



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, G.B.M. KARIUKI & KIAGE JJ.A)**

**CRIMINAL APPEAL NO. 365 OF 2007**

**BETWEEN**

**JOHN NDUNDA MWANIKI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Nairobi (Apondi, J. )*

*dated 31<sup>st</sup> January 2007)*

*In*

**HC.CR. C. 111/05**

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**JUDGMENT OF THE COURT**

The Appellant, **John Ndunda Mwaniki**, was charged before the High Court in Nairobi with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya**. The particulars of the offence as stated in the information were that on the 4<sup>th</sup> of August 2005 along Muyuyu Road Eastleigh in Nairobi within Nairobi Area he murdered Bernice Mutindi Makenga. He pleaded not guilty to the charge but after trial, was found guilty, convicted and sentenced to suffer death.

The prosecution case was that the deceased, Bernice Mutindi Makenga, was a store keeper who worked at the Kenya National Trading Corporation. **PW1** worked with the deceased and recalled in his testimony that on 4<sup>th</sup> of August 2005 he was on duty with the deceased and on the following day, reported on duty only to find the store not open. He then rang the deceased's mobile phone but was directed to voice-mail. After trying in vain on several occasions, he sent one Paul Musyoka to the house of the deceased at 9.30 a.m. Upon his return, Musyoka told **PW1** that neighbours had told him that the deceased had not been seen since the previous day. On 8<sup>th</sup> August 2005, with no word from or on the deceased, **PW1** informed his bosses who advised him to alert her relatives. Her sister and brother in law proceeded to make inquiries at all police stations in Nairobi but were unsuccessful in tracing her.

Shortly afterwards, a story was aired on television concerning the remains of a woman being removed from under a kiosk in Eastleigh. The accompanying picture was also shown to be that of the deceased who was identified as an employee of Kenya National Trading Corporation. The story was to the effect that she had been killed by her worker. **PW1** recalled watching that shocking news.

During their frantic search for the deceased, her sisters **PW2** and **PW3**, visited her Kiosk. The appellant, who worked for her, told them that she had last been seen in the vicinity on the 4<sup>th</sup> of August 2005 at around 8:00p.m. **PW2** explained at length how they had gone to various police stations, hospitals and mortuaries looking for the deceased. Returning to the kiosk on the 10<sup>th</sup> and 11<sup>th</sup> of August, she spoke to the appellant again. He told her that the deceased had bought two suitcases and that he suspected that she had gone on a secret safari. Desperate to find the deceased, **PW2** decided to call the deceased's missing mobile phone again, and to her surprise, found a busy ring-tone. She contacted Safaricom, the mobile service provider, who advised that the mobile phone's SIM card had been destroyed. It turned out that the handset was being used by a Somali national within the Eastleigh Area. This discovery was made by **PW4**, Pastor Isaac Mulwa Mitao, a brother-in-law to the deceased who went to see one Joseph Musyoki at Safaricom on 23<sup>rd</sup> August, 2005 who in turn tracked it to one Ahmed. This Ahmed (**PW6**) said he bought it from the appellant for some Ksh. 2,500 which was confirmed by **PW5**, **PW10** and **PW7**, PC Frasto Gesengi whom he led to the appellant's kiosk. The appellant was then arrested in connection with the stolen mobile phone.

On 1<sup>st</sup> September 2005, relatives including **PW2** went to the deceased's kiosk and found it being guarded by 3 police officers. The appellant had upon further questioning led the team of police officers to a shallow grave at the kiosk where he had buried the deceased. The body was exhumed and it was indeed hers.

The appellant later led **PW10** and others into the kiosk. There, he retrieved a metal object, an iron bar, from under the bed. He had used the same to hit the deceased on the head. He also retrieved a mattock from under the bed: he had used it to dig the shallow grave. A week later, **PW10** revisited the scene of the crime and recovered the deceased's personal effects, so confirmed by **PW2** and **PW3**. They included a handbag, a pair of shoes, a wristwatch and underwear.

Grace Nzioka, the Principal Magistrate, Makadara Court (**PW8**) recalled that on 12<sup>th</sup> September, 2005 the appellant was taken to her for purposes of recording a confession. She confirmed from him that he wanted to do so voluntarily. She then explained his rights to him and administered an oath before recording his long and detailed confession. She read the completed confession back to him before he signed, and she counter-signed it. She then gave a certificate confirming that he was of sound mind and that he had given the confession voluntarily.

Dr. Moses Njue Gachoki (**PW11**) performed an autopsy on the body of the deceased on 8<sup>th</sup> September 2005. It was moderately decomposed and had a bruise on the left forehead and a depressed fracture of the head involving the parietal area and the scalp. It also had a rugged injury at the back of the head indicating that the force used was blunt. He formed the opinion that the injuries must have occurred before death and that the maximum impact was from the temporal area. The cause of death was by a blunt weapon to the head.

When placed on his defence, the appellant explained at length how he was employed by the deceased through his auntie and that the deceased also found him a house at Mlango Kubwa and also introduced him to her sisters. On 9<sup>th</sup> August 2005 the deceased's two sisters went and asked him about the deceased's whereabouts as she was missing from both her home and office. He told them he had last seen her on 30<sup>th</sup> July, 2005. The two sisters kept on coming regularly and complained that Bernice could not be traced. He was later arrested and placed in a Range Rover where he found two Somali's and taken to Kasarani Police Station. There he was interrogated and later taken to a forest where he was tortured up to 5<sup>th</sup> September, 2005 and then forced to sign some pre-written papers. He said he had never quarreled with the deceased. He made no mention of an affair with the deceased and said nothing about her death and the discovery of her body at the kiosk.

We have set out a précis of the evidence before the trial court because, as a first appellate court we are enjoined by **Rule 29 (1) (a)** to re-appraise or re-evaluate the evidence in a fresh and exhaustive way before making our own inferences and conclusions of fact. We do so alive to the fact that the trial court had vantage position as regards observation of the demeanor of witnesses having seen them and heard their evidence as they testified before it.

The appellant being aggrieved by the decision of the High Court (Apondi, J.) appealed by way of a self-made memorandum of appeal filed 7<sup>th</sup> February 2007 against both conviction and sentence. A supplementary memorandum of appeal was filed on his behalf by Wamwayi & Co. Advocates on 26<sup>th</sup> March 2012. Both of those memoranda were abandoned by his advocate who relied instead on yet another supplementary memorandum of appeal dated 25<sup>th</sup> October 2013 and filed on 28<sup>th</sup> October 2013. It raised the following grounds of appeal;

***“(1) The superior court erred in law by convicting the basis of circumstantial evidence that did not meet the required legal standards.***

***(2) The superior court erred in law by treating the testimony of PW3 as confession contrary to the law.***

***(3) The trial court misapprehended the facts and applied wrong legal principles to the prejudice of the appellant.***

***(4) The superior court erred in law by over relying on PW5 and PW6’s evidence who were accomplices and their testimony was evidentially worthless.***

***(5) The superior court erred in law by failing to appreciate that the appellant was a case of psychosis within the meaning of section 12 & 13 of the Penal code (Cap 63) Laws of Kenya.***

***(6) The appellant gave a plausible defence that was believed and ought to have been believed.”***

When the appeal came up for hearing before us, Mr. E. Ondieki, the learned counsel for the appellant, argued the six grounds together. He submitted that the circumstantial evidence showed this was not a murder case. To him, it was an affair gone sour, thus lacking *mens rea*, which, to learned counsel meant ‘an intentional plan to kill’. The appellant had refused to have sexual intercourse with the deceased leading to a heated argument. Counsel proceeded to seek to negative *mens rea* by the startling submission, fit for peremptory rejection, to the effect that the relationship between the appellant and the deceased, and by extension any heterosexual couple, was symptomatic of some form of mental malaise: *“You can only make love when you’re half insane. That is why it is done naked”*. He pursued the matter further at the bar, unsupported by the record or authority that the appellant probably had psychosis at the time as, apparently, some uncle of his also had it. Thus did counsel seek to sway us that this was a case of manslaughter and not murder. He also assailed the trial court for admitting and relying on the confession statement as well as on the evidence of Ahmed the phone purchaser whom he dismissed as an accomplice whose evidence had no probative value.

Mrs. G. Murungi, the learned Senior Assistant Director of the Public Prosecutions, opposed the appeal and supported the conviction and sentence. She stated that malice aforethought was present and that the evidence of PW11, Dr. Njue confirmed the cause of death to have been an injury sustained by a blunt object which caused impact on the temporal part of the head. She further submitted that under **Section 206** of the **Penal Code**, *intent to cause grievous harm amounts to malice aforethought. The appellant’s confession was properly taken with rights explained and an oath administered before recording. The confession was itself detailed. The accused never objected to the production of the statement, and thus it was neither repudiated nor retracted. The confession apart, there was overwhelming evidence especially that of PW5 and PW6 connecting him to the sale of the deceased’s mobile phone. PW10 likewise testified that it is the appellant who led the police to the Kiosk where they found a shallow grave and retrieved the deceased’s body. The murder weapon and the deceased’s personal items were also discovered in the Kiosk having been in the possession of the accused. Mrs.*

Murungi submitted that PW 6 and 7 were not accomplices having given reasonable explanations that they had been sold the deceased's mobile phone by the appellant. The evidence of **PW12**, Dr. Kamau, found the appellant to be mentally sound and there was nothing to weaken the murder conviction.

For a person to be convicted of the offence of murder, it must be proved beyond reasonable doubt that he caused the death of the deceased with malice aforethought. Malice aforethought has statutory definition in **Section 206** of the **Penal Code**:

**“S. 206, Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

- 1. 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;**
- 2. 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;**
- 3. An intent to cause a felony;**
- 4. 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.”**

On our own consideration of the record, there was overwhelming evidence to support the situations referred to in sub-paragraphs (1) and (2) and we find, as did the Learned Judge, that malice aforethought was established.

The appellant was convicted on circumstantial evidence since there was no eye witness to the killing of the deceased. On our own examination of that evidence, we are satisfied that it meets the threshold for safe conviction as set out is a long line of cases. In **MWITA V. R** [2004] 2 KLR 60 at p. 66, this Court stated it thus:

**“It is trite that (sic) 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 where the following extract from **TEPER V R** [1952] AC 480, 489, was quoted ([1958] E.A. at page 719:-

**‘It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’”**

We do not accept that conviction for murder or any other offence is weak, doubtful or unsafe by reason only that it is based on evidence that is wholly or mainly circumstantial. As long as the circumstantial evidence is sufficiently cogent and meets the tests enunciated above, it is as good a basis as any for returning a conviction. Its efficacy was memorably stated nearly a century ago in **R V. TAYLOR WEAVER AND DONOVAN** [1928] 21 Cr. App. R. 20;

**“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”**

We are satisfied that the appellant’s guilt for the murder of the deceased was proved with the accuracy of mathematics that left no room for any reasonable doubt. He killed his employer by use of deadly force.

He then hid her body right there at the kiosk in a shallow grave and went about his business as if it was another ordinary day. He proceeded to sell her cell phone and then to spin a fanciful yarn to her worried sisters that she may have gone on a safari secretively. The murder did out, however, and in the end he gave a detailed inculpatory confessionary statement. He also led the police to the shallow grave and to the murder weapon. The only puzzle that lingers is not as to the appellant's guilt, but that he should have imagined he could get away with it and not be discovered. His conviction was safe and the sentence proper.

In the premises we find this appeal to be entirely devoid of merit and dismiss it in entirety.

***DATED and delivered at Nairobi this 21<sup>st</sup> day of March 2014.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**REGISTRAR**