IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 2 OF 2017

BETWEEN

JULIUS SHUKRANI MGANGA..........................APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Mombasa (Muya, J.) dated 25th January 2016

in H.C.CR.C.No. 62 of 2012)

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JUDGMENT OF THE COURT

[1] **Julius Shukrani Mganga** (the appellant), and another were arraigned before the High Court in Malindi to answer a charge of murder contrary to **section 203** as read with **section 204** of the penal code. The particulars of the charge were that on the 22nd day of October, 2012 at Mbaya Mose Village Kilifi County, they jointly murdered **Osman Salat Hanish**. They pleaded not guilty to the charge and after a full hearing his co-accused was acquitted. The appellant was nonetheless found guilty of murder, convicted and sentenced to suffer death as by law prescribed.

[2] Aggrieved with the said conviction and sentence, he appealed to this Court and proffered five homemade grounds of appeal. After being assigned the matter **Miss Aoko Otieno**, learned counsel for the appellant filed 5 supplementary grounds of appeal, on 28th February, 2016, which she relied on when prosecuting this appeal. In these supplementary grounds, the learned Judge is faulted for finding the murder charge proved beyond reasonable doubt; ignoring that the Information sheet was defective; inordinate delay in hearing and concluding the matter, and failing to find that there were inconsistencies in the testimonies of the prosecution witnesses. Lastly, the learned Judge was faulted for upholding conviction on the evidence that according to learned counsel amounts to a confession which is inadmissible in law.

[3] Conscious of our duty under **Rule 29 (2)** of the Rules of this Court, and our decision in **Okeno vs. Republic** 1972 EA 32 and a litany of other decisions of this Court, we shall reappraise the evidence adduced before the trial court and arrive at our own decision as to whether the appellant's conviction was safe or not.

In a nutshell, the evidence adduced before the trial court was to the effect that the deceased, **Osman Salat Hanish** used to trade in livestock, buying cattle at a lower price, fattening them and then selling them at a profit. On the date in question, the appellant and another are said to have been drinking palm wine (*Mnazi*) at the home of **John Mbura** (PW1). John told the trial court that the appellant borrowed his cell phone to make a call but John declined to lend it to him. He is said to have taken the phone belonging to one **Emmanuel** (PW2) and used it to flash a person who called him back. John who was nearby heard the appellant identify himself by a fake name, *"Kazungu Baya"* and set up a meeting with the person he was talking to for the following day saying he wanted to take him somewhere to buy a cow. Two days later, John received information that there was a man who had gone missing from the area.

[4] According to PW3, **Hasan Sheikh Mohamed** who was a relative of the deceased, he was informed by the deceased's wife on 22nd October, 2012 that the deceased had failed to return home after going to buy cattle, which was very unusual for him. The following day, he and other relatives decided to report the matter to Mariakani Police Station. After reporting they also started looking for the deceased in the area. Three days later, they were informed by the local chief that a male body had been spotted somewhere in some bushes. PW3 and others

went to the scene and identified the body as that of the deceased.

[5] Investigations started and several persons who had gotten in touch with the deceased in the recent past were interrogated. PW4, **Kahindi Chengo Thoya**, a boda boda rider told the court that on 22nd October, 2012, he was at a bus stage in Kaloleni when he met the deceased. The deceased who was talking on the phone asked him to speak to the person on the other side and get directions as to where he would drop him. According to Chengo, the person told him to take the deceased to a place called Korongoni. On the way, they met the appellant who stopped them. Chengo was paid 150/= for the ride and he left the deceased in the hands of the appellant.

[6] Another witness, PW11 **Karisa Charo,** told the court that on 22nd October, 2012 he saw the appellant walking with two somali men, one of whom he identified as the deceased. He did not however know who killed the deceased. PW12**, Majimbo Ngumbao** was one of the persons who saw the deceased's body. He told the court that he was in his shamba minding his own business when he saw two people who told him that they had seen a body lying in the nearby bushes. He followed them to the spot where they said they had spotted the body. While at the scene the area assistant chief, and other persons joined them. He observed that the body had cut wounds on the head, and one of the hands appeared to have been eaten by wild animals. The body which had already started to decompose was removed and taken to the mortuary.

According to the witness, who was the owner of the land from where the body was recovered, he had joined the police later when the appellant led them to a spot in the bushes where they found a bag, scarf, pair of open shoes, a kanzu, panga and a piece of rope. The Kanzu (long robe); scarf, and shoes were identified by the deceased's wife (PW13) as those the deceased was wearing on the date he disappeared. She also told the court that the deceased had carried 400,000/= in cash to buy cattle.

[7] The deceased's body was identified by his wife (PW13) and other relatives including **Mohamed Musa** (PW14). The appellant was subsequently charged with the offence as stated earlier. The investigating officer, **P.C. Lazarus Mutua** confirmed that the appellant led the team to the place where the exhibits were recovered. The post mortem carried out on the deceased's body revealed that he died from severe head injury.

[8] When placed onto his defence, the appellant testified on oath and called no witnesses. He described himself as a boda boda operator. He told the court that on the date in question, he went about his usual boda boda business and nothing unusual happened. On 23rd October, 2012, he was informed that the police were looking for him. He said that he just waited for them to go and arrest him but two days later, he was informed that one of his relatives had been arrested and detained at Kaloleni AP camp. He proceeded there to find out what was happening. He was arrested and taken to the police station where he was charged with the offence in question, which he said he knew nothing about. On cross examination, he admitted that he had taken the deceased to a place called Chasimba, but said he did not know how the deceased met his death. After considering this evidence along with brief submission by counsel for the appellant, the learned Judge found the charge of murder proved to the required standard and convicted the appellant.

[9] As stated earlier in this judgment, this being a first appeal, it behooves us to reappraise this evidence along with the grounds of appeal, submissions of both counsel and the applicable law and then make our independent decision as to whether the conviction against the appellant is sustainable or not.

The appellant faults the learned Judge for failing to find the charge of murder not proved beyond reasonable doubt; not finding that the appellant's constitutional rights to fair trial was violated due to the delays; not finding there were inconsistencies in the witness' testimony which ought to have cast doubt to the prosecution case; and finally that the learned Judge based his conviction on evidence that amounted to a confession which was taken contrary to the law. Miss Aoko learned counsel for the appellant expounded these submissions at the plenary hearing and urged us to allow the appeal.

[10] Opposing the appeal **Mr. Wamotsa**, learned senior prosecution counsel posited that the trial court had analysed the evidence before it and arrived at the correct verdict. It was counsel's submission that the last person to be seen with the deceased was the appellant. He submitted that the appellant's conduct in the entire saga was suspect and inconsistent with conduct of an innocent person. He wondered why the appellant did not want to use his cellphone to contact the deceased; why he had used somebody else's name to introduce himself, thus holding himself out as a different person; and why he had failed to go to the police station after learning that the police were looking for him until he heard that one of his relatives had been detained at the police station. According to Mr. Wamotsa, that conduct was consistent with guilt. According to learned counsel, the information was not defective as the deceased was described by his proper name and the name *'mzee Toshi'* referred to by some of the witnesses was a nickname. In any event, submitted counsel, if there are any discrepancies in the information, such are curable under **section 382** of the Criminal Procedure Code and they do not vitiate the charge. He submitted further that the trial court had not relied on any confession by the appellant and that the evidence pertaining to the recovery of the exhibits was properly admitted and the same had not been objected to. He urged us to dismiss the appeal.

[11] We shall now consider these grounds *vis a vis* the evidence adduced before the trial court, the submissions by both learned counsel, the cited cases and the applicable law. From the onset, we agree with the learned Judge of the High Court that there was no eye witness to the killing of the deceased. The evidence on record is therefore purely circumstantial. The learned Judge however found that the evidence adduced before court irresistibly pointed at the guilt of the appellant. The circumstances pertaining to this case in the learned Judge's view were incompatible with the innocence of the appellant.

[12] Does this Court after fresh analysis of this evidence agree with the learned Judge? On the question of the validity of the information, we are satisfied that nothing was placed before us to show any defects that were fatal to the charge. Learned counsel's contention that the name in the information did not satisfactorily describe the deceased, in our view, from the evidence of the witnesses who included the deceased's wife and other relatives the deceased's official name was the name given in the Information. There was no mistake as to who the name referred to. Nor was there any evidence that the name used belonged to some other person. Further, the recovered body was positively identified as that of the deceased referred to in the information. That submission by learned counsel was in our considered view inconsequential.

[13] Learned counsel for the appellant also submitted that the appellant was in court on 29th October, 2012 which is the date he is said to have led the police officers and others to the spot where the exhibits were recovered, and he could not therefore have led them there. From the record however, it is clear that although the appellant was presented to court for plea on 29th October, 2012, there was an order for him to be remanded at the Mariakani Police Station. He could therefore have been removed from the police Station to where he led the officers to. There is in our view no contradiction there, as the appellant was not in court the entire day, and he therefore had time to take the police officers to the scene of recovery of the exhibits. There are no inconsistencies or contradictions in the evidence before the court that can be resolved in favour of the appellant, or which impacted on the substance of the charge.

[14] On the question of violation of the appellant's constitutional rights to a speedy trial, learned counsel did not tell the court what inordinate delay amounts to in a criminal trial such as this one. Indeed there were no congent or serious submissions on that ground. We note that the appellant was presented to court on 29th October, 2012. There were not less than nineteen witnesses called by the prosecution; all adjournments were explained in the proceedings, and the trial lasted about 3 years. It would certainly be preferable to determine all matters within a shorter period of time, but in our view, given the usual backlog of cases, delay of 3 years for a full criminal trial can hardly be said to be inordinate. That ground therefore fails.

[15] On the fifth ground as to whether the evidence leading to the recovery of the exhibits in question amounted to confession, we note as submitted by learned counsel for the State that the issue was not raised before the trial court. Had it been raised, then the trial court would have enquired into the circumstances under which the items were re covered. Were there threats, was there any kind of promise or inducement; were the police officers present qualified to take confessions? All these would have been addressed by the trial court if the objection to such evidence was raised before that court, and this would have informed the trial court as to whether it was necessary to conduct a trial within trial to determine admissibility of the evidence in question. That did not happen. The appellant was represented by counsel in the trial court. No objection was raised to the admission of the said evidence. It is now too late in the day to interrogate the same at this stage. We agree with the learned counsel for the State that the said ground is an afterthought. Moreover, even if that evidence was to be ignored, the rest of the circumstantial evidence, coupled with the appellant's conduct leaves no doubt that he was behind the killing of the deceased. There is evidence that he is the one who using another person's cellphone lured the deceased to a meeting; he took the deceased over from PW4 and said they were to use another motor bike, the last time the appellant was seen alive was when he was spotted by PW11 in the presence of the appellant. The next time he was seen, he was dead and his body had been partly devoured by wild animals.

[16] In his defence, the appellant admitted that he took the deceased to a place called Chesimba. He did not say where exactly he dropped him. There was ample evidence to show that the appellant had actually talked to the deceased and asked him to meet him so he could show him where to buy cattle. His meeting with the deceased was not accidental as he claimed. Indeed PW4 confirmed that he is the person who handed the deceased over to the appellant, not because his motor bike developed mechanical problems as claimed by the deceased, but because the appellant told PW4 that he was taking the deceased to the owner of the cows he was going to buy and the said owner had a motorbike, which they were to use. This Court in ***Musili Tulo vs. R*** ***[2014] eKLR***, while discussing the criteria observed,

> ***"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-***
>
> ***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."***

After evaluating all the evidence, we are satisfied that the chain link of circumstantial evidence against the appellant was not broken. There is no possibility that somebody else could have killed the deceased.

[17] In the circumstances, we are satisfied that the appellant committed the offence he is charged with. We agree with the learned Judge's finding, and find that the appellant's conviction was safe. This appeal is devoid of merit. We dismiss the same and uphold the conviction and sentence of the High Court.

Dated and delivered at Mombasa this 12th day of October, 2017.

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