IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 78 OF 2013

BETWEEN

JOHN MUTUMA GATOBU……...…….APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J) dated 3rd November, 2007

IN

H.C.CR.C. NO. 76 OF 2007)

****

JUDGMENT OF THE COURT

The appellant JOHN MUTUMA GATOBU appeals to this Court against the conviction and sentence of death imposed on him by the High Court at Meru **(Lesiit J)** for the murder on 10th November 2007 of **Faith Kiende Mutuma** and **Makena Mutuma**, who were his wife and daughter, respectively.

The prosecution case, established by some five witnesses, was that on the material night, at about 12.30 am, JOSEPH MWANGI (PW1) a neighbour of the appellant's, was awakened by a woman's screams emanating from the appellant's house where he lived with his young family. PW2 responded to those screams by going to the appellant's house and calling out the appellant's name. He got no answer whereupon he proceeded to the nearby house of **Stanley Gatobu Kirimania** (PW3) who is the appellant's father, and woke him up.

PW2 and PW3 then walked back to the appellant's house. By this time the screams had ceased and when PW3 called the appellant, he said something that PW3 could not make out. PW2 and PW3 then decided to report to the "Sub-Area" which we understand to be the an administrator of local area or sub-location. The Sub-area Administrator for Gikuune Sub-location was JOSEPH MWONGERA (PW4), and on receiving the report, he set off with PW2 and PW3 for the appellant's house. En route, they met the

appellant who told PW4 that he was on his way to report what he had done in his house. He did not say what it is he had done but invited PW4 to go see for himself.

All four proceeded to the appellant's house. The appellant picked a key from atop a window and opened his house to reveal the lifeless body of a child at the entrance, and that of a woman on a wooden seat, with a table lying on it.

The four then walked to the house of **Wilson Mutuma Ikiugu** (PW5) the area sub-chief, woke him up and reported the deaths. PW5 arrested the appellant and took him to Githoyo Administration Police Post where a call was made to the Kiriene Police Station and the OCS there came and re-arrested the appellant.

The bodies of the deceased were collected in the course of the day and taken to the Meru Hospital Mortuary where a post-mortem examination was done on them by one **Dr. Macharia** on 12th November 2007. He formed the opinion that the deaths were caused by cardio-pulmonary arrest due to head and cervical spine injuries for the wife; and cardio-pulmonary arrest due to head injury caused by a blunt object for the child. He filled a Post-Mortem Form which was produced in evidence by his colleague at the Meru District Hospital, **Dr. Grace Nguyo** (PW1).

Placed on his defense, the appellant gave sworn testimony. He denied the charge and stated that on the night in question he got home at about 8.30 pm. His wife gave him water and he bathed before receiving a call from one Patrick Gitonga a friend of his who is a bus conductor. He excused himself, went to his friend's house where he ate and stayed for some time, talking. On his way back, about 300 metres from his house he met PW2 and PW3 but he did not speak to them. When he got to his house he found his wife and child dead and he rushed to the Sub-Area's house only to meet him on the road and they walked together back to his house.

He protested his loving and amicable life with his family and denied killing his wife and child. He seemed to blame the charges leveled against him on a quarrel he had with the sub area (PW4) over water charges that he was unable to pay. On cross-examination, he also stated he had a good relationship with his father (PW3) with whom he had never quarreled and stated that he was unable to say why the latter testified against him.

That is the totality of the evidence that was placed before the learned Judge and we have subjected the whole of it to a fresh and exhaustive analysis from which we shall make our own independent inferences of fact and draw appropriate conclusions as required by **Rule 29 (1)** of the **Court of Appeal Rules** and which the appellant is entitled to expect from us as a first appellate Court. See **OKENO –VS- REPUBLIC** [1972] EA 320. We do so fully cognizant that we do not enjoy the advantage the trial court had of hearing and observing the witnesses as they testified so as to assess their credibility. That being so, we would accord the trial court's findings and conclusions a great deal of respect while free to depart therefrom if founded on no evidence, on a misapprehension of the evidence or are plainly wrong or perverse.

The appellant was aggrieved by the learned Judge's conclusion that he was guilty and so preferred this appeal raising some seven grounds in a self-crafted Memorandum of Appeal. These were abandoned by his learned advocate **Miss Nelima** who filed a seven-ground Supplementary Memorandum of Appeal pleading that the learned judge erred by convicting the appellant on circumstantial evidence that did not meet laid down requirements; relying on evidence that was contradictory and inconsistent in nature; relying on extraneous matters; failing to consider the appellant's alibi defence and convicting the appellant against the weight of evidence on mere suspicion, the ingredients of murder not having been proved.

Urging the appeal before us, Miss Nelima submitted that the case against the appellant was wholly circumstantial but the evidence did not meet the threshold set by a long line of cases including **SAWE – VS- REPUBLIC** [2003] KLR 364; **KHADIJA MWAKA YAWA –VS- REPUBLIC**, MOMBASA CRIMINAL APPEAL NO. 223 OF 2007 (Unreported) and **MARY WANJIKU GICHIRA -VS- REPUBLIC,** NAIROBI CRIMINAL APPEAL NO. 17 OF 1998 (Unreported) which she cited before us.

She submitted that there was no evidence that the appellant was in the house at the fateful time and that evidence by PW3 that he heard the appellant 'mutter' something inside the house was suspect and did not amount to voice recognition. Counsel contested the learned Judge's finding that the appellant was the last person to be with the deceased alive and questioned why there was no investigating officer called to testify. She urged that the circumstantial evidence did not lead unerringly to the guilt of the appellant.

On whether malice aforethought was proved, counsel's view was that in the absence of proof of a quarrel having occurred between the appellant and his wife, it was not established and so a charge of murder could not stand. She concluded by submitting that the appellant's conduct was not suggestive of guilt, as the learned Judge held, as he was just calm upon discovery of the death of his wife and child.

Mr. Mungai, the learned Senior Prosecuting Counsel opposed the appeal and asserted that even though the evidence against the appellant was circumstantial, it left no doubt about his guilt. He was living in that house with the deceased and his father, PW3, did recognize his voice therein. Counsel further contended that the appellant's calm demeanour at the death of his young family was inconsistent with his innocence. He submitted that the failure to call a investigating officer was immaterial as the prosecution did tender enough evidence to establish guilt. He rested by stating that the fatal injuries inflicted upon the deceased were in themselves sufficient proof of malice as defined by **Section 206** of the **Penal Code**. He urged us to dismiss the appeal.

In a brief rejoinder, Miss Nelima sought to dismiss the submission on voice recognition by positing that PW3 merely assumed that the voice he heard inside the appellant's house was of the appellant and countered that not calling the Investigation Officer was fatal to the prosecution case. She was unable to provide authority for that assertion when asked by the Court.

It is common ground that the entire case against the appellant was circumstantial. It has been stated in numerous cases that in order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existent facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused. See **TEPER –VS- REPUBLIC** [1952] AC 480; **KIPKERING ARAP KOSKEI & ANOR –VS- REPUBLIC** [1949] 16 EACA 135 and **NDURYA –VS- REPUBLIC** [2008] KLR 135.

Having carefully examined the evidence on record, we find the conclusion inescapable that the appellant it is that violently killed the deceased. We find the evidence of his own father, PW3, that he called the appellant who answered from inside the house and muttered something PW3 could not make out to be such as placed the appellant squarely at the scene of the crime, which was, moreover, his own dwelling house. We do not accept that PW3 merely made an assumption. On our own analysis, we find no fault and agree entirely with the learned judge's finding that;

> ***"The prosecution has adduced evidence to show that the accused was inside the house when his wife was heard screaming by PW2. The accused remained inside the house as PW2 went to call PW3. When PW3 called the accused, he mattered something inside the house. The prosecution has proved that the accused was in his house from the time his wife started screaming to the time she stopped screaming. Soon thereafter she was found dead together with her month old baby. The prosecution has cogently established that he accused was the last person with the deceased when she was heard screaming, just before her body was found. From the circumstances of the case, there no chance that any other person went o the accused house at the material time and committed the offences."***

Upon close scrutiny of the evidence adduced, we cannot but conclude, as did the learned Judge, that the appellant's alleged alibi defense was unbelievable given the cogent and unshaken evidence that placed him right inside that house of death, coupled with his conduct thereafter that revealed a man unmoved and unfazed by the deadly find in his house. He was not a man cruelly bereaved, but one who had himself dispatched his family. The circumstantial evidence tendered by the prosecution was neither suspicion nor conjecture as contended for the appellant, but compelling in character leading to a proper finding that he

did the deed.

That leaves the question of malice aforethought. With respect to the appellant's learned counsel, malice aforethought in our law is used in a technical sense properly defined under **Section 206** of the **Penal Code** thus;

> "***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 cause 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 a felony."***

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited.

The appeal before us therefore lacks merit and it is accordingly dismissed.

Dated and delivered at Meru this 17th day of December, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR --