IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK,JJ.A.)

CRIMINAL APPEAL NO. 75 OF 2013

BETWEEN

ELIZABETH KABURIA ………………. APPELLANT

AND

REPUBLIC …………………………. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru

(Lesiit, J.) dated19th June, 2012

in

H.C. Cr.Case No. 70 of 2010)

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JUDGMENT OF THE COURT

1. The appellant was charged with murder contrary to ***Section 203***as read with ***Section 204*** of the ***Penal Code***. The Information is that on the night of 21st November 2010 at Emburi Farm, Maritati sub-location in Buuri District within Eastern Province the appellant murdered Boniface MainaMwangi. The appellant was tried, convicted and sentenced to death by the High Court. She has now appealed to this court.
2. By amemorandum of appeal filed on 6th February, 2014,the appellant raises six grounds of appeal the most important being that the actusreus for murder on the part of the appellant was not proved. The other grounds of appeal are that:

a. ***the learned Judge erred in law and fact in convicting the appellant based on evidence that was full of contradictions;***

b. ***the learned Judge erred in law and fact in failing to find that PW1 did not properly identify the appellant as the circumstances of identification were not favourable and or free from error;***

c. ***that conviction was against the weight of evidence;***

d. ***the Judge erred in relying on the evidence of PW1 which was not credible;***

e. ***the learned Judge erred in law and fact in relying on circumstantial evidence which did not irresistibly point to the accused as the person who committed the offence.***

3. The appellant was convicted based on circumstantial evidence from the testimony of PW1 John Martin Karani. There were no direct eye witnesses' accountson how the deceased met his death.
4. The deceased was Boniface MainaMwangi; the circumstances surrounding his death and the subsequent arrest and arraignment of the appellant are contained in the testimony of PW1. It is not in dispute that a fire broke out in the house of the deceased and he was burnt to death inside his house; the door to the house was locked from outside; the critical question is what or who caused the fire, who locked the door of the house from the outside and who caused the deceased to be burnt to death inside his house.
5. PW1 in his testimony alleged that he had an answer to the above questions stating that it was the appellant who caused the fire and caused the death of the deceased. His testimony was taken to prove that the appellant committed the *actusreus* for the offence. He testified as follows:

> ***"I am a security officer employed at Emburi Farm. I know Boniface MainaMwangi (deceased); he was one of the employees at Emburi Farm as a mechanic. I know Elizabeth Kabura (appellant) as one of the employees at Emburi Farm. I do recall on 21st November, 2010, I completed work at 6.00 pm and went to my house at the camp. At 9.00pm I left my house to go to the toilet. I heard a bang. I stood silent. I then walked towards the noise when I saw the accused leaving the house of Boniface. I noticed it was her. The sky was blue. There was full light. The visibility was good and one could see a far distance. She looked about before she ran away. I asked her you "Kabura what is the problem".She did not respond. She just took off and ran the direction opposite where I was. Boniface's house was 10 meters from the toilet where I was going. From the toilet to my house was 10 meters. The toilet is in the centre of the houses where we live. I saw fire from Boniface's house. I ran there shouting fire! Fire! I tried to open the door, it could not open. Then I noticed the latch was locked from outside. I unlocked and opened the door. Other employees had come. We heard someone groaning inside. There was a huge smoke and big fire. As people tried to put out fire by water I ran to our office for fire extinguisher. I came back with it. We used it to put out the fire. Mugure and Njeru were the first people to come to the scene when I raised the alarm. The house had two rooms. We went in and saw deceased lying on the floor under the bed. The room had a lot of smoke so we could not go in. He was burnt. His hands were lifted and stiff. One of the people Mugure touched him and said he is dead. We called police patrol base and police came. They also declared him dead. … I knew the accused very well. The accused was a girlfriend to the deceased. They were not living together for the one year I knew both of them. The accused and deceased were friends; I saw the accused at her house in the camp that morning. It was 9.00 am or so. She was alone. Accused had two children. When I came out to go to the toilet I did not see any other person. There is electricity lighting in the block of houses. Each house has its own toilet but the toilet is outside. When I heard a bang, it came from the block where the deceased had his house but I could not say exactly which house it happened from. I realized the bang came from Maina's house when I saw fire. I saw the accused come out of Maina's door before running away. I would say she must have locked the house before running away".***

6. PW4 Danson Allan MugweMwangi's testimony linked the appellant to the offence. His testimony was taken to establish the *mensrea* for the offence of murder. He testified as follows:

> ***"I knew the deceased Boniface Mwangi. We used to work at the same place. I do recall on 21st November 2010 the deceased Maina found me at Maritati Centre at 1.30 pm. He told me he had come to visit a little and that he was escorting a lady friend who had visited him. We stayed for about 20 minutes. He then left me saying he wanted to meet***

other friends. He asked me not to leave him when going back to our quarters. I tried calling Maina between 6 and 7 pm that evening. He did not respond. I started going around the market asking for him. I found him in another bar with some of our colleagues. They were drinking alcohol. I asked him why he was not taking my calls. He told me he never heard my calls. Maina kept telling me that he was told to drink beer then he will be killed. I asked him who told him that. He finally told me it was Trailer who told him. Trailer was the nick name for Elizabeth Kabura (appellant). Easton Muturi later came and another colleague. He told us not to leave him when going home. We went back and we each parted ways. Thirty minutes there was a loud bang. I was in my house when I heard the bang. I went out and could not tell the direction of the bang. After two to three minutes I heard screams. I ran towards the screams and ended up in Maina's house. I entered straight away in the bed room and I heard a sound of a man groaning. I went out and told them Maina was inside. I asked for water. Women brought water in buckets. I tried to rescue him; I held his clothes from the neck area; it was his clothes that came off. I could not go into the bedroom as there was very fierce fire. Maina used to call Kabura by nick name Trailer. Kabura is the accused. The deceased told me Trailer told him to go and take alcohol so he could be murdered".

7. The prosecution tendered the evidence of PW5 Julius IkubuKarori in further proof of *mensrea* on the part of the appellant. The relevant part of his testimony is as follows:

> ***"I do recall on 21st November, 2010. It was a Sunday. At 10.00am I left my house to visit another colleague known as Stephen. I passed by the house of Maina the deceased. I saw the deceased at his door and I greeted him. He stepped out to meet me and we spoke for 20 minutes. He walked 3 meters to where I was. The deceased had opened the door to his house and I could see inside I saw he had a woman visitor. I could only see the back of the woman and I did not identify her. I then went towards a corner to Maina's house and I saw Kabura (appellant) at the window to Maina's house banging the window and talking with anger. I heard her say "who told you that these onions are yours: I am the one who planted them." Then I heard her say "nyinyimutakufaleonyote – you will both die today". I decided not to interfere and I just proceeded to Stephen's place. I returned to my house around midday. I did my chores and then slept. At around 10.00 pm I heard a knock on my door. It was Muthambi. He told me Maina had been burnt to death. Maina and Kabura were friends. At the time of the incident the two had disagreed. Kabura was complaining the deceased was treating her with contempt".***

8. PW2 James NjeruNyaga testified that the deceased was his immediate neighbour at the camp where they lived. His house was next to that of the deceased. On 21st November, 2010, at 9.00 pm he heard a loud bang; he listened and then heard a person groaning. His wife was next to the door and she stepped out and returned saying that Maina's house was on fire. That he went out to Maina's place and found Mr. Karani (PW1) having opened the door to Maina's place. There was heavy fire and he ran to the main circuit to switch off electricity; the fire was very fierce and Maina was trying to come out of his bedroom but he burnt at the bedroom door. PW2 testified that he could smell petrol and gas inside the house. The fire was in the bedroom, it did not spread to the other room. PW2 further testified he did not see the appellant at the scene.
9. PW7 PC Victor Mwaura testified that he visited the scene of crime and recovered some ash debris and a jerry can with some liquid from a room that was being used as a kitchen in the house of the deceased. He submitted the ash debris and the liquid to the Government Chemist for analysis. The analysis report showed that the liquid was petrol. The report also showed that no fire accelerant was detected in the debris.
10. PW3 Dr. Mosses NjueGachoki testified that he is the head of forensic department and Chief Pathologist at Kenyatta National Hospital. He produced a post mortem report on the deceased date 23rd November, 2010. The findings were that the deceased had 90% burns to the body; he had ante-mortem injuries on the neck and occipuv of the head. He had a stab wound by a sharp weapon on the left upper trunk; that any burns beyond 20% are fatal. There was evidence of burning due to breathing in hot fumes. He had deep injuries on the back; the brain showed

evidence of congestion which is in keeping with mode of breath due to suffocation; once the brain lacked oxygen it swelled, congested and oedematised. The cause of death was extensive burns; suicide was highly unlikely due to the stab wound and injuries on the back of the head. That the injuries could not have been cause by a fall; the injuries were a stab wound as it had sharp margins; the injuries occurred before he was burnt or before the fire.

11. Having considered and evaluated the above evidence, the trial Judge found the appellant guilty of the offence of murder. The appellant was convicted and sentenced to death. In convicting the appellant, the trial Judge expressed as follows:

> ***"I find that the prosecution has cogently and firmly established the circumstances from which an inference of guilt was sought to be drawn. It has established that prior to the deceased death; the accused was heard threatening to kill him. It has been shown that the threats were issued the same morning within the hearing of PW5. The deceased told PW4 and PW5 that the accused had threatened to kill him that same day he was murdered. I find that the circumstances proved were definite and unerringly pointed towards the guilt of the accused.Ifind that the circumstances taken cumulatively 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 no one else. I find that the prosecution had proved that the accused and no one else committed the offence. The prosecution has proved that the offence was premeditated and well executed. The accused defence was a bare denial. I find that the evidence adduced against her was overwhelming. I reject her defence and find her guilty of murder".***

12. Aggrieved by conviction; the appellant has lodged this first appeal. At the hearing of this appeal, learned counsel ***MsJacqulineNelima*** represented the appellant while the Sate was represented by the Senior Prosecution Counsel ***Mr. Jackson Makori***.

13. Counsel for the appellant elaborated on the grounds of appeal. This Court was urged to find that the trial court erred in relying on the testimony of a single identifying witnesses and on circumstantial evidence which did not irresistibly point to the guilt of the appellant; that the learned Judge erred in failing to find that the conditions for identification were not favourable; that the evidence of PW1 that he saw the appellant at the scene of crime is rebutted by the testimony of PW2 who stated that he did not see the appellant at the*locus in quo*. Counsel submitted that PW2 testified that when he came out of his house, he saw PW1 at the door of the deceased house. It was submitted that the evidence of identification of the appellant was not free from error. Counsel emphasized that the *actusreus* for murder on the part of the appellant was not proved; that the commission of the unlawful act by the appellant was not proved; that somebody set the deceased on fire but it remains a mystery as to who did it. That PW7 testified there was no accelerant which was found in the ash debris; that the government analyst report does not refer to any accelerant.; that there is no evidence on record to support an irresistible inference that it was the appellant who caused the death of the deceased; there was no eye witness to the offence and the evidence remains in limbo as to who caused the death of the deceased; that the appellant should be given the benefit of doubt.

14. The State in opposing the appeal submitted that PW1, PW4 and PW5 all testified that the appellant and the deceased had a relationship. PW1 testified seeing the appellant who ran away from the scene; that there was moonlight and PW7 corroborated the testimony of PW 1. That the deceased told PW 4 the appellant would kill him; that the testimony of PW 4 places the appellant at the scene of crime; that taken cumulatively, the testimony of PW4 and PW5 establishes the motive for the appellant to kill the deceased; that the deceased had more than one partner and this could have angered the appellant. That the learned Judge was faulted for relying on the testimony of a single witness. Citing the case of ***Mali Mali Ole Moyare – v- R,Nyeri Criminal Appeal No. 59 of 2014,*** it was submitted that a credible testimony of a single witness is sufficient to convict an accused person. That in the instant case, the testimony of PW1 was credible and the learned Judge did not err in relying on the same.

15. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial Judge, analyzing the same independently and then drawing conclusion bearing in mind the fact that we neither saw nor heard the witnesses

and make an allowance for that. See the case of ***Muthoka and Another versus Republic,(2008) KLR 297***.In***OKENO V. R., [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

> ***"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 V. R., [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. (SHANTILEL M. RUWAL V. R., [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 has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST, [1958] EA 424.".***

16. We have reassessed the evidence on the record, the grounds of appeal presented to us for determination by the appellant as well as the rival arguments presented by both sides. The evidence against the appellant is circumstantial evidence by PW1, PW4 and PW5. In ***Sawe–v-Rep. [2003] KLR 364,*** this Court said:-

> ***(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".***

17. In the case of ***JAMES MWANGI –VS- REPUBLIC,*** **[1983] KLR 522,this Court s**et out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows:

> ***"In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference …".***

18. The issue for our determination in the instant appeal is whether the circumstantial evidence by PW1, PW4 and PW5 prove the *actusreus* and *mensrea* on the part of the appellant. PW1 testified that he saw and recognized the appellant at the scene of crime; that the appellant was coming from the direction of the house of the deceased and when PW1 spoke to her she did not respond. The legal question is whether the testimony of PW1 is sufficient in law to prove that indeed it was the appellant who caused the fire that burnt the deceased to death. This evidence has to be tested against that of PW2who said he did not see the appellant but saw PW1 opening the door of the deceased's house. The appellant's testimony is one of identification through recognition. It suffices to state that PW1 did not see the appellant set fire or lock the door to the house of the deceased. Evidence of visual identification should always be approached with great care and caution **(**See***WaithakaChege – v- R, [1979] KLR 271)***. Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by single

witnesses (***GikonyoKarume& Another – v – R, [1900] KLR 23)***.In the instant case, we note that without proper caution, a possibility of error or mistake could exist; it was night and the only source of light was moonlight. From the evidence on record, the offence was committed at 9.00 pm at night. According to PW 1, the source of light was moonlight. It is our view that this kind of scenario calls for the trial Judge to be extremely cautious before she can enter conviction based on identification of an accused person at night and in difficult circumstances. It has been held that before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See***Abdalla bin Wendo& Another – v- R, [195] 20 EACA 166; Wamunga – v- R, [1989] KLR 42; and Maitanyi – v- R, 1986 KLR 198)***.It is required that before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. Failure to undertake such enquiries is an error of law and fatal to the prosecution. We have examined the record and find that the conditions for correct visual identification were not favourable and positive. The trial Judge did not evaluate the intensity of the moonlight and its relative position to PW1 and the appellant. In the absence of other evidence to support visual identification by PW1, the evidence of identification by PW1could notsafely be relied upon to convict the appellant. We observe that PW7 visited the scene of crime and testified that there was moonlight. However, he visited the scene after the fact and his testimony does not corroborate the alleged visual recognition of the appellant by PW1. We note that PW2 testified that the appellant was not at the scene when efforts to rescue the deceased were underway. There is no initial report evidence on record showing that PW1 told those who had come to rescue the deceased that he had seen the appellant running away from the scene.

19. We now address the issue of the testimony by PW 4 and PW5 to establish *mensrea* on the part of the appellant. It was the testimony of PW 4 that the deceased told him that *"trailer"* had threatened to kill him. It was the testimony of PW5 that the appellant had said she would kill the deceased. At the outset, it is our considered view that if at all the deceased uttered the words to PW4 and PW 5 as alleged; the same do not amount to a dying declaration. The issue of admissibility and the weight to be attached to the testimony of PW4 and PW5 in so far as their testimony is to be used to prove that the appellant had *mensrea* and caused the death of the deceased is well captured in the case of***Pius Jasunga s/o Akumu – v – R, (1954) 21 EACA 333***, where the predecessor of this court stated:

> ***"…it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration".***

20. We have considered and re-evaluated the testimony of PW4 and PW5 in light of the decision of **Pius Jasunga s/o Akumu** and in light of the evidence from other prosecution witnesses particularly PW1. It is our view that it is very unsafe to base the conviction of the appellant solely on the hearsay testimony by PW4 and PW5 to prove that the appellant had *mensrea*and caused the death of the deceased. The testimony of PW4 and PW5 is only relevant to the extent that it may be used to prove that the deceased said that trailer threatened him; the testimony of these two witnesses cannot be used to prove the truth of the said statement and impute *mensrea* on the appellant; these statements are hearsay. In addition, if any person threatened the deceased, there is no evidence on record to prove that "trailer" was the nick name of the appellant. It is apparent from the record that PW1 did not know who trailer was; the appellant did not know her nick name was trailer; it is only the deceased who perhaps knew who trailer was. There being no direct eye witnesses as to who caused the fire that razed the house of the deceased, we entertain some doubt whether it was indeed the appellant who caused the fire. Suspicion however strong, cannot be the basis of conviction.We give the benefit of doubt to the appellant.

21. In the instant case, as regards the ante-mortem wounds found on the body of the deceased; there is no direct evidence to the effect that those wounds were inflicted on the deceased by the appellant. In totality, we are guided in our finding by the dicta in the case of***Sawe – v- R, 2003 KLR364,*** which we hereby summarize the facts as follows:

"The appellant was convicted by the High Court of murder of her husband. At dawn on 2nd September, 1998, the masionette in which the appellant and the deceased lived caught fire. The time of fire was put at 5.30 am and 6.00 am. Only the appellant and the deceased lived in that house. Katana MwaringaNgowa, a neighbour who lived directly opposite saw the fire through his window at 6.00 am. It was a serious fire. He woke up his family and got out of the house due to the close proximity to the deceased's house. The analysis from the Government Chemist revealed that petrol was a possible accelerant to the fire. The prosecution case was that the appellant with malice aforethought caused the death of the deceased because it was only the appellant and the deceased who lived in the house. The High Court received no eye-witness accounts as there were no such witnesses. The prosecution set out to piece together certain events which it placed before the court as circumstantial evidence connecting the appellant with the death of the deceased. The High Court held that the prosecution had proved beyond reasonable doubt that the appellant had started the fire which caused the death of the deceased. The appellant lodged an appeal against conviction on the ground that the Judge had erred in law and fact when he found against the weight of evidence that the appellant had caused the death. This Court differently constituted held that suspicion however strong, cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt".

22. We have considered the defence testimony and thealibi raised by the appellant; as already stated the prosecution did not lead conclusive and irresistable evidence to identify the appellant as the perpetrator of the crime to the required standard; consequently, we see no need to comment on the defence testimony and the alibi raised except to state that when an alibi is raised, the burden to disprove the alibi rests with the prosecution and in the present case, no evidence was led to challenge the alibi.

23. The totality of our evaluation of the evidence on record and the applicable law is that we are inclined to allow this appeal, as we hereby do and quash the appellant's conviction. We set aside the death sentence meted out and direct that Elizabeth Kaburiabe and is hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR