IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KOOME & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 90 OF 2007

BETWEEN

PAUL MWANGI KARIUKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Muga Apondi, J.) dated 18th April 2007

in

H. C. Cr. C. No. 87 of 2004)

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JUDGMENT OF THE COURT

The ***appellant***, ***Paul Mwangi Kariuki,*** was charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code in that on 31st July, 2004 at Mirangine Village in Nyandarua District within Central Province he murdered Jackson Wagura. The appellant denied the charge and his trial commenced with the aid of assessors on 28th October, 2004. A total of eight witnesses testified on behalf of the prosecution, while the appellant testified on oath and called no witnesses. After the summing up, the three assessors returned a unanimous verdict of *"not guilty"*. However, the learned Judge found him guilty and sentenced him to death.

Aggrieved by that decision, he appealed to this Court. In his Memorandum of Appeal dated3rd May, 2007 the appellant set out the following grounds of appeal:

"1. That the Learned trial Judge of the superior court erred in law by failing to admit documentary evidence which cannot be controverted by oral evidence.

2. That the learned trial Judge failed to appreciate that the evidence on record as to what caused the death was contradictory.

3. That the Learned trial Judge failed to consider that the appellant's defence raised doubts which entitled him to an acquittal.

4. That the learned trial Judge erred in law by failing to sum up the evidence of the prosecution and the defence and also failed to record each of the assessors opinion which was to be orally stated in court.

5. That the learned trial Judge erred in law by failing to consider that the evidence of the prosecution did not prove the ingredients/elements of murder as set forth in sec 203 of the Penal Code."

At the hearing of his appeal, he was represented by his learned counsel, Mrs. G. A. Ndeda, who relied upon the above grounds of appeal but abandoned ground 4 and consolidated grounds 1, 2, 3 and 5 for the purposes of her argument before us. The thrust of Mrs. Ndeda's submissions was that the trial Judge ignored the evidence of poison found in the deceased's blood sample, indicating that death could have arisen from poisoning, given that witnesses had seen him take *"triatix"*. Mr. Z. Omwega, learned Principal State Counsel, conceded the appeal on the ground that the High Court indeed failed to consider the evidence of poison in the deceased's blood stream.

This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and make our own conclusion but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and give allowance for that. In ***Mwangi vs Republic*** ***[2004] 2 KLR 28*** at ***page 30*** this Court stated:

"In Okeno v R [1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:

'an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1975] EA 336). It is not the function of the 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 Sunday Post [1958] EA 424.'"

We have heard the concurring submissions and arguments by the two counsel and having gone over the evidence adduced in the High Court and re-evaluated the same we find the facts, which are not in any serious dispute, to be as follows:

In his evidence Fredrick Kimiri Mwangi (PW 4) aged 15 heard the appellant and the deceased arguing about the loss of a speaker. He also heard the deceased denying possessing the same. He then saw them going out for a short distance, and they later returned. After a short while, the deceased entered the kitchen and came out with a bottle of *"triatix"*, claiming that he (deceased) had drunk the *triatix*. He then saw the appellant grabbing the deceased and saying that he would take him (deceased) to the police station so that the deceased could explain why he had drunk the *triatix*. On the following day he was informed that the deceased had passed on.

On cross-examination by Mrs Ndeda, PW 4 had this to say: *"...the deceased said he had drunk triax which should not be drunk by human beings..."*

The testimony of Eunice Wamuyu Njogu (PW 6) a Forensic Toxologist from the Government Chemist in Nairobi Forensic Division was that on 20th September, 2004 she received some post mortem specimens and a suspected poison from Mirangini Police Station. The Exhibits received were as follows: ***Exhibit (a) 1- Urine, Exhibit (b) 2-Stomach, Exhibit (c) 3- Stomach Exhibit (d) 4- Suspected Poison.*** Following her examination of the said exhibits she found the presence of the following substances:

(i)-Methanol- a highly solvent poison was found in the urine of the deceased at a concentration of 327 ml per 100mls of the sample.

(ii)-Triax (Amitrz)- The same is an acariside was detected in exhibit (1)

(iii)-Paracetamol- (An analeged) was detected at the following concentrations

-Stomach- 9.9 ml per total contents
-Liver-67.0 mg per 100 gms of sample
-Kidney- 53.3 mg per 100gms of sample
-Urine0Nil

Her conclusion was that "***these drug levels indicate a fatal overdose.*"** *(emphasis ours).*

In his medical evidence, Dr. John Weru (PW 7)who conducted the post-mortem, observed that the deceased had deep subcutaneous bruises on the left side of the head and that there were similar bruises on the anterior aspect of the neck and back of the head. In addition to the above, he found a fracture on the left side of the skull that was depressed and non-linear. He also found the deceased bleeding on the left side of the brain and at the back. It was because of the above that he concluded that the cause of death was due to severe head injury.

In finding the appellant guilty of the offence of murder, the learned Judge of the High Court said:

"It was obvious that the accused was very upset when he recovered the radio which was then just a shell without a circuit. From the post mortem form exhibit -2 it is apparent that the deceased person suffered multiple deep injuries. The only reason why the accused inflicted those injuries on the deceased was either to kill him or cause grievous harm on him....The court hereby rejects the defence case which does not ring a bell at all. It is incumbent on the accused to take full responsibility for his actions...The upshot is that the prosecution has proved its case beyond a reasonable doubt..."

With great respect to the learned Judge, we find that there is sufficient evidence on record to suggest the possibility that the deceased might have died of poisoning. The conviction was based on the eye witness testimony of PW 4 who confirmed having seen the deceased drinking poison *"triax"*and contradicting expert witness testimonies of PW 6who confirmed the presence of fatal overdose of poison in the deceased's blood and PW 7 who concluded that the cause of death was due to severe head injury. The possibility of the appellant having died from poisoning and the contradictions of medical expert witnesses should have been considered by the High Court at the point of re-evaluating the prosecution evidence. This was not done and as a result, we find that it does create a reasonable doubt which should have been resolved in favour of the appellant. In the circumstances, the position we have taken is underpinned by the second holding of this Court in the case of ***Ouma vs Republic*** ***[1986] KLR 619*****:**

"At the time of evaluating the prosecution's evidence, the court must have in mind the accused person defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility to the defence being true. If there is doubt the benefit of that doubt always goes to the accused person. That does not appear to have been done in the case."

This test has also been applied by this court in the case of ***Parvin Singh Dhalay vs Republic*** ***Criminal Appeal No. 10 of 1997***, in which the Court said:

"For our part, we think that if there be other co-existing circumstances which could weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."

Further, as a general rule in criminal cases, the burden is always on the prosecution to establish the guilt of an accused person beyond any reasonable doubt***; see Mkendeshwo vs Republic [2002] IKLR 361, at p.366.*** In this case that was not so.

In conclusion, we are persuaded by the submissions of Mrs. Ndeda and the concession byMr. Z. Omwega, learned State Counsel, that the circumstances of the case makes the conviction not safe.

Accordingly, we allow this appeal, set aside the conviction and the death sentence passed on the

appellant. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

In the absence of Okwengu, JA, who is away on study leave, this Judgment is written under ***Rule 32 (2)*** of the Court of Appeal Rules.

Dated and delivered at Nakuru on the 14th day of February, 2013.

ALNASHIR VISRAM
....
JUDGE OF APPEAL

M. K. KOOME
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR