IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 460 OF 2007

BETWEEN

DANIEL MBALU MUTISYA……..……..APPELLANT

AND

REPUBLIC…….…….…….RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Machakos (Hon. Justice R. V. Wendoh) dated 21st December 2007

in

H.C.Cr.C. No. 15 of 2003)

****

JUDGMENT OF THE COURT

DANIEL MBOLU MUTISYA was charged in an information dated 13th December 2002 with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence were that on the 29th day of May 2002, at Ngomeni village within Makueni in Eastern Province, he murdered **ROSEMARY NDETO MUTISYA**. The appellant was tried before Hon. Lady Justice Wendoh, (with the aid of assessors) who found the appellant guilty as charged and sentenced him to death. In this appeal, the appellant asks us to reverse this conviction and sentence.

The prosecution case as presented before the trial court was as follows:

AGNES NZAMBA MAITHA(PW1) who is the appellant's elder sister testified that on 2nd of June 2006, at about 3:00 pm, she was informed by her grandchildren, who were the deceased's students, that the deceased was unwell. She went to the deceased's house and found her asleep. The deceased informed her that she was unwell. This witness said that she couldn't see any injuries on the deceased as she was lying down. She also denied knowing anything about the murder of the deceased.

PW2 was **SGT PHILLIP KIMAULI** who was at the material time based at the Makueni CID Headquarters. On 17th July 2002, he received instructions from the DCIO to accompany a relative of the appellant to Nairobi so that they could arrest the appellant. The appellant had been based at the chief's camp at Huruma but when they went there, they did not find him, as he had gone into hiding. They went

to South B estate, Nairobi where they traced the appellant to a house owned by his sister. He arrested the appellant and escorted him to Makueni Police Station. He testified that at first, he was to arrest the appellant for the offence of assault, but later he was charged with murder.

CHRISTINA NDULU MUTUKU (PW3) is the deceased's mother. She testified that on 10th June 2002, at about 6:00 am, she was informed that her daughter was seen at Makindu hospital as she was being removed from a vehicle. She went there and found the deceased laying on a stretcher.

Upon enquiring from the hospital staff what was happening to the deceased, she was informed that the deceased was being taken into theatre for an operation. She noticed that the deceased had maggots crawling on her legs. She asked the deceased what had happened to her and the deceased told her that she had been stabbed by the appellant on her legs, her private parts and on her shoulder. The deceased further stated that the reason for the beating was that she had been paid Kshs 2,000.00 for some work done, but the appellant had wanted her to claim Kshs 3,000.00. The appellant told her that she should claim the money, and if she did not, then he would kill her.

On cross examination, PW3 admitted that the deceased had a problem talking and that her voice was not clear, but she was able to explain what had happened and that she had been beaten daily from 1st of June 2002. In addition, she stated that during the five years that the appellant and the deceased were married, he would tell PW3 that he was going to kill the deceased and that on several occasions, the appellant would beat the deceased but she tried to hide it. She recalled that on one occasion, the deceased had visited her with an injury which she said was as a result of beatings.

JOSEPH MUTUKU MASYOKI (PW4) is the assistant chief of Kitumbii sublocation, from where the appellant hails. On 29th May 2002 he received a note from Amos Mukolo, the chief, asking him to summon the head teacher of Ngomeni Primary School to his office. He complied with the chief's instructions and the teacher arrived at 3:30 pm. The appellant and the deceased were also present. The deceased made a claim of Kshs 1,000.00 against the head teacher, the chief ordered the head teacher to pay and the matter seemed to have been settled.

On 5th June 2002, he and the chief came across **KITENGE MUTISYA (PW5),** the appellant's brother, who informed them that the appellant had beaten his wife and left her at home. He told Kitenge Mutisya to report the matter to Kavimbu Police Post and take the deceased to hospital. On 9th June 2002, one Corporal Mwanzia came to his office and asked him to take him to the appellant's home because his wife had died, and he wanted to record statements from the family members. When they went to the appellant's home, they found that he had gone to work in Nairobi.

The sixth prosecution witness was **JANET MUENI KITENG'E(PW6)**. She is PW5's wife. She testified that on 29th May 2002, at about 7:30 am, she was at her home with her mother and her husband. The deceased was in her house with the appellant. She heard the deceased scream, asking to be rescued. PW6 woke her mother up, and they went to see what was happening. When they arrived, they asked the deceased what was going on and she informed them that her husband, the appellant, was asking for some missing documents from the school.

The next day, she went back to the deceased's house and in her presence, the appellant continued to ask the deceased about the documents. When he did not get a satisfactory answer from her, he slapped her three times. Later that evening, at about 6:00pm, PW6 heard the deceased screaming again, and she went over to see what the problem was. She found the appellant and the deceased fighting, but they stopped when they saw her. When she inquired what the problem was, the deceased told her that the appellant was still demanding for the certificates.

Then again on the night of 1st June 2002, the deceased came running out of her house and stood in the middle of the compound. She said that she feared that she and the appellant would fight. She eventually went back to her compound and slept. On 2nd June 2002, they went together to pick up the deceased's money where she had been working. At this time, the deceased was walking, and at some point, the

deceased asked PW6 to get her some medicine for headache. The next day, PW6 said that she was unwell, and felt as if she had malaria. The appellant had been home at that time, and didn't do anything. He then left for work. A day later, he sent Kshs 2,000.00 to take the deceased to the hospital. By this time, the deceased's legs and hands were swollen, and she was being treated by her mother-in-law who boiled some water and gave the deceased first aid. The next morning, at around 4:00 am, the deceased was taken to hospital in Makindu, where she died.

On 10th June 2002, **PC JAPHET NJERU (PW 7),** who was based at Makindu Police Post, received a report that there was a patient admitted at Makindu Hospital who had been assaulted by her husband. The mother of the victim, who made the report, told this witness that she needed to take a note from the police to the hospital so that the patient could be treated. He issued the note and booked the incident in the Occurrence Book.

DR M. P. OKEMWA (PW8) is the pathologist who performed a post-mortem on the deceased. The body of the deceased was identified to him by Julius Nzioki and Justus Mutuku. He observed that the body of the deceased had multiple injuries; healed scratch marks on her chin, neck and armpit, deep septic wounds, extending to muscle and bone on the right arm, multiple deep wounds on lower limbs, on her thighs. PW8 also observed various internal injuries, and that the deceased had fluid in both lungs, which was indicative of pneumonia lung infection.

He testified that the broncho-pneumonia is a natural disease which may be accelerated in people with other injuries or if the immunity of people is low. In the instant case, he said that it was accelerated due to the septic wounds and thus it processed through the blood system to affect other parts of the body. Based on the history given to him by the police, he said that the injuries and wounds were caused by battery, and his opinion was that she died due to aspiration, broncho-pneumonia and septicaemia due to large infected wounds. On cross examination, he stated that the cause of death was not natural because it was triggered by the injuries.

JAPHETH MUNYOKI NZINGILI (PW9) is the one who investigated the matter. He received information that the deceased had been injured by her husband, the appellant, who was an Administration Police constable. He had been told that the deceased was admitted at Makindu district hospital in serious condition, so he went to Makindu and found the deceased in pain, and she could not talk. He made inquiries from the ward doctor who told him that the wounds were serious to the extent that they were festering and had maggots, and that her mother in law had been administering first aid and herbal medicine. The appellant had been arrested and charged with assault causing grievous bodily harm, and he was in custody, but was later released on bond by the court.

EZEKIEL NZUVA KING'OO (PW 10) gave evidence on behalf of **DR. KIOKO** who treated the deceased. **PW 10** was working under the treating doctor for over a year, and used to attend ward rounds with him. He was therefore familiar with the contents of the doctor's report.

His evidence was that the patient was admitted on 9th June 2002, due to injuries. She was brought to the hospital by her mother in law, who said that she was hit by a cow. Later on, her mother in law admitted that the patient was assaulted by a person who was known to her, and had taken a week to go to the hospital.

The patient was very sick; she was pale, and her body had extensive septic wounds which were decaying. She was admitted and treated using pain relievers, intravenous fluids and surgical debridement. She looked to be on her way to recovery, but a few days later she developed an infection of the cervix which was also being treated. On 28th of June 2002, at 3:00 am, she developed a respiratory collapse and stopped breathing. The doctor connected the collapse to the wounds due to septicaemia.

When placed on his defence the appellant elected to give sworn evidence. He testified that on 27th May 2002, the deceased telephoned him and told him that her employer, the head teacher at Ngomeni Primary School, had not paid her. He rang the assistant chief and informed him, and he and his wife were

summoned by the chief on 29th May 2002. The headmaster was asked to ensure that he paid the deceased. He stated that he went back to Nairobi on 1st June 2002. On 6th June 2002, the deceased called him and said that she had been hit by a cow when she was tethering it. He sent money so that she could be taken to hospital. He was informed that she was taken to hospital on 9th June 2002, and he went to see her at the hospital the following day and found that she could not talk. He denied ever beating or inflicting injuries on the deceased.

After both sides closed their case, the trial court summed up the evidence for the assessors. They returned their verdict on 5th September 2007. Both assessors found the appellant guilty. Judgment by the trial court was given on 21st December 2007. The trial court was satisfied that the appellant is the one who inflicted serious injuries on his wife, and it was as a result of these injuries that the deceased met her death. Regarding this, the High Court found that:

> ***"in light of her [PW6] evidence, that of PW4 the assistant Chief that he received a report from the accused's brother that the accused had assaulted his wife and the evidence of PW9 that he also received a report from the accused's mother about him assaulting the deceased, I am satisfied beyond any reasonable doubt that the accused assaulted his wife."***

The trial court found that the uncontroverted evidence of the witnesses was that the deceased had severe injuries on her legs and arms. The trial court also accepted that it was as a result of these injuries that the deceased met her death, stating that:

> ***"The person who had had a disagreement with the deceased was the accused and a report made by his mother and brother to the authorities thereafter. I do find that though pneumonia which is a natural disease was partially the cause of death, the initial cause was septicaemia resulting from the injuries inflicted by the accused on the deceased. Malice aforethought flows from the serious injuries that the deceased suffered i.e. open wounds that exposed the bone. To add to that, the accused did not take the deceased to hospital but instead left for his place of work, leaving rot in the house.***

The trial court was therefore satisfied that it was the appellant who inflicted the serious wounds on his wife, and that these wounds got infected which eventually caused the death of the deceased. The appellant was found guilty of the offence of murder as charged, and was convicted.

The appellant offered nothing in mitigation, and he was sentenced to death in accordance with the law.

Being aggrieved the appellant now files this first, and probably final appeal, seeking a reversal of the conviction and sentence. Being a first appellate court, we have re-analysed above the evidence which was presented before the trial court. It is incumbent upon us to re-evaluate the same and draw our own independent conclusion, bearing in mind that we, unlike the trial court, have not had the advantage of seeing and hearing the witnesses as they testified so as to appreciate their demeanour. See ***Okeno v R [1972] EA 32; Jeremiah Kiiru Nyambura V Republic [2011] eKLR).***

The appeal was heard before us on 2nd July 2013. Mr Mogikoyo on behalf of the appellant relied on the memorandum of appeal lodged in this Court, but urged all the grounds of appeal under one heading, being that the charge was not proved beyond reasonable doubt. Counsel argued that PW8 confirmed that the deceased died from brocho-pneumonia, which is a natural disease, and failed to state whether the disease had set in before or after the alleged beatings. Counsel also submitted that the evidence of the beating, which was led by PW3, was unclear as the reason for the beating was not clearly stated. Counsel further argued that if the deceased did tell PW3 that she was beaten by the appellant, then that was a dying declaration and would need to be tested before being accepted by the court. PW5, the hostile witness, also testified that he never heard any argument or witness any beatings by the appellant, and only PW6 had seen the appellant slap the deceased, and that there was no way that a slap could have caused the injuries on the deceased.

Mr Kivihya for the State opposed the appeal. He submitted that the charge of murder was proved beyond reasonable doubt. He argued that while the deceased's statements that she had been beaten by the appellant amounted to a dying declaration, this evidence was taken together with the admission to the doctor that the deceased had been beaten by a person known to her, as well as the doctors evidence that the deceased had an infection in the cervix. This is because she was injured on her private parts.

Counsel further submitted that there was evidence that the appellant was physically abusive on the deceased from 29th May 2002. PW6 also heard the deceased scream and this is because she was being beaten. These witnesses were relatives of the appellant, but the deceased chose to talk to her mother only because she trusted her.

In addition, PW3 testified that the appellant used to say that he would kill the deceased. The totality of the evidence was that the only person who could have caused the injuries was the appellant.

Learned counsel for the state further argued that the deceased was neglected as the wounds were festering and had maggots and that there seemed to have been a conspiracy between the appellant and his mother to cover up his actions. He argued that the trial court did not accept the defence that the deceased had been injured by a cow as it was not probable. He therefore urged us to find that the charge was proved beyond any reasonable doubt, and to dismiss this appeal.

The offence of murder is provided for under section 203 of the Penal Code which provides:

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

Malice aforethought is derived at section 206 of the Penal Code as follows:

> ***"206. 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."***

A person is convicted of the offence of murder when it is proved that he has caused the death of the deceased, through some unlawful act or omission, and that his actions had been driven by malice aforethought as established by section 206 of the Penal Code.

The evidence of PW8 was that death was caused by severe broncho-pneumonia infection which caused the deceased to stop breathing, and that the cause of this infection was the large infected gaping wounds. In addition, the deceased also suffered from

septicaemia which accelerated the brocho-pneumonia. It is clear from the evidence of PW8 that the death of the deceased was not natural, as the disease was aggravated by the fact that she suffered from severe septicaemia which came about from the severe infection in the wounds on her body, which were inflicted by the appellant. We therefore do not accept the appellant's contention that the cause of death of the deceased was natural. We do not accept that the deceased was injured while she was tethering a cow. We

are clear in our minds that it is the appellant who caused these severe injuries.

This evidence is further supported by PW3's account that she was told by the deceased that she had been stabbed by the appellant on her legs, her shoulder and her private parts. The appellant submitted to this court that this evidence amounted to a dying declaration and ought to have been tested before it could be relied upon. Section 33 (a) of the Evidence Act is instructive on this point. The relevant part of it states:

> ***Statements, written or oral, of admissible facts made by a person who is dead, …-***
>
> a. ***relating to cause of death***
>
> ***when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;***

The guidelines that a court must consider in accepting the evidence in the form of a dying declaration were well laid out in ***Choge v Republic [1985] KLR 1***:

> ***"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.***
>
> ***There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is in the reception of evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."***

The statements of the deceased to PW3 would therefore be admissible, and there is corroboration from the evidence of the treating doctor, through PW10, that the deceased was assaulted by a person who was known to her. This, considered together with PW6's evidence on the incidents she witnessed in the deceased's house on 29th May 2002 and on 1st of June 2002 as narrated earlier on, leaves no doubt whatsoever as to who assaulted the deceased. There cannot be any other logical conclusion. We draw authority to make this conclusion from Section 119 of the Evidence Act which provides:

> ***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.***

The totality of the evidence adduced shows that it was the appellant who caused the injuries that eventually triggered the broncho-pneumonia that eventually killed the deceased.

These injuries were multiple, and from their severity, it can be seen that malice aforethought does indeed flow from them. The appellant caused the injuries on the deceased with a clear intent to cause grievous bodily harm, after which he left for Nairobi. We find that the ingredients of murder were satisfactorily proved beyond any reasonable doubt. The appellant submitted that the entire hearing was flawed because, while the hearing had begun with three assessors, later one of them who had turned 60 years old, dropped out, and the matter then proceeded with two assessors.

On that issue, Mr Kivihya urged that one of the assessors left after reaching the age of 60 years, and after that, he could not be traced. He urged that there was nothing wrong with the trial court continuing with

the two assessors.

Before the enactment of the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007, the Criminal Procedure Code provided that:

> ***"262. All trials before the High Court shall be with the aid of assessors***
>
> ***263. When the trial is to be held with the aid of assessors the number of assessors shall be three."***
>
> **…**
>
> *"298 (1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors.*

It is clear from the above provisions that the learned Judge was within the law when she proceeded with the trial with the aid of the remaining two assessors and the trial was not therefore defective.We have considered all the grounds raised by the appellant along with the submissions of the State, the evidence adduced before the trial court and the law applicable and we find that the conviction herein was sound and this appeal is without any merit. We dismiss it in its entirety and uphold the conviction and sentence of the trial court.

Dated and delivered at Nairobi this 20th day of December, 2013.

W. KARANJA

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JUDGE OF APPEAL

M. A. WARSAME
…….…….

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR