IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 193 OF 2013

BETWEEN

JOSEPH GITHUA NJUGUNA……...…..……APPELLANT

AND

REPUBLIC ……..……..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru

(Hon. Justice R.P.V Wendoh) dated 19th July 2013)

in

H.C. CR.C. NO.7 OF 2010)

****

JUDGMENT OF THE COURT

1. This is a first appeal arising from the judgment of R.P.V. Wendoh, J delivered at Nakuru High Court in Criminal case No. 7 of 2010 in which the appellant, ***Joseph Githua Njuguna*** was convicted and sentenced to serve 30 years imprisonment for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The particulars in the Information were that the appellant murdered D M W, hereinafter referred to as 'the deceased' on the 25th day of December, 2009 at Wiyumirerie village in Nyandarua District within Central Province.

2. The appellant denied the charges and the case proceeded to full trial. The prosecution called nine witnesses while the accused gave an unsworn statement in his defence and did not call any witnesses. Five of the prosecution witnesses knew both the appellant and the deceased.

3. In her judgment, the trial Judge conceded that nobody had witnessed the deceased's murder and the case turned on circumstantial evidence. It was undisputed that the accused had on the material day gone to the bar where PW8, S W K worked and the deceased was also at the bar the same afternoon. It was also not in contention that the deceased was found murdered the morning of 26th December 2009 by the road side in the vicinity of where the appellant worked. The body had open wounds that may have been

inflicted by a sharp object. As per the postmortem report adduced in court, the cause of death was severe head injury caused by blunt object.

4. Of note is that the court heavily relied on the testimony of two minors, PW4 S W, 10 years of age and PW5, M N, 9 years of age who testified to having witnessed the appellant and the deceased fight for between one and two hours and the appellant stabbed the deceased on the face and neck as a result of which the deceased fell. The court ascertained on its own the competence of the minors as witnesses before resorting to the minors' testimony. In his defence, the appellant sought to introduce the defence of alibi which the trial judge rejected as an afterthought, the defence not having raised it early at the time he was charged or during the hearing of the prosecution case so as to enable the prosecution to respond or rebut it. According to the trial judge, the appellant's malice aforethought was inferred from the deceased's head injury a pointer that the person who inflicted the injuries wanted the deceased dead or grievously harmed.

5. Aggrieved by the judgment, the appellant preferred this appeal. It is against conviction and sentence as appears from the notice of appeal filed on 26th July 2013. It raises 14 grounds touching on the evidence, testimony, competence and omissions and that the requisite burden of proof in criminal cases, was not discharged. The appellant through his Advocates filed supplementary grounds of appeal listing 4 grounds which at the hearing were the only grounds relied upon for purposes of this appeal as submitted by **Mr. G.C. Yebei** Advocate holding brief for **F.O. Orege** for the appellant.

6. The grounds of appeal are that the learned judge erred in law and fact:-

> ***a) By convicting the Appellant whereas the medical evidence (by the doctor) was that the deceased died from injuries caused by a blunt object while the testimony by PW4 and 5 was that the deceased was stabbed by*** (sic) ***a knife;***
>
> ***b) In convicting the appellant while relying on contradicting and inconsistent evidence of PW4 and PW5, both children and brothers;***
>
> ***c) In ignoring the fact that PW4 and PW5 confirmed that they were coached by PW1 and their testimony was aimed at saving their mother PW8 to secure her release from custody;***
>
> ***d) By relying on extraneous matters even after detecting glaring loopholes in the prosecution evidence.***

From the foregoing, it is apparent that the appellant's grievance comes down to whether the conviction was proper based on the evidence adduced before the court. This evidence ranges from the cause of death, reliance on testimony of minors and whether the prosecution discharged its evidentiary burden of proof.

7. Learned counsel **Miss Yebei** pointed out the conflicting medical evidence as to the cause of death as per the postmortem report and the testimony by PW4 and PW5. Counsel argued that the deceased may have been attacked by many people as evidenced by the footprints next to the deceased's body, there were other people along the road and the accused had no bruises as a result of the fight which was alleged to have taken between one and two hours. Learned counsel took issue with the main witnesses who were minors and who, counsel submitted, were coached by PW1 in order to secure the release of their mother, PW8. The witnesses were therefore not trustworthy and were unreliable according to counsel. She referred us to this Court's decision in **Joseph Ndungu Kimani v Republic [1979]eKLR** to buttress this argument.

8. On the chain of events, it was learned counsel's submission that there was nothing suspicious found in the appellant's house to connect him with the murder. She added that in the absence of further independent witness and in relying on the coached and rehearsed testimony of the minors, the prosecution essentially shifted the burden of proof to the appellant, for the appellant to explain his whereabouts. Learned counsel pointed out that the investigating officer never testified on the matter and hence the case was weak.

9. The appeal was opposed by the State represented by **Mr. J.K. Chirchir**, the Senior Principal Prosecution Counsel. He argued that the medical evidence was not contradictory. Though the doctor never mentioned the stab wounds, PW1 testified to having seen the same and the postmortem report made reference to the deep cut on the cheek and a black eye. Prosecution counsel further submitted that PW4 and PW5 saw the fight between the deceased and the appellant, both of whom the witnesses knew. Prosecution counsel submitted further that coaching of PW4 and PW5 did not arise and by the time of their testimony, their mother was not in custody so as to occasion any fear to the minors.

10. Mr. Chirchir added that the burden was not shifted but that the appellant was merely required under **section 111** of the **Evidence Act** to explain what had happened, witnesses having testified that he was seen fighting the deceased, information that was within his knowledge. Counsel also explained that failure to call the investigating officer was not fatal and in any event the prosecution had been forced to close its case when an adjournment was refused. Counsel concluded by urging us to disallow the appeal and correct the sentence to death.

11. In reply, Mr. Yebei Advocate confirmed that both he and his client, the appellant were aware that should the appeal be unsuccessful, then the lawful sentence to be meted out is death.

12. This being a first appeal, the Court has to evaluate afresh the evidence adduced at the trial and come up with its own findings and conclusions but bearing in mind that it did not have the advantage of observing the witnesses. This position was set out in **Okeno v Republic (1973) EA** as follows:-

> "***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic) [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantatilal M Ruwala Vs. Republic [1957] EA 570). 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 conclusions. 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 had the advantage of hearing and seeing the witnesses. See Peters versus Sunday Post [1958] EA 426".***

13. With the above in mind, and in rendering this decision, we have carefully analyzed, evaluated and appraised the evidence afresh and also taken into account the appellant's and the State's opposing positions as submitted by the learned counsel respectively. The accused was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Under **section 203** of the **Penal Code**, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See **Milton Kabulit & 4 others v Republic [2015] eKLR.**

14. Revisiting the present case, there is no doubt that the deceased died. From the evidence there were differences as to the actual cause of death: was it as a result of stab wounds, trauma caused by blunt object to the head or even an attack by a mob as was suggested during cross examination of PW1? From the evidence of the prosecution witnesses and the trial judge's observation of the photographs taken at the scene where the deceased's body was found, and the postmortem report by the pathologist, it is clear that the deceased had injuries consistent with stab wounds.

15. The next question is whether the appellant caused the death of the deceased. As observed earlier, this case is largely determined upon circumstantial evidence. The parameters for admission of circumstantial evidence were well settled by the predecessor of this court, the Court of Appeal for Eastern Africa and subsequently reiterated by the same Court. In **Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135** the principle laid was this;

"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."

The Court went further in **Simon Musoke versus Republic [1958] EA 71** to add that:

"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."

The trial court took note of the requisite caution and appreciated the parameters of admitting circumstantial evidence.

16. The appellant urged us to consider the chain of events relating to the offence arguing that the chain had split. In doing so, we bear in mind that evidence constituting a chain of events leading up to the commission of an offence is admissible as "*res gestae"* forming the same set of transactions (see **Geoffrey Nguku versus Republic [1982-88] 1KAR 818)**. In **Mwendwa versus Republic [2006] 1KLR 133** the Court added that

*"**To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. And that the said chain must never be broken at any stage"***

17. Though the appellant belatedly attempted to raise a defence of *alibi*, he has not pursued the same on appeal. Be that as it may PW4, PW5 and PW8 place the appellant in the vicinity of the scene where the deceased was found dead. Chronologically, the appellant visited PW8's place of work at the bar at 2.00pm while PW4 and PW5 testified that they saw the appellant fighting with the deceased at about 6.00 pm on the fateful day. The deceased had also been seen at the bar by PW8 at around 12.30pm and left shortly as PW8 refused to sell to the deceased. From his unsworn statement before the trial court, the appellant went to the Shopping Centre through PW8's bar and stayed there till 4.00 pm where he left for home and returned to the posho mill till 7.30pm. As all these places were within the vicinity of where the deceased was found dead, the defence of *alibi* would not have stood and the trial court was right to dismiss it.

18. All these circumstances placed the appellant in the vicinity of the scene of crime. In addition, PW4 and PW5 testified to witnessing the fight between the appellant and the deceased and the stabbing of the deceased which was consistent with the photographs taken at the scene and the postmortem report. All these circumstances led to a rebuttable presumption that the appellant committed the offence within the realm of **section 119** of the **Evidence Act** in the absence of a reasonable explanation. As rightly observed by the trial court, the appellant was obliged to explain these particular set of circumstances in terms of **section 111** of the **Evidence Act**, which he did not.

Section 111 of the **Evidence Act** provides:-

"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 discharged 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."

19. By giving an unsworn statement, which he was entitled to do, the appellant took into account that he would not be open to cross examination by the prosecution and the court would have to rely on the appellant's untested statement. The appellant testified to knowing PW8 and her children PW4 and PW5, he having been a frequent customer at PW8's bar. It was therefore believable that PW8, PW4 and PW5 all knew the appellant very well and there was no reason readily availed as to why they would pick on the appellant to accuse him of such a heinous act of murder. We need not re-emphasize that the trial judge had ample time to consider the demeanor of the witnesses and believed them.

20. The appellant submitted that the evidence of PW4 and PW5 was not credible and was inconsistent for the reason that they were coached and intended to secure the release of their mother. We have carefully perused the record in this respect. These minors did not tell anyone what they saw. PW2 overheard the minors later talking about a murder two days after its commission and that is how PW2 informed PW1 about what the minors had said. It is upon this basis that the children were apprehended and eventually led to their testimony in court. PW8, the mother of the minors had been arrested as the deceased had last been seen at PW8's bar. The judge took sufficient caution in conducting *voir dire* examination to ascertain whether the minors could reliably testify. The judge made the appropriate note on record having satisfied herself that the minors understood the meaning of an oath and were intelligent enough to testify.

21. The minors thereafter proceeded to testify and were even cross examined by the appellant's advocates. From the record, we are persuaded that their testimony was rightly admissible. Their testimony was consistent and the allegation of coaching though made was unsubstantiated by the appellant. Indeed, the trial judge took note that PW8 was no longer in custody when the minors testified. The testimonies of PW4 and PW5 considered in the greater chain of events were very consistent with the prosecution case and only the appellant would have rebutted it either on cross examination or upon being put on his defence, with both opportunities having been availed to him. The chain of events remained unbroken.

22. We appreciate that there may be discrepancies in a trial. In considering any such discrepancies, an appellate court is guided by the provision of **section 382** of the **Criminal Procedure Code**, whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. This Court has ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. (See **Vincent Kasyula Kingo versus Republic Nairobi Criminal Appeal No.98 of 2014).** Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies (see **Njuki & 4 others versus Republic [2002] 1KLR 771**)

23. Applying this to the circumstances of this case, we are not persuaded that the discrepancies alleged go to the root of the prosecution case. Moreover, the fact that nothing suspicious was found at the appellant's house does not in our view affect the case otherwise proved against him. The failure to secure the testimony of the investigating officer similarly does not go to the root of the prosecution case. The death may as well have been caused by the walking stick that the appellant was seen with by PW8 and/or stab wounds. What is material is that the deceased died by the act of the appellant as testified by PW4, PW5 and PW8.

24. Under **section 213** of the **Penal Code**, a person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death including if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill. Having found that the appellant stabbed the deceased in the eye and head and the appellant having not explained the walking stick hidden

under his jacket, it is a probable presumption from the circumstances that the appellant indeed caused the death of the deceased. Circumstantial evidence is good evidence.

25. The final element of the offence to be considered is malice aforethought. This is set out in **section 206** of the **Penal Code** to include:-

> ***"i. 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.***
>
> ***ii. 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly***
>
> ***iii. An intent to commit a felony."***

It is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.

26. The trial Judge inferred malice based on the injuries seen on the head from which she inferred that whoever inflicted the injuries to the deceased wanted him dead. This position finds favour from the decision of the predecessor of this Court in **Rex versus Tuper S/O Ocher [1945] 12EACA63** wherein, it was ruled thus;-

> "***It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick ..."***

It is not in dispute that the deceased suffered deep cut wound consistent with being stabbed with a knife. From the chain of events, the appellant and the deceased were both seen in the bar two hours apart and the appellant was hiding a walking stick in his jacket. The deceased was later seen fighting with the appellant whereupon the appellant stabbed the deceased in the head as evidenced by the postmortem report. Such a vicisious attack with such a weapon as a knife must have been to cause death, or at the very least grievous bodily harm which proves malice aforethought in the required standard.

27. Our re-evaluation and analysis of the circumstantial evidence overwhelmingly points to the guilt of the appellant. We are guided by the law and having perused the trial court's judgment and the record before us, we are unable to fault the trial Judge's decision. In the end this appeal is found to be unmeritorious and it is dismissed in its entirety.

It is so ordered.

Dated and delivered at Nakuru this 2nd day of August, 2016.

R. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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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