IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, OTIENO-ODEK & KANTAI JJ.A)

CRIMINAL APPEAL NO. 5 OF 2013

BETWEEN

PATRICK ASATSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) Dated 31st January, 2013

in

H.C.CR.A. NO. 46 OF 2008)

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JUDGMENT OF THE COURT

The appellant, Patrick Asatsa, was convicted of murder by the High Court ***(L. Kimaru, J.)*** in a Judgment dated 16th July, 2012 delivered by ***S. Chitembwe J***, on 31st January, 2013. He was sentenced to serve Twenty (20) years imprisonment.

The particulars of the offence were that on the 13th day of October, 2008 at Shibuli village, Shibuli sub location, Central Kakamega District (now Kakamega County) within former Western Province, the appellant murdered Jesca Asatsa.

The case against the appellant was mainly based on the evidence of two witnesses, ***James Odera Asatsa*** (PWl) (Odera) and ***Steven Shivia*** (PW2) (Shivia). Odera is a son of the deceased and so is, the appellant. Shivia is the deceased's grandchild as he is the son of her daughter. He is therefore a nephew of both Odera and the appellant. The two witnesses stated, before the trial court, that on 13th October, 2008 in the early morning at about 6.00 a.m. or 7.00 a.m, the deceased woke up and asked Shivia to take her cattle for grazing. He took the animals about 50 to 100 metres away from her house. She then complained to Odera that the appellant had quarreled her the previous night over land and a sugarcane farming contract as a result of which she had decided to go to her sister's. Odera dissuaded her against leaving the home. She then returned to her house. Shortly afterwards, the appellant went to the deceased's house. According to Shivia, the appellant went to the house twice; first with a hoe and a piece

of timber and a second time with only a piece of timber and left the house carrying a hoe. Odera also saw the appellant leave the deceased's house carrying a hoe and noticed that the appellant had changed his clothes. According to him, before entering the house he donned a shirt but when he emerged therefrom he was in T-shirt and had folded his trouser.

Evans Lumhonje Makombe (PW3) (Makombe), the deceased's worker, then returned to the homestead after selling milk at the local market. He went to the house and found the decesed's head covered with blood. He called Odera and together with Shivia they all went to where the deceased was and on finding her still breathing, Odera took her to Nala Nursing Hospital and reported to Kakamega Police station where he found PC Stephen Musyoki, (PW7) (PC Musyoki).

PC Musyoki with Odera went to Nala Nursing Hospital where they found the deceased had died. PC Musyoki observed a deep cut wound on the right side of her head and a swollen neck. ***Rev. Javan AOmmani*** (PW4) (Rev. Ommani) then took the body of the deceased to Kakamega Provincial General Hospital mortuary. The post-mortem was performed by Dr. Orieke on 14th October, 2009 after the deceased's body had been identified by Dan Samson Asatsa (PW5) and Johnson Mbai Asatsa (PW6) the step son and 1st son, respectively, of the deceased. Dr. Orieke found that the deceased had a cut wound on the right side of the skull and blood clots on the left side. He also found a fracture on the left skull and other blood clots under the covering of the brain on the left side and on the right side. There was brain injury on the right side and a bruise on the left side of the brain. The doctor opined that the cause of death was subdural haemorrhage due to blunt and sharp trauma. The post-mortem report prepared by Dr. Orieke was produced at the trial by Dr. Dickson Mchana (PW8) under the prosecutions section 77 (2) of the Evidence Act (Cap 80 Laws of Kenya). PC Musyoki arrested the appellant who was charged with murder.

When put to his defence the appellant elected to keep quiet.

The learned Judge considered the case made out by the prosecution and convicted the appellant of the offence charged. After taking into account the appellant's mitigation, he sentenced him to Twenty (20) years imprisonment. The appellant was aggrieved and hence the appeal before us premised on four (4) grounds of appeal to wit that the judge failed to appreciate the principles of convicting an accused on circumstantial evidence; that the evidence adduced was contradictory and incredible; that the judge shifted the burden of proof to the appellant and that he erred in not considering the submissions made on behalf of the appellant.

The appeal came up for hearing before us on 14th October, 2014 when learned counsel, ***Mr. Mukabwa***, appeared for the appellant and the state was represented by the learned Principal Prosecution counsel, **Mr. Sirtuy**.

Mr. Mukabwa abandoned grounds 2, 3 and 4 and submitted on ground 1, in the main, that circumstantial evidence was inconclusive. Learned counsel took issue with failure of the prosecution to produce crucial items such as the clothes which were worn by the appellant at the material time and were alleged to have had blood stains and the weapon allegedly used in the killing of the deceased. Learned counsel further submitted that the evidence of Rev. Ommani suggested that some other person was a suspect which therefore demonstrated 'the existence of co-existing circumstances compatible with the innocence of the appellant.

Mr. Sirtuy supported the conviction and submitted that the appellant's conviction was sound as, in his view, the circumstantial evidence pointed at the appellant and at no one else. On the submission that there was another suspect, learned Principal Prosecution counsel, stated that the mention of another suspect emanated from witnesses who were not at the scene.

We have carefully considered the evidence presented before the learned Judge, the single ground of appeal argued before us, submissions of learned counsel and the law.

It is true, as Mr. Mukabwa submitted, that the appellant's conviction was based on circumstantial

evidence. The law on when circumstantial evidence may found a conviction, in our view, is well settled. There is a plethora of authorities on such. evidence and reference to a few will suffice.

In ***Rex -Vs- Kipkering Arap Koske & 2 others [1949] 16 E.A.C.A. 135***, the

predecessor of this Court stated:-

"As said in Willis on "Circumstantial Evidence" 6th 1Edition p. 311,

"in order to justify 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 of his guilt. "

The same case clarified who has the onus to prove the inculpatory facts which would justify the inference of guilt. The court stated:-

"The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always with the prosecution. It is a burden which never shifts to the party accused."

The ***Privy Council*** put it this way in the case of ***Taper –Vs- Republic [1952] AC.***

480 at page 489:-

"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."

The learned trial Judge in our case was alive to the relevant case law on circumstantial evidence as he cited the case of ***Sawe -Vs- Republic [2003] KLR 364***, where the Court stated:-

"In order to justify on circumstantial evidence, the iriference 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. . There must be no other co-existing circumstances weakening the chain of Circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution, it is a burden which never shifts to the party accused. "

Having set out the correct proposition in law the learned Judge found that the evidence of Odera, Shivia and Makombe placed the appellant at the scene and no one else. The learned judge said:-

"The court therefore holds that the prosecution did prove to the required standard of proof beyond any reasonable doubt, by circumstantial evidence, that it was the accused and only the accused who had the opportunity, time and motive to harm the deceased. The accused had a long standing dispute with the deceased concerning the title to the parcel of land that he wanted to inherit from his father. The accused also wanted to be given the contract documents for the sugarcane planted on the farm. The deceased was unwilling to hand over these documents to the accused. Prior to the day the deceased was killed, the deceased told PW1 that the accused had quarreled her the whole night. "

From the recorded evidence, it is clear to us that Odera, after listening to the complaints of the deceased about the appellant, dissuaded her against leaving her home and advised her to go back to her house which she did. He did not himself enter the house at that time, Odera then saw the appellant enter the deceased's house as he cleaned his car. Before any other person entered the house, Odera saw the appellant leave her house having changed his shirt and with a folded pair of long trousers.

The same morning of the material day, Shivia was instructed by the deceased to prepare milk for her and

take care of cattle. He then took the cattle for grazing between 50 to 100 meters away from the house of the deceased. While looking after the cattle, he saw the accused enter the deceased's house twice. First with a hoe and a piece of timber and a second time with the piece of timber alone. When the appellant emerged from the deceased a second time which, according to Shivia, was between 10 and 15 minutes, later, he was carrying a hoe.

So, both Odera and Shivia saw the deceased in good health and without any injuries before the appellant entered her house. Shivia did not enter the house of the deceased before she was found with head covered in blood. That discovery was made by Makombe when he arrived after selling milk at the local market. It was Makombe who went into the house after the appellant had been there who found the deceased bleeding from her head with a bed over her and alerted both Odera and Shivia.

The two then re-entered the house and removed the deceased from the house and into Odera's car for onward transmission to Nala Nursing Hospital for treatment where the deceased died. There was no evidence that any other person entered the house of the deceased after or before the appellant entered the house and left and before Makombe found her with the injuries which Dr. Orieke found to have been inflicted by both sharp and blunt objects. It was significant that the appellant had shortly before been seen with a hoe, a panga and a piece of timber. In our view, those facts were incompatible with the innocence of the appellant and were incapable of explanation upon any other hypothesis than that of his guilt. There were no other co-existing circumstances which would weaken or destroy the inference of the appellant's guilt.

Heavy weather was made of the statement by Rev. Ommani, in cross- examination, that members of the public suspected the appellant and Shivia, and PC Musyoki's statement that he was told by Odera that ***"Evans, the shamba boy is the one who had assaulted the deceased***." The two statements, in our view, did not break the chain of circumstantial evidence pointing at the appellant. We are of that view, because Rev. Ommani's statement amounted to inadmissible hearsay evidence as the people who suspected Shivia were not called as witnesses. In any event, Rev. Ommani was not at the scene when the deceased was assaulted. With respect to the statement of PC Musyoki, the record shows that he corrected himself by saying that apart from the appellant there was no other suspect.

There was also the evidence of Odera that just before the deceased was attacked she had complained to him that the appellant had quarreled her the previous night over the title deed of family land and the sugar cane farming contract which documents the deceased held. The failure to secure the two documents from the deceased furnished basis for the attack upon the deceased by the appellant which circumstance, in our view, enriched the circumstantial evidence proved by the prosecution. The post-mortem report produced at the trial showed that the deceased sustained servere injuries on the head. The cut wound on the right temporoparietal scalp was 8 cm long and invaded the skull deeply. There was also a fracture of the left temporal skull. There was right brain contusion and left parital lobe contusion. Dr. Orieke, as we have already observed, found the cause of death to be cardiopulm nary arrest due to acute subdural hemorrhage caused by blunt and sharp head trauma.

The above injuries leave no doubt that the appellant intended to cause and did cause grievous harm leading to the death of the deceased. The attack was not as a result of a fit of rage or frenzy. It was premeditated. Before the attack, the deceased was so threatened by the appellant's unreasonable demands that she had planned to go and live with her sister but was advised against it by Odera. In our view, the events of the fateful morning were a culmination of what the appellant had intended after failing to obtain the title deed to family land and the sugarcane farming contract from the deceased.

In the end we have come to the conclusion that the evidence of Odera, Shivia and Makombe demonstrated, beyond reasonable doubt, that the appellant was the perpetrator of the offence in this case. His appeal is without merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2014.

F. AZANGALALA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR