IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 308 OF 2011

BETWEEN

GMI…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Decree and Judgment of the High Court of Kenya at Meru, (Lesiit, J.) dated 20th December, 2011

in

H.C. CR. C. No. 50 of 2008)

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JUDGMENT OF THE COURT

[1] GMI, the appellant, was on the 20th day of December, 2011, convicted of murder by **Lesiit, J**. and sentenced to death. He faced a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on the 28th day of July, 2008, in Meru Central District within the then Eastern Province, he murdered FK.

[2] The appellant was the deceased's husband. No one saw the appellant murder the deceased but according to the evidence, they had been married for about 15 years. They had two children although one child had died leaving them with one JM who testified as PW 6. The appellant and the deceased used to operate a shop at [Particulars Witheld]. Some of the witnesses especially the sister of the deceased testified that the couple lived happily but the parents of the deceased said the marriage was characterized by disagreements.

[3] On the fateful day that is on the 28th day of July 2008, at about 7.30 p.m., Irene Kagi David (PW 4), said she met the deceased with the appellant at a junction that led to their respective homes. PW 4 said that she had asked the deceased to carry some things for her from her shop and was waiting for her by the road to receive them. PW 4 asked the deceased whether she had brought for her cups, but the deceased told her she could collect the cups the following morning, at the shop from the appellant as the deceased was not going to be present. According to PW 4, the deceased was with the appellant to whom she

confirmed that she would collect the cups from their shop as agreed. They parted company but later she heard people screaming from the direction of the road. When she went to check she found many people including the sub-chief surrounding the deceased who was lying on the ground with the luggage she was carrying on one hand and the torch on the other. This was about 300 Metres from where she had met the deceased with the appellant. She also saw the appellant standing just near the body of the deceased, he was crying; PW 4 posed a question how come it was the deceased who was attacked and yet the appellant must have been the one who was carrying the business money. She was, however, ordered to keep quiet.

[4] Another important piece of evidence that was considered by the trial Judge was by JM (PW 6), the son of the appellant and deceased. On the material day, he was waiting for his parents at the home of his maternal grandparents, so that they could go home together. His mother took long in coming, so his grandmother advised him to go to sleep, a short while somebody by the name Mwirigi came calling them to come out with torches as he had seen somebody lying on the road. PW 6 went to the scene with the deceased's sister FK (PW 3) and saw is mother was the one lying on the road. She was bleeding.

[5] They started screaming as they went back home and on the way, he met the appellant who held his hand and asked him where the deceased was. He told the appellant his mother was lying on the road; he slept at his grandmother's home on that night. The following morning, he and PW 4 went round their house and found an iron bar that the appellant used to carry every evening as he went to pick the deceased from the shop. The metal bar was lying on the flower bed behind the appellant's house and a few meters from where the deceased's body was found. It had pieces of hair and blood on it.

[6] The metal bar was taken as an exhibit by the Investigating Officer. PC Ezekiel Othira (PW 8) and was sent to the Government Chemist together with a blood sample from the deceased's body. The Government Analyst was not able to attend court to give evidence. Despite an objection that was raised by Mr. Omayo, learned counsel for the appellant before the High Court, the learned trial Judge allowed PW 8 to produce the report that was prepared by Stephen Motende. The report showed that the blood stains on the metal bar matched the blood samples of the deceased. In other words, the blood stains came from the deceased after the injury.

[7] The postmortem examination on the body of the deceased was conducted by Dr. Isaac Macharia at Meru Level Five Hospital; he was, however, not able to attend court and his report was produced by his colleague Dr. Grace Nguyo. The postmortem was conducted on 5th August, 2008. Externally, the body had a deep wound on the forehead. Internally, the head had a compound depressed fracture of the occipital bone and the left temporal bone with deep brain laceration. In the doctor's opinion the cause of death was blunt head injury. The appellant does not appear to have been subjected to medical examination and if he was, no report was produced.

[8] The Prosecution's case was the appellant, with malice aforethought, caused the death of the deceased. As only the appellant and the deceased were seen walking together and soon, thereafter, the deceased's lifeless body was found lying on the same road with injuries. There was no eye witness account as to what exactly happened. The Prosecution set out to piece together certain events such as the evidence of PW 4, who saw the appellant and deceased walking together, the evidence of their son, PW 6, who discovered the appellant's iron bar that was blood stained and the analysis of the blood showed it matched that of the deceased. A second circumstance that pointed to the appellant as the author of the deceased's death is that the couple used to quarrel regularly and according to JMM (PW 5), the father of the deceased, they held many discussions to resolve those problems.

[9] The appellant was placed on his defence. He gave sworn evidence and gave an account of his own movements on the material day. He denied that he was walking with the deceased but stated he was going home from Meru Town where he had gone to buy merchandize for business. When he arrived at Rwanyange Town Centre at 8.00 p.m, he found their shop closed. After about 20 minutes, he started walking to his home which is about 20 minutes away; on the way he received a telephone call from one Geoffrey who told him something had happened. He found a large crowd of people when he approached the scene he saw his wife lying on the ground and blood oozing, he was arrested and charged with the murder. He denied that he could have killed his wife as they lived peacefully; used to do business

together and they bought land and built a home together.

[10] After receiving the above evidence, the learned Judge in her judgment made the following observations in pertinent parts thereto:-

> ***"The evidence of PW 7 is taken in isolation. If taken, it would amount to mere suspicion but looked at in the context of the entire case, I find that it does make a pattern that fixes with the entire Prosecution case.***
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> ***The accused did not deny that the metal bar which was produced as an exhibit in this case belonged to him. In fact, he did not make any reference to it in his defence. The only thing the accused said in general is that his son lied against him because of what he had been told to say.***
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> ***The evidence against the accused person is circumstantial and the test that should be applied was set out in the case of ABANGA alias ONYANGO v REP. CR. A NO. 32 OF 1990 (UR), at page 5 where the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:***
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> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three testes: (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."***
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> ***The Prosecution has established the circumstances from which an inference of guilt is sought to be drawn cogently and firmly. I find the circumstances, which are that the deceased was last seen alive in the company of the accused, and that the murder weapon was a metal bar which the accused used to carry often as evidenced by his son PW 6; that all these circumstances point unerringly towards the guilt of the accused. I find that the circumstances taken cumulatively 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."***

[11] The appellant was thus convicted on the basis that he was the last person to be seen with the deceased by PW 4 at about 7.30 p.m., a short while before her body was discovered on the road. Secondly, an iron bar that was identified by the appellant's son as belonging to the appellant was found with blood that matched that of the deceased. It is against those findings that counsel for the appellant preferred the appeal. In her address to us, Miss Kiome learned counsel for the appellant relied on the home grown grounds of appeal which she argued together with the supplementary grounds she had filed.

[12] The first ground of appeal argued by Miss Kiome was that the circumstantial evidence did not exclusively point at the appellant as the only person who had the opportunity of committing the offence. The metal bar that was the suspected murder weapon was recovered near the scene of murder. It was taken to the Government Chemist but only the blood group of the deceased was matched. The blood group or even the finger prints of the appellant were not matched. There was no DNA analysis nor were finger prints lifted on the weapon, and although it was said it belonged to the appellant no one said he was seen with it on the material time. Thus there was no evidence to show that it is the appellant who used the metal bar to inflict the fatal injuries on the deceased. Counsel for the appellant had objected to the production of the weapon and report by the Investigating Officer but he was overruled by the trial Judge. Miss Kiome urged us to dismiss the evidence as lacking credibility for lack of DNA profiling and finger prints.

[13] Regarding the sequence of events, counsel submitted that there was a disconnect due to lack of

evidence on the murder weapon, and the inconsistent evidence by PW 4 regarding the time she met the couple, and the time when the body of deceased was found. She made reference to the case of ***Neema Manchor Ndurya v R, 2008 eKlr***, In that case the Court of Appeal found that there was lingering doubt of the involvement of another witness in the commission of offence (murder of a baby), as there was no evidence as to when the appellant was first seen with the baby. From the evidence it could not be said that circumstantial evidence was so watertight as to exclude a possibility of another person having murdered the child, there was strong suspicion that the appellant might have known how the deceased died but suspicion alone, however, strong, is not enough to sustain a conviction. See ***R v Kipkering Arap Koske & Another, 16 EACA 135***.

[14] On the part of the State, Mr. Motende, supported the conviction and sentence by the High Court, he submitted that there was sufficient evidence to support the charge of murder. The appellant was the last person to be seen with the deceased, the evidence of PW 4, placed the appellant on the scene of murder; this was corroborated by the evidence of PW 6 who discovered a blood stained metal bar that the appellant used to carry every time he was walking from the shop; it had blood that matched the deceased. Thus, all the evidence pointed at the appellant and the trial court was correct in its conclusion that all the exculpatory facts were incompatible with the innocence of the appellant and were incapable of any other explanation than that it was the appellant and none other that caused the death of the deceased.

[15] It is common ground that there was no eye witness in this matter. The conviction of the appellant was entirely dependent on circumstantial evidence. We must, therefore, consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon other reasonable hypothesis than that of guilt. In ***Musoke v R, [1958] EA 715, citing with approval Teper v R, [1952], AL 480***, the predecessor of this Court added a further principle that: -

> ***"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."***

[16] This is the guiding principle in this appeal as according to PW 3, FK, who was also the deceased's sister, she had retired to bed when she was called by a person called "**Mutwiri"** who told them to go out with torches. PW 6 was also in the same house with his auntie, PW 3, he had waited for his mother they go home together for a long time and decided to go to sleep at his grandmother's house. He said:

> ***"Shortly later Mwirirgi came and asked for a torch. Auntie Karimi and me went with a torch. Mwirigi told us that there was a person he saw lying on the ground and cattle was on the way there....."***

Whether this person who was being referred to by the two witnesses as "**Mutwiri**" and "**Mwirigi**" was one person or they were two different people, was not analyzed by the High Court. In our view whether this was one person or they were two, they were important witnesses. We recognize it is the responsibility of the prosecution to decide the number of witnesses to call.

[17] However, in a case depending on circumstantial evidence that was pieced up, the evidence of the first person who saw the body of the deceased and the time the body was seen such as in this matter was crucial evidence. The evidence of those witnesses could have clarified how and when they saw the body of the deceased. These two people were also introduced in the chain of events thereby breaking it up so that there is doubt whether the appellant was the only person who as last seen with the deceased. It is not known the time the deceased was murdered; according to PW 4, she saw the deceased and the appellants about 7.30 p.m. and heard screams about 20 minutes later. According to PW 3 and PW 6, they had retired to sleep after waiting for a long time for the deceased to come.

[18] The other piece of evidence that has caused us some concern was the so called murder weapon. The evidence of the metal bar, from its handling, its testing at the Government Chemist was all slovenly handled. Proper DNA analysis and finger prints were not done to link it with the appellant. In any event,

there was no evidence that the appellant was seen with the metal bar on the material night, thereby leaving doubts as to whether there was a possibility the metal bar was used by another assailant to murder the deceased.

[19] This now leaves us with the single evidence of PW 4 who said that she saw the appellant and deceased at the intersection of the road, they discussed about cups and agreed that she would pick them the following morning from the appellant. After sometimes, she heard people screaming. The exact time when the deceased was murdered is not known. No investigations were carried out to rule out any other intervening factors like the presence of other people on the road where the deceased was last seen walking at night; the role played by Mutwiri or Mwirigi who were not called as witnesses. There are also some contradictions regarding the time and whether there was any motive to drive the appellant into taking the life of his wife.

[20] Considering the remaining evidence is only that of a single witness which was not treated with caution as per the laid down principles, on our part we view this evidence as merely creating a strong suspicion. A strong suspicion that the appellant might have known how the deceased died but suspicion alone no matter how strong is not enough to sustain a conviction. We entertain doubt whether the deceased was attacked by other people or by the appellant.

That being our view of the matter, we find this appeal has merit. We allow the appeal, quash the appellant's conviction, set aside the sentence of death imposed by the High Court and order the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 28th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.***K. KOOME***

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR