IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL NO. 121 OF 2016

BETWEEN

JONATHAN KIPLIMO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret

***(G. R. Kimondo, J.)** delivered on 10th May, 2016*

in

HCCRC. NO. 19 OF 2011)

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JUDGMENT OF THE COURT

[1] Jonathan Kiplimo, (the appellant herein), was arraigned before the High Court in Eldoret for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** Following a trial in which eleven (11) witnesses testified for the prosecution, and the appellant gave sworn evidence in his defence, the learned judge found the appellant guilty of the offence and convicted him as charged. He was accordingly sentenced to death.

[2] Being aggrieved by his conviction and sentence, the appellant has lodged an appeal before us in which he has raised five (5) grounds of appeal. The grounds contend that the trial court erred: in failing to appreciate the facts of the case and the applicable law; in failing to appreciate that the burden of proof lay with the prosecution and that the prosecution had not discharged this burden; in reaching conclusions that were not supported by the evidence adduced; in convicting on weak circumstantial evidence; and failing to consider the appellant's defence.

[3] During the hearing of the appeal, the appellant was represented by **Mr. Marube** while **Ms Oduor** appeared for the Republic. Mr. Marube argued that the trial judge convicted the appellant on very weak circumstantial evidence. He noted that the main witnesses in the prosecution case were declared hostile and others recanted their statements saying that they did not say anything. That left only the evidence of the investigation officer whose evidence could not stand alone.

[4] Mr. Marube relied on the case of **Ndung'u Kimanyi vs Republic [1979]** KLR 282where it was held that a witness in a criminal case whose evidence is proposed to be relied upon, should not create an impression in the mind of the court that he is not a straight forward person or that he is an unreliable witness whose evidence would be unsafe to rely on.

[5] In regard to circumstantial evidence, Mr. Marube relied on the case of **Mwangi vs Republic [1983]** KLR 522, contending that the facts proved by the prosecution did not lead to an irresistible conclusion that it was the appellant who stabbed the deceased; and that the appellant's presence at the scene and at the police station were adequately explained. Mr. Marube therefore, urged the Court to allow the appeal.

[6] Learned Principal Prosecution Counsel, **Ms Oduor,** opposed the appeal maintaining that the appellant's conviction was based on circumstantial evidence that strongly linked him to the crime. She pointed out that the appellant's story was not credible as he claimed to have identified his attackers even though it was raining and misty. Ms Oduor maintained that the appellant was at the scene of the crime and that his contention that he was attacked while driving was not credible.

[7] We have carefully considered this appeal, the grounds raised and the submissions made before us. The circumstances of the offence were that the deceased met his death on 23rd March, 2011 as a result of severe internal hemorrhage resulting from a stab injury to the heart and lungs. The main issue was who caused the injury.

[8] From the evidence that was adduced before the trial court a group of six (6) people who found the appellant at Iten Police Station, identified the appellant to Pc Timothy Ng'etich as the person who stabbed the deceased. The appellant had apparently gone to the police station to report that he was attacked by a group of people at Bugar trading centre. Of the six (6) people who went to the police station, three testified. One witness was Franscica Wanjiku Kosgei (Franscica) who was the conductor of the matatu that was used to take the deceased to hospital. She explained that she arrived at the scene when the deceased was on the ground bleeding. She did not mention having seen the appellant attack the deceased. Another witness was Amos Kipchirchir Serem (Amos), a brother to the deceased who was also among the six, and the one who drove the matatu to hospital, and then to the police station. He explained that he was at the trading centre when he heard people screaming about 50 metres away and on approaching the scene, saw the deceased on the ground with blood flowing from his chest. He stated that he did not know who attacked the deceased.

[9] Mark Kiprop (Mark), was also among the six (6). He stated that he was with the deceased at the stage at Bugar Trading Centre; that he heard the public screaming about 40 metres away; and that he rushed to the spot only to find the deceased on the ground with a stab wound. He denied having seen the appellant at the scene.

[10] Two other witnesses Alex Kiplagat (Alex) and Patrick Kiprop (Patrick) also testified that they were on the highway at Bugar trading centre when they heard screams. Alex maintained that he was about 20 to 30 metres away and that when he arrived at the scene, the deceased had already been removed. Someone told him that the appellant was the one who had injured the deceased but he could not recall who that person was as he claimed to have been drunk. Alex was declared hostile and cross-examined by the prosecution. It turned out that in his statement to the police, he had explained that a motor vehicle KAR 414G green in colour had stopped and someone from the vehicle had come out and stabbed the deceased.

[11] On his part, Patrick claimed that he was 60 metres away when he heard screams and that when he arrived at the scene he found the deceased lying on the ground bleeding. He claimed that he did not know who injured the deceased. This witness was also declared hostile and upon being examined by the prosecution, it emerged that he had made a statement to the police in which he claimed that a saloon vehicle KAR 414G had tried to overtake a lorry and in the process was about to hit the deceased. When the deceased asked the driver why he wanted to hit him, the driver of the saloon vehicle came out with a knife and stabbed the deceased.

[12] The appellant's conviction hinged on the evidence of these five witnesses who were all apparently at the scene. It is evident that neither Fransisca nor Amos or Mark who were among the six persons in the vehicle that reported the assault on the deceased at Iten Police station saw the deceased being assaulted. As the other three occupants of the vehicle were not called to testify, this means that the report that was made to the police station that it was the appellant who stabbed the deceased was anchored on hearsay information as there was no clear evidence of any of the six occupants of the vehicle seeing the appellant stab the deceased. The evidence of Alex and Patrick was therefore crucial to the prosecution case. This was because these were the eye witnesses who were purported to have identified the appellant as the person who allegedly stabbed the deceased. However, in their evidence both witnesses denied having seen the appellant stab the deceased. The witnesses were then declared hostile. The question then is, of what evidential value was their evidence?

[13] Under section 163(1) of the Evidence Act,

> **"The credit of a witness may be in impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him -**
>
> **(a) …**
>
> **(b) …**
>
> **(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted**
>
> **(d) …**

[14] In his judgment, the learned judge was alive to the fact that the statements made by Alex and Patrick to the police having been retracted were of little probative value and that the evidence of Alex and Patrick was unreliable. However, the learned judge then proceeded to state as follows:

> **"33. From the totality of the circumstantial evidence, the chain of events links firmly and completely with the guilt of the accused. Fifteen or so minutes after the accused first reported the attack at Iten Police Station, a group of six people including PW2, PW4, PW5 and PW7 came into the station and reported that Jonathan Kiplimo had stabbed Joshua Chemwolo to death. That was clear from the evidence of police constable Ngetich (PW1). PW 1 said the accused looked "disturbed or nervous" when he first reported the attack. The evidence of PW1 is largely backed up by the evidence of the Investigating Officer, Corporal Ndambuki (PW11). The accused confirmed he was at the scene of the crime. He had a clear**

opportunity to kill the deceased. It amounts to further corroboration. See Opo v Republic [1976-80] 1 KLR 1669, Armstrong Kisuva v Republic, Eldoret, High Court, Criminal Appeal 88 of 2011 [2016] eKLR.

34. I have reached the conclusion that the deceased was driving his car registration number KAR 414G towards Bugar. At Bugar Trading Centre he ran over some stones. It was drizzling and misty. PW5 confirmed that he saw a lorry at the scene. That tallies with the evidence of the investigating officer and PW1. The deceased complained that the accused nearly ran him over. It remains unclear the point at which the accused's car was damaged; but he alighted from the car. He pursued the deceased and stabbed him in the back with a sharp object. That was corroborated further by the pathologist (PW8). The attack was unlawful. The attack was meant to cause grievous harm or death of the deceased. Malice aforethought is thus established. The evidence does not point to the culpability of anyone else except the accused."

[14] In **Erick Odhiambo Okumu v Republic [2015] eKLR,** this Court addressing the issue of circumstantial evidence stated as follows:

"Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in *MUSILI TULO V. REPUBLIC* (*supra)*:

'Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990* this Court tabulated the conditions as follows:

'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' **"**

[15] Therefore, before the learned judge could rely on circumstantial evidence, the circumstances from which the inference of guilt of the appellant is deduced must have been firmly established, and these circumstances must form a complete chain that points directly to the appellant linking him to the commission of the offence and leaving no room for the possibility of the offence having been committed by any other person.

[16] In this case the learned judge relied on the report made to PC Timothy Ng'etich at Iten Police Station by the six occupants of the vehicle. According to him the report was made by a group of members of public totaling six. Although PC Ng'etich did not identify any of the six people, Francisca, Amos and Kiprop testified that they went to the station in the vehicle. However, as already stated none of them confirmed having seen the appellant stab the deceased. Therefore, much as PC Ng'etich may have stated the truth that a report was made to him, the substance and the truth of that report made to him cannot be vouched for without further evidence from the other occupants of the vehicle.

[17] Similarly, the evidence of the Investigating Officer Corporal Robert Ndambuki, that he received information about the incident from Mark and Amos that the deceased was stabbed by the appellant cannot be relied on, as both Mark and Amos denied having seen the appellant stab the deceased.

[18] We find that the conclusion arrived at by the trial judge that the appellant attacked the deceased and stabbed him was based on the recanted statement of the witnesses. This was clearly wrong as Alex and Patrick having been declared hostile, they were not credible witnesses and what they had stated could not be relied upon without proper corroboration.

[19] The learned judge found corroboration in the fact that the appellant was at the scene of the incident. While this may have provided an opportunity to the appellant to stab the deceased, there were several other people at the scene who therefore, also had a similar opportunity. In his sworn evidence, the appellant explained his presence at the scene and what transpired. He claimed to have been attacked by a group of eight to ten people. A "jembe" which he claims was used to attack him was still in the car and his rear windscreen was in fact damaged. The explanation given by the appellant was a probable explanation. The fact that there was inconsistency regarding the damage on the right hand side headlamp did not justify the rejection of the appellant's evidence as the damage could even have arisen from the stones that the appellant had to drive over.

[20] The learned judge also found corroboration in the evidence of the pathologist. However, the pathologist only confirmed the injuries that were suffered by the deceased and the cause of death. His evidence could not provide any corroboration regarding the identity of the person who stabbed the deceased.

[21] We find that the evidence relied upon by the trial judge did not point irresistibly to the guilt of the appellant nor did it rule out the deceased having been injured by some other person. It is clear that the learned judge's mind was clouded by the retracted statements that were made by the witnesses. The learned judge also relied on evidence that had earlier been adduced by Alex and Patrick before Azangalala J (as he then was). However, the learned judge was undertaking the trial *de novo* which meant that the earlier proceedings ceased to exist and could no longer be referred to. It is evident that the witnesses who testified may have withheld the truth. However, without cogent evidence the trial judge could not conjure up a scenario of what he believed occurred and proceed to act on it.

[22] We therefore come to the conclusion that the appellant's conviction was not safe. Accordingly we allow the appeal, set aside the conviction and direct that the appellant shall be set free unless otherwise lawfully held.

Dated and delivered at Eldoret this 31st day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR