



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

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

**CRIMINAL APPEAL NO 219 OF 2011**

**BETWEEN**

**JANE CHESIGEI SANG.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nakuru*

*(Ouko, J. as he then was) dated 5<sup>th</sup> July, 2011*

in

**H. C. Cr. C. No 51 of 2007)**

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**JUDGMENT OF THE COURT**

By way of an Information dated 7<sup>th</sup> June, 2007 and filed before the High Court in Nakuru, **JANE CHESIGEI SANG** ('the appellant') was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the night of 19<sup>th</sup> and 20<sup>th</sup> May, 2007 at (sic) unknown time at Ogilgei farm in Nakuru District of the former Rift Valley Province, she murdered **COLLINS KIPKOECH SANG** ('the deceased'). She pleaded not guilty to the charge and the prosecution presented 5 witnesses in support of its case before the trial court.

**PW 1 PATRICIA CHELAGAT SANG (PATRICIA)**, a daughter to the appellant and sister to the deceased testified that at about 3.00 pm on the material day she was headed home. She met **PW 2 PAUL KIRUI (PAUL)** whom she requested for escort. He agreed. Upon arrival, nobody could be seen within the precincts of the main house where Patricia's family resided, though it was open. The kitchen however was locked from inside and she knocked at the door. Initially there was no response, but moments later the appellant opened the door and ushered Patricia in. It was dark. Suddenly, Patricia noticed the hand of the deceased underneath a blanket which had covered the rest of his body. Upon pulling the blanket away she noticed that the deceased's entire body had been burnt and that he was dead. She screamed despite the appellant's plea for her not to as she would explain. The screams attracted the attention of Paul and the

neighbours who arrived to inquire what the matter was.

Bernard Sighai (Bernard) was among the first neighbours to arrive at the scene. He tried to talk to the appellant to no avail. It came to light that apart from the deceased, the appellant was with a minor by the name **BRIAN KIPREMI (BRIAN)**; that she had disagreed with her husband prior to the incident; that he had moved out in consequence; and that she had contracted a bout of cerebral malaria. The appellant was treated for the said malady but did not recover fully. Later, the police arrested the appellant. Patricia also testified that she visited the mortuary to identify the deceased's body for purposes of post-mortem.

Paul's testimony was similar to that of Patricia in all its material aspects, while that of **PW 3 CPL FRANCIS KARANJA (CPL KARANJA)** who was based at Njoro Police Station rendered an account of the investigation conducted following the death of the deceased. Notable parts of his testimony include:- the report of the events of the material date and recording of the same in the occurrence book (O.B.), the visit to the crime scene, collection of the deceased's body; and an unsuccessful interview with the appellant. A post-mortem was conducted on the body of the deceased and the appellant was taken for a mental examination. Later, she was charged in court for the murder of the deceased.

**PW 4 DR. JOSEPH W. NJARI (DR. NJARI)** who was a psychiatrist working at the Provincial General Hospital at Nakuru testified that he examined the appellant on 12<sup>th</sup> August, 2009. He confirmed that the appellant had been plagued by mental problems from the year 2007. Nonetheless, on the material date he found that she had sufficiently recovered and that she was fit to stand trial. **PW 5, DR. SAMUEL ONCHERE (DR. ONCHERE)** testified on behalf of **DR. KAMAU** who had prepared the post-mortem report but had left the civil service. He had worked with the said doctor for 5 months in the year 2008 and was familiar with his handwriting and signature.

Dr Onchere recounted the findings of the post-mortem report as follows:-

- *External*
- *Burns on the lower trunk and body & extending to lower limbs-60% of the body.*
- *Extensive burns.*

He attributed the deceased's death to loss of fluid as a result of deep burns. The prosecution closed its case and the trial court ruled that a *prima facie* case had been established against the appellant.

In her defence, the appellant gave a sworn statement whose import was that she was mentally sick. She testified that she came to learn that she had murdered the deceased while in prison; that she could not recall the events of the incident in question; and that she could not confirm if she admitted the offence. The deceased was her son, but she could not recall when she saw him last. She was married to **JOSHUA SANG** whom she had not spoken to. She knew she was in court because she had killed her child.

By his judgment Ouko J. (as he then was) returned a special finding pursuant to **Section 166** of the **Criminal Procedure Code** to the effect that the appellant was guilty but insane. The learned Judge also made orders that his finding be brought to the attention of his Excellency the President; and that the appellant be detained at the G. K. Prison at Nakuru where she would continue to receive treatment.

Aggrieved, the appellant lodged a Notice of Appeal and a Memorandum of Appeal in which she advanced grounds to the effect that:-

- *She had pleaded not guilty to the charge of murder.*
- *She was remorseful and deeply regretted the occurrence of the incidence (sic).*
- *She had a family which wholly depended on her and her husband who was mentally ill and in need of her care.*

- *She was sick at the time of the crime which led to follow up treatment at P.G.H. Nakuru.*
- *The sentence of presidential pleasure was excessive, and that the Court should review the same and set her free.*

There was also filed a Supplementary Memorandum of Appeal to the effect that:-

- *The learned Judge erred in fact and in law in shifting the evidential burden of proof to the accused person.*
- *The learned Judge erred in fact and law in finding the appellant guilty on circumstantial evidence when there are (sic) other co-existing circumstances which would destroy the inference.*

Miss Alwala, learned counsel argued the appeal on behalf of the appellant while Mr. J. K. Mutai, Senior Principal Prosecution Counsel appeared for the Republic. Miss Alwala commenced by submitting that **PATRICIA** and **PAUL** found the appellant with the deceased child; that there were no eye witnesses with regard to what had transpired prior to their arrival; that the only evidence was that the appellant locked herself up with the burnt body of the deceased covered in a blanket. She cited the case of *NICHOLUS WATUMA MUTUA V REPUBLIC [2015] eKLR* to expound on the subject of circumstantial evidence. In this regard she contended that no chain was established; that there were co-existing circumstances such as the quarrel between the appellant and her husband and the presence of the minor who was not called to testify. She also raised a query as to whether the traditional *jiko* might have burnt the deceased.

Learned counsel urged that the appellant's failure to explain through non-remembrance should not have been held against the appellant as she was not of sound mind and may or may not have had any recollection of the incident. To her, **Section 111** of the **Evidence Act** would sanction a shift of burden of proof if the appellant knew what she was doing. She further contended that the evidence before the trial court did not directly point to the appellant as the person culpable of the offence. In conclusion, counsel reiterated that failure to remember events does not mean that the appellant killed the deceased and that suspicion, however strong, could not form the basis for a conviction. The case of *SAWE V REPUBLIC [2003] KLR 364* was cited in support of the latter proposition.

In reply, Mr. Mutai briefly submitted that **PATRICIA** had testified that the appellant was found with the body of the deceased; that relations between the appellant and her husband were far from cordial; and that the provisions of **Section 111** of the **Evidence Act** apply to all persons inclusive of the mentally ill. Miss Alwala, learned counsel responded by submitting that **Section 111 (2) (c)** of the **Evidence Act** excludes those who advance the defence of insanity.

We are presiding over a first appeal in which our mandate is to re-evaluate, re-assess and re-examine the evidence tendered before the trial court with a view to arriving at an independent conclusion. See *OKENO V REPUBLIC [1972] E.A. 32*. We are required to bear in mind that we did not have the advantage of seeing the demeanour of the witnesses as the trial court did, which we should give due allowance for. **Section 203** of the **Penal Code** sets out two ingredients namely *mens rea* and *actus reus* which must be proved for the offence of murder to be established. It states as much in the following terms:-

*“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.*

**Section 206** of the **Penal Code** defines malice aforethought as follows:-

*“206. 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 or 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 killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**c. ...”**

Were the twin ingredients for the offence of murder proved in this instance; and was the appellant culpable of the offence? We answer as follows:-

First, there is no doubt that the deceased died as a result of burns he sustained in unclear circumstances. What is in doubt, in our considered view, is whether the appellant occasioned the burns which led to the deceased's untimely and painful death. We say so as the record shows that nobody witnessed the events of the material date. Accordingly, the prosecution case before the trial court was wholly based on circumstantial evidence. In **MUSILI TULO V REPUBLIC –CR.APP NO 30 OF 2013 (unreported)** this Court stated that:-

**“[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics”.**

However, for circumstantial evidence to form the basis of a conviction it must satisfy several conditions which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In **ABANGA ALIAS ONYANGO V REPUBLIC, CR. APP NO 32 OF 1990**, this Court enumerated the conditions as follows:-

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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”.**

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no co-existing circumstances, which would weaken or destroy the inference of guilt. See **TEPER V. R [1952] All ER480** and **MUSOKE V. R [1958] E.A 715**.

Applied to the present appeal, it is clear as we have noted herein above that prior to the arrival of **PATRICIA** and **PAUL** at the crime scene; nobody was privy to what had transpired thereat. The discovery of the deceased's burnt body in a locked kitchen with the appellant therein unable to render an explanation of what transpired upon opening the door triggered the arrest and prosecution of the appellant.

The trial court was alive to the situation before it and expressed itself as follows:-

**“The prosecution case is based on circumstantial evidence”.**

It went on to state that:-

**“The only evidence is that the accused person locked herself up in the kitchen with the burnt body of the deceased covered (sic) in blanket”.**

The learned Judge then invoked the provisions of **Section 111** of the **Evidence Act** thus;

***“The burden in criminal cases is upon the prosecution to prove a charge against a suspect beyond any reasonable doubt. However, Section 111 of the Evidence Act provides that evidential burden may shift to the suspect”.***

He went on to state that;

***“In view of the age of the deceased and the circumstances under which the body was found in relation to the accused person, the evidential burden was upon the accused person to explain how the deceased got burnt. The accused has explained that she could not recall the events leading to the death of the deceased. That explanation confirms a rebuttable presumption that the accused killed the deceased”.***

Section 111 of the Evidence Act is couched in the following terms:-

***“ 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 shall (emphasis ours) be entitled to be acquitted (emphasis ours) of the offence with which he is charged if the court is satisfied (emphasis ours) that the evidence given by either the prosecution or the defence creates a reasonable doubt (emphasis ours) as to the guilt of the accused person in respect of that offence”.***

***“(2) Nothing in this section shall-***

***a. ...***

***b. ...***

***c. Affect the burden placed upon an accused person to prove a defence of intoxication or insanity”.***

The appellant’s counsel submitted that the circumstances herein had not formed a complete chain capable of supporting the conclusion that the murder of the deceased was committed by the appellant. She alluded to the existence of co-existing circumstances which could weaken such a chain notably in our considered view, the failure of the prosecution to call **BRIAN** as a witness. Although the prosecution is at liberty to call any number of witnesses to prove its case pursuant to **Section 143** of the **Evidence Act**, it has to be remembered that the said witness was with the appellant in the locked kitchen. He would have been instrumental in unraveling the events of the material date. Accordingly, we find and hold that failure to call him as a witness not only invited an inference that his evidence would have been adverse to the prosecution case but actually weakened the prosecution case and effectively cast doubt as to whether the appellant was culpable for the murder of the deceased. It failed to exclude other possibilities including accident or the involvement of a different party. That in effect means that the **actus reus** was not proved beyond reasonable doubt which would alone suffice to acquit the appellant.

As to the **mens rea**, we note that this was in issue from the outset with the trial court calling for reports as to her mental soundness or otherwise. At the end of the said inquiries it was confirmed that the appellant had a history of mental illness; that the same would recur from time to time; but that at the time when she was arraigned before the trial court, she had sufficiently recovered to stand trial.

Under cross-examination **DR NJARI** confirmed that prior to the year 2007 the appellant’s state of mind

was such that she had lost touch with reality. He testified that:-

***“She may recall an incident after doing it without knowing what she is doing”.***

Under re-examination he testified as follows:-

***“Such a person may not differentiate right and wrong”.***

***“Such a condition is recurrent”.***

***“It is chronic but episodic”***

***“There are times when such a person experiences incid (sic) [lucid] intervals”.***

On her part the appellant testified that she was mentally sick and that she came to learn that she had killed the deceased while in prison. She could not recollect the events of the material date or confirm whether she admitted to the offence.

What do we make of the foregoing excerpts?

**Section 12** of the **Penal Code** absolves an accused person from criminal liability if he can prove that at the time of the commission of an offence he was suffering from a mental affliction which deprived him of the capacity to understand what he was doing. We are of the considered view that the appellant was incapable of forming the necessary **mens rea** due to her mental illness, the burden of proving which she discharged under the said provision in line with **Section 111 ( 2) (c)** of the **Evidence Act**. Accordingly she brought herself within the exceptions, exemptions and qualifications set out at **Section 111 (1)** (supra) entitling her to an acquittal. We will only interfere with the findings of fact made by the trial court to that extent that it misapprehended the provisions of **Section 111** of the **Evidence Act** and arrived at an erroneous conclusion. See ***PETERS V SUNDAY POST [1958] E.A. 424***. Had the learned Judge properly addressed his mind to the effect of the mental illness on the appellant's capacity to understand, recall and explain her actions, he would not have held her to have failed to discharge the evidentiary burden under the Section.

The upshot of our analysis is that this appeal succeeds. The conviction is quashed and the sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nakuru this 17<sup>th</sup> day of November, 2016***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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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**