IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 67 OF 2014

BETWEEN

BOSCO NDUNGU KINYANJUI ….. APPELLANT

AND

REPUBLIC …….....…RESPONDENT

(Being an appeal from a judgment of the High Court of Kenya at Mombasa: Khaminwa J.) dated 14th November, 2006

in H.C.CR.C. No. 17 of 2002)

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JUDGMENT OF THE COURT

The law regarding the nature and character of proof by circumstantial evidence has been settled by several decisions with the *loci classici* being **R v Kipkering arap Koske (1949) 16 EACA 135** and **Simeon Musoke v. R (1958) EA 715.**

The law requires that circumstantial evidence in a criminal trial be narrowly examined with utmost caution while considering all the circumstances of time, place, means, opportunity and conduct, which point to the suspect as the perpetrator of the crime.

The case against the appellant at the trial rested purely on circumstantial evidence. It was alleged that he had a frosty relationship with the mother who was murdered along with her daughter and shortly before their bodies were recovered the appellant was met leaving the house in which the bodies were; and that his clothes and hands had blood. It was the case for the prosecution that that evidence pointed to him and nobody else as the perpetrator of the heinous crime.

The evidence in this case was presented by three police officers who, respectively took photographs of the scene, investigated the case and escorted the appellant to the hospital for psychiatrist examination as well as the psychiatrist, the doctor who conducted post-mortem examination on the two bodies, an employee of the appellant's mother and the evidence of his siblings. The combined substance of their testimonies was that although their mother, **Anna Wanjiku Kinyanjui**, the deceased in count I loved the appellant dearly, the latter treated her with disrespect, hatred and contempt; that he would insult her, threaten to beat her and indeed on one occasion was found holding her by the throat. He was, because of his behavior towards his mother, viewed by his siblings as the black sheep in the family.

On the morning of 5th June 2001 the deceased in count I was working in her hotel with her eldest daughter, Margaret (PW2), son, Paul (PW1) and an employee, Maluki (PW3) when the appellant came to look for food. The deceased left him at the hotel and returned to the house. After serving himself tea and two pieces of *chapati* the appellant also left for the house. Shortly thereafter two neighbours, **Chengo** and **Murtaza** (not witnesses) came to the hotel to report that the appellant was causing trouble at the house. Margaret, Paul and Maluki rushed to the house only to meet the appellant by the door with blood all over his clothes and hands. Upon being asked what had happened he explained that "*they*" had been attacked by relatives. After this he attempted to escape but was restrained by Maluki, as Paul and Margaret went into the house where they were met with the horrid and grisly sight of their mother and sister whose lifeless bodies lay in a pool of blood in two separate rooms.

IP. Tanui (PW10) led **PC Mwanti** (PW6), **Cpl. Oduor** (PW 7) and other officers to the scene of crime where he re-arrested the appellant and arranged for the bodies to be moved to the mortuary after Cpl. Oduor had taken the photographs of the bodies in relation to the layout of the scene. After conducting post-mortem examination on the bodies **Dr Mwita** (PW8) concluded, from the multiple injuries on the head, with a crushed fracture of the skull exposing brain matter, and a stab wound in the abdomen, that the deceased in count I died of severe head injury due to crushed skull as a result of assault. The deceased in count II also suffered deep lacerated wounds on the frontal-forehead area, on the left eye brow and cheek. These injuries led to severe haemorrhage resulting in her death.

The appellant's mental status was assessed by **Dr. Mwangombe** (PW9) who stated that although he had previously, in 1998 and 1999, examined and found the appellant to be suffering from mental illness for which he treated him, this time around he found him to be of sound mental health. The defence of insanity was not raised and is not even a ground in this appeal.

In his unsworn evidence in defence the appellant denied committing the offence and maintained that he was implicated in the crime merely because he demanded Kshs.5,000 which his brother, **Kamau** (not Paul) owed him; and that he arrived home on the day in question and found a crowd of people who arrested him on allegation that he had killed the deceased persons.

This evidence was presented in a *de novo* trial conducted with the aid of assessors in the High Court (**Khaminwa, J**.), after Commissioner of Assize Tutui, who heard the case initially ceased to exercise judicial authority.

In a scanty summing up which left out several aspects of the case, the learned trial Judge after, correctly indicating that no one witnessed the attack that led to the death of the deceased persons, asked the assessors to bear in mind the ill-will of the appellant towards his mother; that there was no one else at the scene, except the appellant; and that he had blood stained clothes. The learned Judge, in a surprise turn directed as follows:

> ***"The evidence pointed to him as the person who had committed the offences. There was no interviewing (sic) event….. The accused was not drunk that morning and he does not raise that as a defence. Note the guilty intention in murder must be present in order to condemn an accused person. In this case there is evidence of his***
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> ***ill-will towards his mother and other siblings which shows that he had in his mind to do harm to the mother … You have to consider whether his statement in defence is true or at least believable……."***

The assessors, no doubt must have been confounded as we are perplexed by this summing up, which diminished their role as required by the law before the requirement of their participation in murder trials was repealed by Statute Law (**Miscellaneous Amendments) Act of 2007.** It is difficult to see how the assessors were to give their opinion after the court had pre-empted it.

> ***"The opinion of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is***

not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced".

See **Joseph Mwai Kungu v R**, Criminal Appeal No. 68 of 1994. In view of the aforesaid amendments of 2007 no purpose will be served by dwelling on this question more than we have done, save to state that one assessor having been discharged at the stage of the defence, the remaining two gave opposing opinions, with the first one finding the appellant to have "*a case to answer*" while the second one finding him innocent. The learned Judge differed with the last opinion holding without relying on a single authority throughout the judgment that;

"…. The prosecution evidence was overwhelming. The accused was arrested on the scene. He alleged that there was robbery attack. Investigations shown (sic) no such robbery took place…. No one else was found in the compound but him. And the evidence of his relationship with his mother was very bad….. the allegation that he was put in trouble by PW1, his brother over Kshs.5,000/- can only be an afterthought….. There was no one who had opportunity to commit the offence except the accused".

With that she convicted and, without an opportunity to the appellant to offer mitigation, convicted him and sentenced him to death on both counts but holding in abeyance the sentence in respect of count II.

The appellant being aggrieved has brought this first appeal on 8 grounds contained in his home-made memorandum of appeal. Arguing those grounds globally before us **Mr. Ngumbao**, learned counsel for the appellant submitted that the circumstantial evidence relied on was fible and extremely weak; that its total sum only amounted to suspicion; that the relationship between the appellant and his mother only added to that suspicion; and that as a result of that relationship the appellant's siblings despised and implicated him. Counsel submitted that the two witnesses, Chengo and Murtaza, who alerted Paul, Margaret and Maluki of the attack were not summoned to testify. Similarly the bloodstained clothes were not produced in evidence, neither was there a report from the Government Chemist to confirm the source of blood on the appellant's clothes.

Mr. Monda, the Assistant Director of Public Prosecutions, for the respondent, arguing in support of the conviction stated that the circumstantial evidence against the appellant was watertight and simply overwhelming; that the appellant was seen leaving the house where the two bodies were; he was the only person at the scene; he had a bad relationship with the mother, and he tried to flee from the scene. Learned counsel however noted that the appellant was sentenced without an opportunity to mitigate. For this omission he applied that the case be remitted to the High Court for the purpose of taking or recording mitigation and thereafter sentence, or in the alternative that this court should receive it should the appeal be dismissed.

On first appeal we approach these issues as if by way of a retrial, evaluating the evidence on record afresh in order to come to an independent conclusion, without necessarily being bound to follow the trial Judge's findings of fact if arrived at erroneously. But where the question arises as to which witness to believe the court must be guided by the impression made on the trial Judge who saw and heard the witnesses. See **Pandya v R (1967) EA 583**.

We reiterate that the appellant's conviction was based on the following circumstantial evidence; that the appellant disrespected his deceased mother and treated her with disdain and even insulted her once; that after the 1st deceased left her hotel for the house, she was soon thereafter followed by the deceased in a huff, that after Margaret, Paul and Maluki received the news of some trouble in the house they rushed there and immediately upon arrival within 5 minutes, found the appellant coming out of the house where the deceased persons' bodies were; that the appellant's hand and clothes had blood; that there was no one else around; that he wanted to flee; and that nothing was stolen from the house, implying that it was not a case of a robbery.

Applying and bearing in mind the principles we have set out at the beginning of this judgment, can it be said, as was said in the two cited leading cases of **Kipkering** & **Musoke** (supra) that the foregoing

circumstances constitute evidence that irresistibly pointed to the appellant as the perpetrator of the crime with which he was charged, that is, whether the inculpatory facts are incompatible with the appellant's innocence and incapable of explanation upon any other rational hypothesis than that of his guilt. Secondly were there, in evidence, factors or circumstances which would destroy or weaken the inference of the appellant's participation in the commission of the crime?. Irrespective of how Margaret, Paul and Maluki received news of the happenings in the house, they were the first people to get there within a few minutes of the incident. They met the appellant coming out of the house, which was within a wall-enclosed compound with a gate. He was the only person, besides the two bodies, in the compound. It was Paul's evidence that upon entering the house he came across the body of the deceased in Count II moving with a jerk and blood oozing from the head suggesting that the event leading to the fatal injuries had just occurred. The appellant's hand had blood and his clothes were also stained with blood. There was evidence that he himself had no injuries. Although no report was received from the Government Chemist to link the blood to the deceased persons, the appellant's proximity to a bloody scene taken together with his explanation at the time that they had been attacked and based on the conclusion that there was no third party in the vicinity, circumstantially leads to the conclusion that the blood on him could only have come from the deceased persons. When it became clear to him that the truth was about to be discovered, the appellant attempted to run away but was restrained.

Because in all cases of circumstantial evidence the conduct of the suspect is always an important factor, apart from his attempt to escape and bad relationship with the mother, we trace the events of the day which, in our view was the proverbial straw that broke the camel's back. That morning when the appellant went to the hotel and found the mother, Margaret described the encounter as unfriendly as the appellant "*gave my mother a look in a bad way. The look that shows hatred*". Because the appellant was dirty Margaret refused him to go to the kitchen to make his own *chapati* instead of taking those already made by the mother. He was ejected from the kitchen, and being left with no choice, he picked two pieces of *chapati* made by the mother, poured himself tea and when told by Margaret that there was no sugar he carried his cup of tea and *chapati* to the house. When Margaret and the rest got home the next thing she noted after seeing the appellant covered in blood was a broken sugar dish at the verandah. Could this be the immediate link and reason of the attack the appellant having been ejected from the kitchen and denied sugar for his tea?

The totality of these events, which make a complete and unbroken chain of credible evidence leads us to agree with the learned Judge's final determination of the case, that the circumstantial evidence presented by the prosecution, apart from displacing the appellant's defence of *alibi* and disproving the allegation of a debt of Kshs.5,000 to Kamau, pointed irresistibly, positively and unequivocally to the appellant and no other, as the person who committed the cold blooded murder of his mother and sister. We find no co-existing factors or circumstances that would destroy or even weaken the inference of the appellant's guilt.

Regarding mitigation we emphasis the importance of receiving the mitigating circumstances of an accused person even in cases where the only sentence is death. However as stated in **Dorcas Jebet Ketter & Another v R Criminal Appeal No. 10 of 2012**, the failure by the trial Judge to receive mitigating circumstances of the appellant does not go to the merit of the appeal or affect the substance of the case that was before the trial court.

In the result we find no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR