IN THE COURT OF APPEAL

AT KISUMU

CORAM: MAKHANDIA, M'INOTI & ODEK, JJ.A)

CRIMINAL APPEAL NO. 31 OF 2015

BETWEEN

PATRICK ANALO..1ST APPELLANT

KENNEDY EMITATI...2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 17th December 2014 in H.C. CR. A. No. 37 of 2004)

JUDGMENT OF THE COURT

The ***1st appellant Patrick Analo*** and the ***2nd appellant Kennedy Emitati***, together with another person who is not a party to this appeal, were charged before the High Court of Kenya at ***Kakamega*** with the offence of murder contrary to ***section 203*** as read with ***204*** of the ***Penal Code***. The information stated that on 10th October 2004, at ***Mudovela Village, Butsotso North Location*** in ***Kakamega District,*** they murdered ***Benea Ingutia Ongore***.

An unusually high number of judges, five in all, handled the trial of the appellants. After entering a plea of not guilty, the trial started before ***G.B.M Kariuki, J.*** (as he then was), who heard the evidence of two witnesses. Subsequently ***Lenaola, J.*** (as he then was) took over, started the trial *de novo,* and heard the evidence of five prosecution witnesses. ***Kimaru. J.,*** succeeded him and after complying with ***section 200*** of the ***Criminal Procedure Code***, took the evidence of one more prosecution witness. ***Chitembwe, J***. similarly after complying with section 200, concluded the trial. He heard the last prosecution witness, the appellants' defence, and wrote the judgment, which ***Sitati, J.,*** read. The latter judge also sentenced the appellants.

The evidence adduced by the seven witnesses that the prosecution marshaled was that the deceased and the two appellants were related and neighbours in Mudovela Village. They however, had a tempestuous relationship because of a land dispute. Before the events leading to this appeal, the deceased had initiated a criminal case, ***No. 2286 of 2004*** against the appellants for destroying his crops. That case was on going at the time of his death. In addition, the deceased had previously accused the 2nd appellant of attempting to set his house on fire.

Beatrice Inguti (PW1), the widow of the deceased testified that at about 6.00 pm on the material day, the deceased went out of their house to milk his cows within the compound. After a while she heard noises outside and decided to check what was happening. She encountered the two appellants and another person running away from their compound towards a sugar plantation. They were armed with *pangas* and when she spoke to them, they did not respond. Upon reaching where the deceased was, she found him down on the ground bleeding profusely from cuts on his head. She screamed for help and among those who responded were the deceased's brother, ***James Weremba Ongore (PW2)***, a village elder, ***Shadrack Musiri Sibwoni (PW3)***, and a senior assistant chief, ***Titus Muganda (PW4).*** PW2 poured some water on the deceased and he died. These witnesses confirmed that the deceased had suffered cuts on the head and that immediately upon arrival at the scene PW1 informed them that it was the appellants who had attacked the deceased.

PW3 telephoned the police from ***Makunga Patrol Base*** who, on the same night arrested the 1st appellant hiding in a sugar plantation whilst the 2nd appellant was arrested from his house. A bloodstained *panga* and the handle of a *jemb*e were recovered from the first appellant's house. At about 9.00 pm the police took the body of the deceased to the Kakamega Provincial General Hospital mortuary.

Paulina Nyangule Wambani (PW5), a sister of the deceased identified the body for postmortem examination, which was conducted by ***Dr. Vilibwa***. The body had 7 deep gaping cut wounds on the scalp with exposed brain tissue. The doctor, whose report was produced in evidence by his professional colleague, ***Dr. Dickson Mchena (PW6)***, formed the opinion that the cause of death was severe head injury due to assault. ***PC Charles Mwangi (PW7)***, the investigating officer produced the report of the Government analyst which showed that the blood stains on

the *panga* and the *jembe* handle were from blood group "B", which was also the blood group of the deceased.

In his defence, the 1st appellant tendered sworn evidence and did not call any witness. The substance of his defence was that on the material day at about 7.00 pm, he was in house when he heard PW1 screaming saying in the *Luhya* language that the cow had trampled on the deceased as a result of which he was bleeding. He went to the home of the deceased and found him already dead at the place where he was milking the cows. The 1st appellant thereafter went back to his house from where he was arrested later the same night at about 10.00 pm. He confirmed that he was related to the deceased and that they had a land dispute in court.

As for the 2nd appellant, his defence, which was very similar to that of his co-appellant, was that at about 7.30 pm on the material day he was in his home taking supper when he heard PW1 screaming, saying that the cow had trampled on the deceased, and he was bleeding. He went the scene with his wife and found the deceased lying facedown on the ground. He went back to his home from where the police arrested him later that night. He denied having had a dispute with the deceased.

By a judgment dated 17th December 2014, Chitembwe, J. convicted the appellants after he found that the prosecution had proved its case against them beyond reasonable doubt. On 22nd January 2015 Sitati J., upon whom it fell to sentence the appellants, noted that the prescribed sentence for murder was a mandatory sentence of death. Nevertheless, she sentenced the appellants to 30 years imprisonment. They were aggrieved and lodged this appeal, in which they challenge their conviction and sentence on basically two grounds,namely that the trial court erred by finding that the prosecution had proved its case beyond reasonable doubt and by relaying on unsafe circumstantial evidence.

Urging the appeal, the appellants' learned counsel, ***Mr. Amule***, submitted that the burden was on the prosecution to prove its case beyond reasonable doubt but it did not do so, because there was reasonable doubt whether it was the appellants who murdered the deceased. He contended that there were fundamental inconsistencies in the prosecution evidence regarding the time the offence was committed and whether PW1 indeed witnessed its commission. He also questioned the identification of the appellants, submitting that from the evidence of PW2 it was dark and he had to use a lamp at the scene. Counsel cited the decision of the Court of Appeal of Uganda in ***Twahengane Alfred v. Repubic, Cr. App. No. 139 of 2001*** and submitted

that contradictions in the testimony of witnesses on material points should not be overlooked because they affect the value of the evidence.

It was counsel's further submission that the case against the appellants was founded on speculation and suspicion arising from the land disputes between them and the deceased. He relied on the decisions of this Court in ***Mary Wanjiku Gichira v. Republic [1998] eKLR*** and ***Sawe v. Republic***

[2003] KLR 364 and submitted that suspicion, however strong, cannot form the basis of a conviction. Counsel further urged that the prosecution did not adduce any evidence to show that PW1 informed the first person in authority the identity of the assailants and that such evidence was critical in providing a test against which to measure a witness's later statement and to guard against exaggeration and embellishment. In support of that contention he relied on the decision of the former Court of Appeal for Eastern Africa in ***Terekali s/o Korongozi & 4 Others v. R [1952] EACA 259.***

On circumstantial evidence, counsel cited the decision of the High Court ***Republic v. Michael Muriuki Munyuri [2014] eKLR*** and submitted that the trial court relied on circumstantial evidence, which did not meet the test set out in that case. He further contended that the murder weapon was not found in the appellants' houses or in their possession and neither were the appellants' fingerprints proved to have been on the weapon.

Lastly, although it is plainly clear from the record that Sitati, J. sentenced the appellants to 30 years imprisonment, counsel claimed in his written submissions that they were sentenced to death. He invoked the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another v. Republic [2017] eKLR*** and submitted that the mandatory sentence of death was unconstitutional. He therefore urged us to remit the matter back to the High Court for re-sentencing of the appellants.

Mr. Sirtuy, learned counsel for the respondent opposed the appeal contending that the prosecution had proved its case beyond reasonable doubt. He added that the identification of the appellants was safe because the offence was committed at 6.00 pm when there was sufficient light and, in any case, PW1 recognized the appellants. He also submitted that the evidence of PW1 on the injuries that the deceased sustained was firmly corroborated by the medical evidence on record. On the issue of sentence, counsel left the matter to the Court.

We have carefully considered the evidence of record, the judgment of the trial court, the grounds of appeal, the submissions by the respective parties and the authorities that they cited. To the extent that we are dealing with a first appeal, we are obliged to re-evaluate the evidence and come to our own independent conclusion. This Court expressed that duty as follows in ***Attorney General & 2 Others v. IPOA & 2 Others, CA. No. 324 of 2014***

> ***"On our part, as a first appellate court, it is not lost on us that we have the duty, and responsibility to re-evaluate the evidence adduced before the High Court and arrive at our own independent decision. This re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court. This is as required of us under Rule 29(1) (a) of this Court's Rules and as we have variously stated in a litany of decided cases."***

We agree with the appellants that from the evidence on record, none of the prosecution witnesses saw the appellants commit the offence in question. The evidence of PW1 was that the deceased went out to milk his cows and shortly thereafter she heard some noises and went out to see what was happening. She encountered the appellants, armed with *pangas*, running away from the deceased's compound. She found the deceased on the ground, bleeding profusely from cuts on the head and she screamed for help. Clearly therefore, the prosecution case against the appellants was founded on circumstantial evidence. In ***Makau & Another v. Republic [2010] 2 EA 283,***

this Court stated as follows, regarding circumstantial evidence:

> ***"Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics."***

For circumstantial evidence to form the basis of a conviction it must satisfy a number of factors or tests that are intended to ensure that the evidence is reliable. Those tests were explained as follows in ***Abanga alias Onyango v. Republic, Cr. App. No. 32 of 1990:***

> ***"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."***

And in ***Simon Musoke v. R [1958] EA 715*** the Court added a further test, namely that there should be no other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused person.

The circumstantial evidence from which the trial court drew the inference that it was the appellants who murdered the deceased is in our view, very cogent and strong. The deceased went out to milk his cows leaving PW1 in the kitchen. Shortly thereafter she heard noises and went out to find out what was happening. She saw the appellants, who were armed with *pangas*, running away from the compound towards a sugar plantation. When she talked to them, they did not respond. She knew them well, both as relatives and neighbours. The appellants had protracted land disputes with the deceased, which had developed into a then on going criminal case against the appellants. The time was about 6.00 pm, with adequate lighting. Immediately after encountering the fleeing appellants, PW1 found the deceased on the ground, bleeding profusely from cut wounds on the head. The post-mortem report showed that the deceased had suffered seven deep *panga* cuts on the scalp, which caused his death. The scenario we have is that shortly after he was viciously cut with *pangas*, PW1 saw the appellants, armed with *pangas* running away from the deceased's compound.

From the evidence, there were no other co-existing circumstances, which could weaken or destroy the inference that it was the appellants who murdered the deceased. There was no evidence of any other person or persons in the deceased's compound at the time he was murdered. The appellants had a clear motive to harm the deceased in the form of the land dispute between them. The 1st appellant was arrested, not long after the murder of the deceased, hiding in a sugar plantation, which was not consistent with conduct expected of an innocent party. (See ***Stephen Njenga Wanjiru v. Republic, Cr. App. No. 108 of 2013***). The appellants' defence that the deceased could have sustained the seven deed cuts from being trampled upon by a cow is to say the least rather fanciful and the trial judge properly rejected it.

On the identification of the appellants, we have no doubt that it was safe. Other than the fact that the offence was committed at about 6.00 pm, PW1 was no stranger to the appellants. They were relatives and neighbours. This was therefore a case of recognition rather than identification by a stranger, which as the Court stated in ***Anjononi & Others v. Republic [1976-80] 1 KLR, 1566*** "*is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"*. The evidence that the appellants are relying upon to impeach their identification, namely PW2's use of a lamp at 7.30 pm, should be understood in the context that PW2 appeared at the scene later when it was dark and long after PW1 had seen the appellants running away from the scene at about 6.00 pm.

As regards the alleged contradictions in the prosecution evidence, we do not see any contradiction that is material enough to affect the value of the evidence that was adduced. Properly appreciated, the evidence of PW1 is that she did not see the appellants assaulting the deceased. She however saw them fleeing from the scene and immediately discovered the deceased having been viciously cut on the head. The prosecution witnesses who responded and went to the scene were consistent that PW1 informed them that it was the appellants who had assaulted the deceased.

In ***John Nyaga Njuki & 4 Others v. Republic Cr. App. No. 160 of 2000***, this court explained the law on contradictions and inconsistencies in evidence as follows:

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."***

On the existence of a land dispute between the deceased and the appellants, which goes to motive, it cannot be described as speculation because the appellants themselves admitted the existence of the dispute and PW7 gave the particulars of the criminal case that the deceased had initiated against the appellants. Whilst under ***section 9*** of the Penal Code motive is generally imaterial to criminal liability, as this Court stated in ***Dishon Litwaka Limbambula v. Republic, CA. No. 140 of 2003,*** in a case founded on circumstantial evidence, motive may be considered. The Court expressed itself thus, in this regard:

> ***"It was proved that the appellant had issued actual threats to harm the complainant before a certain matter between them in another court was heard. We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to***

prove a crime."

Ultimately we are satisfied that the appellants' appeal against conviction has no merit and is dismissed in its entirety.

Turning to the appeal against sentence, the prescribed sentence for the offence of murder, is death. In ***Francis Karioko Muruatetu & Another v.***

Republic (supra), the Supreme Court held that sentence is not mandatory. In this case, contrary to the appellants' submission, they were sentenced to 30 years imprisonment rather than to death. In imposing that sentence, Sitati, J. duly considered their mitigation statements. It is not lost to us that the appellants viciously attacked the deceased with *pangas*, cutting him on the head seven times from which he died almost instantly. The sentence of 30 years imprisonment was deserved and merited in the circumstances of this appeal. The appeal against sentence too is bereft of merit and is also dismissed.

Our final order is that the entire appeal is dismissed. It is so ordered.

Dated and delivered at Kisumu this 21st day of November, 2019

ASIKE-MAKHANDIA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. O. ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR