IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 79 OF 2011

BETWEEN

JACKLINE VIDANYA BARAZA ……...… APPELLANT

AND

REPUBLIC ……..…...… RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Lesiit, J.) dated 19th April, 2011 ***in H. C. Cr. C. No. 12 of 2009)***

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JUDGMENT OF THE COURT

1. ***Jackline Vidanya Baraza***, ***the Appellant*** herein, was tried before Lesiit, J. on an Information that had charged her with the offence of murder contrary to s***ection 203*** as read with ***section 204*** of the ***Penal Code***. The particulars contained in the Information were that on 1st February, 2008 at Golden Gate Estate, Industrial Area, within Nairobi, the Appellant murdered Munax Ashok Kumar Dave (hereinafter "the deceased").

2. The appellant pleaded not guilty and the prosecution called a total of eight witnesses. The facts that the High Court relied upon are as follows:

3. The appellant was a house-help employed by the deceased, and her family. She had worked with the deceased for nine months until the fateful day of the deceased's brutal murder. The appellant's routine was to report to work at 8.00 am daily, and leave at 4.00 pm. Among the duties she performed, were to open and shut the gates of the house upon the entry or departure of the deceased's family members. On the fateful day of 1st February, 2008, the appellant reported to duty on time, and saw the deceased's husband, Ashok (PW 2) leave for work just before 8.00 am, whereupon she shut the gates. The deceased's daughter, A (PW 1), 18, a student at [Particulars Withheld] Academy in Westlands, Nairobi, had left for school long before the appellant reported to work.

4. When A returned from school at around 5.00 pm, she found the front door locked. She rang the bell. There was no answer. She walked to the back door and found it unlocked. As she opened the door, she saw blood all over – on the wall, and the floor. She ran out to the neighbours inquiring if

any one had seen her mother. When she did not get a positive answer, she and the neighbours called out for the guard, who accompanied them to the inside of the house, where they found the deceased lying in a pool of blood. She was dead. A called her father, while the neigbours called the police.

5. PC Livingstone Kihanda (PW 7) and PC Martin Kamau (PW 8) ("the investigators") were the investigating officers who visited the scene of crime and testified that they found the deceased lying in a pool of blood in the bathroom, with deep stab wounds on the neck, and the deceased's long, black hair wrapped around the neck. They found blood all over the floor of the kitchen, and along the wall to the bedroom and toilet. There were clothes scattered all over. They took pictures of the scene and the body.

6. The investigators were unable to trace the appellant. In November, 2008, Ashok, the deceased's husband, offered to engage a private investigator, and in January, 2009 with the help of the police and the local chiefs, the private investigator, Joseph Mutinda (PW 4) (Mutinda) apprehended the appellant in Busia.

7. Mutinda testified that when he first approached the appellant at the home of her parents, she was visibly shocked and even attempted to escape.

8. Paul Ouma Musunga (PW 6), an Assistant Chief who had accompanied Mutinda to the home of the appellant's parents, and who was present at the time of the appellant's arrest, also testified that the appellant appeared very shocked on seeing them.

9. The appellant was then handed over to the police who arranged for her to be examined by Dr. Zephaniah Kamau (PW 3) who testified that he found stab wounds on the appellant that were consistent in age to those found on the deceased. His examination of the appellant indicated scars on the left lower face, left of the mouth, below the left lower lip, jaw, and upper abdomen, all occasioned by a sharp object.

10. The post-mortem report, prepared by Dr. Jane Wasike, on the deceased, showed that the death was caused by "penetrating neck injury due to sharp object".

11. In her defence, the appellant gave unsworn statement admitting that she reported to work on the morning of the material day but denied committing the offence. She testified that on that day, when she left that evening, the deceased was alive and well and in the company of two women. She testified that the deceased let her out of the gate. The appellant claimed to have returned the next two consecutive days but found no one at home.

12. Satisfied that the prosecution had proved its case, the trial Court convicted the appellant and sentenced her to death. It is that decision that provoked this appeal based on the following grounds as set out in the supplementary memorandum of appeal:-

    i. ***That the learned judge erred in law and in fact in failing to find that the prosecution case was not proved beyond reasonable doubt.***

    ii. ***That the learned judge erred in law and in fact by basing the conviction on circumstantial evidence despite the existence of a reasonable hypothesis of the innocence of the appellant.***

    iii. ***That the learned judge erred in law by finding that the principle of rebuttable presumption as provided in Section 111(1) and 119 of the Evidence Act Cap. 80 was applicable.***

    iv. ***That the learned judge erred in law and in fact by convicting the appellant despite there being no eye witness to the incident leading to the death of the deceased.***

    v. ***That the learned judge erred in law and fact by convicting the appellant despite there***

being no forensic evidence linking the appellant with the death of the deceased.

vi. ***That the learned judge erred in law and fact in failing to find that a crucial witness was not called.***

vii. ***That the learned judge erred in law and fact in failing to find that the prosecution's evidence was inconsistent and could therefore not be relied on to make a safe conviction.***

viii. ***That the learned judge erred in law and fact in dismissing the appellants defence.***

13. In his submissions before us, Mr. D. N. Kinuthia, learned counsel for the appellant, relying on his supplementary grounds of appeal, argued that the evidence before the High Court was entirely circumstantial, and did not meet the threshold required in convicting the appellant. He submitted that the appellant's "disappearance" from the work place, and the "shock" on her for being found several months after the incident, were not sufficient to convict her. He argued that the appellant's own testimony that she indeed left the deceased alive and well, and that she reported to work the following day but found no one at home, should be believed. With regard to the injuries found on the appellant's body, counsel argued that these were not conclusive to determine her guilt.

14. On the other hand, Mr. B. L. Kivihya, learned State Counsel, argued that the appellant, being the last person to be seen with the deceased; having disappeared immediately after the incident; found to be in "shock" when approached, and with the medical evidence that she also had scars that were consistent with a physical struggle with the deceased, and having been occasioned roughly around the time of the deceased's death, made the appellant guilty of the crime.

15. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. This being a first appeal we are called upon to re-evaluate the evidence tendered at the trial court and make our own conclusions. In ***John Irungu Macharia vs Republic – Criminal Appeal No. 23 of 2008,*** this Court expressed itself as follows:-

> ***"That being so the appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and to have this Court's decision on that evidence. But as we do so, we must bear in mind that we have not had the advantage (which the learned Judge had) of hearing and seeing the witnesses and give allowance for that (see Okeno vs Republic (1972) E. A 32 & Mwangi vs Republic (2006) 2 KLR 28.)"***

16. The case was based purely on circumstantial evidence as there was no eye witness account on how the deceased was killed. The prosecution relied on a series of circumstances to establish the guilt of the appellant. In ***Sawe vs Republic (2003) KLR 364,*** this Court held.

> ***"As we have already pointed out, the evidence in this case was entirely circumstantial. 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 co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

See also this Court's decision in ***Mwita –vs- Republic (2004) 2 KLR 60.*** The issue that falls for our consideration is whether the prosecution discharged the above mentioned burden of proof.

17. Having re-evaluated the evidence, we are of the considered view that the evidence on record did warrant the conviction of the appellant based on circumstantial evidence. This is because as set out in ***Sawe -vs- Republic (2003) KLR (supra)*** all facts which formed the chain of circumstances

relied on by the prosecution was proved to the required standard. The prosecution did establish that the appellant was the last person in the company of the deceased; that she left, presumably at 4.00 pm which was her normal departure time, without anyone, including the guard, seeing her; that she went into hiding for several months; and upon being discovered several months later, she was visibly shocked, tried to escape, but was apprehended; that a medical examination of her showed she had scars that were consistent with a struggle she had had with the deceased, and which roughly coincided with the time of the incident.

18. We are satisfied from the nature of injuries sustained by the deceased that they were inflicted with the requisite malice aforethought. Whether or not the motivation, the impulse behind so dastardly an act are known or can be established with certainty, there is no doubt that the statutory elements of malice aforethought as set out in ***section 206*** of the Penal Code were established;

> ***"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 of or to 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 actually 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) an intent to commit a felony***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit felony."***

19. We conducted a fresh and exhaustive reassessment and analysis of all of the evidence that was adduced before the trial court consistent with our duty as a first Appellate Court which has been so expressed in a long line of authorities including the more well known ones of ***Pandya vs. R [1957] E. A 336*** and ***Okeno vs. R [1972] E. A 32***. Having done so, we have come to the conclusion that the appellant did kill the deceased. The kind of injuries sustained reveal a particularly vicious and brutal attack fuelled and impelled by the requisite malice aforethought. The learned judge of the High Court was correct in convicting the appellant and the sentence of death imposed is wholly deserved.

20. The upshot of the foregoing is that we find the appeal herein has no merit and we dismiss the same. We uphold the appellant's conviction and sentence meted out against her.

Dated and delivered at Nairobi this 6th day of November, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

…….

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