



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, OUKO & J. MOHAMMED, JJ.A)**

**CRIMINAL APPEAL NO. 30 OF 2013**

**BETWEEN**

**MUSILI TULO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Machakos (Makhandia, J.) dated 9<sup>th</sup> October, 2012***

**in**

**H.C.CR.C. NO. 41 OF 2010)**

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**JUDGMENT OF THE COURT**

1. On the 3<sup>rd</sup> day of July, 2010, the body of **Scollah Kalunda Mwenga** (hereinafter “*the deceased*”) was found in a cave in Tyaa Forest near Kasina Primary School in Mwingi Central Location of Kitui County. Those who found it and testified in court were consistent that the eyes were gouged out, the ears and tongue were cut out, and the flesh on the face and leg had been skinned. Beside her body lay a rope, a blood stained hat and scattered items of shopping. The pathologist who examined the body two weeks later found:

*“a wound right leg approximately 10cms in diameter, wound left mastoid approximately 6cms in length, wound right lateral side of the chest 5cm in length, and laceration of popliteal vessels of the right leg”.*

He formed the opinion that the cause of death was “*cardio-respiratory arrest secondary to severe blood loss.*”

2. It was obvious that the deceased had been killed, and brutally so. Whoever assaulted her intended the death or grievous bodily harm. She was murdered, but no one saw her killer. About ten days later, **Musili Tulo** (hereinafter “*the appellant*”) was arrested in Narok and transferred to Mwingi Police Station where a charge of murder contrary to **Section 203** as read with **Section 204** of the Penal Code was preferred against him.

3. It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-
  - i. ***The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
  - ii. ***Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
  - iii. ***The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

Those principles were set out in the case of **GMI v. Republic [2013] eKLR** which echoes the *locus classicus* case of **R. v. Kipkering Arap Koske & Another, 16 EACA 135.**

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke v. R [1958] EA 715** citing with approval **Teper v. R [1952] AL 480**, thus:

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

5. The chain of events leading to the appellant’s arrest came from nine prosecution witnesses. They established that the deceased was the wife of the appellant but their marriage was not a happy one. With six children between them, they had domestic squabbles and one of them, according to the mother of the deceased, **Viata Samson Mwenda (PW1)** (Viata), was about the first born daughter who was sired by another man before the deceased’s marriage to the appellant. When the girl became of age, the appellant wanted to have sex with her and when the deceased realized that she fled to her parents’ home with the girl. That was on 30<sup>th</sup> March, 2010. That incident was, however, not reported to the police or anyone else.
6. In the next three months, attempts made at reconciling the deceased and the appellant were not successful and the last time Viata saw the appellant at her home was the 29<sup>th</sup> June, 2010. The following day, 30<sup>th</sup> June, 2010, the deceased left home in the morning to go to the market at Mwingi. When she did not return in the evening, Viata thought she had returned to her husband’s home. The following day the family met to find out what happened to the deceased only to receive information in the evening, through **Agnes Mutei Samuel (PW5)**, who received it from one **Kasyoka** (not a witness) that the deceased was dead. They made a report of a missing person to the area Chief and sought the assistance of Mwingi Police Station.
7. The uncle of the deceased, **Joseph Githurai Kawalo (PW3)** who had learned about the appellant’s presence at the home the previous day and was informed by Viata about the deceased’s failure to return home from the market the following day, organized the family and neighbours to search for the deceased but they made no headway the whole day, 2<sup>nd</sup> July, 2010. The following day, the deceased’s brother, **Samuel Kilonzo Mwenda (PW2)**, arrived from Nairobi but found his businesses closed and his wife absent at home. On enquiry he was told about the disappearance of the deceased and how everyone went out looking for her. He went and found the rest of the family and members of the public near a forest at Kasina Primary school and joined the search. Luckily, a nephew of the deceased, **Christopher Mwenda Mwenzi (PW6)** had earlier met someone (not a witness) who knew the telephone contacts of the appellant and he took three numbers to **Sergeant Alex Ogutu (PW7)** of Mwingi Police Station. Sgt. Ogutu tried them out and one of them went

through. He introduced himself and said he was seeking assistance to locate the body of the deceased. The person at the other end, who Sgt Ogutu believed was the appellant, directed him to proceed to Tyaa Forest near Kasina Primary School and there he would find the deceased. Together with other officers, family members and neighbours, they went to the area and found the body of the deceased in the state described earlier.

8. The witnesses who arrived at the scene, particularly Samuel (PW2), Joseph (PW3), and Christopher (PW4) were consistent that the hat found at the scene belonged to the appellant as they had seen him wearing it many times before. Apart from being their relative through marriage to the deceased, the appellant was also their neighbour.
9. Upon his arrest in Narok and transfer to Mwingi Police Station, according to the prosecution, the appellant recorded a charge and cautionary statement through **Chief Inspector Jonathan Wafula** (PW8) in which he confessed to having assaulted the deceased because of some business money, killed her and left her body in the bush. The appellant also recorded a statement under Inquiry through **Inspector Harrison Mutie Kombo** (PW9) in which he narrated how he met with the deceased at a Mwingi hotel on 30<sup>th</sup> June, 2010 until 6.30 p.m. and described how he subsequently stabbed and killed her then dumped the body in the forest. He further confirmed having received a phone call from a police officer whom he told where to find the body. The full statements were admitted in evidence, according to the trial court “*without any objection or demand for a trial within the trial*”.
10. The appellant in his sworn testimony in defence pleaded the *alibi* that he was nowhere near the scene of crime as he had been working as a mason in Narok since March, 2010. He had returned home on 29<sup>th</sup> March, 2010 but the following morning, he saw three ladies come to his home and take away his wife, the deceased, saying they had been sent by his father-in-law. He followed her to his father-in-law’s home the day after and was told he would not take her unless he brought two cows as dowry. He said he did not have the cows and stayed home until 18<sup>th</sup> April, 2010 when he returned to Narok. That is where he was found by the police and was arrested on the pretext that he was involved in his wife’s death. He denied that he had any marital problem with his wife; that he was at home on 29<sup>th</sup> or 30<sup>th</sup> June, 2010; that he spoke to any police officer about the location of the body; that he owned any mobile telephone as the one he had was stolen in February, 2010; that the hat found at the scene was his; and that he recorded any statements with the police. He asserted that his brother who had a land dispute with him was the one who had set him up so that he could take the land when he goes to jail.
11. On those facts, the trial court, Makhandia, J. (as he then was) accepted the account of the chain of events narrated by the prosecution witnesses and found that the circumstantial evidence as augmented by the appellant’s own confession proved the case beyond reasonable doubt. He delivered himself as follows:-

**“So that the circumstantial evidence linking the appellant to the crime is his strained relationship with deceased, his cell-phone conversation with PW6 that led to the discovery of the deceased’s body, the hat found alongside the body which allegedly belonged to the accused and the accused’s on(sic) confession.”**

12. As to the denials made by the appellant, the trial court observed that the appellant did not deny that the telephone number used by Sgt. Ogutu to call him was his and did not raise the issue of having lost his phone when he cross-examined the witness. It also observed that the information given through the phone was accurate and helped locate the body of the deceased. On the appellant’s *alibi*, the court found that it was not raised before the trial to give the prosecution the opportunity to test it, or during cross-examination of witnesses, but was raised for the first time in his defence. In any event, the court found, the evidence was displaced by the evidence of Viata, which was not seriously challenged, that he was at the home on 29<sup>th</sup> June, 2010.

13. Finally on confession, the trial court had this to say:-

**“The statement by the accused alludes to facts that could only have been privy to the perpetrator of the crime. They are consistent and have been corroborated by medical and other evidence, including the mobile phone conversation that led to the discovery of the body of the deceased. Such details could only have come from a person who was at the scene of the murder at the material time. The confession lays out in his own words how he killed the deceased and left her for dead at Kasina. There can be no doubt therefore that it is the accused who caused the death of the deceased.”**

14. The appellant now challenges those findings before us and has raised 8 grounds in a supplementary memorandum of appeal filed by learned counsel Mr. Gilbert Mutembei. They may be paraphrased and summarized thus:-

*“That the learned trial Judge erred in:*

1. *concluding that the charge had been proved when the evidence pointing to the appellants’ guilt was inadequate;*
2. *holding that the appellant volunteered information through a phone conversation that led to the recovery of the deceased’s body;*
3. *holding that a hat found at the scene where the body of the deceased was found belonged to the appellant;*
4. *admitting a charge and caution statement which had been obtained contrary to the law;*
5. *admitting a statement under inquiry which had been obtained contrary to the law;*
6. *failing to hold that the circumstantial evidence relied upon to convict the appellant did not meet the required legal standards;*
7. *failing to consider the appellant’s defence and rejecting the same which occasioned a miscarriage of justice;*
8. *convicting the appellant on the basis of suspicion without cogent evidence.”*

15. Elaborating those grounds, Mr. Mutembei submitted that there was no evidence of separation or family disagreement between the appellant and his wife, the deceased. The appellant himself said there was none and the only problem was between him and his father-in-law who wanted dowry. There was no reason therefore for the trial court to accept the mere allegations put forward by the deceased’s mother Viata, brother Samuel and nephew Christopher. No reason was given for believing one version over the other.

16. As regards the finding of the body, Mr. Mutembei submitted, there was no basis for concluding that it was the appellant who told Sgt. Ogutu where the body was. In his view, Sgt. Ogutu had no way of identifying the person he spoke to at the other end of the telephone line and no witness was called from the telephone service providers or at all to confirm that the phone number belonged to the appellant.

17. Turning to the incriminating hat, he submitted that only the evidence of three relatives of the deceased who had taken the position that the appellant was responsible for the death, testified. Such evidence, in his view, should have been taken with caution because there was nothing special about the hat despite their insistence that the appellant wore it often. He wondered how a murderer

could deliberately leave behind obvious incriminating evidence.

18. Finally, Mr. Mutembei attacked the admission in evidence of the so-called ‘*statement under inquiry*’ and ‘*charge and caution statement*’ which the trial court treated as confessions. He submitted that the statement under Inquiry was recorded by an Inspector of Police contrary to **Section 25A** of the **Evidence Act**. The charge and caution statement also appeared to have been recorded before the statement under inquiry instead of the other way round. Furthermore, both were recorded contrary to **The Evidence (out of court confessions) Rules, 2009** relating to language and certificate of language, form, and presence of a third party amongst other mandatory requirements. The purported confessions were therefore irregular and inadmissible in evidence.

He concluded that the evidence of the appellant was not considered and overall, the conviction of the appellant was based on suspicion and speculation and he should never have been convicted. Several authorities were cited in support of the above submissions.

19. In response to those submissions, learned Assistant Director of Public Prosecutions (ADPP) Mr. Orinda submitted that there was no reason to doubt the evidence of the four relatives of the deceased - mother, brother, uncle and nephew who were in a position to know and in fact knew about the strained marital relationship between the appellant and the deceased. That estrangement may have provided a motive which is relevant to malice aforethought in this matter. He also submitted that there was no reason to doubt the evidence of the witness (Viata) who saw the appellant the day before the disappearance of the deceased, thus displacing the appellant’s *alibi*. As for the telephone conversation with Sgt. Ogutu, Mr. Orinda supported the finding by the trial court that Sgt. Ogutu had nothing to gain by stating on oath that he called and spoke to the person who directed him where to find the body of the deceased.

20. Turning to the incriminating hat, he pointed out that it was unique with different colours and the witnesses were familiar with it. There was no reason therefore to doubt their evidence on it. Finally, Mr. Orinda submitted that the confessionary statements were not recorded by the Investigating Officer as alleged and were recorded by two different officers in accordance with the Rules. That is why, as correctly observed by the trial court, there was no objection to their production in evidence.

21. We have subjected the evidence to fresh evaluation and considered the submissions of counsel and the authorities cited. The principle that must guide us is that a court of appeal will not normally interfere with findings of fact made by the trial court unless they are based on no evidence, or are based on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see **Chemagong v Republic [1984] KLR 611**. The principle stated by this Court in **Peters v. Sunday Post [1958] EA 424** at page 429 is also important, thus:-

**“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”**

22. There can be no doubt that the deceased’s death was caused by someone who intended it or intended grievous harm to her, which satisfies the definition of “malice aforethought” in **Section 206** of the Penal Code. Malice aforethought is essentially the intent or *mens rea* in murder cases. Mr. Orinda submitted that the estranged relationship between the appellant and the deceased provided a motive for the murder. In our view, that is not the correct approach in law.

23. Generally speaking, motive is not essential to prove a crime. We take this from **Section 9 (3)** of

the **Penal Code** which provides:

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

It may however become an element to consider where the case rests purely on circumstantial evidence. Considering the issue in **Libambula v Republic [2003] KLR 683**, this Court stated as follows:

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”**

In that sense, motive is not *mens rea*. As stated the above, the person who caused the death of the deceased in this matter did it of malice aforethought and the offence was complete, the motive notwithstanding.

24. We must now examine closely the chain of events that was relied on by the trial court to convict the appellant. As stated earlier, the chain must be so complete that it establishes the culpability of the appellant, and no one else, without any reasonable doubt. That is because circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics. If there is a weak link in that chain, the whole chain must collapse.
25. One of the strongest links relied on by the trial court was the apparent confession made by the appellant to the commission of the offence. The appellant vehemently denied that he made any statement to the police and those that were purportedly produced in evidence were contrived. In the judgment, the trial court made reference to the charge and caution statement recorded by Chief Inspector Wafula and the Statement under Inquiry recorded by Inspector of Police Kombo. The court adjudged the statements to be confessional and admitted them in evidence. In doing so, the court stated as follows:

**“They were all admitted in evidence without objection by the accused; so that a trial within a trial could be conducted to establish their authenticity and whether they were voluntary. I am therefore surprised that the accused is now submitting that when the prosecution wanted to produce in evidence, the confession statements, he objected and the court ordered a trial within a trial. And that the court has yet to make a ruling. This is totally misleading. The record speaks for itself. The only time that the defence objected to the admission of the statements is when the investigating officer wanted to produce them. The defence objected and insisted that the makers be availed. The objection was sustained. When the makers (PW8 & 9) eventually testified and tendered in evidence the statements, the defence did not object. Instead, the defence proceeded to cross-examine these witnesses. The accused cannot now be heard to claim that the said statements were not made by the accused nor were they voluntary. Time for such objection is long past.”**

26. We have checked the trial record and found that the Investigating Officer, Sgt. Ogutu, attempted to produce the two statements but objection was taken by counsel for the appellant, Mr. Mutie. The proceedings were as follows:

*“Mutie:*

*I object to the production of the statement on the grounds that it was obtained under duress. The statement had been recorded earlier and he was forced to sign.*

*M.S.A.MAKHANDIA*

*JUDGE*

*Mwenda:*

*I could have the statements marked. I intend to call the makers of the statements.*

*M.S.A. MAKHANDIA*

*JUDGE*

*Mutie*

*No objection*

*M.S.A. MAKHANDIA*

*JUDGE*

*Court:*

*The statement under inquiry and the cautionary statements are MF 1 3 (a) and 4 (b)."*

27.It is evident therefore that there was objection made to the admissibility of the extra judicial statements and it was not accurate for the trial court to state that there was none. Once the objection was raised, it was the duty of the trial court to make an order for a 'trial within the trial' and to deliver a ruling to determine such admissibility, even before the statements were marked for identification. The purpose is to determine the voluntariness of the statement intended to be tendered for the prosecution, because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. It is a matter of law and is for judge alone to decide upon hearing evidence - see **Shah v. Republic 1984 [KLR] 674**. Indeed it is an aspect of fair trial. We do not know what decision the trial court would have arrived at had it held a trial within the trial. What we can say for certain is that the court fell into error by failing to determine the issue of admissibility of the two extra-judicial statements.

28.For a long time in this country, confessions were a vexing issue where extrajudicial statements were extracted from accused persons by the police contrary to all known principles of law and procedure. So vexing that in 2003, Parliament intervened and changed the provisions of the **Evidence Act** relating to confessions and declared them inadmissible generally. In **Act No 5 of 2003, Section 25A** was added to read as follows:

**"25A. A confession or any admission of a fact tending to the proof of guilt made by an accused**

**person is not admissible and shall not be proved as against such person unless it is made in court."**

Two years later by **Act No 7 of 2007** there was a rethink by Parliament and a further amendment was made to include the police but only in a restricted version, thus:

**"before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third**

**party of the person's choice.** Emphasis added.

29. **Section 25A** which governed the proceedings in this trial thus provides:-

**“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.**

**(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”**

30. The requirement in **Sub-section 2** has since been met by the publication of **The Evidence (out of court confessions) Rules, 2009** (hereinafter “**Confession Rules**”) on 6<sup>th</sup> March 2009. They spell out elaborate rules relating, *inter alia*, to the rights of an accused; the administration of a caution; electronic and written recording; clarification of confessions; certificate of confession; and certification by the recording officer. None of the two officers who testified or the court made any reference to those Rules.

31. Take what happened in this case: On the face of it, the two statements were recorded in a lackadaisical manner. At 4p.m. on 14<sup>th</sup> July, 2010, Chief Inspector Wafula was recording a ‘*Charge and Cautionary statement*’. One hour later, IP. Kombo was recording a “*statement under Inquiry*’. Logically, it is the statement under inquiry which should inform the Charge and cautionary statement! At any rate, IP. Kombo had no business recording the statement as it would be contrary to **Section 25A (1)** of the **Evidence Act (supra)**. There was no third party as the section requires. None of the officers followed the **Confession Rules** on language and the various certifications stated therein. In sum, there is considerable doubt that the statements were recorded in accordance with the law and, therefore, they are for exclusion as evidence in the case. We so find.

32. The other strong link in the chain was the finding of the hat at the scene of crime. The significance of the evidence on it was not just that it had two colours and was always worn by the appellant, but that the evidence came from the uncle, brother and nephew of the deceased only. The search for the deceased went on for three days and it was not just the family which was involved. The police and neighbours joined in. It was amazing therefore that there was no independent evidence on that aspect of the matter. The three witnesses may well have been consistent in their evidence, but consistency is not veracity, and this, the trial court should have looked for.

33. For one, the three witnesses were not *ad idem* on the description of the hat. Brother Samuel said he saw the appellant only once in January, 2010 wearing the hat and he knew it was his because ‘*it has two colours which are peculiar. Outside it is white whereas inside it is blue*’. Uncle Joseph did not describe the hat but merely said ‘*I had seen the hat with the accused severally as (sic) frequented my place looking for his wife*’. Nephew Christopher too did not describe the hat but stated; ‘*The hat belonged to the accused. I was familiar with (sic) this is the hat, the accused used to wear everyday*’. More significantly there was no express finding by the trial court on the credibility of those witnesses. We think for our part that undue weight was given to the evidence relating to the hat and we are entitled to interfere with the finding. There was no cogent evidence that the hat either belonged to the appellant or if so, that it was necessarily left at the scene by the appellant.

34. On the link relating to the telephone conversation with Sgt. Ogotu, again, the evidence by Sgt. Ogotu that the appellant told him where to find the body of the deceased amounts to a

confession. Under **Section 29** of the **Evidence Act** such confession would be inadmissible. At any rate Sgt. Ogotu had no way of verifying that he was speaking to the appellant and there was no evidence from the person who gave out the three telephone numbers or from the telephone service providers that the telephone number belonged to the appellant. The investigation of this aspect of the chain-link was wanting and the evidence adduced to fortify it was simply tenuous.

35. As for the appellant having been at home at the time of the commission of the offence and subsequently not being traced and therefore imputing a guilty conscience against him, we observe that the evidence came from only one witness, Viata. We are aware that under **Section 143** of the Evidence Act '*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*' But it is pertinent in this case to wonder why it was not possible for the prosecution to offer solid evidence on the presence of the appellant at his home or Mwingi Market. At any rate, there was no finding by the trial court on the credibility of Viata on this evidence or a caution that she was the sole witness of that fact. Again, with respect, the trial court misapprehended the evidence.

36. We think we have said enough to show that the circumstantial evidence on record does not unerringly point towards the guilt of the appellant nor, taken cumulatively, does it form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. We also think there was a total omission by the trial court to consider the twin principle, whether there were any co-existing circumstances that may weaken or destroy the inference of guilt. One such circumstance was the alleged dispute between the appellant and his brother over family land. No mention was made of this circumstance and it was not eliminated. There were also some 6 children of the appellant and the deceased (or 10, according to Viata). Where were they? We do not know what the trial court would have made of those loose ends, if it considered them.

37. We are satisfied on our own evaluation of the evidence that the offence charged was not proved beyond reasonable doubt. There may well be serious suspicions that the appellant killed his wife, but suspicion alone, however high, has never sustained any conviction for a criminal offence. We quash the conviction and set aside the sentence imposed on the appellant. He shall be set at liberty forthwith unless he is otherwise lawfully held. Those shall be our orders.

***Dated and delivered at Nairobi this 25<sup>th</sup> day of July, 2014***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**