IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 314 OF 2008

BETWEEN

JMM …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Meru (Emukule, J.)*

dated 25th November, 2008

in

H.C.CR.C No. 60 of 2004)

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JUDGMENT OF THE COURT

1. **JMM ,** the appellant herein was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, Chapter 63, Laws of Kenya, in the High Court at Meru. The particulars of the charge were that on 13th June, 2004 in Meru Central District within the then Eastern Province, the appellant murdered BK.
2. The prosecution called a total of 9 witnesses. It was the prosecution's case that the appellant and PW4, NN lived as husband and wife from the year 2002 until 2004; they were blessed with a son known as BK.NN testified that on the evening of 12th June, 2004 the appellant beat her up on the ground that he had been advised by PW2, Douglas Mwenda (Douglas), to leave her and get another woman to marry in church. The appellant resumed beating up NN the following morning and threw her out of their home at around 6:00 a.m and refused to release to NN the child, BK, who was then a suckling 9 months old baby.
3. NN woke up PW7, AN (Agnes), who was a neighbour and informed her what happened. Agnes pleaded with the appellant to release BK who had started crying to NN. The appellant refused and Agnes continued pleading with the appellant to release NN so that NN would breast feed him. Eventually, the appellant gave BK to NN and as the baby was breastfeeding, the appellant forcefully took him again and refused to release BK to NN. Agnes testified that on that day, 13th June, 2004, NN left without BK.
4. NN gave evidence that she went to her aunty's home, PW6, BWN, and informed her what had

happened. Despite requests by BWN to the appellant to release the baby to BK, the appellant refused to do so. Subsequently, on 17th June, 2004, NN in the company of PW3, Stella Mukiri M'twerandu, went to the police station to report the matter.

5. It was the evidence of both PW8, Sergeant Harriet Kinya (SGT Harriet) and PW7 PC Cosmas Tsuma (PC Cosmas) that after the said incident was reported both the appellant and NN were arrested. Subsequently, the appellant stated to SGT Harriet that BK had accidentally fallen to his death when the appellant who was at the time carrying him slipped and fell on the stair case. The appellant led the police officers to the pit latrine at the Praise and Worship Church where he had dumped the baby's body. BK body was recovered from the said pit latrine. Prior to the above recovery of the body, the appellant lied to NN, BWN and Douglas that he had taken BK to his mother who lived in Tharaka. He also lied to PC Cosmas that he had taken BK to one LK who lived in (Details withheld).
6. PW1, Dr. Henry Njiru (Dr. Njiru), gave evidence that on 24th June, 2004 he was requested to perform an autopsy on a body of a baby identified as BK. He noticed that the body was covered with faecal matter and that the baby's head was deformed. He also noticed that a rope had been tied around the baby's neck. In his evidence he pointed out that the body exhibited early signs of decay. Upon performing the autopsy, he established that the baby was around 9 months old and that his skull had been fractured. Dr. Njiru concluded that the death of Brian was caused by blunt trauma to the head.
7. In his defence, the appellant gave an unsworn statement. He testified that on the morning of 12th June, 2004 before leaving for work, he left NN money to take BK who was unwell to hospital. Upon inquiry when he returned home at around 7:00 p.m, NN informed him that she had not taken BK to hospital because she was busy. The appellant maintained that they slept on that night without quarrelling; and the following morning NN took all the household goods and left. The appellant gave evidence that BK condition became worse and he was forced to buy medicine for him at the chemist. He stated that when he went upstairs to get water for the medicine, he slipped and fell with Brian who he was carrying; and that he only heard BK cry out once. When he realised that BK had died he was shocked and was unable to rationally think; and it is at that confused state that he dumped Brian's body in the pit latrine. He maintained that he never intended to kill BK.
8. The trial court being convinced that the prosecution had proved its case beyond reasonable doubt convicted and sentenced the appellant to death. Aggrieved with the said decision, the appellant has filed this appeal based on the following grounds:-

- ***That the learned Judge though appreciating that the entire case hinged on circumstantial evidence erred in law and in fact in failing to find that the circumstantial evidence that was brought forth did not meet the threshold required.***

- ***That the learned Judge erred in law and in fact in failing to find that there was co-existing circumstances in the present case that weakened the inference of guilt on the part of the appellant.***

- ***The learned Judge erred in law and in fact in totally disregarding the appellant's defence.***

- ***The learned Judge erred in law and in fact in failing to find that the prosecution had not established its case to the required standard.***

- ***The learned Judge erred in law and in fact in relying on contradictory evidence in reaching its conclusion.***

9. At the hearing of this appeal, Mr. Muhoho Gichimu, learned counsel for the appellant, submitted that this case was determined by the trial court solely on circumstantial evidence. He contended that the learned Judge (Emukule, J.) erred in failing to find that the circumstantial evidence that was adduced did not meet the threshold required to justify the appellant's conviction. He maintained that the inculpatory facts in this case were not incompatible with the innocence of the appellant. Mr. Gichimu submitted that, according to Dr. Njiru, Brian's death was as a result of an

injury on his head which was inflicted by a blunt object; no evidence was tendered by the prosecution of the kind of blunt object that the appellant may have used to inflict the injury from which Brian died; and that no evidence was adduced to show how the appellant inflicted the said injury to Brian.

10. He further maintained that the learned Judge failed to consider the appellant's defence; that Brian accidentally fell to his death when the appellant who was carrying him slipped on the stairs. He contended that the learned Judge considered extraneous matters when he compared BKs fall on the stairs and the fact that it had been recorded in history that children survive plane crashes to disregard the appellant's defence. Mr. Gichimu further contended that the fact that the appellant gave an unsworn statement did not water down his defence. He further submitted that the appellant had established through his evidence that BK's death was an accident and that he had no intention to kill him.

11. Mr. J. Kaigai, the Assistant Director of Public Prosecutions, in opposing the appeal submitted that the circumstantial evidence that was adduced pointed to the appellant's guilt. He stated that the appellant had chased away his wife, NN, and was left with the child; the appellant led the police to the pit latrine where he had dumped Brian's body; and the multiple fractures found on the baby were inconsistent with the appellant's innocence and defence. Mr. Kaigai contended that the learned Judge in considering the fact that children survive plane crashes was taking judicial notice of the same in evaluating the appellant's defence. He finally submitted that the only error in this case was that the appellant was not given an opportunity to mitigate before he was sentenced.

12. This being a 1st appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In **Okeno V. Republic [1972] E.A. 32** it was held:-

> ***"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. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a 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] E.A. 424."***

13. We have considered the grounds of appeal, submissions by learned counsel and the law. The evidence in this case was purely circumstantial. In ***Sawe -vs- R (2003) KLR 364*** this Court at page 372 held ,

> ***' 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 . There must be no other co-existing circumstances weakening the chain of circumstances relied on. '***

14. The prosecution in this case proved beyond reasonable doubt that the appellant was left with BK after he chased NN away from their home; that the appellant refused to release the child who was still breast feeding to NN; that child was alive when he was last seen with the appellant; that the appellant lied on several occasions as to the whereabouts of the child when he was asked by Dominic, BWN, SGT Harriet and PC Cosmas; and later the appellant stated that the child had died and that he had dumped the body in a pit latrine that was 20 metres away from his house. The above mentioned chain of events as potrayed by the prosecution were never denied by the appellant.

15. According to the medical report produced by Dr. Njiru who carried out an autopsy, the child was found to have a fractured skull. The child was in the physical custody of the appellant immediately prior to his death. There was no evidence that the child had a fractured skull when he was left with the appellant. We find that in the absence of evidence by the appellant as to the height of the stairs

where the child allegedly slipped and fell to his death from the hands of the appellant, the circumstantial evidence becomes inculpatory to the guilt of the appellant. This is because the height of the stair case from which the child allegedly fell from was only within the knowledge of the appellant and by virtue of **section 111(1)** of the Evidence Act, Chapter 80, Laws of Kenya, only the appellant could have given evidence over the same. Failure of the appellant to do so gave rise to a rebuttable presumption under **section 119** of the Evidence Act, that the appellant knew under what circumstances the child was killed. See ***Samuel Ngugi Ndinguri -vs- Republic- Criminal Appeal No. 25 of 1992.***

16. In our view, the multiple strictures of the deceased's skull and dislocation of his 1st and 2nd vertebrae, is a clear indication of malice aforethought on the person who killed the child. We find that the conduct of the appellant dumping the deceased's body into the pit latrine pointed to the fact that it was the appellant who caused the injuries to the child with malice aforethought. In ***Samuel Ngugi Ndinguri -vs- Republic*** ***(supra),*** this Court held,

> ***'..that the injuries found on the deceased's body showed clearly that whoever inflicted them intended, at the very least, to cause grievous bodily harm and that the injuries alone were evidence of malice aforethought.'***

17. We are satisfied based on the series of events which took place after the appellant chased NN from their home to the time that he stated he dumped the baby's body into a pit latrine; the evidence irresistibly points to the guilt of the appellant. Therefore, we agree with the following observations by the learned judge:

> ***Children have been recorded in history to survive plane crashes where their parents perish, there was no evidence as to the height of the stairs where the child allegedly slipped and fell to his death from the hands of the accused. It is perhaps understandable that the child would suffer some head or face injury from the fall. I am not however persuaded that such a fall would cause what Dr. Njiru called multiple strictures of the skull nor in my view dislocation of the 1st and 2nd vertebrae. … In my view, the multiple strictures of the skull and dislocation of the 1st and 2nd vertebrae of the deceased is more consistent with the deliberate application of the blunt object upon the head of the deceased, and pressure upon the 1st and 2nd vertebrae causing their dislocation. The person who applied that blunt object or pressure could only be the accused. He was the person last seen with the deceased child when it was alive and by his own admission in death.***

The observation by the trial Judge that children have survived plane crashes was *obiter* and extraneous. However, that observation did not prejudice the appellant in the context in which it was used and taking into account the entire paragraph read as a whole.

18. From the record of the trial court it is clear that the appellant's defence was considered and rejected by the trial court in view of all the surrounding circumstances and the prosecution's evidence. On our own evaluation of the defence we find nothing in it that would dislodge or cast reasonable doubt on the prosecution's evidence.
19. We cannot help but note that the learned Judge in commenting and giving his view of unsworn statements stated as follows:-

> ***'In my view the provision in section 211 and 306 of the Criminal Procedure Code which allow killers and all manner of hardcore criminals to make unsworn statements and escape cross-examination and call it evidence, needs to be re-thought in our criminal justice system.'***

It was our considered view that the learned Judge erred in stating that it was only killers and hard core criminals who opted to give unsworn statements. This is because as per the Kenyan law every accused person is deemed innocent until he is proved guilty. However, we find that the above statement did not in any way prejudice the appellant defence because the learned Judge correctly

held as follows:-

> ***'In this case, the accused chose not to give sworn evidence. It is his right to do so in law. He made an unsworn statement in court. He could not therefore be cross-examined for the purposes of testing the veracity of his defence. After all it is up to the prosecution to prove its case against the accused...'***

20. Having perused the record of the trial court, we concur with Mr. Kaigai that the appellant was not given an opportunity to mitigate before he was sentenced by the trial court. However, the said error does not in our view render the conviction and sentence issued by the trial court a nullity. In ***William Chemase Sitienei vs. Republic -Criminal Appeal No. 291 of 2008*** this Court held,

> ***' Though the learned judge erred in sentencing the appellant in the main judgment without giving him or his advocate an opportunity to state mitigating factors, we find no fault in the manner the learned judge reached his decision in convicting the appellant.'***

21. We find no reason to interfere with the conviction and sentence issued by the trial court in its judgment dated 25th November, 2008. Accordingly, the appeal herein is dismissed.

Dated and delivered at Nyeri this 25th day of July, 2013

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this is a

copy of the original.

DEPUTY REGISTRAR