IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 32 of 2018

JOEL MAIYO RONGOLIM.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal against the judgment and sentence of the High Court of Kenya at Eldoret

(Macharia, J.) dated 18th November 2018 in HC Cr. RC No. 28 of 2008)

****

JUDGMENT OF THE COURT

1. This murder was gruesome and most foul. The appellant was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars are that on the night of 1st and 2nd March 2008 at Kakiso village of Kipchumwa sub-location in Marakwet District within Rift Valley Province, he jointly with others not before court murdered Faith Yego Kanda.

2. On 1st March 2008, Ms Faith Yego Kanda, a young girl 18 years of age was walking with others at about 8.00 pm going for a party. She was suddenly grabbed pulled by the way side, abducted, taken into a house and shot dead.

3. The prosecution case against the appellant is founded on the testimony of various witnesses. PW1 Alex Kitum Ngolasi testified as follows:

> *That on 1st March 2008, I was at the house of Joel (not the appellant). I heard shouts of a person after a gun shot. (sic) It was about 8.00 pm. The person making shouts were Maximillan, Millicent, Richard Ruto and David Moyale. I asked Maximillan why they were shouting. He said Kipkorir and Joel had grabbed a girl to marry her. She is the deceased here. That on the way and when they asked them what they were doing, they had a shot of a gun. Kipkorir and Joel are now in court. I took a club and a panga and was accompanied by about 20 others and we went to the house of Joel who was inside his house and he fired a shot at us. I could see him. I had a torch. He lay down about 10 metres away from us when he shot. But he jumped over the fence and fled. So we went into his house. On entering the house, we found the deceased lying on the floor near the door. I used a torch. She had an injury on the chest. She was bleeding. She was dead…. There was a spent cartridge in the house. We got screaming and Joel shot at us twice.... We ran away. We slept. The next morning, we went to Joel's house at about 7.00 am. We did not find Joel. The body of the deceased was removed outside. Police came and took the body at about 1.00 pm…. I knew Joel had a gun prior to the incident.*

4. PW2 Maxmillan Jebitwot Ruto testified as follows:

> *On 1st March 2008, I was going to Joel Komen's house with many others…. I know Faith Yego Kanda. We were with her. At Komen's house there was a ceremony after his wife had given birth. We were going to celebrate. As we were going, Kipkorir met us and he greeted us. He asked where we were going and we told him. Faith screamed saying Joel was getting mad. Faith was grabbed by Joel. Joel emerged from the bush and grabbed Faith…. When Faith said Joel was getting mad, she screamed. Joel shot twice. It was evening. I knew Joel and Kipkorir because they are our neighbours. …. We ran away after the two shots upto to Joel's home. On reaching there, we told people what had happened and they left to check what happened. When they came back they told us Faith had died.…..*

5. PW 3 Millicent Chepkosgei Kanda testified that on 1st March 2008 at about 8.00 pm she was on her way to Joel's home in the company of Faith Kanda, the deceased, among others. That the appellant appeared from the bush and grabbed Faith. That the deceased was pulled away and she never saw her alive again. The next day she learnt Faith had died. In her testimony, PW3 clarified that the Joel who had a party was not Joel who is the appellant before this Court.

6. PW4 Thomas Biwott Kasangetweni corroborated what PW3 stated in her testimony. PW5 Gideon Yego, a clinical officer attached to Chebiebit Mission Hospital gave evidence that he had examined the appellant and he certified he was mentally fit to stand trial for murder.

7. PW9 Jacob Koech also a clinical officer at Chebiebit Mission Hospital testified that he conducted a post-mortem on the deceased. That there was a small wound at the back of the body indicating that she was shot from the back. Her lungs had collapsed due to bleeding. That there were lacerations on her genitalia indicating that she had been raped. PW9 produced the post-mortem report as an exhibit. The cause of death was excessive internal bleeding.

8. At the time of his arrest, the appellant had an AK 47 rifle which was submitted for ballistic examination together with the spent cartridges recovered at the scene of crime. PW10 Chief Inspector Immanuel Lagat produced a ballistics expert report indicating that the spent cartridges recovered at the scene of crime were not from the AK 47 rifle that had been submitted for ballistic examination. The spent cartridges were from a different AK 47 rifle.

9. In his defence, the appellant gave a sworn testimony. He testified that on the material day he was inside his house sleeping. That at about 4.00 am, the herdsman came and told him that some people had attacked them at night. That they proceeded to check where the cows were. That on the way they found a woman had died at the gate. He knew the woman as Faith. He denied killing Faith.

10. Upon evaluating the evidence on record, the trial judge found that the prosecution had proved its case against the appellant beyond reasonable doubt. The judge convicted the appellant for murder and sentenced him to death.

11. Aggrieved by the conviction and sentence, the appellant has lodged the instant appeal to this Court. The grounds of appeal are:

> *(i) The judge erred in failing to subject the entire evidence to an exhaustive scrutiny thereby arriving at a verdict that was manifestly unsafe.*
>
> *(ii) That no DNA analysis was conducted showing whether the fluids from the private parts of the deceased could conclusively link the appellant to the rape and death of the deceased.*
>
> *(iii) That the prosecution did not prove its case to the required standard.*
>
> *(iv) That there were material contradictions in the evidence of prosecution witnesses.*
>
> *(v) That the defence evidence was not properly evaluated.*
>
> *(vi) That the appellant was denied a fair trial as required by Article 50 of the Constitution.*

12. At the hearing of the instant appeal, the appellant was represented by learned counsel Ms Orina while the State was represented by Mr. Mulamula. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

13. The appellant submitted that the learned judge erred and convicted him without complying with the provisions of **Section 200 (3) of the Criminal Procedure Code** when the judge took over the proceedings from a previous judge. That the judge erred in relying on the post mortem report without considering that the clinical officer who conducted the post mortem was neither a medical doctor nor skilled in surgery. That the judge erred in convicting the appellant without observing that the rifle that the appellant was arrested with is not the one that fired the fatal shot that killed the deceased. That the judge erred without considering that the circumstances that led to the death of the deceased was a love triangle and there was no malice aforethought on the part of the appellant. It was further submitted that the judge erred in not properly evaluating the evidence on record that revealed inconsistencies in the prosecution case.

14. In substantiating the submissions, it was urged that the clinical officer testified that the deceased had a wound at the back indicating that the shot was fired at the back of the deceased yet the evidence of PW 4 indicated the deceased had a chest wound. The chest wound suggests the fatal shot was fired from the front. The learned judge erred and failed to note this inconsistency in the prosecution case.

15. It was further urged that there were no eye witnesses to the death of the deceased. That PW1 testified there was torch light which enabled him see the appellant. That the prosecution did not lead any evidence as to the intensity of the light from the torch PW1 claimed to have. That in the absence of any evidence relating to light intensity, the alleged recognition of the appellant was not safe.

16. As regards DNA test, the appellant submitted that no DNA analysis was conducted to show that the fluids recovered from the private parts of the deceased had any link to the appellant. That without the DNA test and analysis, there was no proof as to who raped the deceased; that the evidence shows the deceased was grabbed by four to five men and there is no proof that it is the appellant who killed the deceased. It was further submitted that the post mortem report shows that the cause of death was damage to the spinal cord and rupture of the head. That from this report, it is unclear whether the deceased died of gunshot wounds.

17. The appellant strenuously submitted that the judge erred in failing to detect inconsistencies in the prosecution case. That the prosecution witnesses gave divergent description of the contents in the house of the appellant. That one witness testified that the house was empty, another testified the house had a wooden table and a wooden bed. In addition, it is not clear whether the deceased body was recovered in the house of the appellant or outside the house or at the gate. That PW 2 stated that the appellant's house was empty with no bed; PW8 contradicted this and stated the house had a wooden table, a wooden bed and utensils. That the time of death was not established; that PW2 testified the murder took place at 8.00 pm which contradicts PW8, the investigating officer, who stated the murder was 7 hours after the time

of death *(sic);* that the investigating officer stated the deceased was abducted at 6.00 pm while other witnesses stated it was 8.00 pm. Further, that the judge did not consider the murder weapon was never produced in evidence as the ballistic examiner testified that the AK 47 rifle tendered in evidence was not the one that fired the fatal shots as analyzed from the spent cartridges recovered at the scene.

18. As regards fair trial, it was submitted the judge did not take into account the provisions of Article 50 of the Constitution and acted on uncorroborated testimony of PW1 and PW2 and PW4. The appellant reiterated that there was no eye witness to the killing of the deceased and the circumstantial evidence tendered in court is full of contradictions and inconsistencies.

RESPONDENT'S SUBMISSIONS

19. In opposing the appeal, the respondent submitted that all the ingredients of the offence as charged were proved beyond reasonable doubt. That the judge properly analyzed and evaluated the evidence on record. That PW 2, PW3 and PW4 all witnessed the forcible grabbing and abduction of the deceased by the appellant amongst others. That the clinical officer confirmed the deceased died of gunshot wounds. That PW1 and PW4 all confirmed and corroborated each other that the appellant had a torch when he was firing at them.

20. Submitting on the absence of DNA analysis, it was urged that PW9 confirmed that he did not take any specimen either from the body of the deceased or appellant. That notwithstanding the absence of DNA analysis, the charge against the appellant was murder and not rape. That the prosecution case was not premised on DNA but on the fact of abduction of the deceased by the appellant. That there is sufficient evidence on record proving that the appellant was one of the persons who abducted the deceased and shortly thereafter, the deceased's body was found inside his house. The State submitted that the conviction of the appellant was sound and safe in law even in the absence of DNA analysis.

21. The respondent further submitted that the apparent contradictions in the testimony of the prosecution witnesses are immaterial. That PW1 testified that the appellant escaped from the scene of crime; this is corroborated by the fact that the appellant was arrested five months after the offence was committed; that at the time of his arrest, the appellant had a rifle. That the fact that the ballistic examiner's report shows that the spent cartridges recovered from the scene were not from the rifle that the appellant had in his possession at the time of his arrest is not material. Noting that the appellant was arrested five months after the offence, there was a possibility that the appellant had another firearm.

22. The State further submitted that despite contradictions in the prosecution evidence, all witnesses emphatically testified that they recognized the appellant right from the time of abduction of the deceased up to the time of the attempted rescue which led to the shooting of the deceased. It was further submitted that PW1, PW2 and PW3 were all definite that they recognized the appellant and that he was armed and he was firing gun shots. It was submitted that recognition of the appellant by PW1, PW2 and PW3 was sufficient to prove the prosecution case and there was no need for an identification parade.

23. In concluding its submissions, the State urged that the evidence of PW1 and PW4 corroborated that of PW2 and PW3. That the appellant was accorded a fair trial and there was no miscarriage of justice.

ANALYSIS and DETERMINATION

24. This is a first appeal. By dint of **Section 379** of the Criminal Procedure Code and in accordance with the decisions such as ***Okeno - v - R [1972] EA 32***, we are expected to subject the entire evidence to a fresh examination. Our mandate is to analyze and re-evaluate the evidence, being mindful of the fact that the trial court had the advantage of seeing and assessing the demeanor of the witnesses.

25. In **Gusambizi s/o Wesonga – v- R (1948) 15 EACA 65**, it was held that homicide is unlawful unless authorized by law. In the instant matter, the evidence that led to the conviction of the appellant is circumstantial evidence. There were no eye witnesses to the crime. The leading case on circumstantial evidence is **Rep – v- Kipkering Arap Koskei & Another 16 EACA 135,** where the Court held:

> *"In order to justify 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."*

27. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **Abanga Alias Onyango – v- Republic, Cr. Appeal No. 32 of 1990 (UR)** where this Court stated thus:

> *"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."*

26. In the instant matter, on the material day, the deceased was walking in the company of PW2 Maxmillan Jebitwott Ruto, PW 3 Millicent Chepkosgei Kanda and PW4 Thomas Biwott Kasangetweni. All these witnesses testified as eye witnesses that the appellant was one of the persons who grabbed the deceased and pulled her away. The witnesses testified that it is the appellant who grabbed and pulled the deceased. All these witnesses testified that they knew the appellant who was a neighbour. This is evidence of recognition. On our part, we are satisfied that PW2, PW3 and PW4 not only identified the appellant through recognition but also placed the appellant at the scene of crime. We find that the trial court did not err in holding that the appellant was positively recognized by the witnesses.

27. PW1 Alex Kitum Ngolasi testified that shortly after the deceased had been abducted, he was part of the group that went to the appellant's house in an attempt to rescue the deceased. That the appellant fired gun shots at them. PW1 further testified that upon entering the house, they found the deceased had chest injury and was dead. PW1's testimony is critical as it proves that the body of the deceased was found

inside the appellant's house. This is an eye witness account on events happening shortly after the abduction, shooting and death of the deceased.

28. In his defence, the appellant testified he did not kill the deceased; that he had nothing to do with the death of the deceased. We have considered the appellant's sworn testimony. The evidence on record shows that the appellant was amongst the last person seen with the deceased when she was alive. Having been placed as the person who was last seen with the deceased before she died, the appellant has a duty to give an explanation of how the deceased met her death. The appellant (amongst other persons) having been placed at the scene of crime, the legal principle enshrined in the persuasive case of **Uganda - v - Sebaganda s/o Miruho [1977] HCB 7,** is applicable. In **Uganda - v - Sebaganda s/o Miruho [1977] HCB 7,** it was held:

> *"that where is common intention, it is immaterial who inflicts the fatal injury to the deceased as long as when the injury is inflicted the parties are carrying out a common purpose and in such a case one is responsible for the acts of the other."*

29. In this case, the prosecution led evidence through the testimony of PW1 that the appellant fired gun shots. Comparatively, in the Nigerian case of **Moses Jua – v - The State (2007) LPELR-CA/IL/42/2006**, it was held that **even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, in the prosecution of murder or culpable homicide cases where the deceased was last seen with an accused person, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.** In yet another Nigerian case of **Stephen Haruna –v- The Attorney-General of The Federation (2010) 1iLAW/CA/A/86/C/2009, it was held that** a person last seen with the deceased **bears full responsibility to explain the death. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

30. In the instant appeal, the prosecution adduced evidence which establishes that the deceased was last seen alive being abducted by the appellant. PW2, PW3 and PW4 were all categorical it is the appellant who abducted the deceased. PW1 was categorical that the body of the deceased was shortly found inside the appellant's house. We are satisfied that the recovery of the body of the deceased inside the appellant's house shortly after her abduction is sufficient circumstantial evidence that irresistibly links the appellant to the offence charged.

31. The appellant took issue with the fact that no evidence was led to prove the intensity of the torch light that could make PW1, PW2 and PW3 to positively recognize him. We have examined the record; no evidence was led to prove the intensity of the torch light. Nevertheless, we agree with the trial court's observation that it is not questionable how the deceased landed in the house of the appellant. The evidence shows the appellant amongst others abducted the deceased and pulled her away. At the point of abduction, it is not in dispute that the appellant was among the abductees. At the time of attempted rescue of the deceased, it is the appellant who was seen escaping from the scene of crime and the deceased body was found inside the appellant's house. This chain of events leads to an irresistible inference that it is the appellant who shot and killed the deceased.

32. The appellant in his submission urged that the prosecution evidence was inconsistent and that the trial judge did not properly evaluate the evidence on record. This Court has stated before, on the persuasive authority of the Ugandan Supreme Court decision in ***Uganda Breweries Ltd –v- Uganda Railways Corporation [2002] 2 EA 634,*** that there is no set formula upon which evaluation of evidence by a court should conform to. The extent and manner in which evaluation may be done depends on the circumstance of each case and the style used by the court. As a different Court stated in ***Odingo & Another – v- Bunge, No.10/89****:*

> *"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."*

33. In the instant matter, the appellant contends there was no evidence linking him to the offence as charged. In **Wamunga – v- Republic, (1989) KLR 424** it was stated that:

> *"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."*

34. On our part, we are satisfied that the appellant was not only placed at the scene of crime but he was also positively recognized by PW2, PW3 and PW4. We agree with the prosecution submission that the absence of DNA analysis on the deceased and the appellant did not dent the prosecution case. The charge facing the appellant was murder and not rape. The testimony of PW1, PW2, PW3 and PW4 taken in totality proves the culpability of the appellant without need for any DNA analysis.

35. In his submissions, the appellant testified he was not accorded a fair trial. The appellant has failed to demonstrate the extent to which he was denied a fair trial and we thus find this ground has no merit.

36. Auxiliary, the appellant submitted that the learned judge erred in failing to find there was no malice aforethought to sustain a conviction for murder. We have considered the submission. The intention to cause death or grievous harm is malice aforethought and under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

> *"206. 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."

37. The ingredients of murder were explained in the case of **Roba Galma Wario – v- Republic [2015] eKLR** where the court held that:

"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

38. In this case, on malice aforethought, we have considered the appellant's submission and find it has no merit. The fact that the appellant emerged from the bush; the fact that the appellant grabbed and abducted the deceased; the fact that the appellant was armed; the fact that indeed the appellant fired gun shots all point towards an intention to kill or cause grievous bodily harm. The use of the firearm aptly demonstrates an intention to commit a felony. In addition, the appellant fired shots to enable him escape from the scene of crime. We are satisfied that these facts prove malice aforethought on the part of the appellant as specified in **Section 206 of the Penal Code.** In other words, when the appellant who was armed with a gun, emerged from the bush and abducted the deceased; and fired shots to prevent the rescue of the deceased; and being indifferent whether someone was shot or killed and further firing shots to escape from the scene of crime after fatally wounding the deceased; all these facts prove malice aforethought on the part of the appellant.

39. Comparatively, where the conduct of the accused persons is not incompatible with their innocence in **Uganda – v - Yowana Batisita Kabandize (1982) HCB 93**, it was held that:

"the conduct of the accused immediately after the death of deceased of running away from the scene of crime clearly showed a guilty mind."

40. In our considered view, upon our re-evaluation of the evidence on record, we are satisfied that there is circumstantial evidence that irresistibly points to the appellant as the person who killed the deceased. The appellant was amongst the persons who abducted the deceased; he was the one who grabbed and pulled away the deceased; the deceased body was found in his house; there is evidence that the appellant fired shots at the time when there was an attempt to rescue the deceased; there is evidence on record that the appellant disappeared from the scene of crime and was arrested five months later. The act and conduct of disappearance incriminates the appellant. These facts and chain of events lead to an irresistible conclusion that it is the appellant who killed the deceased. Consequently, we affirm and uphold the conviction of the appellant by the trial court.

41. On sentence, we note that the learned judge stated that the death sentence meted on the appellant was mandatory. This position is no longer the law in light of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015.** In the instant matter, there is mitigation by the appellant on record and we see no reason to remit the matter to the trial court for rehearing on sentencing. For this reason, we find it appropriate to interfere with the death sentence meted upon the appellant. We set aside the death sentence and substitute thereto a sentence of thirty (30) years' imprisonment with effect from 18th November 2014 when the trial court passed the sentence.

42. The upshot is that we dismiss the appeal on conviction. We set aside the death sentence and substitute in its place imprisonment for a term of thirty years with effect from 18th November 2014.

Dated and delivered at Eldoret this 17th day of October, 2019

R. N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR