IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 74 OF 2014

BETWEEN

WESTON WANJE WEPUKHULU……APPELLANT

AND

REPUBLIC..……..……RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 15th November, 2013

in

Criminal Appeal No. 6 of 2011)

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JUDGMENT OF THE COURT

The decomposed body of the deceased was found in a farm belonging to Francis Wafula Mang'aya PW3 in Soroka, Tana River County on 7th February, 2011. The deceased was a resident of Soroka and was well known in the village. Although the body had undergone putrefaction some of the villagers were nonetheless able to identify it as that of Mbeto Mbwana Changoma, a 26 years old single man, also known in the village as "Mulamu". He lived and worked in a farm belonging to John Kamangala Mpya, PW6. The body which appeared to have been in the farm for several days had been partly eaten by wild animals. The area was said to be infested by wild animals, such as hyenas, lions and others.

It was suspected that the deceased had a love affair with the estranged wife of the appellant of 13 years. The former after separating with the latter moved to live with her brother PW3 who, as we have pointed out, was the owner of the farm where the body of the deceased was found. It was alleged that close by the body of the deceased, a mobile telephone belonging to the appellant was found.

Because of the state of the body, the post-mortem examination could not establish the cause of death-whether natural or traumatic, but whatever it was, it led to cardio-respiratory failure, which is really, in ordinary language, the sudden stopping of the heart.

It was further alleged that, because the appellant was not pleased by the fact that the deceased had a relationship with his wife, he threatened him and stalked his wife; that he could keep a whole night vigil

at the home of PW3 where his wife was living; that each time he went out he carried a panga or such weapon; and that PW3 had chased him away on occasions and even beat him on another. So when the body of the deceased was found in the state explained earlier, the first suspect was the appellant. He was arrested and upon being questioned about the mobile phone which was found at the scene, he admitted it belonged to him. He however explained that it had been stolen from his house on 24th January, 2011, over 1 week before the discovery of the body of the deceased. The police confirmed its ownership by using the "PUK" number on a card found in the appellant's house to unblock the line. The police also recovered a blood stained shirt in the appellant's house. Regarding this the appellant explained in his defence that when his house got burnt on 25th January, 2010 he got donations including the shirt from neighbours; that when he got the shirt from a good Samaritan it had blood stains and he never wore it. The appellant also explained that, due to dangers posed by marauding animals in the village he had to be armed all the time he went out in the night. He denied causing the death of the deceased, who was known to him and maintained that the only reason why he was charged with his murder was the mobile phone; that his brother in-law PW3, had also been arrested in connection with the death of the deceased and was only released when, from the blue the mobile telephone, was produced by the chief; that he did not know of the relationship between his wife and the deceased; and that he and his wife were almost reconciling when this tragedy happened, leading to his arrest.

From the totality of this evidence the trial court (Meoli, J), correctly found that the evidence as to who was responsible for the death of the deceased was primarily circumstantial. She identified the pieces constituting circumstantial evidence to include the fact that the deceased had a love affair with the appellant's wife; that the appellant was enraged as a result; that on several occasions the appellant would stalk his wife, keep a night-long vigil over the home where the wife lived; that he would be armed on these occasions; that he stopped stalking his wife or going out armed after the death of the deceased; that a mobile phone belonging to him was found lying near the body of the deceased; and that a blood-stained shirt was recovered from his house. The learned Judge dismissed as afterthought the appellant's defence that he had no hand in the death of the deceased; that the blood stained shirt was a gift in that state; and that the mobile phone had been stolen. The learned Judge concluded that;

> ***"23. The presence of the accused's phone separate from its strap at the scene of the body*** *(sic)* ***is suggestive of an engagement between the said deceased and the accused, the admitted owner of the phone……***
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> ***24. Such violence is consistent with the accused's previous conduct in prowling around the home of PW3 while armed, breaking into the house, attempting to strangle his son and the fact that he had previously inflicted a cut on the head of his wife. The accused, from the prosecution evidence was prone to violence and was determined to use force in a bid to force his wife and family submit to him. The deceased was an unmarried man. The presence of his body at PW3's farm suggests he likely strayed into that home for whatever reason and met his death there. It was a case of being at the wrong place and at the wrong time."***

The learned Judge was satisfied that the offence of murder was proved by circumstantial evidence which satisfied the strictures of the two famous decisions in **Kipkering Arap Koskei and another** v **R** (1949) 16 EACA 135 and **Musoke** v **Uganda**, (1958) EA 1915. The learned Judge proceeded, after convicting the appellant to sentence him to death. The conviction and sentence aggrieved the appellant who now brings this appeal relying on 4 grounds contained in a supplementary memorandum of appeal. Those grounds were summarized and argued by this advocate, Mr. Ole Kina as follows;

> 1. That the appellant was denied the right to a fair trial contrary to **Articles 25 (c)** and **50 (2) (f)** of the Constitution by the premature closure of the defence case against the provisions of sections 213 and 310 of the Criminal Procedure Code. The appellant, was thus denied the opportunity to fully participate in all the stages of his trial,
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> 2. That after correctly finding that the case was wholly based on circumstantial evidence, the learned Judge erred in holding that there was sufficient circumstantial evidence to prove the appellant's guilt beyond reasonable doubt, and,

3. That there were factors that weakened the inference of the appellant's guilt which the learned Judge, in error ignored. Mr. Ole Kina gave the example of roaming wild animals in the area.

He urged us to overturn the finding by the learned Judge linking the appellant with the death of the deceased insisting that the appellant gave a plausible explanation regarding the mobile phone, that it had been stolen; that the blood stained shirt was never subjected to forensic examination to link it to the deceased.

Mr. Musyoka learned Senior Prosecution counsel on behalf of the respondent for his part submitted that the circumstantial evidence presented at the trial directly pointed to the participation of the appellant in the murder of the deceased; that the appellant armed with weapons stalked his wife all the time; that his mobile phone was found at the scene near the body; and that a blood stained shirt was recovered from his house. Learned counsel further submitted that the defence was not prematurely terminated as the appellant was given an opportunity to give a sworn statement in defence; that he was represented by counsel who did not apply to make a statement at the end of the defence case; and that in any case **section 307** of the Criminal Procedure Code is not mandatory by the use in it of the word "may".

The only question for our determination, after re-evaluating the evidence on record, is whether the learned Judge properly analyzed the circumstantial evidence and whether from that analysis she arrived at the correct conclusion that the appellant caused the death of the deceased.

It is now firmly settled on the authorities of **Kipkeering** (supra) and **Musoke** (supra) that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the suspect and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and that the court must before deciding upon a conviction on circumstantial evidence, find that there are no co-existing facts that may weaken or even destroy the inference of the accused person's guilt.

We may repeat here briefly the strands of evidence relied upon by the learned Judge to find that the facts irresistibly and exclusively pointed to the appellant as the culprit. They are the mobile phone said to have been found at the scene, the blood stained shirt retrieved from the appellant's house, the stalking by the appellant of his wife, and the alleged love affair of the latter and the deceased. It is elementary learning that whether the evidence relied on is direct or circumstantial, it must prove the offence charged beyond any reasonable doubt and that the burden to do so lies on the prosecution.

Obviously the conduct of the appellant towards his estranged wife was quite unusual. He had been warned by his brother in-law to stop going to his house where his wife lived, but he kept returning. He had been beaten by PW3 for defying this warning, but even that could not deter him. At some stage he was arrested and detained in custody by PW7, APC Zedi Galana who also warned him to keep off his wife and to stop prowling PW3's home at night. Even after his wife insulted him he kept going back. The learned trial Judge concluded of this behavior thus;

> ***"He is a man who refused to accept to release his wife after estrangement and appeared intent to make her life and that of her family miserable."***

We have said that this conduct was unusual and we can only draw some lessons from the famous statement in William Congreve's **The Morning Bride** "*Hell hath no fury like a woman (read man) scorned*". For our part we think that although the breakup of the relationship between the appellant and his wife was attributable to his mistreatment of the appellant's wife, he was still hopeful that they would reconcile. He did not realize how much he loved his wife until she left him, which reminds us of the famous quote by Kahlil Gibran that;

> ***"Ever has it been that love knows not its own depth until the hour of separation"***

The appellant's conduct apart, the only evidence in our view that linked the appellant and death of the deceased is the alleged presence of his mobile phone at the scene. Of the 7 witnesses who went to the

scene first, it was only PWI the father of the deceased and PW3 who testified of seeking the phone next to the body at the scene. The other five (5) were categorical that they did not see anything next to the body. PW2, Grace Wangui Mbugi, who was the first person to stumble upon the body of the deceased recollected that;

> ***"At the scene of the body** (sic) **I saw nothing. Nothing beside the body…..I was the first to see the body"***

PW4, Ali Kalumi Wairo, the Assistant Chief, Kilelengwani Sub-Location who also went to the scene maintained that;

> ***"I did not see the phone at night of first meeting. Phone seen the next morning. PW3 said that he had seen the phone near the body. I took the phone from PW3. I was not there when the police came to collect the body I had left to have breakfast. When I came back I was shown the phone in the ground near the body"***

If this witness did not see the phone when he initially visited the scene, where did it come from when he returned? Where did PW3 get the phone which had not been seen earlier by those who arrived at the scene first?

PW5, Akale Khamala Jilo, a neighbor who also went to the scene before reporting to the chief about the death of the deceased, confirmed;

> ***"I did not see anything else beside the body.…I was there when police collected the body"***

APC Zedi Galana, PW7 recalled that he observed the scene upon getting there and only saw;

> ***"…a badly decomposed body and I did not see any phone…. I did not see anything on the body, not even the tape of a phone"***

Another neighbor, PW9, John Maina Ngure told the trial court that;

> ***"Apart from the body….there was nothing else. ….I did not see anything else at the body** (sic)"*

Finally PW11, CIP Sungura Mosee was in the team of police officers who went to the scene immediately the matter was reported.

> ***"Where the body was found (sic) a phone bearing a cord (sic) was given to PW3 who brought it to me."***

It cannot be that all these witnesses could fail to see the phone next to the body except the deceased person's father and the appellant's wife's brother, on whose farm the body was discovered. Although PW4 and PW11 said it was PW3 who told them that the phone was found at the scene, PW3 himself did not say that he collected the phone and gave it to the police. The fact that the other witnesses did not see the phone coupled with the appellant's defence that the phone had been stolen, rendered the evidence of PW1 and PW3 incredible. The loss of the appellant's phone was reported to the police officers during investigations and repeated in court at the trial. The prosecution under **section 309** of the Criminal Procedure Code failed to bring evidence in rebuttal of this claim. The shirt with blood stains was never subjected to forensic examination to link the blood on it to the deceased. The investigating officer explained that it would have been futile as no blood could be extracted from the decomposed body of the deceased.

Clearly, from what we have said, the appellant was merely suspected from his conduct to have been the one who caused the death of the deceased. It has been said before and bears our repeating that suspicion,

however strong cannot provide a basis for inferring guilt. Guilt must be proved by evidence. See **Mary Wanjiku Gichira** v **R**, Criminal Appeal No.17 of 1998. In any case there were overwhelming co-existing factors that took away the inference of the appellant's guilt. Starting with PW3, it was the appellant's evidence that PW3 was also arrested and treated as a suspect but released. The body was found in his farm. He produced the appellant's stolen phone in strange and questionable circumstances. Secondly, this area is known to be infested by wild animals. As a matter of fact the body had been partly devoured. The doctor could not establish the cause of death. But what we found interesting was the evidence of PW11, CIP Sangura Mosee when he told the court that on 3rd February 2011, perhaps the last day the deceased was seen alive, he was seen at a place called Witu in the company of a lady said to be the appellant's wife and another person; that he had withdrawn some money from an Mpesa agent; that he was also in the company of his (the deceased's) father with whom they went for a drink in a bar; and that once the money got finished the lady left. There is no account of what happened after this, who the third person was and at what stage the third person and the deceased person's father parted ways.

In our considered view the learned Judge erred in failing to properly analyze the evidence and as a result arrived at the wrong conclusion. We think we have said enough to show that the circumstantial evidence relied on by the prosecution was not capable of placing the appellant at the scene of the crime and that he (the appellant) had plausible explanation of each piece of evidence against him.

The appeal, for these reasons is allowed. The conviction is quashed and sentence set aside. The appellant shall be set free forthwith unless he is lawfully held.

Dated and delivered at Malindi this 17th day of June, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR