



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 164 OF 2011

BETWEEN

JULIUS KOOME APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.) dated

2nd June, 2011

In

H.C.CR.A. No 72 of 2005

JUDGMENT OF THE COURT

JULIUS KOOME (the appellant) appeals to this Court against a conviction and sentence meted out by the High Court at Meru for the murder of Dorcas Kaguri on 12th August, 2005 at Giantume Sub-location, Mpuri location in Meru Central District of the now defunct Eastern Province. Six prosecution witnesses gave an account of events of the night of 12th August, 2005. The evidence of PW 2 Joyce Gacheri (Joyce) and that of PW 4 Amos Murega Koome (Amos) is vital in reconstructing the events of the material date. Their testimony is to the effect that on the evening of 12th August, 2005 at about 7p.m., Dorcas Kaguri (Dorcas) who was daughter-in-law to Joyce and mother to Amos arrived at her mother-in-law’s home from Meru town carrying luggage. Joyce and Amos were at the home .Dorcas decided to leave her luggage with her son, as she returned to town to fetch paraffin.

Upon her return, Dorcas was visibly drunk according to her son. Moments later, her husband (the appellant) arrived at the home, whereupon a quarrel ensued between them. The appellant struck Dorcas even as his Grandmother tried to separate the pair to no avail as she requested them not to fight at her home. They continued to fight each other nonetheless, with the appellant wielding a metallic pipe and

hammer like object. He also kicked the deceased who did not fight back.

Joyce and Amos fled to PW 5 Patrick Kibuu's (Patrick) home for refuge and assistance as the fight gained traction. Patrick testified that Joyce informed him that she and Amos had left the appellant and Dorcas fighting at her home. He requested her to report the matter to the village Elder, which advice she heeded, only for the Elder in question to respond that the appellant and Dorcas fought often. Later that night Amos returned home, but did not find his mother. The following day Dorcas was found dead at Joyce's door step.

The evidence of PW1 CIP Charles Ondimu Nyabayo (CIP Nyabayo), PW 3 Juda Matombi (Juda) and that of PW 6 Samuel M'Ibiri (Samuel) are similar in most material aspects as they are essentially a summary of the role played by the local administration and the police in the period prior to and after the deceased's death.

The learned trial Judge put the appellant on his defence after making a finding that there was sufficient evidence adduced by the prosecution making out a *prima facie* case against him. The appellant chose to give a sworn statement and called no witnesses. He stated that he was from Thibiri location Meru, and that on 12th August, 2005 he woke up, milked his cows and prepared tea for his children. Thereafter, he went to his shamba to irrigate his crops until 4 p.m. when he returned home to prepare supper. He left some beans cooking on the fire, having instructed one of his children to stoke the fire. He returned to the shamba with the expectation that his wife Dorcas would be back by 6 p.m. By 6.30 p.m. the appellant had returned home, but his wife was yet to arrive. He decided to start peeling potatoes and bananas. Shortly after finishing this chore, the appellant heard Dorcas hurling obscene insults at him from the direction of the cow shed. He challenged her to explain why she was insulting him in the presence of his mother and his children.

The appellant further testified that he went to a nearby shamba and took a stick ordinarily used to support bananas before pursuing his wife, who in turn fled from the scene to an unknown destination, and he resumed preparations for supper, which he and the rest of the family had before retiring for bed. The following day Dorcas (hereinafter 'the deceased') was found lying dead at the gate leading to the family's home. The appellant denied being drunk on the material day, but conceded that he and his wife fought often. He denied killing her.

The learned trial Judge trained her focus on the evidence of Joyce and Amos who were present when the altercation between the appellant and the deceased began. The learned trial Judge was meticulous in her analysis of the ensuing events. In keeping with the role of a trial court, the trial Judge gave consideration to the demeanour of both Joyce and Amos, and found the pair to be honest. Next, the trial Judge weighed the evidence of the prosecution and that tendered by the appellant against the provisions of **Section 111 (1)** and **119** of the **Evidence Act-Cap 80**, and found that the evidence of Joyce and Amos was not dislodged by the appellant's defence.

Another facet which was given consideration by the learned trial Judge was the injuries sustained by the deceased, namely multiple segmented fractures on limbs which she found to be consistent with a metallic pipe and the hammer-like object Amos saw the appellant use to hit the deceased. The said findings were fortified by the post-mortem report which was tendered in evidence.

The learned trial Judge also addressed her mind to the whereabouts of the appellant and that of the deceased at 9 p.m. on the material date. It is clear from the testimony of Amos that when he and his sister went home to sleep, the appellant was present, while the deceased was nowhere to be seen. In essence, the appellant had ample opportunity to attack and injure the deceased between 7 p.m. and 9 p.m. and with malice aforethought defined by **Section 206** of the **Penal Code**. She also considered and rejected the appellant's defence, with the evidence of Joyce, Amos and Patrick found to have ousted the same.

Aggrieved by the decision of the High Court, the appellant brings this appeal citing in all 14 grounds inclusive of those in the Supplementary Memorandum of Appeal in respect of which the learned Judge is said to have erred but which Miss Kiome, his lead counsel condensed and submitted on as follows:

First, she contended that the metallic pipe and hammer-like object which was allegedly used to inflict fatal blows upon the deceased was not produced. Counsel submitted that it was critical for the murder weapon to be produced, and citing the case of **DAMIANO MURUU MWITHIA VS REPUBLIC [2015] eKLR**, Counsel argued that without a weapon, ‘it would be difficult to establish *mens rea*’, especially because it was unclear which part of the deceased’s body was struck by the said hammer-like object.

Counsel also contended that the evidence tendered by the prosecution was contradictory and could not safely sustain the conviction. She argued that the appellant did not intend to kill the deceased and his alibi was that he was in his house at the time.

Mr Musyoka, learned prosecution counsel opposed the appeal and submitted that the prosecution’s evidence was not contradictory save for a minor non-material variance as to whether the appellant was drunk or not at the material time. On the subject of the murder weapon, counsel submitted that there was no authority for the submission that the same must be produced.

He contended that the appellant having stated in his defence that he had picked up a stick and followed the deceased the whereabouts of the murder weapon was a fact that needed to be explained as it was especially within his knowledge by **Section 111** of the **Evidence Act-Cap 80**. Moreover, **Section 119** of the said act allowed a court to presume any fact that it thinks likely to have happened. He urged us that the appellant had an intention to cause death or grievous harm in line with **Section 206** of the **Penal Code**.

In a brief reply Miss Kiome submitted simply that the post mortem report was not properly produced by CIP Nyabayo.

This being a first appeal, our mandate is as was set out in **OKENO –VS- REPUBLIC [1972] E.A.32** thus:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTILAL M. RUWALA V R [1957] E.A. 57). 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 conclusion 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 has had the advantage of hearing and seeing the witness”.

For a conviction of murder to stand, it was imperative for the prosecution to prove that the death of the deceased was caused by the appellant, and that he had the requisite malice aforethought which is defined at Section 206 of the Penal Code as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, or by a wish that it may not be cause;

(c)

(d).....”.

The record shows that the appellant was unable to shake off the testimonies of Joyce and Amos who witnessed how the altercation between the appellant and the deceased began and escalated. The said testimonies remained vivid and cogent; and weathered the rigours of cross-examination. When their testimonies read together with those of CIP Nyabayo, Juda, Patrick and Samuel, the appellant's complaint of contradictory evidence as well as his defence of alibi are rendered moot and wholly dislodged.

The post-mortem report showed the deceased's cause of death as cardiopulmonary arrest due to internal bleeding and multiple segmented limb fractures occasioned by assault consistent with Amos's testimony that the appellant kicked the deceased, and was armed with a metallic pipe and a hammer-like object which could not thereafter be traced. **Section 111 (1)** and **119** of the **Evidence Act-Cap 80** come into play and together raise a rebuttable presumption against the appellant to wit:-

“111(1) 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:

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 he was 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 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 case”.

Accordingly, the appellant having failed to discharge the burden placed upon him by **Section 111 (1)** of the **Evidence Act** his intention to cause the death of the deceased or cause her grievous harm remained intact, thereby establishing malice aforethought. Failure to produce the murder weapon before the trial court was not fatal to the prosecution's case. In **KARANI V REPUBLIC (2010) 1 KLR 73 at page 79**, the court delivered itself as follows:-

“The offence charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.

See also **EKAI V REPUBLIC (1981) KLR 569**.

We find the appellant's complaint as regards the production of the post-mortem report to be unmeritorious as the record shows that the prosecutor invoked the provisions of **Sections 33** and **77** of the **Evidence Act-Cap 80** before producing the said report to wit:-

“It has been difficult to trace Dr Mutugi as he has left Government sector”.

There was no objection to the said application by the defence and the explanation tendered accords with the cited provisions of the Evidence Act. See also **ROBERT ONCHIRI V REPUBLIC [2004] eKLR**.

Apart from the testimonies of Joyce and Amos who saw the appellant and the deceased fighting, the remainder of the evidence was largely circumstantial after the said witnesses fled from the scene of the fight. The efficacy of circumstantial evidence was memorably stated in **R V TAYLOR WEAVER AND**

DONOVAN [1928] 21 CR APP R.20 as follows:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.

The case of TEPER V R [1952] AC 480, 489 provides guidelines for the use of this class of evidence:-

“It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference”.

The appellant’s defence failed to shake off the inference that he was the one who assaulted and killed the deceased having been involved in a one-sided fight with her on the material date. There were no co-existing circumstances which weakened or destroyed this inference as the deceased was absent from the family home after the fight; and the appellant could not account for his whereabouts or actions between 7 p.m. to 9 p.m.

The totality of our consideration of this appeal is that it is devoid of merit and we dismiss it in entirety.

Dated and delivered at Meru this 24th day of June, 2016

P.N. WAKI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL