IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 63 OF 2016

BETWEEN

KARISA CHARO CHULA ……APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Malindi (Meoli, J.) dated 5th June, 2013

in

H.C.CR.A No. 19 of 2008)

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JUDGMENT OF THE COURT

1. On 27th January, 2008, the deceased **Jumwa Kenga Ngola**, **Dama Ngarema** (PW3), and her daughter **Karembo Garama** (PW7) headed to the communal tap to buy water. The deceased had earlier on borrowed 1 shilling from PW3 to buy the water.

2. On the way to the tap, they met the appellant who apparently had an illicit love affair with the deceased. The appellant is said to have stopped the deceased and engaged her in conversation while the others walked on to the water point. According to PW3, she filled up the deceased's water container and also fetched some cassava vegetables for her and left them at the water point for the deceased to collect them after her escapade with the appellant, and went home. Later the same night at around 7.00 p. m, the appellant went to PW3's house and requested her to go and collect the water and vegetables which she had left for the deceased at the water point. The appellant is said to have informed PW3 that he had decided to take the deceased away as his wife as her husband had already discovered their love affair. PW3 went to the water point and collected the items in question and took them to Dama Kenga (PW1)'s house. PW1 was deceased's co-wife. PW3 informed Dama what had happened and Dama passed on the information to her and deceased's husband Kenga Ngala (PW2).

3. Upon learning of his wife's disappearance and the circumstances under which she had left, PW2 reported the matter to their area Sub-Chief, PW4. According to PW4, he suspected that the deceased had eloped with the appellant. He therefore wrote a letter to the appellant summoning him to appear in his office on 3rd February, 2008 supposedly to explain why he had eloped with another man's wife. The appellant did not heed the summons and so PW4 advised the deceased's husband to report the matter to the police which PW2 did. PW2 and others then started looking for the deceased. They recovered the deceased's body at Bahari Girls School on 15th February, 2008. The body was badly mutilated and had several panga cuts on the head and body. One of the arms was said to be missing. They reported the matter to the police and the body was removed and taken to the mortuary by PW8 Cpl Patrick Situma and other officers from Kilifi Police Station. The witnesses said that after the recovery of the deceased's body, the appellant disappeared from the area and so a search was mounted for him.

4. From the record, after the discovery of the deceased's body, the appellant migrated to his in-laws home. According to Mwalimu Charo (PW10), who was the deceased's brother-in-law the appellant went to their home in Kitengweni on 3rd February, 2008 saying that he was looking for his wife. Charo told the court that the appellant was behaving strangely and he started blocking passers-by from a path that passes through the in-laws home. Asked why he was blocking the people, the appellant is said to have answered that he did not want the people to see him as they would pass information and he could be arrested. After a few days the appellant and PW10 disagreed and PW10 sent him packing. He said that the appellant would disappear for some time, go back to the in-law's home only to disappear later and reappear at night.

5. He was eventually arrested from a church by a village elder, Kahindi Ruwa Nzai (PW9) and the Chief Benson Santa Tsoka (PW11) and PW12 Kahindi Kaluma on 14th September, 2008. He was taken to Kilifi Police Station where he was rearrested by IP Newton Sangalia Mjomba (PW13), and charged with the offence now before the court.

6. A post mortem performed on the deceased's body by Dr. Muriuki at Kilifi hospital confirmed that the deceased's body was decomposed into a skeleton with no skin. There were however multiple cuts on the skull, suspected to have been caused by a sharp object. The cause of death was found to be *"severe head injury due to cuts inflicted by sharp object*."

7. When placed onto his defence, the appellant opted to give an unsworn statement of defence and call one witness. He told the court that he knew the deceased as his neighbour. He admitted that as stated by the witnesses, he met the deceased and PW3 and her daughter as they were going to fetch water. He said that he called the deceased aside and sent her to go and buy flour and take it home to his wife. When he went home that evening, his wife informed him that the flour had been delivered by two men namely Jumwa and Karisa Tele. He said he did not see the deceased thereafter. Four days later, he was approached by a village elder who was enquiring about the whereabouts of the deceased. He said he did not know where she was and that on the material date, the deceased had only requested him for one shilling so that she could go and buy water. He was arrested several months later from his wife's home area where he had pursued her after she left his home. He denied having killed the deceased.

8. After considering this evidence along with the submissions made by learned counsel for the appellant at the close of the case, the learned Judge (Meoli, J) rendered the judgment dated 10th May, 2013, in which she convicted the appellant and handed him the death sentence.

9. That is the judgment that has provoked this appeal in which the appellant proffered four homemade grounds of appeal vide the memorandum of appeal filed on 17th June, 2013. Although learned counsel, Mr. Wameyo who appeared for the appellant applied for and was granted leave to file supplementary grounds of appeal, he did not do so and in the end he relied on the grounds filed earlier by the appellant. These grounds fault the learned Judge for failing to properly consider the evidence on record; convicting on shoddy and insufficient evidence, and relying on conflicting and contradictory evidence.

10. Urging the appeal before us, learned counsel submitted, and correctly so in our view, that the conviction was purely based on circumstantial evidence. He stated that there was no evidence of the deceased having been seen with any weapon. He posited that the deceased's husband was not aware of the illicit affair as at the time the deceased died, and moreover, even if the appellant had been found out, the worst that would happen was for him to pay '*malu*', a fine imposed on adulterers, which was not too exhorbitant. He urged the Court to allow the appeal.

11. The appeal was however opposed by Mr. Wamotsa, learned Senior Prosecution counsel who submitted that on the date the deceased disappeared, she had been left with the appellant and the appellant later bragged to PW3 that he had rented a house for her in Malindi. The other incriminating thing was that he had defied summons to appear before the Chief and had thereafter disappeared to his in-laws place where he was behaving in a bizarre manner until he was apprehended inside a church. According to learned counsel, the evidence was cogent and consistent to support the conviction, and if there were any inconsistences, they were very minor and were not fatal to the prosecution case. He urged us to dismiss the appeal and uphold the conviction and sentence.

12. We have analysed the evidence presented before the trial court above. What remains is for us to critically re-examine and re-evaluate the same, consider the grounds of appeal raised and submissions of both counsel, and form our independent conclusion as to whether the appellant's conviction was safe. As we do so however, we must always bear in mind that we neither saw nor heard the witnesses as they testified and we must therefore give, allowance for that. See the findings in **Okeno vs. R (1972) EA. 32** where the predecessor of this Court, pronounced itself as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses."**

13. The facts herein are not seriously challenged. The illicit affair between the deceased and the appellant was admitted; that the appellant was the last person to be seen with the deceased alive is also not disputed; and the place and circumstances under which the appellant was arrested and charged are indeed not disputed.

14. The only issue for determination in our view is whether the circumstantial evidence on record is sufficient to support the conviction against the appellant. The law on circumstantial evidence is well settled and there is a plethora of decided cases in this area some of which were extensively cited by the learned trial Judge in the impugned judgment.

15. In the locus classicus case of **Kipkering Arap Koskei & another** (1949) 16 EACA 135, the predecessor of this Court set the standards which have been maintained to date. The Court pronounced itself as follows: **R v Kipkering Arap Koskei & another (1949) 16 EACA 135 it was held that:-**

> **"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 guilty, 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."**

Simon Musoke vs. R (1958) EA 715 as follows;

> **"The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt… It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference."**

16. Applying the above test, we are satisfied that the appellant was left with the deceased on the date and time in question. They had left the path the witnesses followed and nobody knows where they went thereafter. According to PW3 in her evidence on cross examination, the appellant was; **"***Speaking in an aggressive, harsh manner and menacingly...accused looked angry and appeared like he wanted to beat the deceased – so deceased told him that if he wanted to beat her they should step aside briefly."*

17. Their encounter was not therefore a happy one and nobody knows whether it escalated after they left the witnesses, and nobody could tell where they went. The learned trial Judge believed that evidence. We cannot impugn her assessment of the witnesses' credibility as we did not see them testify. What happened next is the deceased going to PW3 and informing her that he had taken the deceased away to rent her a house in Malindi. He even told PW3 to go and collect the water and basket of vegetables belonging to the deceased which they had left at the water point. This in our view is a clear manifestation that the appellant knew that the deceased was not going back to her home. He was the only person who knew what he had done to her.

18. In his defence, the appellant tried to bring in two other persons who he claimed took the flour to his wife and claimed it had been given to them by the deceased. That in our considered view does not break the chain. If the appellant did not know where the deceased was, he would not have gone to ask PW3 to go back and collect the water and vegetables and take them to deceased's home. He claimed responsibility for the deceased's disappearance before PW3 and PW7. The only thing he did not say was that he had dispatched her to the next world. Instead he claimed to have resettled her in Malindi. How then would the appellant escape liability?

19. Under **Section 111** Evidence Act in absence of credible explanation by the appellant as to what happened to the appellant, having been the last person to be seen with the deceased, the only logical conclusion is that it was the appellant who killed the deceased.

20. His conduct as explained by his brother-in-law is also telling. Why did he disappear from his home. If it was just about payment of '*malu*', he would proudly have owned up as he did to PW3. He could not have disappeared from his home from February to September to go and hide at the home of his in-laws. PW10 said that the appellant was behaving in a bizarre manner and at one time he threatened PW10 if he continued allowing strangers to pass through their homestead, saying they would report him and he would get arrested. What was he afraid he would be arrested for? When he left his in-laws home, he would hide in the forest and only resurface sometimes at night.

That is not the conduct of a normal innocent person. In our view, this conduct buttresses the circumstantial evidence against the appellant.

Mabel Kavati & another v Republic (2014) eKLR

The evidence of PW5 who chased and caught the 1st appellant was reliable as the chase was in broad day light, it started in the compound of the Institute, PW5 never lost sight of her and had no reason to tell lies about her. This evidence placed the 1st appellant the scene of the murder, her conduct of running away when challenged to stop is evidence guilty conduct.

21. After considering all this evidence our conclusion is that it was indeed the appellant who killed the deceased. The motive may not be known but clearly, from the nineteen cut wounds found on the deceased's skull, along with a severed missing arm, there is no doubt that the killer had the intention of killing her. Malice aforethought as envisaged by **section 206 (a) Penal Code** was therefore established.

22. In all, we find that the learned Judge considered the evidence before her, applied the law properly and arrived at the correct determination. We find no fault with her judgment. The conviction and sentence were soundly predicated on the law and evidence before the court.

Consequently, we find this appeal lacking in merit. We dismiss it and uphold trial court's conviction and sentence.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

…….……..

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