IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 17 OF 2013

BETWEEN

ATHUMAN SHUSHE BAHOLA.....APPELLANT

AND

REPUBLIC..... ….....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Omondi, J.) dated 20th September, 2009

in

H.C.Cr.A. No. 9 of 2010)

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JUDGMENT OF THE COURT

Athumani Shushe Bahola ("the appellant") and ***Fatuma Ali ("the deceased")*** had been a couple since 2001. Whereas the appellant was the husband, the deceased was the wife. The appellant is alive but the deceased is no more. The circumstances under which the deceased met her death is the subject of this appeal. Like any other marriage, theirs was not a bed of roses. It suffered from turbulence every now and then, leading to their parting of ways a year or so before the deceased met her death. Nonetheless it had been blessed with one issue.

On 8th January 2008 at about 8.00 a.m. the deceased talked to her father, ***Ali Maru Guyo (Ali)*** regarding a dispute she was having with the appellant and which she had sought the intervention or arbitration by the Provincial Administration to wit, the Assistant Chief for the area. She already had an appointment with the local chief over the dispute and was enroute. Ali pleaded with her not to go alone. He would have wanted to accompany her but for the hospital appointment that morning. Exasperated, the deceased told Ali, ***"Father let me just go".*** The deceased had earlier on 3rd January, 2008 been to see the area Chief ***Habiba Kawalu Maro(Habiba***) complaining that whenever she met the appellant since their separation, he would insult her, and whenever he got to learn of her intended suitor, he would confront and harass him. Having listened to the complaint, ***Habiba*** advised her to come back on 5th January, 2008 when she would have summoned, the appellant so that she could listen to both of them. However on that day the deceased failed to turn up. Habiba then referred the dispute to the area Assistant Chief, ***Abbas***

Koha Maro (Abbas). Eventually on 8th January, 2008, ***Abbas*** presided over the dispute with the aid of two elders. The deceased reiterated that the appellant kept insulting and assaulting her whenever they met despite living apart. The appellant defended himself. At the end of it all, the appellant was warned to desist from insulting the deceased or interfering with her relationships with other men. During the proceedings, it emerged that each one of them had concerns over the only issue of their marriage, a girl who had been left in the custody of the appellant. The deceased claimed that the child was being mistreated and would be assaulted by the appellant whenever she visited the deceased. She was forced to prevail upon the child not to visit her so as to avoid the beatings. When Abbas informed the appellant that the child was within her right to visit each of the parents, the appellant suddenly became furious and threatened to kill the child. The threat was conveyed in these terms:-

"That issue of the child visiting the mother is what

I will now finish the child over...."

Informed by Abbas that the threat had legal implications, which he was willing to take up with appropriate authorities the appellant immediately recanted and apologized. The proceedings ended at about 10.30 am and every one went their separate ways.

Ali came back from hospital at about 11.00 a.m. and on asking his wife whether the deceased had come back from seeing Abbas, he was told that she had not returned. Immediately ***Ali*** contacted Abbas and informed her that the deceased had not returned home from the time she left his office. Abbas got alarmed and rang Habiba and informed her what had transpired. It would appear that after Abbas had presided over the dispute aforesaid a young man by the name of Maro ***Paul Timona (Maro)*** had rushed to her and reported that he had met the appellant and the deceased on the way and from his observations, things did not look well. Abbas's response was that since he was headed for Hola, the same direction in which the deceased and appellant were headed, he would look out for them. Alas, he never saw them along the way.

Maro knew both the appellant and deceased very well. He had been a schoolmate, as well as classmates of the deceased at Rafili primary school. He knew the appellant too as he had gone to school with his elder brother at Madogo Secondary School. On the material day, he was on his way to Baholi from Malinangire when he met with the deceased whom he greeted and walked on. Suddenly, he saw someone emerge from the bush, check the road and go back into the bush. After about two paces, the same person resurfaced and when Maro turned back, he saw the person and recognised him as the appellant. He was holding a pair of blue sandals and a metal rungu in his hand. Maro already knew about the dispute between the two and how it had been resolved. Fearing for the worst for the deceased, he opted to report his fears to Abbas.

Since neither the appellant nor the deceased had returned to their respective homes, Habiba reported to Hola police station about the missing pair. Meanwhile villagers organised themselves into search teams led by Habiba and Abbas. Among the search teams were ***Shehe Hidavo Badhul (Shehe) Ramadhan Muda Jillo (Ramadhan)*** and ***Ali Hidaho Malata (Hidaho)***. Incidentally, ***Ramadhan*** had the previous day at about 5.00 p.m. met with the appellant at a place called Makere. Being fellow villagers, they exchanged greetings and rode on their bicycles in the opposite directions. However, Ramadhan could not fail to notice that the appellant appeared tired and was riding his bicycle slowly. The next day when he met and joined one of the search parties he confided in them his encounter with the appellant.

The search for the deceased went on for three days. On the 11th January, 2008 following a strong and foul smell, one of the search parties that included Habiba and Abbas, traced it to the body which turned out to be that of the deceased. The body was difficult to identify as the eyes had been gouched out and, the nipples and legs chopped off. It appeared as though the body had been dragged from where it had been initially burried, probably by an animal(s) upto the spot where it was found. Abbas and the search team retraced the route and saw a shallow hole. It seemed like

the body which was naked had been dragged from that hole where it had been covered with twigs. There were clothes belonging to the deceased next to the hole. The police, scenes of crime Personnel and a doctor for purposes of conducting a post mortem were contacted. Because of the bad condition of the body, as it was decomposing with maggots all over, it was decided that the post mortem and burial be conducted at the scene. ***Dr. Maurice Buni (Dr. Maurice*)** in his post mortem report noted that both legs were missing, the right knee was mutilated up to the level of the knee joint with exposed distal femur, the left lower limb was mutilated at the level of mid thigh. There were also multiple wounds on both upper limbs with bite marks, three penetrating wounds on the left side of the chest, wounds were similarly noted on the right pareatal region. Internally, she had three left-side penetrating chest wounds and blood clots. The head had multiple wounds in the occipital region. The cause of death was stated by Dr. Maurice to be cardio pulmonary arrest, due to stabbing by a sharp object.

As all these was going on, the appellant suddenly resurfaced in his homestead. Acting on the information, Abbas accompanied by a police reservist visited the appellant. He was asked the whereabouts of the deceased and in response, he claimed that he did not know. A crowd started to gather and sensing that the appellant may well be lynched, Abbas spirited him away to safety in his house. He eventually handed him over to ***P.C. Pius Muli (PC)*** of Hola police station. Upon further investigations by ***I.P. Johana Ekidor (I.P. Johana)*** the appellant was subsequently charged with murdering the deceased. The information charging the appellant with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code was to the effect that:-

"ATHUMANI SHUSHE BAHOLA: On 8th day of January, 2010 at unknown time at Bononi village, in Laini Location within Tana River District of the Coast Province, murdered FATUMA ALI....."

The appellant denied the information and in his unsworn statement of defence stated that on 8th day of January, 2010, Abbas visited him in the morning and requested him to accompany him to his office. At the office he found the deceased whom he greeted. The deceased presented her complaints against him before Abbas in the presence of two other elders. He denied the allegations. After deliberation the duo were advised to forget the past, forgive each other and continue with their separate lives. They agreed and as a sign of peace, shook hands and left the venue at 10.30 a.m. He then went home and to the farm where he worked until about midday, came back, had lunch and rested. At about 2.30 p.m. He left for his "boda boda" business. A passenger approached him and requested to be taken to Alango Gugurani village. Midway, his bicycle broke down and they were unable to continue with the journey. The pillion passenger proceeded on with the journey on foot. This was about 5.00p.m. Since he could not have the bicycle repaired that evening he opted to spent the night until the next day. The following day, he had the bicycle fixed and returned home arriving thereat in the afternoon. Just as he was being served with late lunch, Habiba and Abbas confronted him and asked him where he had been. They were not satisfied with his explanation as above and ordered him to accompany them to Habiba's office. At about 5.00 p.m. he was re-arrested by ***P. C. Pius*** and taken to Hola police station. Subsequent thereto he was arraigned at the High Court of Kenya at Malindi on an information charging him with murder. He emphatically denied having a hand in the death of the deceased.

The learned judge having carefully evaluated and analysed the evidence of the prosecution and defence, returned a verdict of guilty against the appellant and after listening to mitigation, sentenced him to death. The appellant was aggrieved by the conviction and sentence and instantly lodged this appeal in person on eight grounds to wit:-

" 1. That the learned trial judged erred in law and fact by meting out a death sentence when the evidence given by the prosecution witnesses was uncorroborated.

2. **That the learned trial judge erred in law and fact by sentencing me to death when none of the prosecution witnesses saw me committing the crime.**

3. **That the learned trial judge erred in law and fact by meting out the death sentence when no exhibit or weapon used in murdering the deceased was brought to court.**

4. **That the learned trial judge erred in law by not considering the evidence given by P.W.3 and P.W.4.**

5. **That the learned trial judge erred in law by relying on a charge sheet that was defective.**

6. **That my fundamental rights were grievously violated hence did not get a fair trial right from police station.**

7. **That the learned trial judge erred in law by relying on report from post mortem from whose evidence was not conclusive.**

8. **That the trial judge erred in law by not considering my unsworn defence. ”**

When the appeal came before us for plenary hearing on 2nd December, 2013, ***Mr. Alando,*** learned counsel for appellant adopted the above grounds of appeal and argued them globally. He submitted that the appellants conviction turned on on circumstantial evidence which did not meet the legal threshold. That what was on record was mere suspicion of the appellant and such suspicion cannot form the basis of a conviction. Though Maro talked of suspicious conduct of the appellant when they met, he did not endeavour to explain what was it about the appellant's conduct that aroused his suspicion. Counsel further submitted that if indeed the appellant was bent on killing the deceased, he could not have attended the reconciliation meeting before ***Abbas***. Counsel went on to submit that ***Maro's*** evidence on identification of the appellant was contradictory and hence unrealiable. Finally, counsel submitted that malice aforethought had not been established and that the conduct of the appellant in attending the reconciliation meeting ruled out such possibility.

Responding, ***Mr. Muteti,*** Senior Principle Prosecution Counsel submitted that the conviction of the appellant turned on circumstantial evidence. The evidence led at the trial left no doubt in the mind of the court that it was the appellant who murdered the deceased. It was common ground that the deceased and appellant met with Abbas then left. They both never returned to their respective homes. Abbas gave evidence suggestive of *mens rea*. The appellant was clearly out to kill the child which act he subsequently transferred to the deceased. That was malice aforethought. Counsel further submitted that the appellants disappearance from his home was not an innocent act but had everything to do with the killing of the deceased. Finally, counsel submitted that Maro's evidence connected the appellant with crime. He saw the appellant following the deceased on the road in a suspicious manner whilst armed with a rungu. This was evidence of recognition. This was midmorning when conditions for recognition were ideal. Counsel conceded that indeed there were contradictions in the prosecution evidence, but the contradictions were so minor and did not go to the root of the prosecution case.

These are then contrasting positions canvassed before us upon which this appeal may succeed or fail. However, before we delve in the merits or otherwise of the appeal we must, remind ourselves of our sacred duty as a first appellate court. Although the duty has been restated many times, we consider it all the same useful to set it out lest we forget it, which has over the years served as an important step in the administration of criminal justice by this court. Our duty is to reconsider the evidence which was before the trial court, evaluate the same and draw our own conclusions and at the same time give due allowance for the fact that we have neither seen nor heard the witnesses. In a nutshell, we should turn this appeal into a retrial, however without the benefit of the presence respective witnesses. See ***OKENO v REPUBLIC (1972) E.A. 32.***

We have carefully and anxiously considered the information laid before the trial court, the evidence adduced in support thereof, the judgment of the trial court, the grounds of appeal, the able

submissions by respective counsel and finally, we have as we must, considered the law. It is common ground that the conviction of the appellant turned on the application of circumstantial evidence for none of the witnesses called testified as to witnessing the appellant actually kill the deceased.

The law as regards the principles upon which a court can rely on circumstantial evidence to convict an accused person are basically well settled. In the often quoted case of ***REX v KIPKERING ARAP KOSKEI*** & ***ANOTHER (1949) VOLUME 16 AT PAGE 135,*** the Court of Appeal for Eastern Africa, held as follows:-

"(1) That 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 reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

This legal Principle was updated again by the Predecessor to this court in its decision in the case of ***SIMON MUSOKE v R (1958) E.A.715*** when it quoted extensively, with approval, the decision of the privy council in ***TEPER v R (2)*** (***1952***) ***AC 480*** where that court held.

"It is also necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference"

Reiterating the basis for receiving and acting on circumstantial evidence, this court in the case of ***KARIUKI KARANJA v REPUBLIC (1986) KLR 190*** reiterated that:-

"In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts justifying the drawing of that inference is on the prosecution."

It is now even said that circumstantial evidence if properly examined and appreciated is perhaps the best evidence ever.

Our keen examination of the record reveals that the trial court relied on the following pieces of evidence, circumstantial or otherwise to convict the appellant:-

- **The hostility that remained and persisted between the deceased and appellant despite their parting of ways which necessitated the intervention of the local administration.**
- **The appellant and the deceased left Abbas's office together.**
- **Both the deceased and appellant never returned to their respective homes that day.**
- **Maro met both the deceased and appellant headed the same direction in the morning hours.**
- **During the encounter Maro noted the suspicious conduct of the appellant as he moved in and out of the forest whilst armed with a metal rungu,**
- **The setting presented the appellant with the opportunity to attack and injure the deceased.**
- **Following the disappearance of the deceased the appellant too disappeared only to**

resurface the following day in the afternoon.

- **Then there was the fact that the body of the deceased seemed to have been placed in a natural depression on the ground, which had then been covered by twigs. Of greater significance was the manner in which the clothes had been piled in a heap just next to the hole where the body had initially been deposited. This ruled out the possibility of the deceased having been mauled by wild animals a theory advanced by the appellant. No animal could have attacked the deceased, undressed and killed her and thereafter arranged her clothes neatly in a pile and placed them next to the hole, the learned trial judge surmised.**

- **Finally the injuries observed on the body of the deceased could only have been inflicted by a human being and not animals.**

Counsel for the appellant has maintained that the above pieces of circumstantial evidence do not meet the legal threshold. Going by the legal threshold set out in the authorities we have cited we are unable to agree with this submission by counsel. The conduct of the appellant prior to, at and after the reconciliation meeting was not that of an innocent person. The appellant was not happy at all that the deceased had ditched him. He made it known to all and sundry, that despite their separation, the deceased was forever his. He was prepared to fight whoever tried or attempted to replace him in the deceased's heart of hearts. He was all too willing to involve their only issue of marriage in this theatre of the absurd. The learned magistrate took the view that this may have provided the motive for the appellant to kill the deceased. That the appellant took the position that if he could not have the deceased to himself, no one else should. The State too took the same position as providing the motive for the appellant to end the deceased's life.

Before us, counsel for the appellant maintained that if the appellant had the motive to kill the deceased, he could not have attended the reconciliation meeting. Let us hasten to state that motive is generally irrelevant as regards criminal responsibility. ***Section 9(3)*** of the penal code provides *inter alia:-*

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intent is immaterial so far as regards criminal responsibility..."

In other words the prosecution does not have to prove motive for the commission of any crime and evidence of motive is not sufficient by itself to prove the commission of a crime by the person who possesses the motive. See ***OGETO v REPUBLIC (2004) 2 KLR 145.*** In our view rather than looking for motive in the appellant's conduct, the trial court should have treated the said conduct as part

of the circumstantial evidence.

This unbecoming conduct of the appellant towards the deceased, forced the deceased to take up the matter with the local administration. The two were then summoned so that the dispute could be arbitrated upon and resolved. It is common ground that the meeting took place and the proceedings were not at all harmonious. At some point the appellant became so agitated that he threatened to kill their only issue of the marriage, if the deceased persisted in resolving the custody of the issue in her favour. It was only after ***Abbas*** threatened legal sanctions against him that the appellant calmed down. But this was calm before the mighty storm.

As the trial court appropriately observed

"His claims that they were daily (sic) reconciled by the chief were a gimmick to camouflage his intention and deep resentment..... Even though there is evidence that he apologized, I think this was simply cosmetic. .. So the only person who had exhibited open hostility and

even aggression towards the deceased was the accused.....”

So that by the time the appellant was leaving the stage, he was still enraged.

This is the rage which turned into transferred malice to the deceased as ***Mr. Muteti*** correctly submitted.Therein lies the malice aforethought.

Although the evidence on record is not clear as to how the appellant and deceased parted company from the reconciliatory meeting, it does however appear hat they left headed in the same direction. That will explain their encounter with Maro shortly thereafter. Maro knew the appellant and deceased very well.

Indeed he knew them from childhood. This fact was not disputed. Their encounter was in broad daylight and on the road. Accordingly his recognition could not have been mistaken as conditions were perfect. Indeed he even described how the appellant was dressed, armed and what he was carrying.

However what alarmed Maro whose evidence was not seriously challenged by the appellant was the manner in which the appellant was conducting himself. Though he was a few steps, indeed four steps behind the deceased, the appellant kept jumping into and out of the bush along the road as though he was waiting for an opportune moment to strike. Alarmed at this conduct, Maro immediately reported to one, Issa whom he bumped into . It is instructive that this Issa was one of the elders who had presided over the reconciliation meeting earlier between the deceased and the appellant. It was then that Issa advised Maro to report his fears to Abbas. He suspected that something nasty would happen as a result of the dispute that they had just handled. This is how Abbas came by the information that the deceased had last been seen with the appellant in tow.

It is also common ground that three days later the badly decomposed body of the deceased was discovered. From the witnesses who discovered the body, it was naked, had a blow on the forehead, stab wounds all over, limbs had been chopped off and eyes gouged out. Clothes which were soaked in blood had been folded neatly and placed next to the body and covered with twigs. This was the basis upon the theory advanced by the appellant that the deceased may have been a victim of wild animals was discounted. The deceased must therefore have met her fate through a human act. Going by the evidence of Mr. Maro, that human act must have been committed by the appellant.

Further evidence that links the appellant to the killing of the deceased is that, just like the deceased he also never went home that day. It was not until the following day that he re-surfaced. According to Abbas, the way the appellant approached his house was surprising. He approached the same while hiding. If indeed he had nothing to fear, why approach his own residence stealthily?

In his defence, the appellant has alluded to the fact that he runs a “boda boda” business. That after the reconciliation meeting, he came home, went to the farm, came back, had lunch and went to the stage where he conducts his business. Thereafter he got a customer who wished to be taken to Alangho Gugurani village. Along the way the bicycle broke down and could not be repaired until the following day. When he had it repaired he came back home. However this evidence was discounted by the evidence of ***Ramadhani*** who met with the appellant riding his bicycle in the opposite direction on the material day. He had no pillion passenger at all. What this suggests is that the appellant was lying. If their chance meeting was before his bicycle broke down, he would have had the pillion passenger. On the other hand if the meeting was after the bicycle had broken down, he could not have been riding it. Chances are he could have been pushing or carrying it. However this was not the case. Then this begs the question, why did he not ride the bicycle back home?

The totality of the foregoing evidence is that it points irresistibly to the appellant as being

the author of the deceased's death. The evidence points to no other person but the appellant in the commission of the offence. Could the deceased have been a victim of animal mauling? No. The animals are innocent. There are no inculpatory facts inconsistent with the appellant's innocence. The evidence as laid can only lead to one conclusion, the appellant's hand in the death of the deceased. There are no intervening facts or circumstances that can destroy the irresistible inference that the appellant had a hand in the death of the deceased, not even the animals. The inference is irresistible. The contradictions as to the time when the proceedings were concluded and the encounter between Maro, the deceased and the appellant are inconsequential and do not go to the root of the prosecution case.

This was murder most foul. It rings of a pent-up anger on matters of the heart. There is no doubt at all that this was a crime of passion. How else would one explain the macabre injuries inflicted on the deceased either before, during or after the death of the deceased. The deceased had her eyes gouged out, mammary glands ripped off, limbs chopped off and several stabs on the body. Clearly this was an overkill. Going by his past antics this would definitely fit the profile of the appellant who deliberately refused to move on despite the fall out with the deceased. He took to taunting her, occasionally assaulting her and if he got whiff of an impeding relationship between the deceased and any man he did all he could to scuttle it, in the mistaken belief that the deceased was still his. The ultimate price that the deceased had to pay to assuage the appellant's misguided sense of grip on her was her life, of course at the cruel hands of the appellant.

In the premises, we see no reason to interfere with the trial court's determination that the appellant was guilty of the offence of murder. The sentence imposed fitted the occasion. The appeal is thus dismissed in its entirety.

Dated at Malindi this 13th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/saa