IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM. KOOME & ODEK. JJ.A.)

CRIMINAL APPEAL NO.111 OF 2013

BETWEEN

STEPHEN NJAGI IRERI ………………………………… APPELLANT

AND

REPUBLIC ……………………………………………….. RESPONDENT

(An appeal from the judgment of the High Court at Embu (Ong'undi, J) dated 29th March, 2012

in

H.CR.C NO. 21 of 2009)

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JUDGMENT OF THE COURT

1. ***Stephen Njagi lreri***, the appellant, was jointly charged with Mary Wanja Njiru with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** in the High Court at Embu. The particulars of the offence were that on 15th September, 2009, at Kitharo Village, Gikiiro Sub-location in Mbeere District within the then Eastern Province, the appellant and his co-accused murdered one Peter Nyaga Ngari.

2. The appellant and Mary Wanja Njiru (Mary) are husband and wife. They pleaded not guilty to the charge. The prosecution called a total of eight witnesses in support of its case. It was the prosecution's case that on 15th September, 2009 at around 9:30 p.m. after PW2, Felista Nyaga (Felista) and her husband, Peter Nyaga Ngari (deceased) had supper outside their house, Felista went into the house to prepare the bed for the deceased. As she was coming out of the house, she saw the appellant and his wife approaching their compound armed with a panga and a jembe stick respectively. The appellant and his wife demanded money from Felista for the miraa the deceased allegedly stole from them. It was Felista's evidence that earlier that day, the appellant and his wife had complained that the deceased had stolen their miraa and the issue was settled. Felista testified that when Mary began beating her, the deceased and herself ran in different directions; Mary ran after her while the appellant ran after the deceased; Mary continued beating her until she fell on the ground. Thereafter, Mary ran after the appellant. Felista stated that she did not see the deceased being beaten but she heard him screaming. The deceased did not go back home that night. The following morning Felista was informed by a neighbour that her husband had died and his body was lying in a neighbour's farm. Felista went to the scene and

confirmed that her husband had died. It was Felista's evidence that she knew the appellant and his wife prior to the incident because they were relatives and neighbours. Felista was able to identify the appellant and his wife with the help of the cooking fire that was outside the house. The matter was reported to the police station.

3. **PWl**, Lucy Wanini (Lucy), the appellant's sister, gave evidence that the deceased was her cousin. She testified that on 16th September, 2009 while she was at home policemen came and inquired about the whereabouts of the appellant and his wife. The appellant and Mary had gone to fetch water. Lucy learnt that the police were looking for the appellant and his wife because they were suspects in the murder of the deceased. Upon their return, Lucy informed the appellant and his wife that the police were looking for them. It was her evidence that the appellant and Mary subsequently disappeared for a while.

4. It was PW4's, PC Florence Muthoni (PC Florence), evidence that on 3rd October, 2009, while she was on duty at Kiritiri police post, the area chief brought Mary to the police post and she was placed in police custody. On the same day PW5, PC Weldon Tergechi (PC Weldon), received information about the appellant's whereabouts. The appellant was arrested within Gikiiro Sub-location. PW7, Dr. Joseph Thuo (Dr. Thuo), examined both the appellant and the deceased and found them to be mentally fit to stand trial. PW6, Dr. Stephen Mwangi (Dr. Stephen), conducted post mortem on the deceased's body and found that the deceased died as a result of cardio vascular arrest due to massive head injuries. He testified that injuries were caused by a combination of sharp and blunt objects. The appellant and Mary were subsequently arraigned in court and charged with the offence.

5. In his defence, the appellant gave an unsworn statement. He testified that prior to his arrest he was a farmer and businessman; he used to sell miraa at Mwea. On his business; he returned home at around 7:00p.m; he ate supper with his wife and slept. He testified that on 16th September, 2009, he went to sell miraa at Mwea and returned at around 7:00 pm when his wife informed him that the deceased's body had been found in a neighbour's farm. Thereafter, the deceased was buried. On 3rd October, 2009, while he was at Mwea, the appellant received a telephone call from his customer informing him that his wife had been arrested. The appellant went to Kiritiri police post to find out what had happened. At the police post, the appellant asked to see his wife but he was placed in custody until 6th October, 2009, when he transferred to Embu Police Station. He denied committing the offence he was charged with.

6. On the other hand, Mary gave a sworn statement in her defence. She testified that she used to sell second hand clothes at Mwathire-Kiritiri. On the morning of 15th September, 2009, she went to Gikomba in Nairobi to purchase second hand clothes and came back to Embu at around 5:00 p.m. She stated that she arrived at her house at around 6:00 p.m and started preparing supper; her husband, the appellant, arrived at around 7:00p.m and they ate together and went to sleep. The following day she went to sell the second hand clothes and she learnt that the deceased had died. Subsequently, on 3rd October, 2009, while she was at work, a man told her that he had heard a report about her at the police station. Mary in the company of the said man went to the police station. She was arrested and placed in custody. She denied committing the offence.

Being satisfied that the prosecution had proved its case, the trial court convicted both the appellant and his wife for the offence of murder. After considering mitigation by the appellant and Mary and the social inquiry report made in respect of Mary, the trial court sentenced the appellant to death and placed Mary on 3 years probation. It is that decision that has instigated this appeal based on the following grounds:-

- ***The learned Judge erred in law in finding that the prosecution had proved its case beyond reasonable doubt yet there was no cogent evidence to support such a finding.***

- ***The learned Judge erred in law by failing to find that the evidence adduced by the prosecution witness has glaring inconsistencies and contradictions such that it was not safe to convict on.***

- ***The learned Judge erred in law and in fact in that contrary to the provisions of***

Article 27 of the Constitution she discriminated against the appellant in that she meted out a fairer sentence against the appellant's co-accused as opposed to the sentence meted out against the appellant.

- ***The learned Judge erred in law in meting out a sentence that was too harsh in the circumstances.***

8. Mr. Njunguna, learned counsel for the appellant, submitted that the trial court did not properly evaluate the evidence on record. He stated that PW1 testfied that she did not see the appellant beat the deceased; PW2 testified that she was beaten by the appellant's wife and both her and the deceased ran in opposite directions.

According to Mr. Njunguna it was not clear from PW2's evidence exactly when she saw the appellant. Mr. Njunguna submitted that the evidence of PW2, and the investigating officer were contradictory. In that PW2 testfied that she never saw the appellant beat the deceased while the investigating officer, PW8, testfied that PW2 saw the appellant beat the deceased. He contended that due to the contradictions in the evidence it was not safe for the trial court to convict the appellant.

9. Mr. Njunguna maintained that despite PW2 alleging she had been assaulted, there was no evidence tendered to support the allegation. He further maintained that there was no evidence to support the finding that the appellant had gone into hiding since he was arrested within the vicinity of the scene. He argued that the circumstances of the appellant's identification were unclear and not conclusive.

10. Mr. Njunguna submitted that there was discrimination against the appellant on the issue of sentencing. This is because despite the fact that both Mary and the appellant gave their respective mitigation, the appellant was sentenced to death while Mary was placed under probation. According to him, the sentence issued was discriminatory and contrary to Article 27 of the Constitution. He urged us to allow the appeal.

11. Mr. lsaboke, Senior Prosecuting Counsel, in opposing the appeal, submitted that the appellant did not exonerate himself from the scene of crime. He stated that the evidence of PW2 clearly connected the appellant with the assault of the deceased. This is because PW2 saw him carry a panga and his wife carry a stick; it was the appellant who chased the deceased. Mr. Isaboke contended that the injuries that were sustained by the deceased could only have been inflicted by the weapons the appellant and his wife were armed with. According to Mr. Isaboke, the appellant's conduct also pointed to his guilt because he disappeared for about two weeks after the incident.

12. On the issue of sentencing, Mr. Isaboke stated that sentencing depended on what each accused person did; there was no evidence that Mary caught with the deceased and inflicted injury upon him. He maintained that the appellant was handed the mandatory sentence for the offence of murder.

13. This being a first appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In ***Okeno -vs- Republic, [1972] E.A.32*** it was held:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a wholeto be submitted to afresh 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 findings 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. Sundav. Post, [1958] E.A.424."***

14. We have considered the record, the grounds of appeal, submissions by counsel and the law. We are of the considered view that the following issue arise for our determination:-

- ***Did the prosecution prove to the required standard the guilt of the appellant?***

- ***Was the sentence meted out to the appellant in violation of his rights under Article 27 of the Constitution?***

15. In considering whether the prosecution had proved its case, we have to re-evaluate the evidence on record to determine if the same supported the conviction of the appellant. Counsel for the appellant submitted that the evidence of Felista and the evidence of the investigating officer, PW8, were contradictory. Felista testified that she did not see the appellant beat the deceased while PW8 testified that Felista had seen the appellant cutting the deceased with a panga. Section 382 of the ***Criminal Procedure Code*** provides;

> ***"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The test for making a decision on cases with discrepancies is established in the court of appeal **case** ***Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*** **Tunoi, Lakha and Bosire JJ.A., held:-**

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

We are of the considered view that despite the discrepancy in the evidence of the investigating officer the same did not cause miscarriage of justice and is curable under ***Section 382*** of the ***Criminal Procedure Code***. This is because from the record it is clear that Felista maintained that she did not see the appellant assaulting the deceased and that was the position the trial Judge took in making her decision.

16. It was Felista's evidence that on the material night after having supper with the deceased outside the house, she went in the house and prepared the bed for him. When she came out she saw the appellant and his wife approaching; she recognized them using the fire that was outside the house. The appellant contends that the identification evidence was not safe to warrant his conviction. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. ***In Wamunga -vs- Republic (1989) KLR 424***, this Court held,

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfiedthat the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

17. In this case the incident took place at around 9:30 p.m. Felista testified that she had known the appellant for many years prior to the incident and that he was her neighbour. She further stated that she was able to recognize the appellant using the fire that was outside. In her evidence, Felista described the

fire as a big fire.

The evidence of identification at night must be tested with the greatest care using the guidelines in ***Republic - v- Turnbull. (1976) 3 All ER 549*** and must be absolutely watertight to justify conviction. In ***Maitanyi -vs- Republic (1986) KLR*** 1986, this Court in, holding that an inquiry as to the nature of light is essential in testing the accuracy of evidence of identification held,

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight.... It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into...' See Wanjohi & Others -vs- Republic (1989) KLR 415."***

18. We find that the learned Judge did evaluate the nature and intensity of the light which Felista used to recognize the appellant. We concur with the following findings by the learned Judge,

> ***"I have assessed the evidence of PW2. The big fire outside their house would give sufficient light to enable her identify the people they were dealing with."***

Further, this was a case of recognition since the appellant was known to Felista prior to the incident. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

> ***"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

19. ***In Maitanyi -vs- Republic (supra),*** this Court held,

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."***

We find that when Felista reported the incident she gave the appellant's name as one of the assailants. We agree with the following finding by the learned Judge,

> ***"This clearly confirms that when PW2 went to the police to report the incident she gave the names of the accused 1 (appellant) and accused 2 and that's why the police were looking for them the same day the body had been found."***

Based on the foregoing we find that the appellant was positively identified as one of the assailants.

20. Having perused the evidence on record, it is clear that there was no eye witness as to what happened when the appellant ran after the deceased. The evidence against the appellant was circumstantial. In **Mwita -vs- R.(2004) 2 KLR 60, 66**, this Court stated:

> ***"It is trite law that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt (See Simon Musoke -v- R 1958 EA 715)."***

In ***Mwangi- vs- R, (2004) 2 KLR 28***, the Court said:

> ***"It must be asked, why is the Court of Appeal looking at each circumstances separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."***

21. We pose and ask ourselves; is there a chain or concatenations of events linking the appellant and the deceased's death? Is this chain and link of events uninterrupted? Is there credible evidence that the appellant was not only the last person to be seen alive with the deceased but also the person who killed the deceased? It was the prosecution's case that earlier on the day of 15th September, 2009, the appellant and his wife had accused the deceased of stealing miraa from them and the issue was resolved. Thereafter, at around 9:30p.m the appellant in the company of his wife went to the deceased's home demanding money for the miraa which was allegedly stolen; the appellant and his wife were armed with a panga and stick respectively; the appellant's wife began beating Felista and the deceased ran away. The appellant followed the deceased and Felista heard the deceased screaming. The following day the deceased was found dead. Upon a post mortem being conducted, Dr. Stephen found that he died of cardia vascular arrest due to massive head injuries. The doctor also found that the injuries were caused by a combination of sharp and blunt objects. Based on the aforementioned evidence, we find there was a chain of events linking the appellant to the deceased's death. The chain of events was uninterrupted. Further, the injuries sustained by the deceased were caused by blunt and sharp objects which were consistent with the weapons the appellant and his wife had. We also find that the appellant's conduct clearly pointed to his guilt. This is because the prosecution gave evidence which was not contradicted that he disappeared for a period of two weeks when he was informed that the police were looking for him. We find that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis than the appellant killed the deceased.

22.Having expressed ourselves as above, was the offence of murder proved against the appellant? For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought. (See ***Nyambura & Others-vs- Republic*, [2001] KLR 355)**. In this case as correctly held by the learned Judge the deceased died as a result of injuries which were inflicted by the appellant. The issue in question is whether the appellant had the requisite intention/ malice aforethought to kill the deceased by inflicting the said injuries.

23. Instances when malice aforethought is established is provided in ***Section 206*** of the ***Penal Code:***

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-***
>
> 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."***

24. We find that the appellant had the necessary intention to do grievous harm to the deceased based on

the fact that on the material night he went to the deceased's house armed. This is evident from the fact that the appellant followed the deceased even after the deceased ran away from him. The evidence of the doctor on the nature of injuries sustained by the deceased irresistibly points to a continuous brutal attack on the deceased by the appellant and his wife. In ***Ekaita-vs- Republic*. (1994) KLR 225**, this Court at page 230 held,

> ***"For the purposes of this appeal, where the accused knows that there is a serious risk that the death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not..'***

See also ***Nzuki- vs- Republic*. *(1993) KLR 171***. We are of the considered view that malice aforethought on the part of the appellant was established. We find that the learned Judge correctly convicted the appellant for the offence of murder.

25. On the issue of sentencing, we find that the appellant has not established that his rights under ***Article 27*** of the ***Constitution*** have been violated by the different sentences meted to him and his wife. This is because firstly, criminal responsibility is individual and secondly, there was no cross appeal filed in respect of his wife's conviction and sentence. Further, the learned Judge issued the death sentence prescribed under ***Section 204*** of the ***Penal Code***. We find that the said sentence is lawful and see no reason to interfere with the same. See this Court's decision in ***Joseph Njunguna Mwaura & 2 Others -vs- Republic, Criminal Appeal No.5 of 2008.***

26. The upshot of the foregoing is that we find that the appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR