IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 109 OF 2015

BETWEEN

GORDON ODHIAMBO SHEM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay, (D.S. Majanja, J) dated 10th June, 2015

in

HCCRC NO. 16 OF 2012)

****

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Homa Bay. On 10th November, 2011 the said High Court was informed that the appellant, **Gordon Odhiambo Shem** had murdered **Trufosa Ager Resa,** hereinafter "the deceased" in her house at Kakwajuok village in Rachuonyo North District within Homa Bay County on 25th September, 2011 contrary to Section 203 as read with Section 204 of the Penal Code. When presented in the said court on 10th November, 2011, the appellant denied the information and soon thereafter his trial commenced. The prosecution marshalled a total of 11 witnesses in a bid to prove its case against the appellant. The prosecution case in brief was that:

PW1, John Oyiengo Oloo the deceased's step son and a nephew to the appellant, on the morning of 25th September, 2011 was informed by his son that the deceased's house had been broken into. He went to the house and found the deceased lying on the floor in a pool of blood. The deceased's body had cut wounds on the neck and head. He immediately summoned his wife Cecilia Atieno PW2 to the scene. He thereafter proceeded to report the matter to the area assistant chief, Wilson Were (PW3). He stated that the deceased had previously complained to him that the appellant was disturbing her by constantly asking for food. As a result she had reported the matter to PW3 who had scheduled a meeting of 16th November, 2011 to discuss and resolve the dispute. This never came to pass as she was killed before the meeting could be held.

PW2, other than being the wife of PW1 was also daughter in-law to the deceased. Reacting to PW1's instructions, she proceeded to the deceased's house and found members of the public thereat. She observed a cut wound on the deceased's neck. She knew the appellant who was her nephew. Similarly the deceased had complained to her about the appellant stealing from her and demanding for food. This was not long before the incident.

PW3, the area assistant chief knew both the deceased and the appellant as they were residents in his area of jurisdiction. Upon being informed of the incident by PW1, he went to the scene where he found the deceased lying on the floor. She had a cut on the neck. Prior to this he had called Kendu Bay Police Station Commanding Officer (OCS), IP David Mukala (PW7) who sent police officers to the scene. On arrival PW3 asked for the whereabouts of the appellant since the deceased had complained to him on 21st September, 2011 that he had forcefully asked for food from her and threatened to kill her. He had given her a letter inviting her and the appellant to come on the 26th September, 2011 for a meeting to resolve the dispute. Whilst still at the scene, PW1 brought the appellant whom he arrested and handed over to the police at the scene. When the police searched the house where the appellant used to sleep they found a white trouser stained with lots of blood hidden under a mattress. The police officers also noticed blood stains on his shirt and asked him to surrender it. Done, the police officers removed the body of the deceased to Simbori hospital mortuary.

PW4, Erick Ouma Shem the appellant's brother on the material day heard screams in the morning and went to see what was happening. He found the deceased lying on the floor. He had heard that the appellant and the deceased had differed when he took the deceased's Identification card without her permission.

PW5, JOOO a grandson to the deceased and a son to PW1 used to sleep with the appellant in the same house. On 24th September, 2011 he went to bed at around 10:00pm and was joined a few minutes later by the appellant. The following day, he woke up at around 7:00am and went to school leaving the appellant asleep. He was later summoned home by PW1 and found the appellant already arrested by police officers. He confirmed that he had seen the appellant wearing the blood stained shirt and trousers the previous day.

PW6 Dr. Peter Ogolla carried out a post mortem on the body of the deceased on 29th September, 2011. He observed a cut wound on the outer side of the eye, the left cheek bone and on the right side of the jaw. The right jaw had a fracture and was compressed. He concluded that the cause of death was arrest of the heart and lungs resulting from lack of oxygen that resulted from compression of the spinal code. A sharp object was probably used to inflict the injuries. He also examined the appellant and found him fit to stand trial.

PW7, came to the scene after receiving a call from PW3 at about 8:00am. He found the body of the deceased lying in a pool of blood. She had a deep cut on the left side of the neck. The officers he had dispatched earlier to the scene and who included IP Isaac Mweme (PW9) had recovered a blood stained axe, and the appellant's blood stained clothes which were handed over to him.

PW8, Lawrence Kinyua Muthuri, a Government Chemist Analyst on 5th October, 2011 received, from PC Richard Chemjor (PW11) samples of blood, clothes and axe and was tasked with determining the source of blood stains on the said items. He found after DNA profiling that the blood on the items all matched the DNA blood profile of the deceased.

PW9, as already stated was tasked with going to the scene by PW7. On arrival he found the deceased lying in a pool of blood. She had a cut on the left side of the neck and two cuts on the head. There was an axe behind the door which had blood stains which he took possession of. They searched the appellant's house in his presence and recovered a white trouser that was stained with blood. He was also wearing a dark blue shirt which had blood stains. He asked the appellant to remove the shirt and hand it over to him. He then arrested the appellant and took the deceased's body to Simbiri Hospital Mortuary.

PW10, SP Ayub Bakari, the District Criminal Investigations Officer, Rachuonyo South District at around 9:00am received a report of murder and proceeded to the scene. Together with the scenes of crime personnel they took photographs of the scene. The body of the deceased was lying in a pool of blood. She had cuts on the head, neck and left eye. The body of the deceased was thereafter taken to Simbiri Hospital Mortuary for post mortem. Preliminary investigations indicated that the appellant had quarreled with the deceased over a piece of land. It was then that he made a decision to charge the appellant with the offence of murder.

PW11, PC Richard Chemjor who was based at Rachunyo CID offices attended the deceased's post mortem and collected all the exhibits and samples which he subsequently forwarded to the Government chemist.

Put on his defence, the appellant gave sworn testimony. He stated that he was living with the deceased who took care of him. On the evening of 24th September, 2011 at about 8:30 pm he had supper with the deceased and left. The following morning at about 6:00am he was woken up by PW1 who told him that the deceased was lying on the floor. He ran to the house and tried to carry her to where there was light but realized that she was dead and left her on the ground. His trousers were stained with the deceased's blood when he fell on her as he mourned. He decided to change the clothes before going to call the village elder. The police then came and arrested him and subsequently charged him with an offence he did not commit.

The learned Judge (Majanja J) having careful evaluated the evidence tendered by both the appellant and prosecution was persuaded that the appellant had committed the offence. On that basis he convicted him of the offence and sentenced him to death.

Aggrieved by the conviction and sentence aforesaid, the appellant filed the present appeal and raised six (6) grounds to wit that the trial court erred in law; by failing to find that the case against him was not proved beyond reasonable doubt; by convicting him on the prosecution case based on hearsay evidence, failing to take into consideration the glaring inconsistencies in the testimonies of prosecution witnesses; failing to find that the mandatory nature of the death sentence was unconstitutional and was not only unconstitutional but also against the spirit of the Universal Declaration of Human Rights as it denied him the right to life.

At the plenary hearing of the appeal, the appellant was represented by **Mr. Anyull,** learned counsel holding brief for **Mr. Kouko,** learned counsel while **Mr. Muia,** learned prosecution counsel appeared for the state. Counsel relied on their written submissions and opted not to highlight.

The appellant submitted that he was the sole caregiver to the deceased in her old age hence it would be beyond imagination that he would murder her. That the 11 witnesses who testified did not witness the commission of the offence and none of them placed him at the scene of crime. The appellant further contended that the prosecution relied on hearsay evidence contrary to Section 69 of the Evidence Act, he further submitted that the evidence adduced was purely circumstantial and was insufficient to prove the prosecution case beyond reasonable doubt. While relying on the case of **Francis Karioko Muruatetu & Another v Republic (2017)eKLR** counsel noted that the mandatory death sentence imposed on the appellant was unlawful and violated his constitutional right.

The appeal was opposed. Mr. Muia in his submissions stated that malice aforethought had been established under subsections (a), (b) and (c) of section 206 of the Penal Code considering the nature and extent of injuries inflicted on the deceased as confirmed by PW6 in the post mortem report. That from the evidence there is no doubt that the appellant assaulted the deceased with an axe which resulted in her death. Counsel took the view that although the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court, the offence was committed in a gruesome and heinous manner and the appellant who did not appear remorseful and should therefore suffer the ultimate sentence, which is the death sentence.

With regard circumstantial evidence, counsel relied on the case of **John gacoki Nzilu v Republic (2018) eKLR** and submitted that from all the evidence tendered it could safely be concluded that the appellant committed the offence. Turning to the inconsistencies in the prosecution case, counsel submitted that there were no inconsistencies, and even if there were, they were inconsequential. Counsel concluded by submitting that the prosecution case was proved beyond reasonable doubt as neither the cross-examination of its witnesses nor the evidence tendered by the appellant displaced the prosecution case in any aspect.

This is a first appeal. It is our mandate as set out in rule 29(1) of this Court's Rules to re-appraise the evidence and draw our own conclusions on the guilt or otherwise of the appellant. We have a duty to re-hear the case and reconsider the record in totality of the trial court while bearing in mind that we did not have the occasion to observe the witnesses as they testified and give due allowance. **In the case of Issac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005** this court held that:

> ***"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance of the same."***

(See also ***Kamau v Mungai [2006} eKLR 150 and Njoroge v Republic [1987] ELR 19***

We have perused the record of appeal, submissions by counsel and the law. The issues for determination are whether the prosecution case against the appellant was proved beyond reasonable doubt and whether this Court should exercise its discretion and interfere with the death sentence imposed on the appellant.

To sustain a conviction on the charge of murder, it is absolutely necessary to prove the death of the deceased, that the death was caused by the appellant and that in so doing he was actuated by malice aforethought. The three essential ingredients must be proved beyond any reasonable doubt. These essential ingredients were reiterated in ***Anthony Ndegwa Ngari v Republic` [2014] eKLR*** as follows:

> ***"…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."***

It is common ground that the deceased was found dead lying in a pool of her own blood on the morning of 25th September, 2011 in her house. The cause of death was established by PW6 to be arrest of the heart and lungs resulting from lack of oxygen due to compression of the spinal code. That the injuries were inflicted by a sharp object likely to be the blood stained axe recovered from the deceased's house. Indeed the fact of the death of deceased was not in dispute at all. The witnesses who happened to go to the scene testified that they found the deceased dead and lying in a pool of blood with injuries to the neck and head. Even the appellant did not dispute that fact. Accordingly the learned judge cannot be faulted for holding that the deceased died as a result of the fatal injuries inflicted on her by a sharp object likely by the blood stained axe.

Was the appellant responsible for the death of the deceased? No doubt this was a case of circumstantial evidence as correctly observed by the trial court. This is the same positon taken by the appellant in his submissions. No witness testified to seeing the appellant commit the offence or place the appellant at the scene of crime. It has been stated time without number that a case based on circumstantial evidence is only as strong as its weakest link. The prosecution must therefore lead evidence of circumstances that point irresistibly to the accused as the person who must have committed the crime. There must be no other co-existing circumstances, that should weaken or destroy the inference of guilt on the part of the appellant. In the case of **Omar Chimera v Republic Criminal Appeal No. 56 of 1998** the court held that:

> ***"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his 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 co-existing circumstances which would weaken or destroy the inference – TEPER V THE QUEEN [1952] AC 480 at page 489]." "Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge."***

This Court has since then laid down three tests which must be satisfied for circumstantial evidence to hold. This was in the case of **Judith Achieng' Ochieng' v Republic (2009) eKLR** where it held 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 the 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 the 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."***

The learned Judge while taking into account all the relevant circumstantial evidence made the finding that the fact that the appellant's clothes were stained with the deceased's blood placed him within the vicinity of the scene of crime and that all evidence irresistibly pointed at the appellant as the person who had the opportunity in the circumstances to commit the crime to the exclusion of any other person. We cannot agree more. We note from the record that the appellant was an orphan who was under the primary care of the deceased. He would take his meals in the deceased's house and go to sleep elsewhere. Like every other day, on the night of 24th September, 2011 he had his supper with the deceased at around 8:30pm as stated in his testimony. He was the last person to be seen with the deceased before she was found dead the

following morning. From the evidence on record there was no forced entry into the deceased's house, thereby ruling out the possibility that other people may have forcefully gained entry into the house after the appellant had left. According to PW5 who used to sleep in the same house with the appellant, he went to sleep at 10.00pm. By then the appellant had not come. Shortly thereafter he appeared. However, according to the appellant, he had supper with the deceased at about 8.30pm. and left. There is no explanation on record where the appellant was between 8.30pm. and 10.00pm. The explanation can only be that this was perhaps the time he was committing the crime.

Further his clothes were stained with blood that belonged to the deceased. The appellant did not dispute the fact of the blood being found on his clothes. However he hastened to add that his clothes came into contact with deceased blood when he fell on her as he mourned and also when he attempted to carry the deceased's body to where there was light. However, this does not explain why he had hidden the blood stained trouser under the mattress. Moreover, PW5, his housemates saw him in the blood stained clothe the previous night. The evidence on record further shows that the appellant was not the first person to arrive at the scene. In fact he was brought to the scene by PW1. By then members of the public had already gathered at the scene. None of them testified to seeing the appellant fall on the deceased as he mourned or carry the body anywhere. If anything and according to PW2, he exhibited no emotions at all. Further there is no evidence on record either by the local chief or any other witness at the scene that the appellant ever proceeded to see the local chief after changing his blood soiled trouser.

The shirt and trousers are personal items of clothing and therefore the appellant bore an evidential burden to provide a reasonable explanation how the deceased's blood was found on his clothes in terms of Section 111(1) of the Evidence Act as correctly observed by the learned Judge. The section provides, *inter alia:-*

> ***"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:***
>
> ***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:***
>
> ***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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."***

Whereas in this case the appellant's explanation as to how the deceased's blood came to be found on his clothes was not credible, the court was entitled to presume certain facts under section 119 of the Evidence Act which provides:-

> ***"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."***

Given the foregoing, we entirely agree with the learned judge's findings when he stated thus:-

> ***"I also reject the proposition that the accused went to the deceased's house that morning once the deceased's body was discovered. He had been left in the house by PW4 (sic) that morning and the facts irresistibly point to the fact that either after supper with the deceased or at some point in the night the accused went up to the house struck her with the axe and strangled her. The only explanation of the blood stains on his clothes is that he killed the deceased that night. After the act, he went home and changed his bloodied trousers and went to sleep. Although learned counsel for the accused put questions to the witnesses to suggest that there could have been an intruder, the existence of an intruder does not explain how the accused's clothes became stained with the deceased blood since I have found, the accused did not go near the deceased body that morning. Even if I accept that the accused found the deceased already dead at some time that morning, why wasn't he the first to raise alarm or inform anyone else that the deceased had been found dead. The prosecution evidence therefore excludes the possibility that the deceased could have died in any other way other than by the hand of the accused ….."***

No doubt the prosecution led credible circumstantial evidence that irresistibly pointed to the appellant as the culprit and we have no reason to disagree with the findings of the trial court.

The appellant also raised the issue of inconsistency in witness testimony. However, he failed to point out the specific inconsistencies. It is our view that just like the trial court, the alleged inconsistencies, if any, were not so material as to poke holes in the prosecution water tight case. In any event, contradictions and inconsistencies are nothing new in criminal proceedings. All that the trial court needs to appreciate is whether the said contradictions or inconsistencies were prejudicial to the appellant and went to the root of the prosecution case. In the case of **Joseph Maina Mwangi v Republic CA No. 73 of 1992 (UR),** this Court held that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

Did the appellant kill the deceased with malice aforethought as defined in **Section 206 of the Penal Code thus:**

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> ***(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

"The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident." See also: George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic [1991] KLR 622.

In the case of ***Republic v Lawrence Mukaria & Another (2014)eKLR***, this Court made the following observations as well:

"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."

From the evidence on record the deceased was assaulted by a sharp object, an axe that was found at the scene. The appellant must have known that by attacking the deceased with an axe he would cause the deceased grievous harm and or even death. Accordingly, malice aforethought was proved.

As regards the death sentence imposed by the trial court, we are aware of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic (supra)** which held that:

"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…It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"

Taking into account the relevant circumstances of this case especially the fact that the appellant was an orphan, was a grandson to the deceased and depended on her for his upkeep and the fact that he has been in custody for the past eight (8) years, and considering further the mitigation and record, we are of the view that this is a case that calls for our review of the sentence. In the circumstances, a sentence of imprisonment would serve the interest of justice.

For the foregoing reasons, we find no reason to interfere with the trial court's conviction of the appellant. The appeal against conviction is accordingly dismissed. However, the appeal against sentence succeeds and is allowed. The sentence of death is set aside and in substitution thereof the appellant shall serve 25 years imprisonment with effect from 10th June, 2015 when he was sentenced.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.