IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 34 OF 2015

BETWEEN

GARAMA CHENGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 23rd June, 2014

in

H.C.CR.C No. 23 of 2011)

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JUDGMENT OF THE COURT

1. This is an appeal against **Garama Chengo's** (the appellant) conviction for the offence of murder that was contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The particulars of the information were that on the night of 31st July, 2011 at Boyani Village in Palakumi Location within Kilifi County, the appellant murdered Charo Mwangirani Chula (deceased).

2. It is common ground that no one witnessed the appellant inflict the injuries from which the deceased died. It is also not in dispute that his conviction was somewhat based on circumstantial evidence which was corroborated by evidence of voice recognition. For a conviction to be rightly based and safe to sustain a conviction on circumstantial evidence such evidence must meet certain criteria. This Court in ***Musili Tulo vs. R [2014] eKLR,*** while discussing the criteria observed:-

> ***"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."***

3. Consequently, what this Court is being called upon to do in this appeal is to determine whether the circumstantial evidence against the appellant met the foregoing threshold. In other words, whether the evidence adduced before the trial court was sufficient to justify his conviction. In doing so, the court has to take a look at the chain of the circumstantial and other evidence that was relied on by the trial court.

4. The gist of the prosecution's evidence was that on 30th July, 2011 at around 11:30 p.m the deceased and his younger wife, Bendera Charo Mwangirani (PW2) had retired to bed in one house while his granddaughter, Juliet Kadzo (PW1) and his older wife had retired in another house within the same compound. At that late hour, visitors came and Bendera recognized the voice of one of them who was calling out to the occupants of the homestead, as that of the appellant. Apparently, Bendera was well acquainted with the appellant who was the deceased's nephew. Both Bendera and the deceased went together to open the door for their visitors. With the aid of the torch which the deceased was holding Bendera confirmed that the appellant was indeed amongst the visitors. She brought seats outside their house and called out to Juliet to bring other seats for the visitors. After settling the visitors Juliet and Bendera went back to their respective houses leaving the deceased with the guests.

5. According to Bendera, she heard the appellant warning her not to come out of the house. Meanwhile, Juliet was also threatened with dire consequences by one Kahindi if she screamed for help. Moments later, both Juliet and Bendera heard the deceased screaming that he was dying and calling on Juliet to come to his aid, but when they tried to get out of their houses they realized that their doors had been locked from outside. Juliet frantically tried to call out for assistance from neighbours without success. She even tried calling Mwenda Kazungu (PW4) who lived nearby to come and open her door. Unfortunately, Mwenda was too afraid to lend any assistance. She waited until the following morning at around 6:00 a.m. before she went to the deceased's compound and opened the doors. On opening, Juliet and Bendera were startled by the sight of the deceased's lifeless body which lay on the ground. They observed that he had multiple cut wounds on his head. The postmortem report was prepared by Dr. Rashida, but it was produced by Dr. Malik Yajbhai (PW6) which indicated the cause of the deceased's death as severe head injury secondary to trauma with sharp object.

6. The appellant was subsequently, arraigned in court and charged with the offence of murder. When he was put on his defence, he denied committing the offence. He maintained that on the material night he was not at the scene let alone within the vicinity. He was in his house at Mombasa and was informed of the deceased's death the following morning while on his way to work.

7. The trial Judge (Meoli, J.) after weighing the evidence before her in a judgment dated 23rd June, 2014 found that the same placed the appellant at the scene at the material time and pointed towards his guilt. The Judge expressed:-

> ***"The assault on the deceased commenced soon after PW2 heard the warning uttered by the accused after he locked her door on the outside****.(sic)* ***This action and the warning followed immediately by the crying out by the deceased in words to the effect that he was dying, inevitably suggests that the same visitors were his assailants. His mutilated body was found at his door early on the next morning. The accused alibi cannot stand. The proven inculpatory facts in this case inexplicably point to the accused and other unknown persons as the culprits in the murder of the deceased. Moreover, there are no co-existing circumstances to weaken that hypothesis. His defence cannot withstand the weight of the prosecution evidence and is utterly displaced.***
>
> ***By inflicting more than 14 cut wounds on the deceased his assailants clearly intended to cause his grievous harm if not kill him. Malice aforethought is self-evident. I find that the prosecution has proved its case against the accused beyond reasonable doubt and will convict him accordingly."***

In the end, the appellant was sentenced to death.

8. It is that decision that is the subject of the appeal before this Court which basically challenges the circumstantial evidence against the appellant. Mr. Ngumbau, learned counsel for the appellant, submitted that the learned Judge misdirected herself by failing to find that the evidence before her was insufficient to warrant the appellant's conviction. In particular, the circumstances obtaining at the location were poor for a positive identification. In as much as Bendera testified that she used torchlight to identify the appellant, the learned Judge failed to appreciate she was behind the deceased at the time. Further, the learned Judge did not interrogate the intensity of the torchlight as held in the case of ***Wamunga vs. R [1989] KLR 424***. Equally, the evidence of voice recognition was not safe for the simple reason that Bendera did not state the words uttered by the appellant which led her to recognize his voice. In support of that line of argument, he relied on the case of ***Mbelle vs. R [1984] KLR 626***. As far as he was concerned, the prosecution failed to call the deceased's older wife, investigating officer and the arresting officer whose evidence was crucial to the case at hand. He argued that the learned Judge disregarded the appellant's alibi defence hence arrived at the wrong conclusion. It is on those grounds that the Court was urged to allow the appeal.

9. Mr. Monda, learned Senior Assistant Director of Public Prosecution, in opposing the appeal, contended that the evidence on record was credible and watertight. In his opinion, the learned Judge properly dealt with the issue of identification which placed the appellant at the scene. He added that the conditions prevailing at the time were favourable for a positive identification. There was both visual and voice recognition. Mr. Monda submitted that the learned Judge was right in concluding that both Juliet and Bendera had identified the appellant. In conclusion, he argued that the learned Judge had considered the appellant's defence.

10. The role of this Court as a first appellant court was succinctly put in

Ibrahim Ali vs. R- Criminal Appeal No. 92 of 2016 as follows:-

> ***"In a first appeal like this, we are obliged to submit the evidence adduced before the trial court to a fresh and exhaustive evaluation, weigh any conflicting evidence and draw our own conclusion, but always remembering that we do not have the advantage enjoyed by the trial court of hearing and seeing the witnesses as they testified, which is critical in determining the credibility of witnesses and what evidence to believe or disbelieve. For that very reason, even though the first appellate court is entitled to arrive at its own independent conclusions, it will not readily interfere with the findings of the trial court unless it is satisfied that no reasonable tribunal could have made such findings on the basis of the evidence on record."***

11. It cannot be gainsaid that a conviction can be properly founded on circumstantial evidence, that is, evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. The first piece of circumstantial evidence was that the appellant was placed at the scene at the material time. The evidence in that regard was through visual and voice identification. As aptly appreciated in ***Waithaka Chege vs. R [1979] KLR 271***, evidence of visual and voice identification should always be approached with great care and caution. Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by single witness See ***Karanja & another vs. R [2004] 2 KLR 140.***

12. In the instant case, we note that the learned Judge properly cautioned herself on the foregoing. Contrary to the parties' submissions, the learned Judge did not rely on the recognition evidence of Juliet. This was because she found and rightly so, that the circumstances of her identification of the appellant were unclear. As such, the learned Judge was left with the identification evidence tendered by Bendera as the sole witness. In our considered view, the voice recognition evidence by Bendera by itself was not sufficient for the simple reason that she did not give evidence regarding the particular words uttered by the appellant. Our position is fortified by this Court's decision in ***Maghenda vs. R [1988] KLR 255***. However, the voice recognition was corroborated by the subsequent visual recognition of the appellant by Juliet. Bendera was consistent in her evidence that when she, together with the deceased, opened the door for the visitors the appellant stood directly in front of the torchlight enabling her to recognize him. To that extent we agree with the holding of this Court in ***Anjononi &Another vs. R [1976-80] KLR 1566***, to the effect that:-

> **"The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of the accused……**
>
> **Recognition of an assailant 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."** Emphasis added.

13. The second piece of evidence was that no sooner had Juliet and Bendera returned to their houses than their doors were locked from outside.

Immediately thereafter they heard the deceased's screams who was then in the company of the appellant. The deceased's body was discovered the following morning with multiple cuts. The totality of circumstantial evidence is that it formed an unbroken chain of events which irresistibly pointed towards the appellant's guilt.

14. With regard to the defence of alibi, raised by the appellant, we draw guidance from the sentiments of this Court in ***Victor Mwendwa Mulinge vs. R, [2014] eKLR*** thus,

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v.R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

We find that the learned Judge properly considered this defence and correctly found that it was displaced by the prosecution's evidence that squarely placed the appellant at the scene. Moreover, it was the uncontroverted evidence of Kahaso Charo Mwanjirani (PW3) that on the material day she met the appellant within the vicinity a couple of hours before the incident, at around 6:00 p.m. He was in the company of two men who were unknown to her. This clearly displaced his alibi that he was in Mombasa on the material day.

15. For the foregoing reasons this appeal lacks merit both on conviction and sentence. We however take cognizance of recent development in law regarding sentencing in the case by the Supreme Court in **Francis Karioko Muruatetu and Another vs Republic,** (2017) e KLR where the Supreme Court of Kenya, pronounced that the mandatory aspect of death sentence was unconstitutional. That judgement therefore removed the fetters on the courts' discretion when passing sentence in cases where death penalty was the only one prescribed by law. In the

instant appeal, the appellant was treated as a first offender, and although he did not mitigate (perhaps well aware that the only sentence that was prescribed by law then was death). We also note that the appellant was a young man, a nephew of the deceased thus by serving a death sentence the family in essence would be deprived of two members. For those reasons we are of the view that the appellant should benefit from the said decision, and in the event we interfere with the death sentence and substitute it thereto with 25 years' imprisonment. It is so ordered.

Dated and delivered at Malindi this 22nd day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR