IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 37 OF 2015

BETWEEN

BAKARI JOHN JUMA ……..… 1ST APPELLANT

KARISA KITSAO KARISA ……. 2ND APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 9th December, 2014 **in H.C.CR.C No. 10 of 2011)**

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JUDGMENT OF THE COURT

1. In James ***Mwangi vs. R [1983] KLR 522,*** this Court set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows:

> **"In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference …"**

2. This is the predicament the learned Judge (Meoli, J.) found herself in when **Bakari John Juma** (the 1st appellant) and **Karisa Kitsao Karisa** (the 2nd appellant) were arraigned before the High Court and charged with two counts of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The particulars of the first count were that on the night of the 3rd and 4th April, 2011 at an unknown time at Msefuni Village within Lamu County, the appellants jointly with others not before the court murdered E M K (E). On the second count, the details were that on the above mentioned date and place the appellants jointly with others not before the court murdered W M (W).

3. Apparently, the appellants had been employed by E at his farm in Mpeketoni as wine tappers. It seems that for the duration of their employment they lived in his compound. E was irked by the appellants' conduct which included tapping wine from his palm trees without his consent and bringing women into his compound for immoral purposes. He voiced his displeasure to his wife M W M (PW1) and J K N (PW2). On 2nd April, 2011 he was particularly upset and he informed M that the appellants had refused to leave his compound despite asking them to do so. M who used to operate a business in Lamu agreed she would come back on 6th April, 2011 and they would sort out the issue. She left for Lamu the following morning and returned on 4th April, 2011 stopping first at the children's office to attend to a matter involving her daughter. The matter revolved around the maintenance of her granddaughter, one W by her daughter's estranged husband. Following the breakup of her daughter's marriage W used to live with her grandfather, E.

4. Margaret found it rather unusual that her husband had not arrived at the children's office by noon as they agreed and she decided to look for him at the house. Upon arrival she found that the door had been locked from the outside. When she opened the door she came face to face with a most horrific scene she had ever seen. Both her husband and granddaughter's mutilated bodies lay on the ground. No one had witnessed what had happened to the deceased persons.

5. Subsequently, the appellants were arrested in connection with the murders. The reason being that not only had they had disagreements with E but he had also ordered them to leave his compound prior to his death. Agnes Karioko Mugo (PW5) testified that she had a relationship with the 1st appellant while he was still working for E. At one point in time E had informed her that the 1st appellant was

entertaining other women apart from her and a dispute arose between her and the appellant. She also testified that the appellants had been asked to leave Elijah's compound.

6. In their defence the appellants gave sworn statements denying committing the offences. They both testified that they had left Elijah's employment long before his demise and had secured employment in a nearby farm.

7. The learned Judge did not buy the appellants' story and found that the evidence though circumstantial pointed towards their guilt; the appellants had the requisite motive to kill Elijah and his granddaughter on account of the disagreements. In addition, they had opportunity to do so because they lived in the deceased's compound. In a judgment dated 9th December, 2014 the learned Judge held,

> **"The sudden disappearance of the accused is so proximate in time to the murder of the deceased that in the circumstances of this case it provides credible corroboration of the circumstantial evidence mounted against the accused. The reason for the hurried disappearance was the murder of the deceased and his grandchild. The explanation they gave to this court is not only contradictory but totally rebutted as exposed by the prosecution evidence as an afterthought. I dismiss their defence as implausible and unbelievable.**
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> **In my considered opinion the proven circumstantial evidence here justifies an inference of guilt on the part of the accused persons as the inculpating facts are incompatible with their innocence. In the circumstances of this case I can find no co-existing circumstances tending to weaken the inference of guilt. I do find that the prosecution has proved its case against the accused persons and will convict them accordingly."**

Ultimately, she sentenced each appellant to 23 years imprisonment.

8. The appellants are now before us challenging their conviction mainly on the ground that the circumstantial evidence against them was not sufficient to justify their conviction.

9. Mr. Nabwana, learned counsel for the appellants, submitted that the circumstantial evidence did not irresistibly point to the appellants' guilt. There was no evidence of a common intention between the appellants. They were not aware of the offence and did not act in concert. He argued that there was no evidence of malice aforethought on the part of the appellants. Both appellants were arrested working in a nearby farm. Mr. Nabwana urged us to allow the appeal.

10. Mr. Wangila, Senior Prosecution Counsel, on his part, conceded the appeal. As far as he was concerned, the learned Judge had erroneously shifted the burden to the appellants to prove their innocence. There were other workers in the farm who had the opportunity to commit the offence.

11. We have considered the record, submissions by counsel as well as the law. Before us is a first appeal against the appellant's conviction and sentence for the offence of murder. As such we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See ***Okeno vs. R [1972] EA 32.***

12. The burden lay with the prosecution to prove that the chain of events relied on pointed to the appellants' guilt. This much was restated by the predecessor of this Court in ***Rex vs. Kipkerring Arap Koske & 2 Others [1949] EACA 135*** thus;

> **"In order to justify a conviction 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 and 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 always on the prosecution and never shifts to the accused."**

13. In our view, the evidence of disagreements and the fact that the appellants were asked to leave by the deceased without more is not cogent to infer guilt on their part. We say so because like the learned Judge the evidence regarding at what particular point in time the appellants left the deceased's house is not clear. Therefore, the finding by the learned Judge that the appellant left on the same day the deceased persons were killed has no basis. Could the possibility of other persons other than the appellants committing the offence be ruled out? We think not. Equally, the finding that they had hurriedly disappeared falls by wayside because it is not in dispute that the appellants were arrested while working in a nearby farm.

14. In totality, what was against the appellants was mere suspicion which however strong could not justify their conviction. See ***Sawe –vs- R [2003] KLR 364.***

15. Accordingly, the appeal has merit and is hereby allowed. We quash the appellant's conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 15th 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