IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 53 OF 2018

BETWEEN

JOHN KIPSESAT CHEPYATOR ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret

(Kanyi Kimondo, J.) dated 15th May, 2017

in

HCCC No. 19 of 2007)

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JUDGMENT OF THE COURT

The appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars being that on 17th day of January, 2007 at about 1.00am at Tinomoi Sub-location, Bekibon Location in Baringo District within Rift Valley Province, he murdered Rebecca Kipsesat. The appellant denied the charge but after a full trial, he was found guilty of the offence, convicted and sentenced to death.

The facts that informed the prosecution case were briefly that on 17th August, 2007, at about 1:00pm, the appellant went to the office of **David Kipyegon Chebiyatoor *(PW5)***, the Assistant Chief of Bekipon location. According to PW5, when the appellant walked into his office he told him that he had cut his wife, **Rebecca Kipsesat**, *"the deceased"* on the neck, hands and back. He explained that he had cut the deceased with a *panga* which he was still in possession of at the time. ***PW5***, then proceeded to the scene of the crime where he found the deceased's body and indeed it had cuts on the neck, hands and back. He then called police officers from Kabarnet Police Station who came and collected the body.

This narrative was confirmed by **Benson Ngetich *(PW1)***, the Chief of Bekibon who was also in the office at the time. He confirmed that he knew both the appellant and the deceased as husband and wife since they lived within his area of jurisdiction. He stated that he was called by a Good Samaritan on 17th January 2007 at 12.30pm who informed him that the appellant had killed his wife at Mzee Major's farm. He sent ***PW5*** together with two Administrative Police officers (APs) to investigate the matter. However, before they left his office, the appellant passed by with a blood stained panga in hand and entered the nearby AP camp which also housed the office of PW5. It was then that ***PW1***, ***PW5*** and the two APs arrested him. Upon arrest, the appellant was found in possession of a *panga* that was blood stained. They inquired from him what had happened, to which he responded that he had killed his wife.

A farmer within Baringo, **William Kipkwarkwar** (***PW2)*** testified that pursuant to a phone call he received from the ***PW1***, he reported the incident to Kabarnet Police Station and accompanied the police officers to Major Kipkuto's farm where they found the body of the deceased with cuts on the neck, back and hand. He later spoke to the appellant while inside the police vehicle and he told him *"wacha tu"*.

The post mortem was conducted by **Dr. Philip Mbithi *(PW4)***, the County Director for Health in Trans Nzoia County. He observed that the deceased had multiple cut wounds on the right arm, back, both sides of the neck and her spine had been severed. The deceased had deep cut wounds on the left side of the head with resultant fracture and both her hands were completely severed. As a result, it was his conclusion that the cause of death was hypo-polemic shock secondary to excessive blood loss from multiple cut wounds.

Put on his defence, the appellant gave an unsworn statement and denied killing the deceased. He claimed that on the fateful day; he went for a Chief's baraza where he was arrested by APs. He did not know the reason for his arrest. Prior the said arrest, on 10th January 2007, PW1 had visited his house to investigate an alleged break-in by his son Cherotich Kipsesat. He claimed that the deceased and his son then disappeared only to return on 16th January 2007.

The learned Judge, **(Kanyi Kimondo, J.)** noted in his judgment that that there were no eye witnesses to the murder. However he concluded that the appellant's statement to both ***PW1*** and ***PW5*** amounted to a confession under **section 26** of the **Evidence Act**. He concluded that the combination of the confession, the nature and circumstances of the attack, pointed compellingly, irresistibly and exclusively to the culpability of the appellant. It is upon this summation that the appellant was found guilty of the offence and sentenced to death as already stated.

Dissatisfied with the judgment and sentence, the appellant filed the present appeal on grounds that that the Judge erred in law by convicting him based on: - a repudiated confession which was inadmissible as it contravened **section 25A** of the **Evidence Act**; evidence that was not beyond reasonable doubt; failing to observe that malice aforethought was not proved and rejecting his defence without giving cogent reasons for such rejection.

When the appeal came up for hearing, learned counsel **Mr. Angu Kitigin,** appeared for the appellant while learned prosecuting Counsel **Mr. Kwame Chacha,** appeared for the State. Both Counsel relied on their written submissions which they briefly highlighted.

Mr. Angu submitted that the appellant was convicted based on a repudiated confession. That both ***PW1*** and ***PW5*** gave contradictory testimonies. That the evidence tendered did not give a proper picture of the location of the meeting that took place between PW1, PW5 and the appellant. Counsel contended that the learned judge erred in holding that a Chief was not a person in authority. Further that a repudiated confession requires corroboration and according to the learned Counsel there was none in this instance. The prosecution failed to conduct a blood analysis on the *panga* in order to ascertain whether the deceased's blood was on it. On the issue of sentencing, counsel submitted that on the basis of the mitigation, the sentence imposed on the appellant was severe since he was a first offender and urged us to review it.

Mr. Chacha, in opposing the appeal submitted on the issue of the confession that the Court looked at the totality of the circumstances of the case. The confession was proper since the appellant presented himself to ***PW1*** and ***PW5*** and owned up to killing the deceased. The 2 Chiefs went to the scene of the crime and confirmed what the appellant had told them. Counsel submitted that the learned judge was right in finding that the Chiefs were people in authority and that the sentence imposed should be retained considering the aggravated nature of the offence. We were thus urged to dismiss the appeal.

This being a first appeal, we are under an obligation to re-appraise and re-evaluate the evidence tendered before the trial court and reach our own conclusion. As stated in the case of **Reuben Ombura Muma & another - v - Republic [2018] eKLR**:

> ***"This being a first appeal, our mandate as an appellate Court 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."***

We have carefully considered the record of appeal, submissions by Counsel and the law. The issues that fall for our determination are whether; the alleged confession of the deceased to PW1 and PW5 was admissible; the circumstantial evidence tendered by the prosecution proved the guilt of the appellant beyond reasonable doubt, the rejection of the appellant's alibi defence was proper and the sentence imposed requires review in the light of the mitigation proffered by the appellant as well the Supreme Court decision in **Francis Karioko Muruatetu & another v. Republic [2016] eKLR**.

It is common ground that the conviction of the appellant turned on his alleged confession to ***PW1*** and ***PW5*** that he had killed his wife. It was also founded on circumstantial evidence. The learned judge held that what the appellant told PW1 and PW5 amounted to a confession and that he was alive to the provisions of **section 25A (1)** of the **Evidence Act.** He also held that ***PW1*** and ***PW5*** were arguably persons in authority contrary to the submissions of the appellant. The learned Judge further held that since the appellant voluntarily confessed to killing his wife, the confession was admissible under **section 26** of the **Evidence Act**. To our mind a confession is informed by **section 25A** of the **Evidence Act** thus:-

> ***(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.***

In the instant appeal we must satisfy ourselves as to whether what the appellant told ***PW1*** and ***PW5*** amounted to a confession admissible in Court. This Court pronounced itself on this issue in the case of **Thoya Kitsao Alias Katiba v Republic [2015] eKLR** as follows;

> ***"This brings us to the confessions by the appellant. We have recently held in SANGO MOHAMED SANGO & ANOTHER V. REPUBLIC, CR. APP. NO. 1 OF 2015 (MALINDI) that the decision of this Court in MARY WANJIKU GITONGA V. REPUBLIC (supra), is still good law and that there is nothing in the Evidence Act that bars admission of a confession by an accused person made voluntarily to a private citizen or a person not in authority. The changes that were brought to the provisions of the Law of Evidence Act touching on confessions by Act No. 5 of 2003 and Act No. 7 of 2007 were intended to address the then egregious abuse and irregularities arising from confessions taken by the police. The overriding question is whether a confession to a fellow citizen or to a person not in authority was made voluntarily. Under both the Evidence Act and Article 50(4) of the Constitution, the trial court is obliged to exclude evidence, including a confession that is obtained in circumstances that would render the trial unfair or otherwise undermine the administration of justice."***

The above position was expounded further in the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** in the following manner;

> ***"However, in 2003, the Criminal Law (Amendment) Act, No 5 of 2003 effected fundamental changes to the law on confessions and admissibility of information from an accused person leading to discovery of evidence. Among the changes, a new section 25A was introduced into the Evidence Act, which made confessions inadmissible unless made in court. In addition, section 102 of the 2003 Act repealed section 31 of the Evidence Act, meaning that henceforth information from an accused person leading to discovery of evidence was not admissible. As this Court noted in Thoya Kitsao alias Katiba v. Republic [2015] eKLR, those changes were intended to address the then egregious abuses and irregularities arising from confessions taken by the police. Practical challenges in the implementation of the new law however led to further amendments in 2007 through the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007, which allowed confessions to be made before a judge, a magistrate or a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the suspect's choice. It also allowed the Attorney General, in consultation with the Law Society of Kenya, the Kenya National Commission on Human Rights, and other suitable bodies to make rules governing the taking of extra-judicial confessions, leading the promulgation of the Evidence (Out of Court) Confession Rules, 2009. What is very clear in all this is that section 31 of the Evidence Act or a variation thereof was not re-enacted, meaning that information from an accused person leading to discovery of evidence is not admissible outside a confession."***

We have taken cognizance of the foregoing authority and persuaded by it. As stated therein, the Court must consider the provisions in the ***Evidence (Out of Court) Confession Rules, 2009*** which are very clear not only on the rank and cadre officers that confessions ought to made to but also on the procedure of recording and adducing the confession before court. From the reading of the said rules, a confession must be recorded in writing, the accused person ought to be given an opportunity to clarify the content of the said confession and it must contain a certificate at the end. This must read together with the provision of **section 25A** of the **Evidence Act** which provides that the cadre of officers should be either a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police. We take cognizance of the fact that anything less that the foregoing, does not amount to a confession. The learned judge erred in concluding that the appellant's statement was a confession and that ***PW1*** and ***PW5*** were people in authority hence competent to receive a confession yet the law is very clear of the cadre of people who can take a confession. In any event the alleged confession was subsequently repudiated and without corroboration it was worthless piece of evidence.

The learned judge also noted that the entire prosecution case hanged largely on circumstantial evidence. He found that the combination of the confession, the nature and circumstances of the attack pointed to the exclusive culpability of the appellant. Since we have already ruled that the appellant's words to PW1 and PW5 did not amount to a confession as provided for in **section 25A** of the **Evidence Act** and even if it was, it was repudiated; we must then satisfy ourselves whether these was sufficient circumstantial evidence to prove the guilt of the appellant beyond a reasonable doubt. In the case of **Joan Chebichii Sawe v Republic [2003] eKLR**; this Court stated:-

> ***"As we have already pointed out, the evidence in this case was entirely circumstantial. 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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."***

From the record, the circumstantial evidence includes the fact that the appellant came to the offices of PW1 and PW5 holding a blood stained panga. Earlier on PW1 had received an anonymous call informing him that the appellant was killing his wife by cutting him with a panga and that this was happening in mzee Kipkuto's farm. Acting on the information, and upon arresting the appellant, PW5 proceeded to the scene where he had been informed the body was and found the body of the deceased had cuts on the neck, back and hands. Upon post mortem being undertaken on the body by PW4, he observed that the deceased had multiple cut wounds on the right arm, back, neck and her spine had been severed as well as her hands. He opined the cause of death as resulting from multiple cut wounds. The injuries appear to have been inflicted with a sharp object. No doubt a panga is a sharp object. The appellant had such a panga.

Given these chain of events, we are satisfied just like the trial court was that the evidence point irresistibly to the culpability of the appellant. We do not see any other co-existing circumstances that would weaken the inference of guilt on the part of the appellant. Throughout the cross-examination of the prosecution witnesses by the defence, the possibility of any other person having committed the offence was never canvassed. We reiterate and associate ourselves with the observations of this Court in the case of **Philip Nzaka Watu v Republic [2016] eKLR**, that:-

> ***"While PW3 did not see the appellant actually stab the deceased, the evidence, which is circumstantial, points to the appellant, and to nobody else, as the deceased's assailant. We are satisfied that the evidence on record is incompatible with the innocence of the appellant and incapable of explanation by any other reasonable hypothesis except his guilt. In addition, there are no other co-existing circumstances, which would weaken or destroy the inference of guilt on the part of the appellant."***

With regard to malice aforethought, it is obvious that the appellant in inflicting those injuries on the deceased intended to cause the death of or grievous harm to the deceased. This is the essence of section 206 of the Penal Code which defines what amounts to malice aforethought. In particular section 206(a) of the Penal Code provides that malice aforethought is proved that the accused by his or her act(s) had 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. This was the case here. Accordingly, malice aforethought was proved beyond reasonable doubt contrary to the submissions by the appellant.

On his alibi defence, we can only reiterate and reinforce what the learned Judge stated. At para. 27 of his judgment, he stated:-

> ***"I have weighed the defence put forth by the accused. Juxtaposed against the evidence of the prosecution, it rings hollow. Of course, the legal burden of proof never shifted to him. But it is a fat lie to claim that on the material date he was going to a village baraza called by the chief when he was arrested; or, that he did not know the reasons for his subsequent arrest. The entire conduct of the accused reveals no defence known in law. He simply had no legal justification in taking the life of the deceased."***

We entirely agree with that summation.

Turning to the appellant's sentence, Courts now have discretion to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. See **Francis Karioko Muruatetu** (supra). We have some instances where this Court has declined to reduce the sentence of death due to the heinous manner the offence was committed. In **David Ongata Opiyo & 6 others v Republic [2019] eKLR**, this Court stated as follows as its reasons for declining to reduce a sentence;

> ***"In the present case, we find that the manner in which the appellants committed the offence was heinous, gory and gruesome. The appellants mercilessly beat up the deceased persons with pangas, rungus and swords and as if that was not enough, they tied the 1st deceased up in ropes and drowned him in the lake. Similarly, they tied a huge stone on the 2nd deceased's head that made him drown in the lake. No human being deserves this kind of torture and inhuman treatment. Given these set of circumstances in which two innocent lives were lost, we are reluctant and not inclined to exercise our discretion in favour of the appellants to review the imposed sentence downwards. The sentence of death was deserved for each of the appellants."***

In this case PW4 while conducting the post mortem noted that externally, the deceased had multiple cut wounds on the back and both sides of the neck. Her spine had been severed. She had deep cut wounds on the left side of the head with resultant fracture. Both hands were completely severed. It requires no gain saying that the deceased was killed in the most horrid, heinous, gory and painful manner. Nobody needs to die in this manner. We think therefore that the sentence of death imposed on the appellant was commensurate to the offence as committed by the appellant. We see no reason to interfere with it. Accordingly, we uphold the conviction of the appellant and the sentence of death imposed. The appeal therefore fails and is dismissed.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR