IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 51 OF 2016

BETWEEN

KARISA KITSAO KENGA......................................APPELLANT

AND

REPUBLIC...RESPONDENT

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

at Malindi (Omondi, J.) dated 27th June, 2011

in

H.C.CR.C No. 23 of 2008)

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JUDGMENT OF THE COURT

1. Before us is a first appeal against the appellant's conviction for the offence of murder. As such, we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See ***Okeno vs. R [1972] EA 32*** and ***Kiilu & Another vs. R [2005] KLR 174.***

2. The appellant and his co-accused, Max Sikubali Kitsao, were charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The particulars of the charge were that on 25th October, 2008 at Konjora Village, within the then Kilifi District of Coast Province, the appellant and his co-accused murdered Kitsao Kenga Mwanzani (the deceased). Both the appellant and his co-accused entered a plea of not guilty and the matter proceeded for trial.

3. On 25th October, 2008 Alfred Tsui Ngua (PW1) and his kinsmen attended his daughter's, Serah Kadzo Ngua, burial at her in-laws homestead. As is customary in the *Giriama* community, after the burial, Alfred's family and his in-laws held separate meetings on the same day. It was the prosecution's case that the purpose of those meetings was to discuss the cause of Serah's death. The meeting between Alfred's kinsmen was chaired by the appellant who was the deceased's son and Alfred's nephew.

4. Apparently, some members of the family had consulted a traditional '*seer*' or prophet for purposes of finding out the cause behind Serah's death. One Samuel Chai Tsui informed the family that the said '*seer*' had indicated that Serah's death had been caused by someone within the family. Even before further details were given, the appellant yelled '*tosha tosha'* and the rest of the group joined in chanting the same words. He then directed the deceased, Alfred and Kahindi Mboshi all of whom were brothers to move to the center of the meeting. He claimed that despite the three brothers having been brought up well they did not want to bring up their own children in the same way. Instead, they had done acts that resulted in their being bewitched and killed. He directed the three to take an oath by saying '*leo apeni kabisa sababu, leo ni leo*.'

5. It was then that Alfred saw the appellant aiming something in his hand at the deceased who immediately fell down. Alfred tried to assist the deceased but was hit with a stick at the back of his head causing him to fall down. Fortunately, he managed to crawl and escape into a bush. It was his testimony that he heard the deceased screaming that he was dying. Out of fear he did not turn back and he hid in the bush for about five hours.

6. Meanwhile, Kahindi Charo (PW2), Serah's father in-law, and his kinsmen who had finished their meeting noticed fire in the direction where their in-laws were holding their meeting. They rushed to the scene only to find a body set ablaze and everyone else had fled. The matter was reported to the police and the burnt body was identified as the deceased's.

7. Later on, while making his way home, Alfred met some relatives who warned him against going to his home because his brother (the deceased) had been killed and the body burnt by the same people who were looking for him. Alfred went into hiding and only resurfaced three weeks later to record a statement when he learnt that the appellant and his co-accused had been arrested. The appellant and his co-accused were arraigned and charged in court.

8. In his defence, the appellant acknowledged that on the material day he had attended his cousin's funeral. He even admitted that a meeting was held thereafter and the agenda involved discussions on whether there should be mourning or condoling. According to him, Alfred expressed his desire for mourning since the same entailed monetary contribution. However, the younger generation opted for condoling which did not have any financial implications. Suddenly, a group of people ran towards them throwing objects; it seemed as if some people were being chased and beaten by others. As a result, people in the meeting scampered for safety and the appellant ran into his father in-laws house.

9. Moments later, he was informed that his cousin, the co-accused, had collapsed outside. He decided to go to his aid only to find that he had been seriously injured during the frenzy. He rushed his co-accused to the hospital where he was admitted. Subsequently, he learnt that the deceased had been killed. He was arrested when he went to inquire about the same at the police station.

10. Faced with the foregoing evidence, the trial Judge in her own words expressed thus-

> "***Malice aforethought was demonstrated by the utterances 1st accused (appellant) made, and in the manner he worked up the crowd into frenzy.***
>
> ***I find no contradiction in prosecution witnesses' evidence-PW1 explained that he saw accused aim an object at the deceased-whereas PW4 says 1st accused hit deceased with a wooden bar-PW1 never specified the nature of the object he saw being aimed at deceased- and the bottom line is that both confirm.*** *(sic)* ***I have no doubt in my mind concerning accused 1's role in the death of the deceased both by word and conduct.*** *(sic)"*

11. Ultimately, the trial court convicted the appellant for the offence of murder and sentenced him to death. The appellant's co-accused was acquitted for lack of evidence.

12. It is that decision that has sparked the appeal which is predicated on the grounds that the learned Judge erred in law and fact by-

> *a)* ***Finding the appellant guilty of murder whereas there was no conclusive evidence that had been adduced before the trial court.***
>
> *b)* ***Failing to consider the appellant's defence and his submissions.***
>
> *c)* ***Misdirecting herself and considering matters which were irrelevant and extraneous to the case before her.***
>
> *d)* ***Failing to appreciate the conduct of the appellant after the incident was not consistent with the conduct of a guilty mind.***

13. Mr. Obara, learned counsel for the appellant, submitted that the prosecution's case was based purely on circumstantial evidence. To him, the evidence adduced did not draw a continuous chain of events which irresistibly pointed to the appellant's guilt. He argued that the object that PW1 allegedly saw the appellant throw was never identified. Furthermore, the words allegedly uttered by the appellant prior to the incident were not malicious. Accordingly, malice aforethought had not been established against the appellant.

14. Mr.Wangila, Senior Prosecution Counsel, in opposing the appeal, contended that malice aforethought had been established; the appellant's suspicion that the deceased was practicing witchcraft which caused the death of his cousin and the acrimony he displayed against his father was sufficient to give rise to malice on his part. He urged us to dismiss the appeal.

15. We have considered the record, submissions by counsel and the law. From the postmortem report, there can be no doubt that the deceased's death was caused by someone who intended it or intended grievous harm to him. However, no one witnessed the murder hence the prosecution relied on circumstantial evidence to connect the appellant to the murder.

16. For a conviction to be rightly based on circumstantial evidence such evidence must meet a certain criteria. 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.

The predecessor of this Court also set out an additional criteria in ***Simon Musoke vs. R*** ***[1958] EA 71*** 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."*** Emphasis added.

17. Did the circumstantial evidence adduced by the prosecution meet the above criteria? The fact that the appellant uttered the words '*tosha tosha'*, '*leo ni leo'* coupled by the fact that he suspected the deceased of practicing witchcraft as alluded, in our view, did not irresistibly point towards the appellant's guilt. In addition, the object which the appellant allegedly aimed at the deceased was not identified by Alfred who was present. In fact in his evidence, Alfred testified that at the material time it was dark hence bringing into question whether he indeed saw the appellant aiming an object at the deceased. We disagree with the learned Judge that Newton Mjomba, the then Deputy OCS of Kilifi (PW4) corroborated Alfred's evidence that the appellant threw a wooden bar at the deceased. It is clear that Netwon was not present at the material time and only went to the scene after the incident was reported. We also take note that at the material time there were several people in attendance at the family meeting. Therefore, the possibility that the deceased was killed by other persons other than the appellant could not be ruled out.

18. The burden lay with the prosecution to prove that the chain of events relied on pointed to the appellant's guilt. This much was restated by the predecessor of this Court in ***Rex vs. Kipkerring Arap Koske & 2 Others*** ***[1949] EACA 135*** thus;

> ***"In order to justify a conviction 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 guilt 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."***

19. We find that the prosecution failed to prove its case to the required standard. All that there was against the appellant was mere suspicion which could not be a basis for his conviction. See ***Sawe –vs- R*** ***[2003] KLR 364***.

20. In the result, the appeal has merit and is hereby allowed. We quash the appellant's conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

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