



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & MURGOR J.J.A)

CRIMINAL APPEAL NO. 108 OF 2009

BETWEEN

ELIZABETH MWIYATHI SYENGOAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 29th April 2009

In

HCCRA. NO. 21 OF 2004)

JUDGMENT OF THE COURT

The appellant **ELIZABETH MWIYATHI SYENGO** appeals to this Court against her conviction for the murder of **LENAH MUNYAO**. She also appeals against the sentence of death imposed on her by the learned trial judge (**Lenaola, J.**) on 29.4.09.

The particulars of the charge that led to the appellant's conviction and sentence aforesaid, as contained in the information dated 30.1.0, are that on 27.2.01 at Mwitiki Location in Kitui District of the Eastern Province, the appellant murdered the deceased.

The prosecution case in a nutshell was that on the material morning the deceased, then heavily pregnant, was at her home where she lived with **BENEDICT MUNYAO CHENGO** (PW3), her husband of one year. He had left at 7.00am for Kalinga Primary School where he was a teacher. At about 10.00am, the deceased received a visitor who came not in peace. That visitor, identified by **EUNICE WAYUA MASUMBE** (PW2) as the appellant, was seen coming out of the couple's house in hot pursuit of the deceased. That chase culminated in the appellant wrestling the deceased to the ground before strangling her with her bare hands. The appellant then tied a rope around the deceased's neck before dragging her back to the house while PW2, under threats from the appellant, cowered and left the scene.

When PW3 returned to his home that evening, his wife was missing. The doors were unlocked. The goats were still in the shed while the chickens were in a state of agitation. Everything was in disarray and his home had an eerie air of the abnormal hanging over it. Inside the house he found some items missing. They included a sewing machine, a radio as well as an assortment of the deceased's clothes.

PW3 went to a nearby kiosk where, upon enquiry, he was told by one **KIOKO MWANGANGI** (PW5) that PW2 had informed him about the appellant's assault on the deceased. PW2 confirmed this and a search party was then mobilized. Following drag marks that started at PW3's kitchen, the group reached a small thicket by a stream. There, they found the deceased's body. It was half-naked. Its eyes were gouged out. The whole head was covered in drying blood right into the mouth.

A post-mortem examination was conducted by **DR. JOSEPH MAUNDU** (PW7) who observed that the deceased's neck was deformed and easily twisted in all directions with cracking sounds due to a fracture of the cervical column. The spinal code was severed as a result of strangulation. The cause of death was opined to be cardio-pulmonary arrest secondary to strangulation. The injuries were manually inflicted, save for the eyes that were gouged out by use of some sharp weapon.

The appellant gave sworn testimony in which she strenuously denied any involvement in the killing of the deceased who she denied even knowing. She denied ever being at the scene, dismissing PW2's evidence as pure malice-fueled fantasy. She also explained that her travelling to Taveta shortly after the deceased's murder as a wholly unrelated attempt at going to seek a livelihood for herself and her children.

The learned Judge believed the prosecution case, disbelieved the appellant's defence and proceeded to convict and sentence her as aforesaid, hence this appeal. **Mr. Mogikoyo**, the learned counsel for the appellant abandoned the home-made grounds of appeal first filed by the appellant herself and relied on the memorandum of appeal he filed on 10.10.13 raising the following three grounds, which he argued together;

“1. THAT the learned Trial Judge erred in law and fact in convicting the appellant when the offence of murder was not proved to the required standard in law.

2. THAT the evidence against the appellant was contradictory, unclear and borders on conjecture.

3. THAT the learned Trial Judge erred in law and fact when he rejected the appellant's sworn defence.”

Mr. Mogikoyo started his submissions by asserting that there was no evidence to prove that the appellant killed the deceased and did so while possessed of the requisite malice aforethought. He referred us to the old English case of **WOOLMINGTON Vs. DPP [1935] A.C. 642** where the Lord Chancellor, Viscount Sankey famously remarked that the duty placed on the prosecution to prove the prisoner's guilt represents a golden thread running through out the English Criminal law and no attempt to whittle it down could be entertained. That proof beyond reasonable doubt is the standard to be reached in criminal cases and the burden of it is borne by the prosecution and never shifts to the accused to prove his innocence is, of course, central to criminal justice in this country. See **AJWANG Vs. REPUBLIC [1983] KLR 337**.

Counsel then proceeded to assail the testimony of PW2 which he dismissed as unreliable. Pointing out that the appellant had no reason to return to her former home having parted with PW2, Mr. Mogikoyo submitted that it was inconceivable that such a return as alleged should have been noticed only by a single soul, namely PW2. It was his contention that the deceased not having been an invalid, it was incredible that she neither resisted the attack nor took any measures to defend herself. He then made a sweeping statement which led us to ask him whether he was speaking a truism or merely expressing a personal opinion “It is not possible for one lady to kill another with her bare hands.” He conceded, as he had to, we think, that it was only his opinion he was offering.

In short, Mr. Mogikoyo invited us to find that PW2 was a witness of doubtful integrity. He pointed at two instances in her testimony, one where she had said that she had never worked for the appellant or her husband, and where she had hesitated as to whether she knew someone by the name of Juma as instances qualifying her for disbelief in line with this Court's observations in the case of **NDUNGU KIMANYI Vs. REPUBLIC [1979] KLR 282**.

Counsel concluded his submissions by likening the case before us to **SAWE Vs. REPUBLIC [2003] KLR 364** decided by this Court. He submitted that this was a case of circumstantial evidence that did not warrant a conviction. He stated that the circumstances including the appellant's apparent flight to Taveta, which he contended was a coincidence, did not raise above suspicion and suspicion is not enough to found a conviction.

On her part, **Ms. Nyamosi**, the learned Assistant Director of Public Prosecutions contended that there was ample proof beyond reasonable doubt that the appellant did kill the deceased with malice aforethought within the meaning and intendment of **Section 206** of the **Penal Code**.

Ms. Nyamosi answered the appellant's criticism of PW2 by stating that she was a witness of truth, a star witness for the prosecution. Counsel submitted that the witness may have faltered but she was truthful and remained unshaken in the crucial aspects of her testimony even under intense cross-examination. On whether a woman can strangle another to death, Ms. Nyamosi pointed out that her learned counterpart was no expert in these matters before herself offering that the deceased had been weakened and rendered vulnerable by 7 months of gestation, making it the easier for the appellant to curtail her attempts at flight for her life, and thus overpower her. Counsel dismissed as farfetched the suggestion that any other person could have been the killer and was categorical that the evidence against the appellant was based, not on suspicion, but on compelling circumstantial evidence as well as the testimony of an eye-witness in PW2.

We are satisfied from the nature of injuries that were 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 a felony.”***

As to the question whether the appellant was the culprit, argument on her behalf is that the eye-witness evidence is weak being that of a single witness and even then a not so reliable one. The law is that there is no requirement that any fact be proved by a multiplicity of witnesses. It has indeed been said by this Court to be trite law that a fact may be proved by the testimony of a single witness (See **RORIA Vs. REPUBLIC [1967] E.A. 583** and **MATANYI Vs. REPUBLIC [1986] KLR 198**). A court, of course, exercises the appropriate and necessary degree of caution whenever it is called upon to base the conviction of an accused person on the evidence of just one witness. The court must be satisfied that in all the circumstances of the case the particular witness is truthful and his or her evidence worthy of belief.

It is this circumspection that Mr. Mogikoyo had in mind when he attempted to show that PW2 is not a witness to give the court comfort enough to convict or to uphold a conviction. With respect to counsel, we do not think PW2 herein is a witness in the category and character depicted in **NDUNGU KIMANYI** as one who creates an impression in the mind of the court that he is not a straight forward person or raises a suspicion about his trust worthiness, or does (or says) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his

evidence.

The witness in that case had properly been described thus;

“The complainant was not a virtuous virgin. A man of loose conscience; on a previous occasion also had been involved in a swindle operation for making easy money when he lost Sh. 40,000.”

In our case PW2 was a rural woman of over seventy years whose only sin appears to have been her easy simplicity. Her lack of sophistry is a quality to be noted, if not admired, and definitely not one that would justly invite the criticism leveled at her testimony. On our own careful perusal of the record, we are satisfied that PW2 was a trustworthy witness. She saw the appellant’s brutal and merciless strangulation of the deceased followed by a rather chilling dragging by rope as one would drag an animal or a carcass. She, being old and threatened by the appellant, could not come to the deceased’s help. She was not in any way mistaken regarding the identity of the killer who was someone she knew well. Shortly, indeed minutes, after the shocking incident she did confide in PW5 all that she had seen. She repeated the same to PW3. The subsequent gory find following a search confirms the truthfulness of what she told the two and which she recounted before the trial court.

Strictly speaking then, the case is not one of purely circumstantial evidence. The **SAWE** case can therefore be easily distinguished on the basis that whereas in **SAWE** nobody saw what happened in that house of death, here we have an eye witness who saw the appellant brutalizing the deceased. Besides the eye witness testimony, there were other surrounding circumstances that all pointed to the appellant as the killer. Notwithstanding the appellant’s denial, she did in fact know the deceased and had in the year 2000 threatened to beat her as testified to by PW3, the deceased’s husband. When the police, including **CPL. STANLEY MONORE** (PW6), went to the appellant’s home the very night following the murder, they found that the deceased had left in the dead of night. That flight so soon after the murder, and under cover of darkness, is not consistent with innocence. The appellant’s settling at Taveta is hardly an innocent attempt to eke out a living at a far away place. Rather, it was a flight from justice and not the act of an innocent.

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 unhesitating 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.

In the result this appeal is bereft of merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 17th day of January, 2014.

J.W. MWERA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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