REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJA)

CRIMINAL APPEAL NO. 7 OF 2015

BETWEEN

ELIUD NG'ANG'A....................................APPELLANT

VERSUS

REPUBLIC...DEFENDANT

(*Appeal from the Judgment of the High Court of Kenya at Nyeri (Wakiaga, J) Dated 28th October, 2014*

in

H.C.CR. A. NO. 39 OF 2009)

****

JUDGMENT OF THE COURT

The Appellant, **Eliud Ng'ang'a Mwangi,** was arraigned before the High Court at Nyeri with the offence of Murder contrary to **section 203** as read with **section 204** of the Penal Code. In that on the 21st day of October, 2007 at Gikira Village, Gikira Sub Location, in Murang'a North District, within Central Province (as it was then called) he murdered **Rhoda Njambi Maina**.

The appellant denied the charge prompting a trial in which the prosecution tendered eleven (11) witnesses in support of the charge, while the appellant gave sworn testimony and called two witnesses in support of his defence. The brief facts are that on the 20th October, 2007 **GWN,** (PW3), left for school, leaving behind her deceased mother, the appellant, whom she referred to as a father, and her younger brother, in the house the deceased had rented from **Susan,** (PW2) in August, 2007. She came back from school at around 3.00 pm only to find her brother alone outside their house which was locked from the outside. At around 9.00 pm, the appellant came and handed them over to a stranger who escorted them to their grandmother's compound. On the 21st October, 2007 **Risper**, (PW1), the mother to the deceased and grandmother to **GWN**, left for the scene and also found the door locked from the outside. She filed a report of her missing daughter with the area Chief **Monicah Wairimu Muthee, (PW7) (Monicah)** and **C.I.P John Mburu, (PW6) (C.I.P John)** of Kangema Police Station. On the 20th day of November, 2007 the deceased's premises were broken into and her decomposed body found underneath a bed,

prompting **Risper** to file a report of murder with Kangema Police Station.

Following the murder report, **C.I.P. John** in the company of **P.C. Peter Koech, (PW5) (P.C. Peter**) visited the scene of the murder and observed items strewn all over the room, a rope around the neck of the deceased and a jacket on top of the bed from which **P.C. Peter** recovered the appellant's photograph. Post Mortem was carried out on the 27th day of November, 2007 by **Doctor Joseph Njoroge, (PW11) (Dr. Joseph**), in the presence of **Kennedy Ngure Maina, (PW4), (Kennedy)** and **P.C. Isaac Musomi, (PW8) (P.C. Isaac)**. The cause of death was Asyphyxia due to strangulation.

The appellant was arrested on the 11th day of July, 2009 by **I.P James Mburu,** (**PW9), (I.P James)** for the offence of being drunk and disorderly. It turned out that he was wanted by Kangema Police Station for the murder of the deceased and he was re-arrested for that. On the 23rd day of July, 2009 he was certified mentally fit to stand trial for the said murder by **Dr. Samwel Owino Ong'ang'a (PW6), (Dr. Samwel)**.

The appellant gave sworn testimony and called **Nancy Waithera Ng'ang'a,** his wife, (DW2), (**Nancy); and Godfrey Mwangi Ng'ang'a,** the son, (DW3) (**Godfrey**). At the start of his testimony, the appellant stated that he knew the deceased generally as he used to see her in Kangema Town but later recanted and denied ever knowing her at all. It was his testimony that on the date of the alleged murder, he went about his matatu driving duties, plying the Kangema Nairobi route. After work, he retired home and never left his home. Thereafter he went about his routine job as usual, always available, until he was arrested for the offence of being drunk and disorderly on the 11th July, 2009. He was surprised when he was subsequently charged with the murder of the deceased, an offence he knew nothing about. He did not know why the witnesses and police officers with whom he had no grudge and whom he saw in court for the first time fabricated the case against him, using his jacket and photograph taken from him after he had been arrested for the offence of being drunk and disorderly.

J. Wakiaga, J. in the impugned judgment dated the 8th day of April, 2014 found the prosecution case proved to the required thresh hold, found the appellant guilty of the offence of murder, convicted him and sentenced him to death.

The appellant was aggrieved and is now before us on a first appeal, raising Ten (10) supplementary grounds filed on his behalf by the firm of **John Swaka & Co. Advocates** on the 7th day of December, 2015, which learned counsel **Mr. John Sakwa** compressed into two, namely:

1. That the prosecution case did not meet the thresh hold of proof beyond reasonable doubt.

2. That the learned trial Judge fell into error when he held that the appellant's *alibi* defence had been ousted by the disjointed circumstantial evidence tendered by the prosecution.

In support of ground 1, **Mr. Swaka,** submitted that the prosecution failed to call material witnesses; the learned trial Judge failed to reconcile conflicting evidence which default was not only fatal to the prosecution case, but also incurable and therefore created a doubt in the prosecution case which should have been resolved in favour of the appellant. **Mr. Swaka** also contended that in the absence of an inventory and scenes of crime photographs connecting the recovery of both the jacket and photograph of the appellant at the scene of crime with the murder, there was nothing to oust the appellant's assertion that these were removed from his person at the time he was arrested for the offence of being drunk and disorderly, and then converted to fabricate the murder charge against him.

In support of ground 2, **Mr. Swaka** submitted that no witness talked of seeing a rope that the Doctor found around the neck of the deceased during the post mortem; there was no evidence to show that the appellant had absconded from his home area; the possibility of suicide was never ruled out; the appellant raised a plausible alibi supported by his witnesses, **Nancy** and **Godfrey**, which was not properly considered or analyzed as the learned Judge simply dismissed it and yet it had dislodged the prosecution's disjointed circumstantial evidence.

In response to the appellant's submissions, **Mr. J. Kaigai,** the learned Senior Assistant Director of Public Prosecutions, submitted that the appellant's conviction was based on overwhelming evidence which had met the required threshold of proof beyond reasonable doubt; the failure to reconcile the conflicting evidence was neither fatal nor material to the prosecution case as it is curable under **section 382** of the Criminal Procedure Code. He further submitted that all material witnesses were tendered before the court and a reasonable explanation given for those not tendered; the chain of circumstantial evidence in the prosecution case was complete and linked the appellant to the scene of the murder of the deceased; appellant's disappearance from the scene of the murder and his own home area for a period of almost two years is a clear demonstration of guilty conduct; murder was proved through medical evidence that the deceased died of Asyphyxia due to strangulation; the rope **P.C. Peter** saw around the neck of the deceased when the body was discovered, is the same rope that the Doctor who performed the post mortem noted around the neck of the deceased; possibility of suicide did not arise as the deceased could not have strangled herself, pushed the body underneath the bed and then locked it in the room from the outside; and, lastly, that the appellant's *alibi* defence was rightly disbelieved by the learned trial Judge as the witnesses he called in his defence admitted that he (appellant) would not have disclosed to them any illicit extra marital relationship(s) if he was involved in any.

In reply to the respondent's submissions, learned counsel **Mr. Swaka** maintained that the contradictions, inconsistencies and discrepancies highlighted in his submissions were fundamental and should not have been wished away by the learned Judge; and that the testimonies of the uncalled witnesses would have been adverse to the prosecution case.

This is a first appeal. Our mandate as set out by the predecessor of the court in the case of **Okeno versus Republic [1972] EA32,** at page 36 is as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya versus Republic) [1957] EA 336) and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantatilal 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 findings 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. See Peters versus Sunday Post [1958] EA 426"**

We have revisited the record in totality, re-assessed, re-evaluated, re-analyzed and re-considered it in the light of the impugned judgment and the rival submissions set out above. In our view, the following issues fall for our determination:-

(1) Whether there are any material contradictions, inconsistencies and discrepancies in the prosecution case which rendered the prosecution case unproved.

(2) Whether the prosecution failed to call crucial witnesses.

(3) Whether the appellant's *alibi* defence was displaced by the prosecution circumstantial evidence.

On the alleged inconsistencies, discrepancies and contradictions, the court, in **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,** held, *inter alia,* that:-

> "**In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"**

From the record, it is not disputed that in her testimony, **Susan** referred to events that took place in the

year 2008 as opposed to 2007 consistently referred to by the other prosecution witnesses; and that **Risper** contended that there were no other tenants in the locality, while **Susan** and **P.C**. **Peter** asserted that there were other tenants in the locality. We agree with **Mr. Swaka's** submission that these were never reconciled by the learned trial Judge. Our role as an appellate court in the circumstances is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant's conviction and sentence. See the case of **Josiah Afuna Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).**

We have accordingly done so and our view is that, **Susan's** reference to the said events as having occurred in 2008 as opposed to 2007 most likely arose from memory lapse considering that she was revisiting them almost three years later. As for the presence or otherwise of the neighbours, at the scene of murder, Susan who was the landlady said there were neighbours. P.C. Peter who was involved in the investigations into the murder also confirmed in his testimony that there were neighbours to the scene of the murder. It is therefore our finding that the above alleged contradictions, inconsistencies and discrepancies though they existed, were inconsequential to the prosecution case as the overwhelming evidence on the record was that the murder of the deceased occurred in the year 2007, while the investigations into the said murder revealed that there were neighbours who may have been in possession of vital evidence relating to the murder of the deceased but who were too scared to volunteer that information to the police.

In response to issue number two (2), **Section 143** of the Evidence Act Cap 80, Laws of Kenya, makes provision that no number of witnesses is required to prove any fact. The predecessor of the court in **Bukenya and others versus Uganda [1972] EA 549,** stated clearly that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; that the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case; and that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In **Keter versus Republic [2007] 1EA135,** the court was categorical that:-

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

It is not disputed that the person who escorted **GWN**, PW3 and her brother to **Risper's** compound; the person who broke the door on the instructions of **Susan,** and the neighbours to the deceased's residence were not called to testify. The explanation given by the prosecution was that **GWN**, PW3, did not identify the person who escorted them to **Risper's** compound as it was at night; while **P.C. Peter,** explained that the neighbouring tenants were too scared to volunteer their statements to police. There was, however, no explanation given as to why the person who broke into the room on the instructions of **Susan** was not tendered to give evidence.

Considering the above in the light of the totality of the record, it is our view, that although the first two categories were crucial witnesses, the prosecution gave a plausible explanation for the failure to tender them as witnesses. As for the one who broke into the room, the evidence of **Risper** and **Susan** was sufficient to establish the fact that the door had been locked from the outside from the date the deceased went missing and it had to be broken into to gain entry which led to the discovery of the deceased's decomposed body.

Finally on the (3rd) issue, it is undisputed that the appellant and his witnesses set up an *alibi* defence. An *alibi* is a plea by an accused person that he was not at the scene of the crime at the time the offence was allegedly committed. See the case of **Lenyesio Lekupe & Another Nyeri Criminal Appeal No. 145 of 2011 (UR).** In the case of **Ajwang versus Republic [1983] KLR 337,** the court restated the principle that the burden of proving the ingredients of the offence is entirely on the prosecution and the accused cannot be called upon to prove his innocence.

In **Saidi versus Republic [1963] EA.6,** the predecessor of the court had this to say:-

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."**

See also **Sekitoleko versus Uganda [1967] EA531**, for the holding, *inter alia*, that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi, or something else; and second, that the burden of proving an alibi does not lie on the prisoner.

In rejecting the appellant's alibi, the learned trial Judge relied on circumstantial evidence and reasoned thus:-

> **"The question is whether there was sufficient evidence to link the accused with that act. The only evidence that was tendered to link the accused with the offence is that of PW3 and PW5. According to PW3, the accused spent the night of 20th October, 2007 with the deceased and that PW3 left for school, in the morning of 21st October, 2007 after her mother (deceased) prepared breakfast for her. When she came back from school PW3 said she found her little brother Ndegwa, alone outside their home. The house was locked from outside. Her mother (deceased) was not at home. At 9.00pm, PW3 said, the accused arrived and took them to the home of their grandmother (PW1). On the way, the accused handed them over to a stranger who took them to the hedge of their grandmother's fence. PW3 said, that the accused, fondly referred to as Baba Maina, spent every night at their home and that her biological father used not to visit them. I am convinced that PW3 knew the accused very well and that she told the truth when she said that the accused spent the night on the material date with the deceased. Though DW2 and DW3 stated that they did not know the relationship between the accused and the deceased, I do not expect them to be told by the deceased of his illicit affair. P.W.2 confirmed that she knew that the accused cohabited with the deceased and that he had interacted with him prior to the date of the incident. P.C. Koech (P.W.5.) visited the deceased's residence on 20th November, 2007 and therein he found a jacket which had the appellant's photograph. The accused has attempted to explain that the jacket and photograph were taken from him by the police when he was arrested. I do not believe the accused's line of defence. There was no reason to make the police plant such evidence against the accused. I find the evidence of P.W.3 as corroborated by the evidence of P.W.5 to be credible. The circumstantial evidence when pieced together show that it is the accused who committed the act of killing the deceased and no one else. I find that the ingredient of actus reus was proved."**

The principles that guide the court on the admissibility or otherwise of circumstantial evidence as a basis for founding a conviction against an accused have been considered in numerous decisions of this Court and we take the summary from the case of **Sawe versus Republic [2003] KLR 35,** where the Court stated:

> "**Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt." In Musili versus Republic CRA No.30 of 2013 (UR) it was stated that "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt. In Mohamed & 3 others versus Republic [2005] 1KLR 722 the court went further to define what is meant by circumstantial evidence thus:-**
>
> **"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved." While in**

Mwendwa versus Republic [2006] 1KLR 133 the court added that

"***To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. And that the said chain must never be broken at any stage" And lastly in Ndurya versus Republic [2008] KLR 135 it was held inter alia that:-***

"Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence has always to be narrowly examined. It was necessary before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference...."

In the light of the above principles, it is our finding that the chain of circumstantial evidence the prosecution relied upon to link the appellant to the murder of the deceased is made up of two limbs. The first limb deals with the appellant's interaction with the deceased before she went missing; while the second limb deals with the recovery of the appellant's jacket and photograph at the scene of the murder.

In the first chain of evidence, **Risper, Susan, and GWN**, gave consistent evidence that the deceased rented two rooms from **Susan** in August, 2007. Between August, 2007 and 20th October, 2007 all the three witnesses had interacted closely with the appellant and the deceased, and were firm in their testimonies both in chief and cross examination that the two cohabited as man and wife. **GWN** and her brother referred to the appellant as their father. **Risper** and **GWN** were unchallenged on their testimony that the couple used to drink and quarrel often although the cause of the quarrels was unknown to them. **GWN** lived with the couple and left the appellant in the house when she left for school on the date the deceased went missing**. Susan** had been to the house at least twice to demand rent. **Risper** was the mother of the deceased and lived only thirty (30) minutes walk away. She was firm that she used to visit the couple at the said residence. All the three witnesses concurred that the appellant only absconded from the scene of the crime coincidentally with the disappearance of the deceased only for her decomposed body to be found in the very house she cohabited with the appellant.

The appellant's response to the above evidence was that he had no grudge with the above mentioned witnesses as he did not know them before. Neither did he know the reasons as to why they fabricated their evidence against him. The learned trial Judge who heard and saw both sides testify believed **Risper, Susan** and **GWN** as truthful witnesses, because they had closely interacted with the appellant and in the learned Judge's view, knew him very well. Their testimonies were also not shaken in cross-examination.

The failure to call the person to whom the appellant handed **GWN** and her brother to escort them to **Risper's** compound did not constitute a break in the prosecution circumstantial evidence chain against the appellant. This is because, the learned trial judge believed **GWN** as a truthful witness and believed her testimony that it is the appellant who handed them to the unknown stranger to escort them to **Risper's** compound, which evidence was corroborated by the testimony of **Risper** that the children were alone when they reached her house with a story that the appellant had handed them to a stranger to escort them to her compound.

The second limb of the chain of circumstantial evidence was through a jacket and photograph recovered at the scene of the murder. The appellant admitted that the two items belonged to him. The explanation the appellant gave was that, these were removed from him at the time he was arrested for the offence of being drunk and disorderly, and converted to fabricate the murder charge against him by the police officers whom he neither knew nor had a grudge with.

P.C. Peter's firm testimony was that the jacket and photograph recovered at the scene of the murder and identified by the witnesses as belonging to the appellant, were kept at the police station as exhibits until the appellant was arrested for being drunk and disorderly and subsequently charged with the murder of the deceased..

I.P. James Mburu, the officer who arrested the appellant for the offence of being drunk and disorderly, stated that he did not know the appellant before, and was not even aware that he was wanted by Kangema Police Station for the murder of the deceased. Nowhere in his cross-examination was it put to him that either him or the other officers involved in the arrest of the appellant for the offence of being drunk and disorderly, fabricated the murder charge against the appellant. The only reasonable inference to be drawn from the above is that the appellant's allegations that these items were removed from his body at the time he was arrested for the offence of being drunk and disorderly, and then converted as exhibits to implicate him in the murder of the deceased, was an afterthought and did not therefore oust **P.C. Peter's** assertion that these items were taken to the police station as exhibits soon after their recovery from the scene of the murder. This finding negates **Mr. Swaka's** submission that the evidence on the recovery of the said items could only hold if corroborated by the record of an inventory or scenes of crime photographs. The presence of the appellant's jacket and photograph at the scene of the murder corroborated the testimonies of **Risper, Susan** and **GWN** that the appellant resided in that house with the deceased as man and wife, and that **GWN** left him in the said house on the day the deceased went missing. He was therefore the last person to be seen with the deceased while alive.

Section 111(1) of the Evidence Act Cap 80 Laws of Kenya provides, *inter alia,* thus:-

> "**When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."**

In the case of **Douglas Thiong'o Kibocha Versus Republic [2009] eKLR** the court made observation, *inter alia,* that:-

> **"When Parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanations on certain matters especially within his knowledge. Otherwise the prosecutions would not be able to conduct full investigation in such cases and the accused in the events, will escape punishment when the circumstances suggest otherwise. Section 111 (1) above, places an evidential burden on an accused person to explain those matters which are especially within his knowledge. It may happen that the explanation may be in the nature of an admission of a material fact"**

In the circumstances of this appeal, the admission of a material fact was the appellant's acknowledgement that the jacket and photograph belonged to him. Section 111(1) placed an evidential burden on the appellant to explain first how his jacket and photograph were found at the scene of the murder, and second, how the deceased was murdered. He failed to do so as his allegation that these were taken from him when he was arrested for the offence of being drunk and disorderly was ousted by the truthful evidence of **P.C. Peter** and **IP Mburu** as already found above.

Evidence of items found strewn in the room where the deceased's body was found, the presence of a rope around the neck of the deceased's body, the pushing of the body underneath the bed and then locking the room from outside; together with the appellant's conduct of keeping the deceased's children away from this room, and then escorting them to their grandmother's compound at night through a stranger was sufficient for the learned trial judge to draw an inference that the appellant was well conversant with all that had transpired in the said room leading to the murder of the deceased.

The issue of suicide raised by **Mr. Swaka** in his submissions did not arise as there was no way the deceased could have committed suicide, and then pushed her own body underneath the bed and then locked it in from the outside.

On the basis of totality of the above assessment, it is our finding that there was sufficient material before the learned Judge on the basis of which he rightly held that the ingredients for the offence of murder in terms of **Section 206** of the Penal Code were satisfied. We therefore have no doubt that the chain of circumstantial evidence tendered in support of the prosecution case linking the appellant to the murder of

the deceased was complete. It ousted the appellant's *alibi* as found by the learned trial judge, a finding we make no hesitation in affirming. We therefore find no merit in this appeal. It is accordingly dismissed in its entirely.

DATED AND DELIVERED AT NYERI THIS 1ST DAY OF MARCH, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR