**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, OKWENGU & WARSAME, JJ.A)**

**CRIMINAL APPEAL NO. 179 OF 2016**

**BETWEEN**

**MAMUSH HIBRO FAJA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 23rd February, 2016*

***in***

***HC CR. Case No. 48 of 2013)***

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**JUDGMENT OF THE COURT**

**Mamush Hibro Faja** (the appellant) was on 16th April, 2013 charged with murder contrary to **section 203** as read with **section 204** of the Penal Code, Cap 63, Laws of Kenya. The appellant was alleged to have murdered Tegis Mohamed Abdi, on the 7th day of April, 2013, at Huruma-Kiamaiko within Nairobi County

The prosecution called 10 witnesses while the appellant gave unsworn evidence and called no witness. On 23rd February, 2016, the trial Judge (**Lesiit J.**) found the appellant guilty as charged, convicted him and sentenced him to death as provided by law, thereby precipitating the present appeal. The Amended Memorandum of Appeal dated 13th February, 2019 raises 8 grounds of appeal that aver that the learned Judge erred by convicting the appellant:

***i. when the ingredients of murder were not proved;***

***ii. on the evidence of PW2 who contradicted her statement; and***

***iii. on evidence of identification in pitch darkness with limited light from a mobile phone;***

***iv. On circumstantial evidence riddled with inconsistencies.***

Before we consider the grounds of appeal, it is pertinent to highlight the evidence adduced at the trial.

PW3, **Habiba Mohamed,** the deceased's mother and neighbor testified that on the material day at 4.p.m. or thereabouts, the deceased came to her house and told her that she was going to her brother's house to charge her phone. Later, the deceased came with PW2, her last son and the deceased's young child and bid her goodnight. At around 10. p.m. she saw her daughter in law and the children return.

PW2, **Dansoye Ado Duba,** was the deceased's neighbor and sister-in-law. She lived about 200 meters from the deceased's house. On the material day at around 4.00 p.m. the deceased went to visit PW 2 in her home in Kiamaiko, Kariobangi. The deceased told her that there was no electricity in her house and that she needed to charge her husband's phone. The deceased stayed at the said house until 9.00 p.m. when she was escorted by PW2 to her flat. PW2 testified that when they arrived at the deceased's flat, the house was dark and the door slightly ajar. The deceased then put the light on her phone so they could see and PW2 saw the appellant standing in the sitting room. She entered the house, greeted him then returned to her own house. At around 10.00 p.m., she heard noises and people saying that a man had killed his wife.

She

followed the crowd which led her to the appellant's house where he lived with the deceased. She peeped through the window using the beam from a torch and saw the deceased lying on her stomach, hands outstretched, blood gushing from her body.

The evidence of PW1, **Amina Dida** was that on the material day, the deceased had called her at around 2 p.m., asked to see her and mentioned that she and her husband were having problems. PW1 proceeded to the deceased's house at around 9.00 p.m. Given that there was a blackout in the area, she navigated her way to the deceased's home on the second floor using the torch on her mobile phone.

PW1 testified that when she arrived at the appellant's house, she heard the deceased arguing with someone. She knocked on the door in vain and when there was no answer she gave up and retreated. On reaching the ground floor she changed her mind, turned around and headed to the flat to try again. On her return, she met the appellant whom she knew well, leaving the house. She then spoke to him in their mother tongue but he did not answer. Instead he proceeded to hastily lock the door with a padlock and as he walked away, she saw him leave a trail of bloody footprints. According to PW1, this made her anxious and she scrambled to the nearest window, opened it, lifted the curtain and shone the light of her phone inside the sitting room. She saw the deceased sprawled face down on the floor, arms outstretched lying in a pool of blood. She cried out and a neighbor on the same floor came out of his house. She asked him to look into the house and collapsed thereafter.

The evidence of PW6, **Kare Abdul Rahi**, was that he was a next door neighbour of the deceased and that he had lived on the same floor with the appellant and the deceased for about three months. On the material night, at about 9.00 p.m., he heard screams and got out of his house to investigate. He found other neighbours outside who informed him that the screams had emanated from the deceased's house. Since no more screams could be heard, they all returned to their homes.

About half an hour later, as he left his house to go to the toilet, he saw blood at the door of the deceased's house. Suspicious, he flashed his torch and saw blood like shoe footprints leading from the deceased's house to the stairs. He followed the bloody shoe prints and noticed they went downstairs and outside. He raised the alarm and when his neighbours came out of their houses, they noticed an open window to the deceased's house, pulled the curtain and saw the deceased lying on the floor. He remained at the scene until the police arrived.

According to PW8, **SGT Nicholas Murira** he was informed of the incident by the officer in charge, CIP (W) Ringera at about 10.00 p.m and he and his fellow officers arrived at the scene at around 10.30 p.m. He broke down the door to the house, and found the lifeless body of the deceased which had deep cuts on the neck and stomach. He searched the house and recovered a blood-stained somali sword inside the bedroom under the bed. The body was then removed from the scene and taken to City Mortuary.

PW7, **PC Anthony Mutua** testified that on the morning of 13th April, 2013, he was on duty at Pangani Police Station with police officer Sarah Helegai, when the appellant came to the Police Report office. He introduced himself as Mamusa and then stated in a steady voice that he had killed his wife Tegis in Huruma area. PW7 placed the appellant in a cell and later confirmed that indeed there was a murder incident in Huruma area. He then called Huruma Police who came for the appellant.

At the trial, the appellant gave an unsworn statement and denied committing the offence. He testified that on 7th April 2013, he went to work in the morning and left at 9.00 p.m in the evening. When he arrived at his flat in Huruma, he saw a raucous crowd of people and overheard someone saying "*Mamush has killed his wife*". Scared, he fled and went to Huruma Police Station where he found the deceased's relatives who accused him of murdering the deceased prompting the police to arrest him.

The trial Judge upon weighing the evidence before her, rejected the appellant's *alibi*, and convicted him stating in part as follows:

> ***"The prosecution has firmly and cogently established the fact that the accused was the last person to be seen with the deceased before she died, and (sic) fact he was left with the deceased in their house moments before the deceased was found dead that night. Those facts taken together with the evidence of PW1 that the person she saw leaving the deceased home was the accused just before the deceased body was seen inside the same house he just left, all point irresistibly to accused guilt (sic). I find that the prosecution has established that it was the accused who attacked the deceased on the night in question."***

This being a first appeal, we are bound to exhaustively re-appraise the evidence on record as a whole and make our own conclusions, whilst bearing in mind that we did not have the opportunity to see the witnesses as they testified. (See ***Kiilu & Another vs. R [2005] KLR 174***)

At the hearing, **Mrs. Rashid**, learned counsel for the appellant, submitted that the prosecution case was based on mere suspicion. Counsel challenged the identification of the appellant and contended that his identification occurred in pitch darkness, with limited light from a mobile phone torch by a witness who had admittedly only met the accused person once.

Counsel further challenged the credibility of the testimony of PW2. In her opinion PW2 was not a reliable witness given the inconsistency in her statement made to police and her evidence before the court. According to PW2's statement, she escorted the deceased up to the door of her house and returned home. Her testimony that she entered the flat and greeted the accused was therefore a distortion of the truth and an attempt to implicate the accused by placing him at the scene of the crime.

Counsel for the appellant submitted that the standard of proof of beyond reasonable doubt, was not achieved, and that there was no evidence connecting the appellant with the murder of the deceased. She prayed that the Court allow the appeal and quash the appellant's conviction.

**Ms Matiru**, Prosecution Counsel, opposed the appeal claiming that there was overwhelming evidence against the appellant. Counsel submitted that both PW1 and PW2 were truthful witnesses and the credibility of their evidence was not in doubt. PW2's testimony established that the appellant was home at the time of the death of the deceased, while PW1 recognized the voice of the deceased arguing

with someone in the house moments before her death. In her view, the learned Judge rightly evaluated the evidence and came to the correct decision.

We have considered the record, submissions by counsel and the law. From the postmortem report dated 8th April, 2014, the cause of the deceased's death was multiple stab wounds to the neck and abdomen. There can be no doubt that the deceased's death was caused by someone who intended to end her life or intended to cause grievous harm to her. What is in issue is whether the prosecution has proved beyond reasonable doubt that the appellant is the perpetrator.

The evidence before us clearly indicates that there was no eye witness to the heinous crime, hence the prosecution relied on circumstantial evidence to connect the appellant to the murder. It is with this in mind that we have considered the circumstantial evidence in this case. As stated in the case of ***Republic vs. Taylor Weavor and Donovan*** ***(1928) 21 Cr. App. R.20:***

> ***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."***

Again, the principles governing reliance on circumstantial evidence to convict an accused person are well settled. There are several authorities on this subject. This court in ***Criminal Appeal No. 30 of 2013***, ***Musili Tulo vs. Repblic [2014] eKLR*** laid down the requisite criteria as follows:

> ***"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-***
>
> ***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.***

Similarly, in ***Republic vs. Kipkering Arap Koske & Another, 16 EACA 135*** a case cited to us by counsel for the appellant, the predecessor to this Court gave an additional criterion as follows:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."***

The trial court relied on the evidence by PW1, PW2 and PW6, who gave an account of the circumstances surrounding the commission of the crime. According to PW2's testimony, she escorted the deceased to her matrimonial home where they found the appellant standing in darkness. She entered the house, greeted the appellant, then left. The fact that PW2 escorted the appellant to her home is not in question as this was corroborated by PW3. However, the appellant's counsel urged the court to disregard PW2's testimony as implausible, due to her departure from her witness statement which seemingly stated that she did not enter the house. Counsel further contended that PW2 could not have entered the deceased's house given that the child on her back was the deceased's daughter from another marriage and the separation would have been unbearable for the toddler. Counsel relied on the testimony of PW3 who allegedly stated that PW2, who was carrying the deceased's daughter could not have entered the house as the baby would have cried and clung to the deceased.

With all due respect to Counsel, the record does not bear out this version of PW3's testimony. However, it is true that in her evidence to Court, PW2 stated that she entered the house and greeted the appellant; whereas the witness statement shown to her reads " **We escorted her up to her house and went back**". Though the statements are at variance, we are inclined to believe

PW2's evidence that what she told the court is exactly what she told the police and that the statement was never read back to her. Her testimony is corroborated by PW1's testimony that the appellant was in the house. Moreover, PW2 had known the appellant quite well for over a year. He was her brother-in-law and according to her testimony, they had a good relationship.

We therefore see no reason for PW2 to want to falsely incriminate the appellant.

We also rely on the Court's observation of the witness as follows:

> "**There** ***was no such evidence to suggest that PW2 was lying about going into (sic) accused home that night. I examined her demeanour during her testimony and found her composed, clear and one who gave a good impression that she was telling the truth***."

In the circumstance, we find that PW2's testimony places the appellant squarely at the scene of crime moments before the deceased was murdered. That evidence was not in any way shaken during cross-examination.

The core of this appeal however lies in the testimony of PW1, whose identification of the appellant was through recognition. Recognition is a matter of fact and where the prosecution relies solely on the evidence of recognition, it has the onus to prove that the circumstances were conducive for such recognition and free from possibility of error before it can be a basis of a conviction. (See ***Wamunga vs. R [1989] KLR 424.)***

As stated by this court in ***Criminal Appeal No.25 of 2013, Hamisi Swaleh Kibuyu vs. Republic [2015] eKLR***:

> ***"Conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit."***

We are therefore minded of crucial questions that we must consider while looking at PW1's testimony. These include; whether the appellant was known to the witness; the nature and frequency of their interaction; the lighting conditions including the intensity and brightness of the mobile phone torch; the position of the witness and the appellant at the time the light was being shone; and the witness' description of the appellant and the scene of the crime.

The factors to look at when testing the evidence of recognition are unlimited so as to eliminate any margin of error that may result in injustice. In ***Republic vs. Turnbull & Others (1976) 3 ALL ER 549*** the Court laid out the following factors that the court should consider in deciding if the conditions under which the identification was made were favorable**:**

> ***"... The Judge should… examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

On the night in question, it is an undisputed fact that the whole of Kiamaiko area was shrouded in darkness. PW1 claims to have met the appellant as he was leaving his flat, and that she was able to identify him using the torch on her phone. In her own words:

> ***"I was using my phone light at the time I met him. He was very busy locking. He was looking at the door. I was pointing the light at him talking to him. When he went is when I tried the padlock and realized he locked the door. Accused walked fast down the stairs. He was wearing the (sic) bright jacket, greyish trouser. The jacket was creamish not white. He did not have a cap…I was standing on the left side of the door as he locked…I lifted my hand with the phone to see clearly (shows above shoulders) …I was close enough to him, if I stretched my hand, I could have touched him"***

The description given by PW1 is thorough and specific. She goes a step further to describe the color of the tiles on the stairs on the deceased's flat. As to whether she knew the appellant well, she admits that she had met him once by the roadside in mid-March 2013 when the deceased had introduced them.

According to the testimony of PW6, a neighbor who lived on the same floor with the deceased and the appellant, he heard noises coming from the deceased's house at 9.00 p.m. on the fateful night. He and a few other neigbours got out of their houses to investigate. Given that there were no more screams, they all returned to their houses. Half an hour later, PW6 left his house to go to the toilet and saw bloody foot prints originating from the door of the deceased's house and leading down the stairs. He alerted his neighbours,

went to the deceased's house, saw an open window, peered inside, and saw the body of the deceased lying on the floor.

The evidence adduced by PW6 also corroborates PW1's testimony on the fact that there was commotion coming from the deceased's house. As stated by PW1, at around 9.00 p.m., there was an open window which she claims to have opened, and that whoever murdered the deceased retreated from that house leaving a trail of bloody footprints.

We appreciate that there were minor inconsistencies regarding the evidence of PW1 vis-à-vis that of PW6 with regards to time and the fact that they did not run into each other even though they both claim to have been on the scene after the incident occurred. The general rule as regards the effect that discrepancies in the evidence of witnesses have in discrediting that evidence, is that it would depend upon the nature of the discrepancies, and whether or not they are trifling or substantial. PW2 explained that after seeing the lifeless body of the deceased, she was hysterical and screamed for help. She then fainted and came to herself at 2a.m. This may explain why PW6 did not see her. Furthermore, there may have been mayhem and confusion at the discovery of a murdered neighbor and friend. In the circumstance we do not find that the inconsistency by the witnesses was deliberate or material. We agree with the sentiments of the trial court:

> ***"The time they gave was a clear estimation. I find that the time was an approximated time. The fact is they were all clear that what they testified to happened at approximately 9 p.m."***

In ***Criminal Appeal No. 29 of 2015 Philip Nzaka Watu vs. Republic*** ***[2016] eKLR,*** this court discussed the discrepancies between witnesses as follows**:**

> ***"It must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

The corroborative evidence overwhelmingly points to the guilt of the appellant. As we have earlier stated, PW2's evidence places the appellant squarely at the scene of the crime. Even though the onus of proof in criminal cases rests entirely on the prosecution, this Court cannot ignore the fact that that appellant was the last person to be seen with deceased while she was alive. The appellant therefore has a duty to explain how the deceased met her death and in the absence of any explanation (and there is none), only one inference can be drawn: he murdered the deceased. We also note that the murder weapon was found in the appellant's bedroom and it is only reasonable to infer that the appellant premeditated the crime.

Furthermore, the appellant's *alibi* that he was at his workplace the entire day cannot hold, in view of the strong circumstantial evidence placing him at the scene of crime at the material time. We are of the view that the appellant's *alibi* defence was dislodged by the prosecution evidence.

The last link of the evidence that we must discuss is the circumstances surrounding the appellant's arrest and alleged confession. The record shows that the appellant was arrested on 13th April 2013, five days after the murder and not on the night of the murder as claimed by the appellant. This is evident from the testimony of PW5, **Amina Mohamed-** an active member of Advocacy for Human Rights, who called the OCS Huruma Police Station, reported the crime and directed the police to the deceased's flat. PW5 testified that one week later, the OCS called her to confirm that the appellant had surrendered to police.

From the testimony of PW7- a Police Constable at Pangani, the appellant walked into the station and admitted that he had killed his wife. He was immediately taken to the cells without any notable procedure. The procedures and guidelines to be followed when taking confessions under **Section 25 A** of the Evidence Act and under the Evidence (out of court confessions) Rules, 2009 were blatantly disregarded. The effect, as rightly held by the trial court Judge, is that the alleged confession was inadmissible and PW 7 ought not to have been allowed to testify on what the appellant allegedly stated to him. We are satisfied that notwithstanding this infraction, there was other sufficient evidence that could be relied on.

From the above analysis and on our own consideration and evaluation of the record, the evidence adduced by the witnesses, the appellant and the post-mortem report, we find that the circumstantial evidence on record formed an unbroken link which compellingly points to the appellant's culpability in the deceased's death. The circumstances have cumulatively formed a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else. The evidence on record points in the direction of the appellant; that he was placed at the scene of crime, left in a hurry after commission of the crime and gave no explanation as to why he went underground after the cruel murder of his wife. The disappearance of the appellant, immediately after the death of his wife is not a reflection of an innocent person.

In the end, we are satisfied and do conclude that the circumstances from which an inference of guilt is sought to be drawn, were without doubt, cogently and firmly established**.** The prosecution proved beyond a reasonable doubt that the appellant murdered the deceased on 7th April, 2013 at Kiamaiko in Kariobangi. The appellant was rightly convicted, hence his appeal against conviction fails.

On sentence, we have noted from the record the mitigation made before the trial court, and that the ultimate sentence imposed on the appellant involved a thorough consideration of the circumstances of the murder and mitigating factors. Like the trial court, we think the sentence of death as prescribed by law was appropriate given the circumstances. We are satisfied that the trial court properly exercised its discretion, and therefore uphold the sentence of death that was imposed by the trial court.

Accordingly, the appellant's appeal is dismissed in its entirety.

***Dated and delivered at Nairobi this 25th day of October, 2019.***

***P.N WAKI***

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***JUDGE OF APPEAL***

***HANNAH OKWENGU***

**.....**

***JUDGE OF APPEAL***

***M. WARSAME***

**.....**

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***