**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 96 OF 2007**

**CYRUS KATHURI NJERU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a conviction and sentence of the High Court of Kenya at Embu (Lenaola, J.) dated 27th February, 2007***

***in***

***H.C. CR. C. 3 OF 2003)***

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**JUDGMENT OF THE COURT**

The appellant, ***Cyrus KathuriNjeru*** was charged and tried by the High Court at Embu***(Lenaola, J.)*** for an offence of murder contrary to ***Sec. 203*** as read with ***Sec. 204*** of the ***Penal Code.*** The particulars of the charge were that on 5th day of June, 2001 at Shaui Estate, Municipality location in Embu District within Eastern Province, he murdered, ***Murithi Gichovi*** alias Kalulu.

The appellant was tried with the aid of assessors as per the law in force at the material time. The learned Judge and the two assessors heard the evidence of 15 prosecution witnesses and the unsworn statement of the appellant. After submissions from both counsel, the appellant was on 27th February, 2007 convicted of the offence of murder as charged and sentenced to death.

Being aggrieved by the conviction and sentence, the appellant has filed this appeal and later the Supplementary Memorandum of Appeal dated 4th April, 2012. ***Mrs.Gichuhi,*** learned counsel for the appellant made her submissions based on the said memorandum of appeal.

The said grounds are reproduced because Mrs.Gichuhi totally relied upon them while submitting on the appeal.

***1) That the learned Judge erred in law and fact in failing to recognize that the appellant's constitutional right was violated having been detained for sixteen (16) days without being taken to court.***

***2) That the learned Judge erred in law and fact in failing to analyze the whole evidence that was adduced by the prosecution witnesses and particularly failing to account the actions of the witnesses***

***who actually claimed to have escorted the deceased to his home and thereby arrived at a wrong finding i.e. (PW1 & PW4).***

***3) That the learned Judge of the Superior Court erred in law and fact in failing to consider that the deceased was found in a slum and a possibility of being murdered by other people was very high.***

***4) That the learned Judge erred in law and fact in relying on the allegation of (PW4) particularly that the appellant would follow the deceased within 5 minutes, an allegation which was not supported by (PW1) who also was said to have escorted the deceased in the company of (PW4).***

***5) That the learned Judge erred in law in concluding that the blood stain on the alleged trouser and keys belonging to the appellant was that of the deceased, yet the expert's evidence (PW12) was only suggestive and not conclusive.***

***6) That the learned Judge erred in law and fact in concluding that the appellant stabbed the deceased with the knife attached to is nail cutter yet the (PW3) had confirmed that the murder weapon must have been longer knife than a pen-knife.***

***7) That the learned Judge erred in law and fact in convicting the appellant whereas the requisite ingredients of the offence of murder were not proved beyond reasonable doubt as the prosecution's evidence did not exclusively point to the guilt of the appellant.***

It may be appropriate to state at the outset that this case was partly heard by *Hon. Okwengu, J.* (as she then was) and Hon. Lenaola, J. thereafter heard the case *de novo*. The two witnesses who gave evidence before the first trial Judge were ***Magendi Njeru Mbogo*** and ***Sylvester Njeru***who gave evidence as PW4 and PW2 respectively before Lenaola, J.

PW2, Sylvester Njeru,who was also PW2 in earlier trial,has not testified before either of the Judges that he escorted the deceased to his house. Evidence to that effect was given by MugendiNjeruMbogo PW4 (who was PW1 in the earlier trial). We thus discern that the ground no. 2, as raised in the supplementary memorandum of appeal could be due to confusion in supposing that PW1 and PW4 mentioned therein are two different witnesses. As observed earlier, PW4 was PW1 in the earlier trial and thusPW1 in earlier partial trial and PW4 in the full trial was the same person i.e. MugendiNjeruMbogo who gave similar evidence in all relevant aspects before both courts.

Ground no. 1 which raised theissue of violation of the Constitutional right of the appellant in that he had been detained for sixteen days before his arraignment in court was also abandoned.

Mrs.Gichuhi substantially submitted on the remaining grounds as under:-

(1) The scene of offence was a slum area where rooms are closely erected, separated only by iron sheets. No one had seen the accused committing the offence. In the circumstances anyone in the area could have committed the offence.

(2) As per evidence of PW4 Mugendi, he and PW2 Sylvester Njeru had escorted the deceased to his home, but it was only PW4 who testified that the accused threatened the deceased ***"to wait for him at his house as he would be going thereafter 5 minutes."*** PW2 had not mentioned this threat and this discrepancy in evidence should be taken in favour of the appellant.

(3) PW3 ***Dr.NgugiKariaria***testified that the murder weapon must have been longer than a pen knife and that the report of CleophasOtienoOjode (PW3) the Government Analyst was not conclusive on the opinion in respect of blood group of the blood found on trousers of the appellant and that found on nail cutter attached to four keys recovered from him.

(4) With the above submissions, Mrs.Gichohi urged us to allow the appeal and quash the conviction and sentence.

The learned state counsel, ***Mrs.Nyalyuka*** submitted that the evidence led by the prosecution proves beyond reasonable doubt that it was the appellant and no one else who had committed the offence. The blood stains found on the trousers of the appellant and on nail cutter with bunch of 4 keys recovered from the appellant immediately after the commission of crime matched the blood group of the deceased. This evidence leaves no doubt as to who committed the offence of murder. She urged that the appeal be dismissed.

This being a first appeal, we are duty bound to reconsider the evidence led before the High Court, re-evaluate the same and arrive at our own conclusion giving allowance to the fact that we have neither heard nor seen the witnesses. (*see**Okeno –vs- Republic(1972) EA, Mwangi –vs- Republic(2004) 2 KLR 28** and recent unreported judgment of this Court in **Criminal Appeal No. 459of 2007**between **Samuel KaranjaKuria –vs- Republic**.*

The deceased MurithiGichovi was found dead in his house situate at slum area of Shauri Estate within Embu Municipality, a place known for sale and consumption of traditional liquor described by PW4 as *'Machore'*.

The evidence before the High Court can be summed up as under:-

On the material date, i.e. 5th day of June, 2001, the appellant and the deceased were in the house of PW2, Sylvester Njeru where traditional liquor was being sold. PW2 was in company of ***Beatrice Kagendo*** (PW10), ***Patrick Gitonya*** (PW14) and ***MugendiNjeru*** (PW4). As per evidence of PW2, the deceased arrived first around 8.00 pm to drink the liquor and was served and then the appellant entered and was similarly served with the liquor. An argument arose between the two customers as to who was older so as to determine who would pay for the liquor. The appellant was challenged that he did not have an ID to prove his age and thereupon he went home to get his ID and returned with it and a sharp double edged panga. The panga was taken by Beatrice (PW10). The two, however, continued abusing and fighting each other. They were separated and went their own ways while the deceased was escorted by PW2 and PW4. After 10 minutes, PW2 heard screams from the wife of the deceased and found that the deceased was injured.

None of the witnesses from the prosecution case saw the appellant stabbing the deceased to death.

When the appellant and the deceased had traditional liquor in the house of PW2, Sylvester Njeru, the other persons present were PW4 MugendiMbogo, PW10 Beatrice Kagendo and PW11 Patrick Gitonya. They reiterated in relevant aspects and thus corroborated the testimony of PW2 that the appellant and the deceased had a quarrel over the issue of their respective ages and the appellant had to go to his house to bring his ID which he did but also came with a double edged sharp panga. As per the evidence of PW2 Njeru, PW4 Mugendi and PW10 Beatrice Kagendo, the panga was given to PW10 who returned the same to the house of the appellant. Their evidence on this aspect has not been challenged so as to put any dent on its veracity.

There is evidence that both the appellant and the deceased were drunk but the deceased had to be escorted to the house which fact shows that the deceased had more to drink.

PW2 further testified that after the deceased was escorted to his house, within 10 minutes he heard screams and on checking he found that the deceased had been injured. They removed the deceased from his house. Their efforts to take him to the hospital by taxi were not fruitful and the deceased died on the roadside.

PW 10 Beatrice and PW 11 Patrick Gitonga also testified that later that night, they heard screams in the neighbourhood and PW4 Kagendo heard someone shouting that *'Kalulu'* the deceased's who was also known by that name, had been killed.

PW5 ***JacklineMbandi***, the wife of the deceased testified that she was in a nearby house which was separated from the family house and she heard some commotion. She came out and a next door neighbour

of the deceased, PW 7 ***SaveriaKagendo***, told her that her husband was screaming by stating *"what have I done?"* and then shouted by calling her "*wawee mama Dorine*". She also stated that before entering his room, the deceased greeted her, lit the lamp in his room and switched on a radio. Before long, she heard his screams. PW5, then entered the house and found the deceased in a pool of blood, his trousers partly removed. The neighbours gathered and their efforts to take the deceased to hospital did not succeed and the deceased died on the road waiting for transport. She with her neighbours reported the matter to Embu Police Station and the body was transported to Embu Hospital Mortuary. PW9 ***Edith Kirimi*** was amongst the group who helped PW5 and also joined her to report the matter to Embu Police Station.

The persons who went to Embu Police Station to report, namely PW2, PW5, PW7 and PW9 were all locked up and kept in custody for seven days to their dismay.

PW8 ***Peter Karimi*** is an operator of a video shop who was paid in advance for a show by the appellant and confirmed that the deceased watched the show on the material night and left the shop at about 9.30 p.m.

After the report of the offence was received PW 14 ***P.C. OmariMaro*** in company of one ***CPL Muchui*** visited the scene and found that the deceased had a sharp wound to his chest. He went back to the Police Station.While in the station, he receiveda report by the appellant that he had been attacked by an unknown person and he had stabbed that person with a knife attached to his nail cutter. The witness noticed that his clothes and nail cutter were blood stained. The appellant was taken into custody and he took possession of the nail cutter and also his trousers. Later on these items were taken by him to the office of Government Chemist for further process.

The blood stains on the trousers and nail cutter attached to four keys were examined by PW13 CleophasOtienoOjode, an officer and chemist attached to the office of the Government Chemist, against blood sampleof the deceased as well as that of the appellant. The blood of the deceased was of group 'O' and that of the appellant was of group 'AB'. The blood stains on trousers and nail cutter attached with four keys were found to be of blood group 'O' and he opined that those blood stains ***"could have come from the deceased after injury".***

PW6 Eunice Njogu, an officer at the Government Chemist, analysed the blood, liver, part of the stomach and kidney taken from the deceased's body by PW3 Dr.NjagiKaivaria who performed post mortem on the body of the deceased. In her analysis, she found that the deceased had prior to his death consumed alcohol equivalent to nine tots of whisky or six half litre bottles of beer.

The cause of death of the deceased, as per the post mortem report of Dr.Njagi (PW3), was wound penetrating into the cage of chest resulting into severe bleeding i.e. cardiopulmonary arrest due to cut aorta and severe haemorrhage.

The trial Judge rightly observed that there was no eye witness to the commission of the offence and that the case is based on circumstantial evidence. We also note the uncontroverted evidence that the two met each other in the house of PW2 SylvesterNjeru to drink traditional liquor. They drank the same and at some point had disagreements over who was elder to other. What we have to discern is whether their meeting as aforesaid and the events thereafter in respect of both of them connect each other so as to lead to the death of the deceased at the hands of the appellant as alleged by the prosecution?

The principles applicable to the cases of circumstantial evidence are well settled. The trial court has cited the case of ***Albert KiturKimaiyo& Another -vs -Republic, Criminal Application No. 99 of 2002***, which adopted the finding made by Court of Appeal for Eastern Africa in the case of ***KipkeringArapKosgei and KimureArapMatatu (1949) 16 EACA 135*** which are:-

**"In order to justify on circumstantial evidence theinference of guilt the inculpatory 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."**

In the case of ***KariukiKaranja – vs – Republic, (1986) KLR 190,*** *it was observe,d and we adopt, that:-*

***"an aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt [and] is not good enough evidence."***

In Taylor's book on evidence 11th Evidence it is observed:

"**The circumstances must be such as to produce moral certainty, to the exclusion of every other reasonable doubt."**

**"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"**

We have anxiously considered the facts of the case as well as the principles of law as aforesaid and we are of the view that the learned trial Judge very appropriately analysed the evidence before the court like the visit by the deceased and the appellant at the house of PW2 in presence of PW2, PW4, PW10 and PW11, the eruption of quarrel between the two, the appellant going to his house and coming back with an ID and a panga, the continuance of their disagreement, the high consumption of traditional liquor by the deceased so that after separating the two he needed to be escorted by PW4 to be left at his home, the ominous threat by the appellant to the deceased that he would see the deceased within five minutes and after a few minutes screams from the deceased were heard by PW7 and PW2, and PW5 found the deceased in a pool of blood.

To the above evidence it is worth adding that as per PW14, the appellant reported to him that he had stabbed an unknown person, who tried to attack him. No other incident of stabbing was reported in Shauri Estate for that night. The proximity in time between the death of the deceased and alleged incident of threat is telling.

The learned Judge observed in his judgment and we quote:-

***"It cannot in my view be, that all these matters are coincidences. On the contrary, my view from the evidence before me is that it is the accused who followed deceased, stabbed him once in the chest with the knife attached to his nail cutter proceeded to report a case of self-defence from an attack from unknown person(s) but his trick was discovered and he was instead arrested for the murder of the deceased. No other hypothesis can arise in this case other than this and the accused's defence is a continuation of his attempt from the first day to exonerate himself from the consequences of his reckless action. It took that single stab to the heart to kill the deceased and it would be recalled that earlier during the quarrel the accused had gone to bring a panga with the intent of harming the deceased but PW10 took it away and it was returned to the accused's house. He would in all probability have used that panga as opposed to the small knife attached to his nail cutter which nail cutter as I saw in court was actually attached to his bunch of keys as is usual and therefore was on his person at all times. The chain of evidence as I have enumerated above is completely unbroken and the defence is an afterthought and completely incapable of believe save that it is framed to be as near the truth as to make it believable but it cannot."***

We do appreciate further that the judgment has also considered that though both the deceased and the appellant were drunk, the intoxication of the deceased needed the help of an escort to be left at his home while the accused went away on his own and thus had lucidity of mind to form the intention to cause grievous harm by his threat which he carried out almost immediately and had clarity to plan a lie after the commission of the crime which he sprung at the police station.

We also agree with the observations by the learned Judge when he found that:-

***"It cannot be excuse of his actions therefore that his mind was clouded by alcohol to the point of incomprehension".***

In the premises, we find that the appeal has no merit. The conviction and sentence are lawful and we order that the appeal be and is hereby dismissed.

We so order.

***Made at Nyeri this 5th day of July, 2012.***

**ALNASHIR VISRAM**

**.....**

**JUDGE OF APPEAL**

**K H RAWAL**

**.....**

**JUDGE OF APPEAL**

**D K MARAGA**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**