IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 44 OF 2016

BETWEEN

MICHAEL MURIUKI MUNYORI…….APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Meru (Lesiit, J.), dated 25th September, 2014 in ***HC.CR.A. NO. 71 OF 2010)***

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JUDGMENT OF THE COURT

By this appeal the appellant **Michael Muriuki Munyori** seeks to overturn the judgment of the High Court at Meru (Lesiit J) by which he was convicted and sentenced to death for the murder of **Lucy Kagendo Muriuki** (deceased) on the night of 21st and 22nd November, 2010 at Sirimon Village, Sirimon Sub-location of Ontulili Location of Buuri District of the then Eastern Province. The deceased was his wife.

The prosecution case, as mounted through five witnesses, was that on the evening of 21st November, 2010, the appellant and the deceased were in their house alone, their two children having gone to spend the night at their cousin **Martha Kanana**'**s** house that was about 50 metres away. In the middle of the night the appellant was heard asking the deceased, who had been quite drunk –staggeringly so – the previous evening, where his phone was. Come morning, he called one of his children at **Kanana's** house to go and prepare for school. A friend of the appellant **Joshua Meme Magiri** (**Joshua**) came by the appellant's house between 7.20 and 8.00am to enquire why the appellant had not been to the business the two had together. **Joshua** found the appellant taking tea with his children. Asked where the deceased was, the appellant told Joshua that she was in the house having excessively drunk the night before. This did not entirely satisfy **Joshua** and at an opportune moment when the appellant had stepped out, he stole into the bedroom and;

> ***"I found his wife sleeping on the bed covered with a blanket. I called out loudly 'Nyanya' she did not answer. She was lying on her left side. I touched her right hand. It was very cold. I touched her face and felt it was cold. I went out knowing she was dead. Things were orderly in***

the kitchen and bedroom.

Muriuki returned with a basin which the child used to wash. The children left for school. Then Muriuki told me to escort him to get his phone. On our way we met Gatobu. I told Gatobu I had seen something, that Muriuki's wife is dead. I told him to go and investigate if my finding was correct."

After collecting the appellant's phone, **Magiri** and he returned to the appellant's home only to find a large crowd of people including **Joshua Kirimi** (PW5) who had found the deceased dead. The local administrator, popularly called the Sub-Area, had been informed as were the police who came and took the body of the deceased to the Nanyuki Hospital Mortuary. **Magiri** and other witnesses thereafter recorded their statements at the Timau Police Station where the appellant was also taken and detained. This was after the police led by Superintendent **Daniel Kinyua** (**PW3**) re-arrested him from members of the public who had apprehended him. PW3 on entering the appellant's house had found the lifeless body of the deceased and noted that it had bruises on the neck, chest, back and face. He produced a report of the post mortem examination subsequently carried on the body by **Dr. Michael Wekesa** who could not be traced to testify. According to the report, the body appeared to have generalized whole body bruises on the neck and back consistent with trauma by beating. It also had a cut wound on the right periorbital region, lateral to the right eye, between the right eye and ear, about 2 cm in length, penetrating into the temporal skull. The head thus had a compound fracture of the right temporal bone consistent with trauma by sharp object. The spinal column had unstable neck and fractured cervical neck bones. The doctor formed the opinion that death was caused by cardio respiratory arrest due to head injury by trauma by sharp object.

Kenneth Mungeria (**Kenneth**) the deceased's and the appellant's adolescent son testified that while sleeping at his cousin **Kanana's** house, at 1a.m he heard the appellant ask the deceased where his phone was to which she replied she had not seen it. This exchange was followed afterwards by screams, then silence. He was afraid and went back to sleep. When he got home the next morning at 7.00 a.m., he found the appellant in the kitchen preparing to make tea for which he sent Kenneth for milk. They took the tea the appellant made and when Kenneth wanted to give some to the deceased, he found her covered with a blanket and he chose not to disturb her. He later went to visit his sister at Katinke only to return later on the day to find his mother dead.

After hearing the prosecution witnesses, the learned Judge found a *prima facie* case established and placed the appellant on his defence and he gave evidence on oath. His testimony was simply that he was not at home on the night of 21st to 22nd November, 2010 when the deceased met her death. He swore that he spent that night at Nanyuki and returned the following morning only to find a crowd outside his house and his wife dead. He wanted to go and report that death but the police arrived having already been notified and in fact proceeded to arrest him. While still maintaining that he did not spend that night at home, however, the appellant in cross-examination readily admitted that **Joshua** did visit him (the appellant) at his home the morning of the discovery of the deceased's body and the appellant's arrest.

We have carefully examined, considered and set out the evidence that was tendered before the trial court in keeping with our duty as a first appellate court to subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at our own independent conclusions on the appellant's guilt or otherwise. We have done so bearing in mind also the appellant's complaints herein as contained in the supplementary memorandum of appeal, which are that the learned judge erred in law and fact in;

- ***basing a conviction on insufficient circumstantial evidence***
- ***finding that the appellant spent the material night hence placing on him the evidentiary burden to explain how the deceased met her death***
- ***rejecting the appellant's defence***
- ***finding that the prosecution had proved the offence of murder***.

Arguing the appeal before us, **Mrs. J. K. Ntarangwi**, the appellant's learned counsel criticized the learned Judge for basing her decision on section 111 of the **Evidence Act** under which the appellant was

required to explain how the deceased died yet the prosecution had not first established a case to justify such shift of the burden. Counsel doubted whether it was possible for **Kanana** and **Kenneth** to hear the appellant's voice enquiring about the phone from a different house some 50 metres away. She referred to **Kenneth's** report at his sister's that all was well at home and there was no fight, to demonstrate that the appellant's presence on the fateful night was not established. In counsel's opinion, it was not logical for the appellant to have fought the deceased over the very phone he went looking for with Magiri the next day. She also downplayed the fact of the appellant making tea for the children the next morning – which she termed not unusual and explicable – on the basis that the deceased used to sleep heavily.

Mrs. Ntarangwi concluded her submissions by faulting the learned Judge for reaching a definitive finding that the appellant was at home on the material night when he was not and any other person could have killed the deceased. To counsel, the circumstantial evidence relied on did not form a complete chain to justify a conviction.

For the respondent, the learned Senior Assistant Director of Prosecutions **Mr. Onderi** contended that at least three witnesses – **Kanana, Magiri** and **Kenneth** – all placed the appellant at the scene of the crime as we have already pointed out in our summary of the evidence. Counsel then concluded that the appellant told **Magiri** an obvious lie that the deceased was drunk in the bedroom when he well knew that she was dead. He urged us to dismiss the appeal.

It is not in dispute that the evidence presented by the prosecution was circumstantial in character there being no direct or eye-witness evidence to show that the appellant killed the deceased his wife of many years with whom he had children, some of whom were already married. The crucial point from the evidence tendered is that on the evening of 21st November, 2010, the appellant was at home with the deceased and the latter was apparently drunk, which was not unusual for her. The couple's two children including **Kenneth** went to spend the night at the nearby house of their cousin **Kanana**. It was while there that in the middle of the night he, as well as **Kanana**, heard the appellant ask the deceased for his phone some time about 1.00am. Kenneth then heard screams some time later and even roused his younger brother who, however, had not heard anything. The two children went back to their house the next morning at about 7.00am and found their father in the process of making tea for them. Kenneth was sent to buy milk and after the tea was ready he made to serve his mother but she was seemingly asleep and covered with a blanket. He did not give her the tea so as not to wake her.

The significance of this line of evidence, together with the testimony of Magiri, who came to the appellant's home that very morning, is that it placed the appellant at home during the critical time between the evening of 21st November and the morning of 22nd November 2010 when the deceased met her death.

Whereas the appellant's testimony was that he was not home that night having spent it at Nanyuki, we think that there was overwhelming and unshaken evidence that he spent the night at home in the company of the deceased. This is how he came to be found right there in the kitchen fixing tea as early as 7.00am on 22nd November 2010. Having been the only person in the company of the deceased with whom he spent the night in the same bedroom, he stood under a duty to explain how his wife, who was alive the evening before, lay lifeless in the bedroom. This is the logical, commonsensical expectation of the natural course of events in everyday life. It is statutorily recognized in the sections 111 and 119 of the Evidence Act which provide as follows;

> ***"111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception 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:***
>
> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

Provided further that the person accused shall be entitled to be acquitted of the offence with which is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

…

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Now the appellant told both **Magiri** and **Kenneth** that the deceased was asleep on that morning by reason of having had a lot to drink the previous evening. That was an obvious lie because such sleep as the deceased was in, was such as she could never awake from, being dead. It was therefore an obvious lie he told as was his testimony that he spent the previous night at Nanyuki. In the ordinary course of events, such a lie can only be construed against the person so lying and in the case of an accused person, it becomes an inculpatory fact. This Court so stated in ***ERNEST ABANGA alias ONYANGO vs. R*** **CR. NO. 32 of 1990 (UR),** which the learned Judge cited, as follows;

"In RAFAERI MUNYA alias RAFAERI KIBUKA vs. REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect."

Such would only be a single inculpatory fact or two but the law on circumstantial evidence has long been established to be that the inculpatory facts must lead to the irresistible conclusion that the person accused is guilty and that they are incapable of explanation on any other hypothesis inconsistent with his guilt and that, further, there should be no co-existing fact or facts that would weaken that inference of guilt. See ***REPUBLIC vs. KIPKERING ARAP KOSKE*** **[1949] 16 EACA P. 135.** A more recent decision in this area is the oft-cited ***SAWE vs. REPUBLIC*** **[2003] KLR 354** of this Court, and its main holdings still hold good;

"1. In order to justify 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

There is no doubt that the deceased met her death in the house she shared with the appellant in a violent and painful manner as attested to by the post-mortem report. Her generalized whole body bruises were consistent with trauma by beating while her neck was unstable with the cervical neck bones fractured. A sharp object penetrating her skull was the cause of death. Those injuries were not self-inflicted and they spoke to malice aforethought as defined by **section 206** of the Penal Code. The one person who had opportunity to inflict those injuries in this case of gross intimate violence, with all the paradox it carries, was the appellant. His attempt at hoisting *an alibi* was easily displaced by the clear and cogent evidence that placed him at the scene of the crime – his own house and bedroom.

The totality of our consideration of this appeal is that it has no merit as the appellant was properly and safely convicted of the murder. We therefore order the appeal dismissed.

Dated and delivered at Meru this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..…..……

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR