drink with and whether she was only in the accompany of the appellant. The learned Judge was also faulted for holding that the prosecution case was proved beyond all reasonable doubt when the appellant was convicted and sentenced on mere suspicion that he was the last person seen in the company of or in contact with the deceased. That malice aforethought was also never proved.

Opposing the appeal, the respondent submitted that there was sufficient circumstantial evidence that the only person who could have murdered the deceased was the appellant and that malice aforethought was established under section 206 (a), (b) & (c) of the Penal Code in line with the extent of injuries confirmed by the medical report and the cause of death which was respiratory arrest secondary to strangulation. That all the essential ingredients for the offence of murder were proved beyond reasonable doubt and the prosecution evidence was not in any way dented by the appellant.

This being a first appeal, we are expected to subject the entire evidence adduced before the trial Court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have to give due allowance. This is also the essence of rule 29(1) of this Court's Rules that enjoins us to re-appraise the evidence and draw our own inferences of fact on the guilt or otherwise of the appellant. I**n the** well-known case of ***Okeno v Republic*** *(1972) EA 32* the predecessor of this Court re-stated that requirement thus:

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 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) EA 424)".***

We have perused the record, the submissions by counsel and the law. The issues that desire our attention are whether; the conviction of the appellant based on circumstantial evidence was safe; whether the appellant's alibi defence was rebutted and finally whether we should interfere with the sentence imposed. We shall start with the appellant's alibi defence.

In the case of **VICTOR MWENDWA MULINGE v R [2014] eKLR** this Court stated:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and inweighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

In the present appeal, the appellant's alibi was that on the material day, he was not at all in the company of the deceased. Rather, he was busy building his house and preparing land to plant maize. Thereafter he left for Nairobi to look for employment where he stayed for a year before he was called home by his mother to construct his house. The learned Judge however held and rightly so in our view that it was an afterthought. How could he have been called home to construct house which he had already constructed before he left for Nairobi? Further, the appellant raised that defence very late in the day, that is, when giving his defence testimony thereby giving the prosecution no time at all to test and rebut the same. At no time at all during the cross-examination of the prosecution witnesses did the appellant allude to the possibility of such defence. Further, during cross-examination of the prosecution witnesses, the appellant never disputed that the jeans long trouser found at the scene of crime belonged to him. He initially denied knowing PW2 but later conceded to have known him as a neighbor. Certainly his defence in those circumstances was not credible. Finally, there was the unchallenged evidence of PW1 and PW2 that they saw the deceased in the company of the appellant between 3 and 6pm. Taking all the foregoing into consideration, the alibi defence was a hoax and the learned Judge was right in rejecting it.

As regards circumstantial evidence, it is common ground that there was no direct evidence linking the appellant to the death of the deceased. There was no eye witness to the murder either. It is trite law that circumstantial evidence is often the best evidence. In the case of **Ndurya v. Republic [2008] KLR 135,** it was stated *inter alia "that circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. It was necessary before drawing the inference of guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. Such evidence should not create a lingering possibility that the offence may have been committed by a person other than the appellant."* In the case of **Mwathi v. Republic [2007] 2 E.A 334,** this Court observed that in the absence of eye witnesses, the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon other reasonable hypothesis than that of guilt. See also the locus classicus cases of **Rex v. Kipkering Arap Koske, 16 EACA 135** and **Teper v. R [1952] AC 480**.

In this case, PW1 & 2 saw the appellant in the company of the deceased between 3:00pm-6:00pm on the material date. They both knew the appellant and were able to recognize him. PW8 stated that from his investigations he established that the deceased was last seen with the appellant during the cultural festivities at Mulwanda Trading Centre. Further, a jeans long trouser belonging to the appellant was found besides the body of the deceased. Finally, there was the evidence of the appellant running away from home for close to two years immediately after the incident. When this evidence is taken cumulatively it points irresistibly to the appellant as having committed the offence. Having been the last person to be seen with the deceased before her demise, he had a duty to explain what transpired. In a nutshell the evidence tendered formed such a complete chain such that there was no escape from the only logical conclusion that the appellant was the only person who knew where the deceased was and what happened to her thereafter.

Again, the circumstances of the present appeal satisfy the application of Sections 111(1) and 119 of the Evidence Act both of which make provision for a rebuttable presumption which if demonstrated by the evidence on the record operate to shift the burden on the appellant to

explain how the deceased met her death considering that the appellant was the last person to be seen with the deceased before she was found dead. In the case of **Douglas Thiongo Kibocha v Republic [2009] eKLR** this Court while construing section 111 (1) of the Evidence Act had this to say:

> **"When parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact."**

See also the cases of **Mwandoro Ndurya** (supra) and **Musyoka Maingi Nguli v. Republic [2019] eKLR**.

With regard to proof of malice aforethought, in the case of **Isaak Kimanthi Kanuachobi v R**(**Nyeri) Criminal Appeal No. 96 of 2007 (ur)**, this Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code as follows:

> ***"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008)."***

In the instant appeal, there is evidence by PW9 that there was a visible cut wound on the thigh and private parts were mutilated. Internally the genital system had mutilation and private parts and cervical system also had injuries. Her right hand was cut off. It is therefore clear that whoever inflicted those injuries intended to cause death to the deceased; hence malice aforethought.

With regard to the sentence, Section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death**." However, the Supreme Court in **Francis Karioko Muruatetu & another v Republic (2017) eKLR,** found the said provision to be unconstitutional when it stated:

> ***"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."*** Emphasis ours.

The Supreme Court was of the view that due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence.

Although the Supreme Court did not outlaw the death sentence, in deciding whether or not to impose death sentence it was held in **Bachan Singh v The State of Punjab (Bachan Singh) Criminal Appeal No. 273 of 1979 AIR (1980) SC 898,** a decision cited in the **Muruatetu's case** (supra) that:

> ***"It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."*** Emphasis ours.

Similarly cited was the decision of the Privy Council in **Spence v The Queen; Hughes v the Queen** (**Spence & Hughes**) **(unreported, 2 April 2001)** where Byron CJ was of the view that:

> ***"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."*** Emphasis ours.

From the foregoing, we are satisfied that the manner in which the deceased died was heinous. The appellant mercilessly chopped off the deceased's right hand and strangled her. Thereafter he went for her genital organs which he mutilated. No human being deserves to die in this manner. As such, we are reluctant to exercise our discretion as provided for in the **Muruatetu case** (supra) and review the appellants' sentence.

The upshot is that the appeal lacks merit and it is therefore dismissed in its entirety.

Dated and delivered at Kisumu this 31st day of October, 2019.

R. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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.

DEPUTY REGISTRAR.