IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & KIAGE JJ.A)

CRIMINAL APPEAL NO. 266 OF 2010(R)

BETWEEN

CHRISTOPHER MURAYA MUTAHI ……..…..……. APPELLANT

AND

REPUBLIC……..…….……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi by (Lesiit, J.) dated 24th June, 2010

in

HC.CR.C. NO. 43 OF 2008)

****

JUDGMENT OF THE COURT

This appeal is yet another case emanating from fatal marital discord.

The appellant was charged, tried, convicted of and sentenced to suffer death for the murder on 17th August 2007 of EUNICE KAGURE, his estranged wife of 5 years and mother to their two children.

The prosecution case before Lesiit, J. was that the deceased left the home where she lived with the appellant in July 2007 and went on an extended visit to her grandmother at Kanyayo Village. While there, she met and struck a relationship with one DANIEL KIRIGA CHEGE (**PW2**). **PW2** had been a widower for some 7 years. He and the deceased, who considered herself separated from the appellant, were quite serious about being hitched. They visited a Voluntary Counseling and Testing Centre (VCT) on 3rd August 2007 to ascertain their HIV status. The results being propitious, they commenced cohabitation.

That cohabitation would prove to be tragically short lived for, on 17.8.07, while **PW2** was away, the appellant came calling. He confronted the deceased. She called out the name of Mbugua, SAMWEL NJARA, (**PW4**) a neighbour who had earlier in the day been mending her and **PW 2's** fence. She was asking him to help her. Rushing to see what was a miss, **PW4** saw a man chasing the deceased. That man had literally cornered the deceased forcing her to walk backwards. **PW4** re-assumingly told the deceased that he was coming to her aid but the man reached the deceased before **PW4** could. **PW4** thought the man was going to rape her as he cornered her against the wall of a bathroom and she could run NO further. The man then stabbed the deceased once on the left side of the chest before running off into a maize

plantation and making his escape. As he did so, he shed off a red T-shirt he was wearing and disappeared bare-chested.

PW4 tried to give chase after the man all the while shouting 'Thief Thief' but neither he nor the other people who joined in the chase including DAVID MUTUNGI (**PW3**) could catch up with the man and they gave up the chase. Returning to **PW2's** home, **PW4** found that the deceased had succumbed to the stab wound and expired. Her body had been taken to the City Mortuary. This eye witness was later called to an identification parade mounted by Acting Inspector of Police ODHIAMBO MAKORI (**PW10**) where he was able to pick out the appellant as the man who stabbed the deceased to death.

PW6, LUCY WAMBUI, the deceased's 73 - year old grandmother and she testified that the appellant had visited her home in the July before that fateful August day. He was looking for the deceased but did not find her as she had gone to hospital. He came again on the material day but he appeared agitated, refusing to enter the house and sitting outside only when she insisted that he take the offered chair. She testified to her concerns for the deceased's safety as the deceased had reported to her threats made by the appellant on the phone that he would kill the deceased and her people. When the appellant left, **PW6** followed him, impelled by his state of anger and anxiety coupled with a recollection of the threats he had made. His walk being brisk, PW6 lost sight of him but she took a short-cut towards **PW2's** home only to be greeted by screams and the lifeless body of the deceased, stabbed to death.

On that same day, BENEDICTA WANJIRU (**PW7**) was at her place of work, a roadside shop at Wathande, chatting with her cousin. A man came to them and asked them if they knew Kirika's home. They not only answered in the affirmative, but **PW7** offered to show the stranger that home. She led him to PW2's gate which he entered. She then went on to her own home in the neighbourhood only to be startled scarcely ten minutes later by screams emanating from PW2's home. She rushed there and found a woman lying on the ground dead. The stranger was nowhere to be seen.

The evidence of the deceased's aunt by marriage, DAMARIS WANGARI GITHIMA, was that on the material day she was at home. At about 11.30am, the appellant came there but left shortly afterwards. Half an hour later she heard an alarm being raised at **PW2's** home. She rushed there and found the deceased had been stabbed to death. Next to the body was a new knife that was now bent and blood-stained. The witness recalled that the deceased had earlier complained that the appellant had threatened to kill her.

The presence of the appellant in the neighbourhood was also confirmed by DAVID MUTUNGI (**PW3**) who narrated how the appellant came briefly to **PW1's** house at about 11.00am but left without taking the seat he had been offered. A mere ten minutes later, **PW3** heard screams, with people shouting that a woman had been stabbed by a man whose description fitted the appellant. **PW3** armed himself with a panga and went out, with others, in search of the culprit in a forest nearby. Their search proved fruitless and was abandoned at about 4pm.

P.C. SAMSON BOR (**PW 11**) was a police officer attached to Kikuyu Police station. On the material day he and his colleagues received a call from the 99 controller in Kiambu instructing them to proceed to a homestead in Kahiga. It was **PW2's** home and there they found the lifeless body of the deceased stabbed on the chest. Beside it was a kitchen knife. This knife did not come from **PW2's** kitchen and was brand new. The witness recovered it. It was blood-stained as were the clothes the deceased was wearing. He took samples of the deceased's blood to the Government Chemist who confirmed the stains were of the deceased's blood type. The witness learnt that the appellant had been at the scene and disappeared thereafter. He went into hiding until 7th May 2008, some 9 months later, when **PW11** laid an ambush for him in Dandora and arrested him.

We have endevoured to set out the evidence in obedience to our obligation as a first appellate court. We recently expressed this obligation thus in **ANN WAMBUI MUTHONI Vs. REPUBLIC** Criminal Appeal NO. 91 OF 2011;

"This being a first appeal, it is our bounden duty and the appellant is entitled to

> **expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial court so as to reach our own independent conclusion on the guilt or otherwise of the appellant. This is in actualization of the appellant's right under Article 50(2) (9) of the Constitution and is in consonance with Rule 29 (1) of the Court of Appeal Rules which donates to us power to reappraise the evidence and to draw our own inferences of fact."**

The principles that we bear in mind while exercising our jurisdiction in this regard are now old hat as can be seen from such cases of notoriety as **PANDYA Vs. R [1957] EA 336** and **OKENO Vs. R [1972] EA 32**. More recently, we restated the same principles in the case of **SUSAN MUNYI Vs. KESHAR SHIANI**; Civil Appeal No. 38 of 2002 (unreported) as follows;

> ***"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and make our own independent conclusions.***
>
> ***In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect to disturb them."***

Bearing those principles in mind, we now address the appellant's appeal to us. He initially filed a Memorandum of Appeal raising three substantive grounds. Appearing before us to urge the appeal, Mr. Kariu, the appellant's learned counsel, elected to argue only the first two of those grounds namely;

> **"1. THAT the High Court justice (sic) erred in both law and facts when she convicted me in this case while relying on circumstantial evidence of PW4**
>
> **2. THAT the High Court judge erred in law and facts when she convicted me in this case without considering that it was a fight between the deceased and one who was my wife."**

In his submissions, Mr. Kariu conceded the indisputable fact that the appellant did stab the deceased fatally. He, however, stated that the stabbing was as a result of provocation which led to an altercation between the appellant and the deceased. To found the submission hoisting the defence of provocation, counsel referred us to the appellant's unsworn statement where he told the trial court as follows;

> **"I knocked the gate and my wife came out. That is when I greeted her but she did not respond to me. I asked her what was the matter. She told me to return to my mother so that she can look for a good wife for me."**

Counsel further contended that the stabbing of the deceased was not premeditated, for had it been so, the wounds would have been more than the single one from which she died. He maintained, referring to the unsworn statement, that it was the deceased who first attacked and slapped the appellant and she who first wielded the knife. Counsel urged us therefore to find that the learned judge's finding that malice aforethought had been proved was erroneous, and besought us to accept the appellant's account of what transpired as being the more authentic version.

Opposing the appeal, Mr. Kamula, the Senior Assistant Director of Public Prosecutions, emphatically rejected the defence of provocation. He pointed to the evidence of **PW4** the eye witness who beheld what

transpired and who saw neither struggle nor a fight. The SADPP maintained that on the evidence, the appellant chased after the deceased while armed with a brand new knife which he carried for that particular purpose. He also asserted that the appellant's 9-month disappearance after the stabbing was not consistent with innocence.

Having ourselves studied the entire record and reassessed the evidence, we find that the only issue for our decision is whether the uncontested stabbing of the deceased by the appellant was impelled by the legal malice aforethought that constitutes the ***mens rea*** for the offence of murder. Its meaning and content is provided for at **Section 206** of the Penal Code as follows;

> ***"…malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –***
>
> a. ***An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> b. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> c. ***An intent to commit a felony;***
>
> d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

Addressing the issue of malice aforethought, the learned trial judge captured the basis of the State's contention that the same was established by the prosecution by referring to the submissions by the Prosecution;

> ***"Ms Macharia urged the court to consider the nature of the injury inflicted on the deceased by the accused and conclude that it was calculated to cause severe injury to the deceased as to ensure she does not survive the attack. I agree the injury was a single stab to the chest. The court can in my view safely conclude that the accused intended to cause grievous harm to the deceased. The injury was so strategic as to lead to the conclusion that the accused ought to have known that the injury could have been either grievous or fatal to the deceased."***

We think the learned judge properly directed herself on the law and the facts that clearly established malice aforethought.

Turning to the defence of provocation that the appellant mounted, we find and hold that the evidence and the facts established actually excluded it. We are not at all persuaded that by merely telling the appellant (if at all she did) that he should go and have his mother get him a good wife, the deceased thereby induced in him a sudden and temporary loss of self-control that rendered him 'so subject to passion as to make him for the moment not master of his mind.' (Per Devlin J, in **R Vs. DUFFY [1949]1 ALL E.R. 932**). Those words do not, in our opinion, amount to provocation which is defined at **Section 208** of the Penal Codeas meaning and including;

> ***"Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***

We are persuaded that the appellant was in full control of his faculties. His threats to kill her his journey in search of the deceased while armed with a knife; his charging after her helpless and retreating self; the single stabbing strike penetrating to the heart, and his subsequent flight from capture and the law, all testify to a cold and calculated murder. It was impelled by wounded feelings on account of the deceased not only leaving the appellant, but going ahead to transfer her wifely favours to a much older man, a widower, in the person of **PW2**. The appellant set out maliciously intending to and actually finishing off the deceased, and there was therefore nothing in the case to reduce it from murder to manslaughter.

In the complaint that the learned judge was wrong to rely on inconclusive circumstantial evidence to convict the appellant, we find no merit. The evidence adduced against the appellant was not merely circumstantial. There was the direct and cogent eye-witness evidence of **PW4**. He saw the appellant pursue, confront and stab a helpless and cowering deceased before taking flight. There was nothing to weaken the veracious force of that witness' account.

The rest of the evidence which was circumstantial in nature went to lend further credence to the testimony of **PW4**.

Given the admitted fact that the appellant did stab the deceased to death, we are satisfied on our own consideration of the case that the learned judge properly directed herself when she found as follows;

> ***"The accused searched for the deceased, tracked her down, stabbed her in the chest, escaped from the scene, packed his bags from his home and was not seen again until nine months later. These circumstances form a chain so complete as to lead to an unerring conclusion that the accused planned and executed the murder under consideration."***

The upshot is that we find the appellant's conviction for murder to have been founded on sound evidence and his guilt was proved beyond reasonable doubt.

This appeal is devoid of merit and is accordingly dismissed.

Dated and delivered at Nairobi this 8th day of November, 2013.

J. W. MWERA

……

JUDGE OF APPEAL

P. M. MWILU

……

JUDGE OF APPEAL

P. O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

/mwn