IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 121 OF 2011

BETWEEN

MALIKULUS SHAMBUSHI LUBEMBE ……..... APPELLANT

AND

REPUBLIC …….....… RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Lenaola, J.) dated 3rd March, 2011

in

H.C.CR.C. NO. 16 OF 2006)

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JUDGMENT OF THE COURT

The appellant, ***Malikulus Shambushi Lubembe***, appeals to this Court against his conviction by the High Court (Lenaola, J) for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. It had been alleged, in an information filed by the Attorney General on 24th February, 2006, that the appellant had on the 16th day of 2006, at [particulars withheld] village, Mahiakalo sub-location in Kakamega District within Western Province, now Kakamega County, murdered ***T A A (deceased)***. Upon his conviction on 3rd March, 2011 he was sentenced to suffer death as by law provided.

As this is a first appeal, we are duly bound to reconsider the evidence on record, evaluate it and draw our own conclusions. Those guidelines have been repeated time without number by this Court. We need only refer to the case of **Okeno – v – R [1972] EA 32** in which, at page 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] E.A. 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. (Shantilal M. Ruwala -v- R. [1957] E.A. 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 finding 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] E.A 424."

It is also an established principle of law that a court of appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see **Chemagong –v- Republic [1984] KLR 611**.

The facts of the case are straight forward. The deceased was the mother of ***F I A (PW1) (F), N K (PW2) (N)***, and ***J I (PW7) (I)***. In the afternoon of 16th January, 2006 the deceased whilst accompanied with N left her home at [particulars withheld] to fetch firewood a distance away from her home. N returned home alone and did not immediately tell anyone where her mother was or what had happened to her. It was acknowledged that N was mentally challenged.

When the deceased failed to return the second day, I reported her absence to his uncle ***T K (PW5) (K),*** Aunt ***L N (PW6) (L)*** and sister ***F.***

A search was mounted and N pointed out where she had left the deceased when they had gone to fetch firewood. The deceased's body was found lying on its back. It had scratch marks on the neck, cane marks on the thighs and the left leg was broken. A postmortem conducted by ***Dr. Jason Amukonyi (PW3)*** indicated that the cause of death was a cervical spine fracture caused by strangulation.

The team that found the body of the deceased informed the Assistant Chief ***Zakaria Ngaira (PW4) (Ass. Chief)*** who visited the scene and informed the police. N mentioned the name of the appellant to the Assistant Chief who arrested the appellant while looking after cattle in the forest. He then handed him over to the police.

In his defence, in an unsworn statement, at the trial, the appellant narrated how he was arrested by the Assistant chief and subsequently taken to Kakamega police station where he was charged as already stated on offence he denied.

The learned Judge of the High Court concluded that the offence of murder had been committed and that it had been committed by the appellant. The learned Judge delivered himself thus:-

"From the record, I have no doubt that, slow as she may have been, her (N's) evidence was unshaken by the intense cross- examination that she under-went. She was able to tell that the accused person who she named to her brother and sister, as well as the Assistant Chief and uncle (all who testified in court as PW1, PW7, PW4 and Pw5 respectively, was the person who raped her mother and strangled her and also threatened PW2 with the same fate. The next day, when she was asked where her mother was, PW2 said that she was at the place where they had gone to fetch firewood and she led the search party to the discovery of the body

When a person meets a woman innocently fetching firewood, knocks her down, rapes her and strangles her then those actions could only be actuated by malice aforethought and upon her death the offence of murder has been properly proved."

Aggrieved by those findings, the appellant came before this Court citing some ten (10) grounds of appeal. Mr. Olel, learned counsel for the appellant, condensed those grounds into two grounds by arguing grounds 1,2,3,4,5 and 10 together and grounds 6,8 and 9 together. Learned counsel abandoned ground 7.

A summary of the broad issues raised in the two grounds is as follows: improper appreciation of the evidence adduced; conclusions made which were inconsistent with the evidence and inconclusiveness of the medical evidence as to the cause of death.

In his submissions before us, Mr. Olel pointed out various inconsistencies between the testimonies

of witnesses in relation to time, distances and other matters of detail and urged us to find the evidence unreliable. Learned counsel placed emphasis on the testimony of N the single identifying eye witness arguing that, given her mental status, she should not have been relied up to found the appellant's conviction. Learned counsel further discredited the medical evidence as to the cause of death particularly as obvious injuries which were observed by lay witnesses were not indicated in the postmortem report.

For his part, Mr. Ogoti, learned Senior Assistant Director of Public Prosecutions, supported the findings of the learned Judg. Learned counsel submitted that the evidenced of N placed the appellant at the scene of crime which scene she left after being threatened with death by the appellant. In learned counsel's view, the medical evidence corroborated the testimony of N who knew the appellant prior to the incident which incident occurred in broad daylight.

We have carefully considered the evidence which was adduced before the High Court, the judgment of the learned Judge and submissions of learned counsel. The conviction of the appellant would not have been possible without the testimony of N. We appreciate that the trial court would have been in better position to access the credibility of N: In this case however, the testimony of N was not taken before learned J. who eventually prepared the judgment which is the subject of this appeal. Learned J. took over the trial from Ochieng, J. who heard the evidence of N and was transferred elsewhere hence the subsequent hearing of the case before Lenaola, J.

We have anxiously considered the evidence of N and find certain aspects of her evidence disturbing. We appreciate that she was mentally challenged and her evidence should be considered in that light. When she testified in chief, N stated that the appellant strangled the deceased, felled her down removed her clothes and *"did bad manners"* to her. He then warned her not to report to anyone or else he would kill her. That evidence appeared water tight against the appellant.

On cross-examination, she was not sure whether she was the one who pointed out where the deceased was to the search party. She was also not sure of whether she stated what had happened to the deceased to the search party at the scene. She further alleged that she informed the Asst Chief at his office that the appellant had held the deceased by her neck. This evidence considered together with the testimonies of other witnesses raises doubt as to whether it was properly appreciated by the learned Judge. Before considering the evidence of other witnesses one aspect of N's testimony is significant. In her own words:-

> *"My father has a younger brother, but I cannot recall his name, he stays near us at [particulars withheld]. I have stayed with him since I was born, but I do not know his name."*

How is a court supposed to appreciate the evidence of a witness who cannot recall the name of a close relative such as an uncle with whom she had stayed since birth when the same witness purports to recall a neighbor who does not stay with her?

N also testified in part, that she told the Asst Chief that the appellant held the deceased by the neck. Did the Asst Chief confirm that? Let him speak for himself. He stated:

> *"One of the deceased's children called Night (PW2) told me that while looking for firewood the accused was seen at the scene and she left the deceased with the accused."*

So, in her first report, N did not state that she saw the appellant strangle the deceased or *"do bad manners"* to her. This brings us to the findings of the learned Judge regarding what Night told the people she met after the attack on the deceased. The learned Judge stated in his judgment that N told the Asst Chief, F, K and I that it was the appellant who raped her mother and strangled her. That conclusion is not borne from the evidence. F testified that when she met N after being informed of the disappearance of the deceased, she told her that the deceased had remained where she was fetching firewood. F did not even talk to N at the scene. K, in his evidence in chief never said that N implicated the appellant at all. However, in cross-examination he testified that after the body of the deceased had been collected by the police, N told them that she had seen the appellant with a panga. She never mentioned that the appellant

had raped or attacked the deceased. On his part, I testified that when he talked to N about the whereabouts of deceased, she told him that she had gone to visit her sister N B. N did not tell I that she had witnessed the appellant rape and strangle the deceased.

A court in the assessment and evaluation of evidence must consider the evidence holistically and not consider pieces of evidence in isolation. It is only after a holistic consideration of the evidence that a finding as to whether an accused person has been shown beyond reasonable doubt to have committed the offence complained of, maybe made. In the appeal before us, it is our view that the evidence of N considered together with the evidence of other prosecution witnesses raised considerable doubt on the events leading to the demise of the deceased. We do not know what conclusion the learned Judge would have reached if he had appreciated the evidence as we have done. On our part, we have no hesitation in concluding that the doubt raised should have been resolved in favour of the appellant.

The upshot is that, although, in our view, the offence of murder was demonstrated given the injuries sustained by the deceased, the prosecution did not demonstrate, beyond reasonable doubt that the murder was committed by the appellant. We therefore allow the appellant's appeal, quash his conviction and set aside the sentence of death meted out to him. The appellant is set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MAY, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR