



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

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

**CRIMINAL APPEAL NO. 37 OF 2009**

**BETWEEN**

**URITA NJERI MUCHIRI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the conviction and Judgment of the High Court of Kenya at Meru, (Emukule, J.) dated 6<sup>th</sup> March, 2009*

*in*

*H.C. CR. C. No. 3 of 2006)*

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**JUDGMENT OF THE COURT**

[1] This is a first appeal from the judgment of the High Court at Meru, **Emukule, J.** dated 6th March, 2004. By dint of principles enshrined in the well known case of ***Okeno v R, 1972, EA***, we are duty bound to revisit the evidence adduced before the trial court afresh, analyze it, evaluate it, and arrive at our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing the demeanor of witnesses and hearing them and thus give allowances for that.

[2] Urita Njeri Muchiri, the appellant, (Urita), was married to the deceased as the 2nd or 3rd wife. They had one child and the deceased had four other children with his former wives who had gone their ways when he was living with Urita and one of the sons' called M. Before the fateful day, U had disagreed with the deceased and gone to live with her parents. On the fateful night of 13th or 14th November, 2005, when the deceased was allegedly murdered, MM (PW 1), a son of the deceased with another woman testified that he was at home with the deceased. On 13<sup>th</sup> November 2005 the deceased left home in the morning and returned at about 7.00 p.m., and he called M to open the door for him. M said he and his father went to sleep and while they were sleeping, U came at night in the company of another man whom he did not know. She started throwing stones and hitting the door with sticks. M opened the door and U with the man she was with entered the house. She lit a lamp and kept it beside where the deceased was sleeping. She tied a wire round the deceased's neck and hanged the him

with the wire to the ceiling of the house and left.

[3] M said he continued sleeping and early the following morning, U came and cut the wire and asked M to help her drag the body of the deceased which he did, they dragged the body and left it by the door. M said U threatened him and warned him not to tell anybody. M said he went to school leaving the body of his father on the door until about lunchtime when he returned from school and informed his grandmother who in turn reported the matter to the sub-area chief and subsequently, the incident was reported to the police at Chuka.

[4] This was the only direct evidence that implicated U with the death of the deceased. The other evidence was circumstantial. It basically showed that U was at the house of the deceased on the evening of 13th and morning of 14th November, 2005. Philomena Karimi, PW 2 used to live at her home at Mbukoni Village. At the midnight of 13th and 14th November 2005, U who was a neighbour came to her house and requested for a place to sleep claiming she had been chased away by her husband. U was given a place to sleep but the following morning she woke up at 5.00 a.m. and went away without saying where she had gone. She returned at 7.30 a.m. for breakfast.

[5] It is not clear whether this is the same breakfast U had with Silas Mbariu Iringa (PW 3). This was his evidence. PW 3 is the brother of the deceased. On 13th November 2005, while at Nkubu Market, he met one Rwanda Riungu who was vying for a political seat and was actively campaigning for the Referendum. He asked for the deceased whom he wanted to appoint as an Agent. When PW 3 returned home at about 6-7 p.m., he found U in the kitchen together with a child. U told PW 3 that she had been waiting for the deceased from midday. U accompanied PW 3 to his home where they ate supper. At about 9 p.m., U left for the deceased's place but returned after only 20 minutes saying the deceased had refused to respond to her calls and requested PW 3 to help wake him up.

[6] PW 3 said he declined, thus U said she would go back to the deceased's house and wait for him until morning. PW 3 did not see U that night, but the following morning at 6.30 a.m., he saw U coming from the deceased's house. He invited her for breakfast and in the course of taking breakfast, U informed PW 3 that the deceased had not responded to her calls in the night. It was only M who responded. She also said she did not see the deceased in the house.

[7] MM, PW 4, said he was a pupil in standard 6. He recalled that on 14th November 2005, while on his way to school, he passed by the compound of the deceased. He met U standing on the door of the house holding a baby. He did not see anybody else but he heard U say that she would bring up the child who was crying when M is dead.

[8] Wellington Nyamu Kingi, (PW 5), was the Chief of Katuboni location, on 14th November, 2005, at around 2 p.m., while in his office which was not far from the deceased's home, he heard people saying "*M is dead*", together with the Assistant Chief, they went to the deceased's home and saw his body lying in the table room about 3 feet from the door. He made the report at Chuka Police Station. P.C. John Gachara, PW 6, received the report and moved the body to Chuka District Hospital Mortuary. The deceased's body had a swollen neck and blood was oozing from the neck. There were no visible injuries on the body and there did not seem to have been any disturbance in the bedroom. Only the bed was unmade. PW 6 commenced investigations in the matter, he visited the scene and recovered a wire but he could not link it to the deceased's death.

[9] The postmortem examination on the body of the deceased was carried out by Dr. Kihura on 29th November 2005, who proceeded on study leave and the evidence to that effect was adduced by Dr. Nimrod Ngala Ngaramo, PW 7. The body of the deceased had bruises on the left shoulder around the clavicle and left arm and below the left eye; depression marks around front part of the neck internally, there was blood in the chest cavity and scalp *haemotrauma* on the right occipital area. In the opinion of the doctor, the cause of death was trauma to the head and chest injury; also strangulation was likely cause. U was also subjected to mental assessment and was found physically and mentally fit to stand trial. PW 6 said he recommended U be charged based on the fact that she was seen at the deceased's home on the material day after she had separated from him. He also relied on the statement of M to recommend her

prosecution.

[10] This trial was started with the aid of assessors when Sitati, J. heard the 7 Prosecution witnesses. The matter was taken over by Emukule, J., who reviewed the evidence and delivered a ruling on 23rd May 2008, in which he found U had a case to answer. Thereafter Emukule, J., proceeded to hear the defence evidence without the assessors. There is no record at all on how the assessors disappeared from the proceedings. U gave sworn evidence in defence. She stated that she had been married to the deceased for six years and they had one child. However, the deceased had married two other wives but they had separated. On 13th November 2005, she visited the deceased's home for the first time since they had disagreed with deceased on 11th October, 2005, and she had gone to stay with her parents about 10 Kms away. She arrived at the deceased's home at about 1 p.m. but found nobody at home. She sat by the veranda and fed her child when Maria heard the child crying and came to inquire. Maria greeted U and exchanged pleasantries and U said she would continue to wait for deceased. [11] She waited until 2.30 p.m, and then went to her brother in law's (PW 3) house within the same compound. She found PW 3 with his wife and they stayed there until about 7.00 p.m. She went to check on the deceased and found the house open from outside but locked from inside. She called several times but the deceased did not answer. She only heard M coughing so she went back to PW 3 to ask for somewhere to sleep but he turned her away. She also went to her mother in law and was turned away. It was Florence Karimi, PW 2, who gave her somewhere to sleep.

[12] Very early in the morning, she went back to the deceased's house and found M standing at the door. She told him she wanted to remove some things from the house. She entered the bedroom, took a paper bag and scissors and left. On the way, she met PW 3 who invited her for tea in his house. After tea, he escorted her and she went back to her parent's home. She returned on 21st November 2005 to vote during the Referendum as she had registered in that area. She met Maria on the shamba who invited her to her home. Suddenly she was arrested and charged with the murder of the deceased. She denied having had anything to do with his death.

[13] After evaluating the evidence, Emukule, J., was satisfied that U murdered the deceased. She was convicted and sentenced to death. That is what prompted this appeal based on 5 grounds as set out in a supplementary memorandum of appeal filed on behalf of the appellant by her advocate on 23rd October 2013. In brief, those grounds faulted the conviction of the appellant based on contradictory evidence; reliance on circumstantial evidence that was weak in nature; failure to comply with provisions of **Section 322** of the **Penal Code** and **Section 200(1) (2) and 3** of the **Criminal Procedure Code** and reliance on the evidence of PW 1 which was at variance with the postmortem report.

[14] In her submissions to us, M/s Nelima, learned counsel for the appellant highlighted each of those grounds and cited authorities in support thereto. According to M/s Nelima, the whole trial was a nullity for failure to comply with the mandatory provisions of the Criminal Procedure Code. She pointed out that there was an amendment that provided that **Section 200** of the **Criminal Procedure Code** would apply to proceedings before the High Court. After Sitati, J. left the matter and it was taken over by Emukule, J., it was mandatory for the court to inform the appellant so that she could elect whether to recall witnesses or proceed from where Sitati, J. left the matter; failure to do so prejudiced the appellant as judgment was written by a Judge who never heard or saw the prosecution witnesses; similarly, the Judge failed to comply with the provisions of **Sections 321, 297 and 298** of the **Criminal Procedure Code** as the case started with the aid of assessors. The appellant had accrued rights when her trial started with assessors, and, therefore, the same assessors should have conducted the trial to the end. The assessors were not discharged and no reasons were given for their disappearance from trial. Counsel cited the case of *Wanjiku v R, 2009 KLR page 210*, where it held:

1. *“Under the interpretation and General Provisions Act (Cap 2), Section 23(3), where written law repeats another law, unless contrary intention appears, the repeal is not to affect any legal proceedings, remedy, right, privilege, obligation liability or penalty and any such legal proceeding or remedy may be instituted, continued or enforced and such penalty imposed just as if the repealing written law had not been made.*

2. *In view of this provision, the appellant was entitled to be tried with the aid of assessors and the amendment of the law did not and could not have deprived him of the right which had accrued to him when the new legislation came into force. The High Court was justified in summarily dismissing the assessors.*”

[15] The second issue argued by M/s Nelima was regarding the evidence of Morris, he testified that the deceased was strangled and hanged with a wire, yet the postmortem report showed a depression on the shoulder, there was no evidence to support death by strangulation. This also contradicted the investigating officer who said there were no marks on the neck to support death by hanging with a wire. The Judge was faulted for relying on circumstantial evidence whose facts were not incompatible with the only logical conclusion that it was only the appellant who had the opportunity to cause the death of the deceased. The facts left gaps that there could have been other person(s) who caused his death. Also, the conduct of M made him an accomplice whose evidence should have been treated carefully. Counsel cited the case of Sawe v R, 2003 KLR, page 364 and urged us to allow the appeal.

[16] Mr. Kaigai, the learned Assistant Director Public Prosecutor, submitted that although the evidence against the appellant was strong, there were procedural misdirection; He conceded that the provisions of **Section 200** of the **Criminal Procedure Code** was not complied with and also the trial had begun with assessors and should have been concluded with them. He urged us to order a retrial.

[17] In response to this request of retrial, M/s Nelima responded that the sole evidence of M which was vague on the death of the deceased and the lapse of 10 years will not serve the interest of justice.

[18] We agree and just like Mr. Kaigai has rightly concluded, the conviction of the appellant cannot stand due to the procedural misdirections during the trial that must have prejudiced the appellant. The issue for consideration is whether the evidence in this matter and the lapse of time, of about 8 years since the offence took place, a retrial will serve the interest of justice. See the case of Elirema & Another v R, 2004 KLR on the principles that guide the court on whether to order a retrial. The appellant was convicted based on the evidence of PW 1 which was taken with circumstantial evidence that she was present at the deceased's home during the night and in the morning before his body was discovered dead.

[19] M the son of the deceased, who was at the time aged about 18 years is the one who gave evidence that the appellant strangled the deceased with a wire and hanged him on the ceiling. In the morning, she cut the wire and asked M to help her drag the deceased to the sitting room. The behavior of M is clearly of somebody who acquiesced in what was happening, he failed to report the crime but did so subsequently, his evidence should have been treated with caution. See the case of Ndungu Kimanyo v R, 1979 KLR 282, where this Court stated:

*“The witness in a Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straight forward person or raise a suspicion about his trustworthiness or say something which indicate that he is a person of doubtful integrity and, therefore, unreliable witness which makes it unsafe to accept his evidence.”*

[20] M was allegedly present when the deceased was hanged with a wire, he said he helped the appellant drag the body of the deceased to the door, he did not tell anybody but continued to sleep when his father was hanging, and the following morning he went to school. The evidence of the Investigating Officer clearly shows he did not take M's evidence seriously as he did not regard the piece of wire as the cause of death. He based his conclusions on the fact that the appellant was present at the deceased's home on the material day, although they had separated. In our respectful view, the evidence of PW 1 raises concerns on whether he was an accomplice or he too had a hand in the death of the deceased. See the case of Mwangi v R, 1984 KLR 595 in which accomplice evidence was held to be unreliable for the reason that the accomplice was likely to swear falsely to shift blame from himself.

[21] It was said that the appellant was present at the deceased's home, after they had disagreed and she had gone to stay with her parents. The appellant explained the circumstances under which she returned to

her matrimonial home. She testified that when she went to the house at about 8.00 p.m., she found the deceased and M sleeping in the same house and when she called the deceased did not answer, it was only M who coughed. Thus, the exculpatory facts did not only point at the appellant as the only person who had the opportunity to commit the offence. There were other people like M who had the same opportunity. Moreover, very shoddy investigations were carried out; for instance the postmortem examination did not point at strangulation as the cause of death. The investigations did not extend to the state, in which the deceased was when he came home on 13th November 2005. Could he have been assaulted elsewhere before he came home as his body had many bruises? Moreover the investigating officer said the body had no external injuries only a swollen neck which was not noted in the postmortem report.

[22] In this case the evidence does not irresistibly point to the appellant with mathematical precision that it was she and none other murdered the deceased within the meaning of ***R v Kipkering Arap Koske & Another***, 16 EACA 135, where it was held *intra alia*:

***“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

In our judgment, the evidence of M and the circumstantial evidence does not justify an order for a retrial, besides the fact that the appellant has been incarcerated for over 8 years; in our view a retrial will not serve the ends of justice.

[23] We decline to order a retrial, the appeal is allowed, we quash the conviction and set aside the death sentence. Unless the appellant is otherwise lawfully held, she should be set at liberty forthwith.

***Dated and delivered at Meru this 28<sup>th</sup> 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**