REPUBLIC OF KENYA

IN THE COURT OF APPEAL IN NAIROBI

(CORAM: MARAGA, WARSAME, MUSINGA JJ.A)

CRIMINAL APPEAL NO 111 OF 2010

JACKSON MAINGI NZIOKA……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi

(Lesiit, J) in High Court Criminal Case No. 37 of 2007)

JUDGMENT OF THE COURT

On 5th February 2010, the High Court of Kenya at Nairobi found the appellant, **JACKSON MAINGI NZIOKA**, guilty of murder contrary to section 203 as read with 204 of the Penal Code, Chapter 63 of the Laws of Kenya. He was convicted and sentenced to death, and being aggrieved by the conviction and sentence, he filed the present appeal, raising the grounds contained in the supplementary memorandum of appeal dated 14th June 2013 to wit:

"1. The learned judge of the High Court erred in law in the sentencing and convicting the appellant in the absence of vital eye witness and also not taking into consideration section 124 of the Evidence Act;

2. The learned judge of the High Court erred in law in convicting and sentencing the appellant based on circumstantial evidence;

3. The learned judge of the High Court erred in law in convicting and sentencing the Appellant without proof by the prosecution beyond reasonable doubt contrary to section 108 of the Evidence Act, Cap 80 of the Laws of Kenya;

4. The learned judge of the High Court erred in law in convicting and sentencing the appellant by failing to consider the Appellant's defence without proper reasons violating the provisions of the Criminal Procedure Code."

He prays that this appeal be allowed, his conviction quashed and the sentence set aside.

The particulars of the offence were that on the 25th day of August 2006, at Entarara Reserve, Loitoktok in Kajiado District, the appellant murdered a child by the name **FREDERICK WAINAINA MUIRURI,** hereinafter referred to as "the deceased".

During hearing at the High Court, the prosecution called twelve witnesses. The gist of the prosecution's case was that on the evening of 2nd August 2006, the appellant, who was also known as Wamuzee, went to the home of **SERAH WAITHERA MUIRURI (PW1),** who was the mother of the deceased. He asked for some water, which **ELIAS KIMANI (PW7)**, the son of PW1 gave to him. He kicked the water away and began demanding the sum of Kshs. 1,500.00 from PW1 as payment for fixing her fence. The appellant had been requested by **PETER MUIRURI (PW2)**, the husband of PW1 and the father of the deceased, to mend the fence for the said sum of money. PW1 asked the appellant to wait for payment from PW2; it was then that an altercation ensued between the two.

The appellant produced a *panga*, locked up PW1's two younger children in a bedroom and then proceeded to assault her while she was holding the deceased child. She managed to escape but the appellant tripped her, and as she was getting away, left the deceased child on the floor. She ran away screaming and later when the neighbours visited the scene of the attack, the young child **FREDRICK MUIRURI** was injured and the appellant was nowhere to be found. The child later died of a cut to the head, which in **DR. JOSEPH GATURA'S (PW12)** opinion was caused by a sharp object, such as a *panga*. PW 12 is the one who carried out a post-mortem examination on the body of the deceased.

The appellant's case was that he visited the house of PW1 but she was not at home. At some point, he went out and locked up his goats, then returned to PW1's house. He and PW1 started chatting and he asked her to lend him some money. She went into her bedroom and returned with a *panga* in one hand and was carrying the child in her other arm. PW1 attacked him, and he defended himself with a *jembe*. A fight between them ensued, and he ran away. He also stated that after that, he couldn't remember what happened as he was drunk.

The High Court evaluated the entire evidence adduced by the prosecution and the defence. The trial court found that even though it was evening, the appellant was positively identified by PW1, PW3 and PW7, and that the evidence tendered was reliable and watertight. The trial court also found that the actions of the appellant comprised malice aforethought in that the appellant must have known that his actions would result in the death or grievous harm to the deceased. The trial court also considered that while no one had actually seen the appellant attack the deceased child, there was circumstantial evidence which pointed to the fact that the deceased was alive until the time PW1 ran away, and was found injured a few moments later when PW4 came onto the scene of the attack.

The trial court's finding was that all the facts point to the accused as being the one who attacked both PW1 and the deceased, causing them severe injuries from which the deceased succumbed. The trial court stated that ***"I find the facts adduced are incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused. I am also satisfied that there are no co-existing circumstances which could weaken or destroy the inference of guilt."*** The trial court also rejected the appellant's defence that he was drunk and stated that "***in the circumstances, I am not satisfied that the accused was intoxicated at the time of the attack. In any event I am not satisfied that it has been shown that by reason of intoxication if any, the accused was insane, temporarily or otherwise at the time of the act…."***

The trial court further stated that ***"I find the fact that the accused armed himself before proceeding to [PW1's] home, and the fact that he ran away for almost a year after the attack, are proof of a person who knew what he was doing. I find that the accused's conduct of attacking the deceased and then running away and hiding was consistent with the conduct of a person with a guilty mind."*** The appellant was therefore found guilty and convicted of the offence of murder.

As a first appellate court, we are bound to re-evaluate the evidence on record and come up with our own conclusion. We aptly rely on ***David Njuguna Wairimu V Republic [2010] eKLR*** where this Court, quoting with approval the sentiments expressed in ***Okeno v R [1972] EA. 32*** stated that:

> ***"… [the duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may,***

depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision…."

The mother of the deceased child, PW1, testified that on 2nd August 2006, the appellant came to her house at about 7:30 pm and requested for drinking water. She asked her son, **ELIAS KIMANI**, to give him water, which the accused kicked away. He then entered her house and while brandishing a *panga*, he demanded the sum of Kshs 1,500.00 as payment for fixing her fence. She asked him to wait for her husband but the appellant refused and said that he would kill her, together with her children. She asked to be allowed to go to the bedroom together with the children but the appellant instead locked up Elias and her daughter Nancy in one of the bedrooms.

As PW1 was trying to escape, the appellant tripped her and she fell down, then he assaulted her, causing her injuries on the shoulders, her hands and the face. She left the child there and ran away to the neighbours. She was later informed that the child had been killed. She was herself admitted at Loitoktok Sub-district Hospital for one day. She had known the accused for about six months as he was her tenant, whom she sometimes gave casual work to do.

The deceased's father, PW2, was on duty when someone came to his place of work and informed him that he was required at home. On arrival, he found a number of people, who told him that the appellant had killed his son. He, along with other neighbours, went to look for the appellant without success. About a year later, on 5th May 2007, he met the appellant in Loitoktok town and together with one Peter Kiroi, arrested the appellant and took him to Oloitoktok Police Station.

PW3 was **STEPHEN MWANZIA**, at the time, a student at Entara Primary School. On the material day, he was preparing supper at his home when he heard two of his neighbours, Wamuzee and Mama Kim quarrelling. He then saw the appellant assaulting PW1 with a *panga*. She was carrying a young child; she managed to escape, but left her child behind. Thereafter, the appellant threatened him as well so he ran away, but he later went back with some members of the public and found that the child had been severely injured on the head. Prior to the incident, he had known the appellant for about two years. He never saw the accused assaulting the deceased, but saw him assault PW1.

PW4 was **MICHEAL MURUNGU GITHUTU**. He was on his way home at around 7 pm when he heard some noise emanating from where he lives, he ran towards the noise and found a group of people, among them PW1 who said that she had been assaulted by her tenant. She requested him to go collect her child who she had left behind. He went to her house and saw the child lying outside, with an injury to the head, thought the child was still alive. The appellant was nowhere around, and he was later informed that the child had died.

The evidence of these prosecution witnesses was that it was the appellant who attacked PW1 while she was carrying the child, causing them injuries which eventually caused the child's death.

We now turn to consider the appellant's grounds and wish to begin with the ground that the High Court erred in convicting the appellant by failing to consider the appellant's defence, which violated section 169 (1) of the Criminal Procedure Code. This section deals with the contents of a judgment. Section 169 (1) provides that:

" (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment

to which he is sentenced."

A judgment that does not comply with section 169 of the Criminal Procedure Code would render it a nullity. See ***Elizabeth Gitiri Gachanja & 7 Others V Republic [2011] eKLR*** where the Court stated that:

> ***"…We have no doubt in our mind that where the facts are clearly undisputed that the trial court has not complied with the provisions of section 169 (1) and (2) of the Criminal Procedure Code, the trial would be vitiated…"***

We have looked at the judgment of the trial court and do not find it wanting in any form. The trial court has properly set out the issues for determination and made a finding on each. Moreover, we have noted that the judgment is properly signed by the trial judge. This ground of appeal is completely baseless and fails.

The first ground raised by the appellant is that the trial court erred in convicting and sentencing the appellant in the absence of eyewitness testimony. It is alleged that no one witnessed the murder. This ground can be considered together with the second ground raised by the appellant, which is that the trial court erred in convicting the appellant based on circumstantial evidence.

The use of circumstantial evidence has been a matter considered at length by this court. In ***Elizabeth Gitiri Gachanja & 7 Others V Republic (supra)*** this court (O'Kubasu, Waki & Onyango-Otieno) summarised the leading cases on the use of circumstantial evidence as follows:

> ***"In the often quoted case of Rex vs Kipkering arap Koske & Another [1949] Volume 16 at page 135, the Court of Appeal for Eastern Africa held as follows:-***
>
> ***"(1) That in order to justify, on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."***
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> ***This legal principle was updated by the predecessor to this Court in its decision in the case of Simoni Musoke v R [1958] EA 715 when it quoted with approval the decision of the Privy Council in Teper v R (2), [1952] AC 480 at page 489 where that Court stated:***
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> ***"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 could weaken or destroy the inference."***

In ***John Macharia Gachanja v Republic [2009] eKLR*** the court stated that

> ***"First, the law is clear that in order to rely on circumstantial evidence to convict an accused person the links in the chain of that evidence must be complete and thus the evidence must point at the accused as the only person committed the offence and none other."***

In this case, the Court was guided by the holding in ***Mwangi v. Republic (1983) KLR 327,*** where this Court held:-

> ***"1. In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.***
>
> ***2. In order to draw the inference of the accused's guilt from circumstantial evidence,***

there must be no other co-existing circumstances which would weaken or destroy the inference."

In this case, it is undisputed that no one actually saw the appellant attack the deceased child. However, there is no doubt that PW1 and the appellant had an argument that resulted in her being attacked by the appellant. Both PW3 and PW7 witnessed this attack. PW3 also saw PW1 drop the child before she escaped. PW3 was forced to flee after the appellant threatened him. PW4 also testified that after he met PW1, she requested him to go collect the child from the scene. He went to the scene of the attack and found the child lying on the ground, with an injury to the head. This is the injury that, in the doctor's opinion, was caused by a *panga* cut. The trial court found that the circumstances in this case pointed irresistibly to the fact that it was the appellant who attacked PW1 and also caused the death of the child. Given the appellant's earlier threat to kill PW1 and her children, we are of a similar view. The account of what happened, from PW1, PW3 and PW7, links the appellant to the attack on PW1 and the child, and as is clearly brought out by the evidence of the doctor, the death of the child was caused by the injury to his head.

In circumstances such as those in the present appeal, Section 111 of the Evidence Act, Chapter 80 of the Laws of Kenya, placed the burden on the appellant to disprove the facts that pointed to him as being the one who inflicted the fatal injury to the child. The period between the time when PW1 and PW3 ran away, and PW 4 visited the scene and found the injured child, who was still alive at that point, was very short. In the absence of any explanation from the appellant, the only logical conclusion is that it is the appellant, and no one else, who inflicted the fatal injury to the deceased.

We also agree with the findings of the trial judge that the offence of murder was proved beyond any reasonable doubt. The appellant visited the home of PW1 when he was armed, and he must have known that by attacking PW1 and the child with a *panga*, he would at least be inflicting grievous harm on them. Moreover, his conduct after the incident is that of a person with a guilty mind. We say so because he ran away from the scene, and never went back. He was traced after one year.

The final ground that the learned judge erred in law in convicting without proof beyond reasonable doubt also fails. The evidence points clearly, and leaves no doubt that it is the actions of the appellant that caused the death of the child.

Consequently, this appeal has no merit and we dismiss it in its entirety.

Dated and delivered at Nairobi this 19th day of July 2013

D. K. MARAGA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR