IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 138 OF 2010

BETWEEN

JOHN BOSCO NJERU ……..……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (W. Karanja, J.)

dated 3rd May, 2010

in

H.C.CR.C No. 11 of 2008)

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JUDGMENT OF THE COURT

The appellant was charged before the High Court at Embu on 3rd November, 2008 with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code.*** The particulars of the offence as set out in the information were that on the night of 17th and 18th October, 2008 at Kirigi Village, Kirigi Sub-Location, Ngandori Location in Embu District within Eastern Province, the appellant murdered JoyAnn Wanja Njiru (hereafter "the deceased"). He pleaded not guilty to the charge and the case went to trial.

The prosecution case as presented through a dozen witnesses was that, the appellant and the deceased lived with their one year old baby in a rented room in a residential plot at Kirigi Market. On 18th October, 2008 at around 9:00 a.m. residents of the said plot were perturbed by the relentless crying of the baby. Upon going to the couple's room to find out what was going on, they noticed that it had been locked from the outside with a padlock. Concerned about the baby, the residents called their landlady, PW5, Alice Muthoni (Alice), who came in the company of PW6, Harrison Kiragu (Harrison), a village elder. Harrison called the then station commander at Manyatta Police Station, PW9, CIP Hassan Asman Mutacho (CIP Hassan) and informed him about the situation. CIP Hassan instructed Harrison to break the couple's door in the presence of witnesses and rescue the child. After gaining access into the room Harrison noticed the deceased lying motionless on the bed covered halfway by a bed sheet; he then confirmed that the deceased was dead. A little while later the appellant came and sat outside the plot

crying. Harrison arrested the appellant and took him to the police station where he was rearrested.

PW8, PC Wycliffe Odera (PC Wycliffe) then stationed at Manyatta Police Station testified that the appellant had in the early morning of 18th October, 2008 at around 5:00 a.m. reported that his wife who had been ailing had died in the house of natural causes. He gave the appellant a note to take the body to the mortuary. From the record several of the couple's neighbours testified that they had last seen the deceased with the appellant the previous day, that is, 17th October, 2008 in their room at around 6:00 p.m. The postmortem report which was prepared by PW2, Dr. Njau Mungai (Dr. Njau) indicated that the deceased died of asphyxia due to strangulation of the neck.

Following the foregoing evidence, the trial court was convinced that the prosecution had made a case against the appellant and he was placed on his defence. The appellant gave an unsworn statement. He stated that on 17th October, 2008 he woke up early and left for work. When he went back home he discovered that the deceased had died. He reported the death at Manyatta Police Station and was given a note to take the deceased's body to the mortuary. When he got home from the police station he found many people around his house and he was arrested.

The trial court, satisfied that the circumstantial evidence against the appellant was overwhelming and pointed to his guilt, convicted and sentenced him to death. That verdict and sentence aggrieved the appellant and he duly preferred this appeal against both. In his homegrown grounds of appeal, the appellant states that the learned Judge "**erred in law when**" she;

- **failed to consider that he was "not identified doing the crime"**
- **failed to consider that he made a report over the death of the deceased.**
- **failed to find that the evidence "had collaboration" (sic) to sustain a safe conviction.**
- **failed to consider that he was unwell and failed to order medical examination to test his ability to continue with his defence.**
- **Convicted him unheard.**

At the hearing of the appeal, the appellant's learned counsel Mr Nderi, elected to combine and argue all the grounds together. He started by asserting, correctly in our view, that the entire case against his client hinged on circumstantial evidence. He submitted that the evidence tendered by the prosecution was not compatible with the appellant's innocence. He charged that the prosecution did not exclude the possibility that there may have been another person in the tragic house beside the couple. This was especially so because none of the several neighbours who testified actually entered the house. It was possible, submitted counsel, that the appellant may not have been in the house at the material time - a possibility the prosecution did not exclude or discount. Counsel concluded by asserting that the appellant's conduct of reporting the deceased's demise to the police as having been caused by natural cause was innocent as she had indeed been ailing since the year 2005. He urged us to find the conviction unsafe and quash it.

The Republic opposed the appeal. Mr Kaigai, the learned Assistant Director of Public Prosecutions submitted that the prosecution had proved the case to the required standard with a sufficiency of circumstantial evidence. He pointed out that the appellant's neighbours who testified all confirmed that he was with his wife all day and into the night of 17th October 2008. This evidence placed the appellant at the scene of the crime and therefore completely displaced the appellant's claim in his unsworn statement that he was not there. The neighbours all confirmed that the appellant was in the house and that no other person left that house. He concluded by urging us to find that the evidence of P.C. WYCLIFFE served to strengthen the prosecution case that the appellant was the culprit in that he gave a false report as to the cause of the deceased's death, and did not go to take the body for preservation despite being given a note for that purpose.

On a first appeal our duty is to subject the whole evidence to a fresh and exhaustive analysis and appraisal before arriving at our own independent conclusions as to the guilt or otherwise of the appellant. The matter proceeds by way of a re-hearing but we, unlike the trial Judge at first instance, do not have the advantage of hearing and observing the witnesses who testified. We assess their evidence on the basis of

what is on the record. For precisely that reason, we are slow to interfere with the findings and conclusions of the trial court but will not hesitate to so if those findings be shown to be based on no evidence or a misapprehension of the evidence or the Judge is shown to have acted on wrong principles. This Court and its predecessor have restated that approach in numerous cases the more notorious ones being **OKENO –VS- REPUBLIC** [1972] EA 32, **KIARIE –VS- REPUBLIC** [1984] KLR 739 and **OGETO –VS- REPUBLIC** [2004] KLR 14.

Bearing that duty in mind, we have carefully considered all the evidence that was tendered before the learned Judge. It was wholly circumstantial in nature in that there was no direct evidence linking the appellant to the death of the deceased. Nobody saw him do it. All we have is the set of circumstances that the deceased was on 17th October 2008, a Friday, seen in the single- roomed house she shared with the appellant and their little child aged about a year. The appellant was by all indications alive and well. Her opposite door neighbour JERUSHA WANJIRU (PW1) saw the ill-fated couple in their house that evening up until about 8 p.m when she retired for the night. Another neighbour CATHERINE MUTHONI (PW3) was actually with the deceased fetching water within the shared compound at about 6.00 p.m and did see the couple in their room at 6.30 p.m. Other neighbours also testified to the couple being in and about their house the whole day on that fateful day into the evening. The appellant was not seen leaving the house.

It is only when the couple's toddler was crying inside their house which was locked from the outside that the neighbours realized something was amiss. This was the next morning at 9.00 a.m. Upon the house being broken into, the deceased was found lifeless on the bed. According to P.C. JONATHAN KYALO who came to the scene, the body had visible injuries around the neck and had bled from the nose and mouth, all indicative of foul play. The postmortem examination conducted by DR NJAU established that the cause of death was asphyxia due to strangulation of the neck. This mode of death explained the almost circumferential mark around the neck, the cyanosis on the fingers, toes, tongue and conjunctiva as well as the puffy face, protruding tongue, popped out eyes and the fluid oozing from her facial orifices.

Without a doubt the deceased had been suddenly, unsuspectingly and mercilessly strangled by the use of some smooth ligature, explaining the absence of any signs of struggle. That fact gave the lie to the appellant's police report at the rather odd hour of 5.00 am given to PC WYCLIFFE that his wife had died of natural causes. She had died at the hand of man, not nature.

The appellant having been placed at the scene of the crime by multiple witnesses, and having been the last person to be seen with the deceased alive in the house the duo exclusively shared with their toddler child, a logical duty to explain, recognized by law, fell upon him because what transpired within that house that fateful night is a matter specially within his knowledge in accordance with **Section 111** of the **Evidence Act, Cap 80**. We are satisfied that the learned Judge properly directed herself on this legal point and in citing this Court's decision of **MKENDESHWA –VS-REPUBLIC** [2002] 1 KLR 461 where it was stated that;

> ***"In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the Accused to explain matters which are peculiarly within his own personal knowledge".***

From our perusal of the record it seems plain that the appellant made no attempt whatsoever to explain how his wife, who the evening before was alive and well, ended up dead in the house behind a door locked with a padlock from the outside. In fact, all he gave in his defense was a terse and wholly unilluminating statement:

> ***"I was not at home on 17/10/2008. I woke up on the morning and went to my place of work. When I came back home I found that time Wanja had died. I went to the nearest police station i.e. Manyatta. I reported what I had found at home. The report was booked and I went back home".***

The allegation that he was not at home on 17th October 2008 is dispelled by the several neighbours who testified that he was at home all of that day. At any rate, he made no attempt to explain himself as to the night, for it was then that the deceased met her death. His defence did not therefore even amount to an alibi proper, as he claimed not to have been at home on 17th October 2008 having left for his unnamed place of work that morning yet it is the night he should have been concerned to explain. In sum, there is nothing in what he stated to weaken the cogent and consistent testimony of multiple witnesses that he was in fact at home day-long.

We are satisfied upon a consideration of this matter that the circumstantial evidence met the test enunciated in a long lime of cases including the old **KIPKERING ARAP KOSKE & ANOTHER** [1949] 16 EACA 135, and the more recent **SAWE –VS-REPUBLIC** [2003] KLR 364, which is that in order

to justify a conviction, the inculpatory facts must lead irresistibly to the conclusion of the accused's guilt and there must not be any co-existing factors inexplicable by a theory suggestive of his innocence or that would otherwise weaken the inference of guilt.

Everything in this case points to the appellant's guilt and there is nothing that weakens` that unerring conclusion that it is he that strangled his wife to death. That the evidence against him is circumstantial and not direct does not weaken the certainty of his guilt because, as was memorably stated early in the last century in **REPUBLIC –VS- TAYLOR WEAVER AND DONOVAN** [1928] 21 CR.APP.R 20;

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

The upshot is that this appeal fails for want of merit . It is accordingly dismissed in entirety.

Dated and delivered at Nyeri this 27th day of May 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. 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