THE COURT OF APPEAL

AT NAKURU

(CORAM: GATEMBU, SICHALE & KANTAI JJ. A)

CRIMINAL APPEAL NO. 223 OF 2014

BETWEEN

NANCY SOILA PARSIMEI ……………………… APPELLANT

AND

REPUBLIC ………………………………………... RESPONDENT

(Being an appeal from the judgment of the High Court at Nakuru (Wendoh J)

dated 1st October, 2014

in

H.C.CR.C No. 73 OF 2011)

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JUDGMENT OF THE COURT

1. The appellant, Nancy Soila Parmisei, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 1st October 2011 at Enosupukia village in Narok North District within Narok County, she murdered Mary Wanjiku Chege. She was tried before Wendoh, J at the High Court at Nakuru and convicted in a judgment delivered on 1st October 2014 and sentenced to death. She has appealed to this Court against the conviction and sentence.

Background

2. The prosecution called five witnesses. The first witness was Peter Ntaiya ole Nchoko (PW1) a businessman and a farmer based in Enosupukia in Narok. He began his testimony by stating that on 15th September 2011, he was at home at Enosupukia in Narok and that there was a fight between the appellant and the deceased and that he did not know the cause of the fight. He went on to say that on 30th September 2011 he received a call from the deceased (to whom he referred as Mama Mukami), a business partner, seeking assistance to get land to lease; that he informed the appellant, who he said was his girlfriend and who was then visiting him, of the impending visit by the deceased; that the deceased arrived at about midday on 1st October 2011; that the appellant prepared lunch for them and after having lunch, he (PW1) took the deceased to view the land for lease; that after viewing the land they returned to his home where he left the deceased with the appellant and went away on other errands.

3. PW1 stated further that on returning from his errands at about 10.00 p.m., he found that the appellant had closed the premises and had gone to sleep; that he decided to pass by the house where the deceased was sleeping to find out if she was comfortable; that he and the deceased were seated on the bed talking when the appellant broke the glass window; that he went outside of the house and found the appellant standing at the door trying to push herself inside the house; that the appellant then got hold of the deceased and pushed her outside; that "*within a second*" he saw the deceased fall on her knees and then "*saw a flow of blood on her legs*"; that on realizing that something had happened, he told the appellant that she had done something terrible after which he left and went to his house and locked himself up; that the appellant was wild and he hit her three times to protect himself; that he then called his son, Chris Nchoku (PW4) and asked him to attend to the deceased and "*if she was serious to take her to hospital*"; that he then slept till the morning and woke up at 6.00 a.m., opened the door and saw the deceased in the same position he had left her and realized she was dead.

4. Chris Nchoku (PW4) the son of PW1 stated that on 1st October 2011 at about 10.00 p.m., he was asleep in his house on his father's plot

when he heard screams coming from outside; that he went outside and found the deceased, "*the lady who died*" who asked him, "*my child come and help me*"; that he assured the deceased that he would help her; that although the deceased did not look like she was injured, she fell after which he saw blood and screamed; and that the deceased moved near him and held him. He went on to say that by the time his father asked him to take the deceased to hospital, she was already dead and he did not know what had injured her; that he knew the deceased as a business person who used to live in his father's plot at a place known as Ntulele. He said that he went to the police station that morning.

5. Asked about the appellant, PW4 stated that she was "*like my guide*" and that he used to "*take her as a mother*"; that she used to stay in the same plot as his father where she had a bar called Men Summer's Club while his father's Starlight hotel was in the same plot and that he, PW4, lived on the same plot.

6. Raiyan ole Merai, PW2, the security chairman in the area, stated that at about 1.00.a.m on 2nd October 2011 she was woken up by a boy called Maani John who informed her that a lady had been murdered near her home at a place known as Sii; that she arrived at the scene, a plot owned by PW1, at about 2.00 a.m. and saw "*a woman lying down and had been stabbed*" but she did not know where she was injured; that "*there was blood on the ground where the lady lay*"; that she found over 10 people at the scene who said that the appellant had stabbed the lady; that she called the Officer Commanding Station who requested her to arrest the appellant and take her to the police station; that the next day the police arrived at the scene and when they turned the body, she noticed that the deceased was stabbed on the back with a sharp object and learnt that the deceased was dead.

7. PW2 further stated that at the scene she visited PW 1 who she had known for a long time since they were young, but was told he was asleep; that she had also known the appellant "*for several years*" and used to live at place known as Maragu Njoro but that she "*had started to live here for about 2 months*" and that both the appellant and PW1 had bars in the same plot but that she did not know if the appellant used to live with PW1.

8. PW3, Mpapai ole Morijoi, a motor cycle operator stated that at about 3.00 a.m. on 1st October 2011 (presumably on 2nd October 2011) he received a call from PW2 (he referred to PW2 as "he" though it would appear PW2 is female) and was asked to go and carry a passenger; that he found PW2 and the appellant and took them to Maela Police Station where he left them and returned to his home; that when at home he received a call from PW2 to go pick "him" and take "him" to Nairagi Enkare Police Station, which he did. He left PW2 at that police station and went home.

9. The last prosecution witness was Dr. Titus Ngulungu, (PW5) a pathologist based in Nakuru. He examined the body of the deceased on 5th October 2011 at Narok District Hospital, where he performed a post mortem on the body of the deceased and found a 25 by 15 mm stab wound on the lower axis of the left side of the neck; neck vessels were severed which caused blood loss; he formed the opinion that the cause of death was massive hemorrhage due to stab wound to the neck caused by a sharp object. He prepared a post mortem report which was tendered in evidence before the trial court.

10. In her sworn defence, the appellant stated that prior to her arrest, she resided in Enenkare, Narok; that on 1st October 2011 at about 10.00 a.m. she was at Enosupukia Sintakara where she was living with PW1 (to whom she referred as her husband) and his son (PW4) and where she was farming and undertaking a bar business; that PW1 alerted her that a family friend, Mama Mukami, whom she knew, would be visiting; that the visitor arrived at 11.00 a.m. and she welcomed her; that they had lunch with her together with PW1 and PW4; that at about 2.00 p.m. she opened her business and her husband (PW1) and Mama Mukami went on a motorcycle to the shamba which was 3 km away where Mama Mukami wanted to lease land for farming; that at about 4.00 p.m., PW1 and Mama Mukami returned; that she welcomed them back to the bar and served them drinks; that at about 6.00p.m., PW1 went off leaving her with Mama Mukami.

11. The appellant went on to say that at about 7.00p.m., she escorted Mama Mukami and showed her a place to sleep in her house girl's room and also showed her how to lock the door and returned to the bar; that her customers left by 9.00.p.m. by which time PW1 had not returned; and that at about 10.30 p.m. when she was asleep PW1 called her; she opened for him and at his request she made food for him; that PW1 enquired from her where Mama Mukami was; that PW1 ate part of the food and complained that it was salty and threw it at her and a fight ensued; that PW1 pinned her down and beat her; that she screamed and neighbours came; that a neighbour named John inquired whether PW 1 had escalated the fight in the bar to the house and that PW1 became harsh whereupon John asked her to accompany him to his house where she slept.

12. The appellant stated further that the following day, a village elder (PW2) came to ask for her and took her to Maela Police Station; that on enquiring why she was being taken to the police station, she was informed that they were going to get her husband; that on asking for her husband, she was informed that he was at Nairegi Enkare Police Station; that on being taken there she confirmed that she was the wife of PW1 and the OCS directed that she be booked but she was not told why she was being booked; that it is only after she was arraigned that she learnt of the charge facing her and that Mama Mukami had died; that when she called her husband (PW1) to inform him what had happened, he told her that he was released on bond and that they would meet in court; that she was then surprised to see him testify.

13. Under cross examination, she stated that she had lived with PW1 since 2009 and had a 6-year-old child; that she married PW1 when his wife died; that they used to live at Enkare Town before moving to Enosupukia to do business; that the deceased used to live on her husband's plot at Ntulele. The appellant maintained that she did not fight with Mama Mukami or know what happened to her; that John, at whose house she slept, recorded a statement with the police; that PW1 had been arrested and she found him in the cells at Nairagi Enkare Police Station; that she was arrested on 2nd October 2011 and taken to Maela.

14. Based on that evidence, the trial court was satisfied that it was the appellant who attacked the deceased and fatally injured her and proceeded to convict and sentence her to death. Dissatisfied, the appellant filed this appeal.

The appeal and submission

15. The grounds on which the appellant's appeal is grounded as set out in her grounds of appeal and supplementary grounds of appeal are

that the trial court erred in convicting her based on scanty evidence that was not watertight; that circumstances were not conducive for identification and that she was not positively identified as the assailant; that the Judge failed to consider that the appellant was not at the scene of crime when the body of the deceased was found; that the trial Judge shifted the burden of proof to the appellant and that her defence was ignored; that crucial witnesses were not called; and that the sentence meted out is harsh.

16. Expounding on those grounds, learned counsel for the appellant Mr. D.N Mongeri submitted that as the first appellate court, we are obliged to review and re-evaluate the evidence and draw our own conclusions; that the conviction was based solely on the evidence of PW1 as all the other witnesses did not witness the offence being committed; that in the circumstances of this case the testimony of the arresting and investigating officer would have been crucial to shed light on the reasons why the appellant was arrested and charged with the offence; that the omission to call those witnesses was fatal to the prosecution's case; that the trial court failed to address itself to this with the result that a gap in the evidence remains thereby raising reasonable doubt as to the guilt of the appellant. Counsel urged that notwithstanding the power of the court to compel attendance of witnesses under Sections 144 and 145 of the Criminal Procedure Code, an inference should be drawn that the evidence of such witness would have been adverse to the prosecution.

17. Stressing that there was insufficient evidence to support the conviction, counsel pointed out PW1 on whose evidence the appellant was convicted did not see the appellant attack the deceased; that PW1 conceded in cross examination that he did "*not know what killed Mama Mukami* " and the question of what killed the deceased remains unanswered as he neither saw the appellant hitting the deceased nor did he see her stabbing the deceased. Counsel went on to say that identification of the assailant was hindered because the incident occurred at night; that based on the evidence of PW2, PW3 and PW4, there was no light or electricity at the time the deceased body was discovered.

18. According to counsel, the learned Judge also erred in shifting the burden of proof to the appellant by expecting her to explain the death of the deceased based on the assumption that she had caused the death. Counsel went on to say that despite the centrality of *mens rea* and malice aforethought as key ingredient of the offence, the learned Judge did not sufficiently consider the same; and that there was no evidence to illustrate bad blood between the appellant and the deceased in order to establish *mens rea* or malice on the appellant's part.

19. Citing the decision of the Court in ***Dzombo Chai v R Criminal Appeal No.256 of 2006*** counsel concluded by urging that the evidence on the basis of which the appellant was convicted is far from watertight and the conviction should be quashed and the sentence set aside.

20. Opposing the appeal, learned Assistant Deputy Public Prosecutor Mr. A. Chigiti submitted that the conviction was based on cogent evidence; that in light of Section 143 of the Evidence Act no particular number of witnesses are required to prove a certain fact and the absence of the arresting and investigating officer did not affect the prosecution case.

21. Counsel referred us to the decision of this Court in ***Karanja vs R [1983] eKLR*** and submitted that the trial court properly relied on circumstantial evidence to convict the appellant; that the appellant did not deny that she broke the window and that she pulled the deceased out of the room; that as the appellant is the only person who was present, she is the only one who can explain who stabbed the deceased and the trial court did not thereby shift the burden of proof to her; that based on the testimony of PW1, there was moonlight and security lights that enabled her identify the appellant.

22. Regarding the death sentence, counsel urged that the matter should be remitted back to the High Court for an appropriate sentence to be meted but otherwise urged the court to dismiss the appeal on conviction.

Analysis and determination

23. We have considered the appeal and the submissions. The question for consideration in this appeal is whether the evidence tendered before the trial court established the appellant's guilt to the required standard.

24. Dr. Titus Ngulungu, PW5, the pathologist who performed the post mortem concluded that the deceased died from massive haemorrhage caused by a stab wound on her neck. Nobody saw the appellant stab the deceased. The conviction of the appellant was therefore based on circumstantial evidence underpinned heavily on the evidence of PW1 who the trial Judge described in her judgment as "*the only witness to the offence*" and by rejecting the appellant's defence. In that regard, the Judge stated:

> ***"I will dismiss the defence and instead believe that the accused attacked the deceased after she found PW1 and the deceased were in one of the rooms. Although PW1 did not see at what stage the deceased was injured, it is the accused who attacked the deceased."*** [Emphasis]

25. The Judge went on to surmise that although the appellant denied that there existed a love affair between PW1 and the deceased, the appellant:

> ***"Must have suspected the two and was enraged by PW1's visit to the room where the deceased had slept on the fateful night. If PW1 was not a lover of the deceased, the accused knows best why she attacked the deceased."***

26. In order to convict an accused person on the basis of circumstantial evidence, there are pre-requisites. In ***Abanga Alias Onyango vs R, Criminal Appeal No. 32 of 1990***, the Court stated:

> ***"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."***

27. In the same vein, the Court in ***Nzivo vs Republic [2005] 1 KLR 699*** held that:

> ***"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10 th Edition P 31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference – Teper v The Queen [1952] AC 480 at page 489." – See James Mwangi v R [1983] KLR 327 at pg 331."***

See also ***Sawe vs Republic [2003] eKLR*** and ***Erick Odhiambo Okumu vs R [2015] eKLR.***

28. Guided by those principles, it is our duty to review, re-evaluate and analyse the evidence on record and to draw our own conclusions bearing in mind that we have not heard the advantage, which the trial Judge did, of hearing directly from the witnesses and observing their demeanour. [See ***Okeno v Republic [1972] EA 32.***]

29. As earlier stated, PW1 testified that on 30th September 2011, he received a call from the deceased, (to whom he referred as "Mama Mukami") requesting for assistance to get a piece of land to lease; that he informed the appellant that the deceased was coming; that on 1st October 2011, the deceased arrived before noon and the appellant prepared lunch for them; that after lunch he took the deceased to view the piece of land and then "*came back to my home and left her with Nancy*" after which he left to do other errands; that he returned at about 10.00p.m. and found that Nancy (the appellant) had closed the premises and had gone to sleep; that he passed by the house given to the deceased to find out if she was comfortable and as he was talking to the deceased, the glass window was broken from outside; that he went outside and found the appellant standing at the door trying to push herself inside the house; that the door was open; that the appellant got hold of the deceased and pushed her outside and "*within a second*" saw the deceased fall on her knees and also saw a flow of blood on her legs; that he "*did not see anything at that moment*" but realized something had happened and told the appellant she had done something terrible and went to his house and locked himself up; that he called his son and told him to attend to the deceased and to take her to hospital "*if she was serious*"; that he then slept till 6.00 a.m. the following morning and opened the door and saw the deceased in the same position he had left her and realized she was dead.

30. Up to a point, the appellant's version of events agreed with PW1's version. According to the appellant she was at Enosupukia Sintakara on 1st October 2011 where she had gone to do farming and where she had started a bar; that she used to live with PW1(to whom she referred as her husband) and his son, PW4; that PW1 informed her that a visitor, to whom she referred as a family friend that she knew and also as Mama Mukami, was coming to visit; that the Mama Mukami arrived at 11.00 am; that she welcomed her and PW1, PW4, herself and the deceased had lunch together; that at about 2.00 p.m., she opened the bar and PW1 and Mama Mukami left on a motor cycle to go to the shamba that Mama Mukami wanted to lease; that at about 4.00 p.m., having viewed the piece of land, PW1 and Mama Mukami returned to where the appellant was, at the bar; that the appellant welcomed them and served them with drinks and at about 6.00 p.m., PW1 left leaving the appellant and Mama Mukami at the bar.

31. It was also the appellant's testimony that at about 7.00 p.m., Mama Mukami requested the appellant to show her a place to sleep and the appellant escorted her to the maid's room and prepared a place for her to sleep; that the appellant then returned to the bar and continued to serve her customers until 9.00p.m. after which she closed the bar and went to her house, located within the vicinity of the bar, to sleep; that PW1 called and she opened for him at about 10.30p.m, asked for food which she made; that PW1 ate some of food, complained that it was over salted, threw the food at her and "*started a fight*"; that the appellant screamed, neighbours came and a neighbour by the name John came to her rescue and took her to his house where she slept until the following morning when the village elder (PW2) came to fetch her to return her to her husband, PW1 but instead took her to Maela Police Station; that on enquiring why she was being taken to the police station, she was informed that it was to get her husband; that she was then taken to Nairagi Enkare Nkare Police Station where PW1 identified her as his wife after which she was booked and subsequently charged; that she learnt of the death of the deceased in court; that PW1 later informed her that he had been released on bond and she was surprised that he was a prosecution witness.

32. When all the evidence is considered, we are troubled by the testimony of PW1 on which the trial court hinged the conviction. PW 1 began his testimony in chief by stating that on 15th September, 2011, two weeks prior to when the deceased was stabbed to death on 1st October 2011, there was a fight between the appellant, to whom he referred as his girlfriend, and the deceased although he did not know the cause of the fight. The impression created by PW1's testimony in that regard is of a strained relationship between the appellant and the deceased thereby laying a basis for the hypothesis, with which the learned Judge agreed that PW1 (whom the appellant considered to be her husband) and the deceased were lovers and that the appellant must have been "*enraged*" by PW1 visiting the deceased's room.

33. Yet, it was also PW1's evidence that, notwithstanding the alleged hostility between the appellant and the deceased, (as he had the court believe) he alerted the appellant of the impending visit by the deceased; had the appellant host the deceased for lunch; was comfortable to leave the deceased under the care of the appellant as he went off on his errands, who then went on to prepare for a place for the deceased to sleep. These actions on the part of the appellant would appear incompatible or inconsistent with actions of a person who PW1 considered to have a grudge against the deceased. If indeed PW1 considered that there was a wedge between the appellant and the deceased, how probable is it that he would inform the appellant of the impending visit by the deceased; entertain the deceased for lunch alongside the appellant; leave the deceased under the care of the appellant as he went off on his errands? PW1 does not, in light of this troubling questions, come across as a credible witness.

34. The testimony of PW1 raises other concerns: PW1 stated under cross examination that he did "*not know what killed Mama Mukami*"; that after seeing her "*fall on her knees*" and after seeing "*a flow of blood on her legs*", he was content to call his son PW4 to attend to the deceased and proceeded to his house where he "*slept till morning*". It is bizarre that PW1 would have left the deceased who was injured and bleeding at the time without seeking help, medical or otherwise and was content to simply call his son to attend to her. Furthermore, PW1's son, PW4, did not in his testimony state that it was his father who called him to attend to the deceased. Rather, PW4's testimony was that he was asleep and was alerted by screams and that he then went outside and "found the lady who died" alone and asked her if there was a problem and offered to help her; that the deceased fell and that is when he saw blood.

35. The other troubling aspect of this case is that it would seem that PW1 was himself a suspect. The appellant stated in her evidence that when she was taken to the police station on the morning of 2nd October 2011, she asked for her husband and was told he was at Nairagi Enkare Police Station; that when she was in court, her husband told her that "*he was released on bond*" and that she was surprised to see him as a witness. The testimony of the appellant in that regard is given credence by that of PW3 the boda boda operator who ferried PW2 and the appellant to Maela Police Station and subsequently to Nairagi Enkare Police Station where PW1 was held.

36. There is also the consideration that the appellant also stated in her evidence that John, in whose house she said she had spent the night after his intervention when he found PW1 beating her, had also recorded a statement with the police. It is not clear whether the "John" mentioned by the appellant is the same person who was mentioned by PW2 as the person who woke her up and reported that a lady had been murdered.

37. In the foregoing circumstances, there is merit in the appellant's submission that the testimony of arresting and investigating officer would have been invaluable to explain if indeed PW1 was a suspect and the circumstances under which he was exonerated and the appellant charged with the offence. It is unfortunate that the prosecution did not procure the attendance of the investigating officer as a witness and the prosecution application for adjournment in order that the investigating officer could be called was declined by the trial court on account of the delay already experienced in the conclusion of the hearing. Although it is not evident that PW1 would have had a motive to harm the deceased, he clearly had the opportunity as did the appellant to do so as they were the only ones present at the scene of crime. In our view, PW1 knew more of what transpired on that fateful night than he was prepared to share with the trial court.

38. On the whole, and in light of those concerns and the gaps in the chain of events leading to the death of the deceased, we are left with lingering doubts as to the guilt of the appellant. In our judgment, the evidence on record was insufficient to support the appellant's conviction. Had the learned trial Judge properly evaluated and analysed the evidence she would have found that there was reasonable doubt whose benefit should have been given to the appellant. We do not consider that her conviction is safe. There are co-existing circumstances, which weakened the inference of guilt on the part of the appellant. As this Court stated in ***Republic vs. Danson Mgunya [2016] eKLR***

> "***We must reiterate that the burden was on the prosecution to adduce evidence, which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture***."

39. In this case, the learned trial Judge appears to have accepted such invitation by the prosecution to "**convict on the basis of inferences and conjecture"** when she concluded that the appellant "***must have suspected the two and was enraged by PW1's visit to the room where the deceased had slept on the fateful night. If PW1 was not a lover of the deceased, the accused knows best why she attacked the deceased*."**

40. The result is that the appeal succeeds and is hereby allowed. The conviction is hereby quashed and the death sentence meted against the appellant is hereby set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

This Judgment is delivered under Rule 32 (2) of the Court of Appeal Rules as the Hon. Lady Justice Sichale, JA declined to sign the same.

Dated and delivered at Nakuru this 18th day of October, 2018.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole Kantai

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JUDGE OF APPEAL

I certify that this is the

true copy of the original

DEPUTY REGISTRAR