REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, WAKI & NYAMU, JJ.A.)

CRIMINAL APPEAL NO.459 OF 2007

BETWEEN

SAMUEL KARANJA KURIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang, J.) dated 8th February, 2007

in

H.C.CR.C.NO.130 OF 2004)

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JUDGMENT OF THE COURT

The appellant, ***Samuel Karanja Kuria,*** was in an information filed in the superior court charged with murder contrary to ***section 203*** and ***204*** of the Penal Code. The particulars of the offence were that on 21st June 2004 at ***Uthiru Village Kinoo Location*** in ***Kikuyu Division of Kiambu District in Central Province***, the appellant murdered ***Mathew Mbugua Kimwaki***.

According to the evidence adduced by prosecution, nobody saw the killing of the deceased but the appellant had between 10.30 p.m. and 11.00 p.m on the night of 21st June 2004 become an immediate suspect. The reason for the suspicion was that soon after the killing, a brother of the deceased, ***Evanson Kinyangi Kimwaki (PW1)*** was woken up from his sleep with a sad report that his brother had been found in a drunken state lying somewhere near ***Neighbours Bar***. Accompanied by his other brother ***Noah Njuguna KimwaKi*** (PW4) they did a search of the area adjoining ***Neighbours Bar*** using a spotlight, because the area was poorly lit. To their horror, they saw somebody they knew namely, the appellant, who was moving unsteadily while leaning on the wall of the Neighbour's Bar, as he moved from the darker area of the canopied verandah. When the appellant saw the two brothers he immediately disappeared from their sight but as he did so he dropped an object which had a metallic sound and the two brothers PW1 and PW4 were immediately able to identify it as a butcher's cleaver. It had blood stains on it. Using the spotlight they were able to find the dead body of their brother Mathew Mbugua Kimwaki. It lay on the verandah of Neighbours Bar from which the appellant had come before he disappeared.

Officials from the local chief's office and members of the public came to the scene to help and they were

soon after joined by the Administration Police. The team gained entry into the appellant's house. They broke into the house and found him in his bed with bloody hands, bloody sports shoes and bloody trousers. The government analyst ***John Maina Munyai*** (PW8) conducted a DNA sampling which revealed that the items recovered from the appellant's house had a DNA origin in the blood of the deceased. On his part the appellant did not defend himself but instead exercised his right to remain silent.

In a full trial in which eight witnesses testified the superior court ***(Ojwang, J.)*** convicted the appellant for the offence of murder and sentenced him to death. Aggrieved by the verdict the appellant filed a homegrown memorandum of appeal in this Court on 19th February 2007 and thereafter his counsel ***Mrs Nyamongo*** filed a supplementary memorandum of appeal which contains the following grounds:-

1. THAT the superior court erred in law by failing to resolve that the Appellant's constitutional rights as spelt out under *section 72(3)(b)* ***had been violated.***

2. THAT the superior court erred in law by failing to resolve that *section 265* ***of the C.P.C. had been violated.***

3. THAT the superior court erred in law by failing to hold that the charges of murder contrary to *section 203* ***as read with*** *section 204* ***of the penal code were never proved beyond reasonable doubt.***

4. THAT the superior court erred in law in failing to resolve that the constitutional rights of the Appellant under *section 77(2)(b)* ***had been violated.***

5. THAT the superior court erred in law by failing to re-evaluate the entire evidence and draw own conclusions.

6. THAT the superior court erred in law by failing to resolve the circumstantial evidence that did not meet the required legal standards.

7. ***THAT the superior court erred in law by failing to resolve material contradictions and inconsistencies in favour of the Appellant.***

8. ***THAT the superior court erred in law and in fact by failing to note that the prosecution erred in law by leaving out critical witnesses.***

9. ***THAT the superior court erred in law by failing to consider plausible defence as given by the appellant.***

10. THAT the superior court misapprehended the facts, misdirected itself, applied wrong legal principal and drew wrong inferences to the prejudice of the Appellant.

11. THAT the superior court erred in law by shifting the burden of proof to the Appellant contrary to the law.

In her submissions, learned counsel submitted that the motive for the murder had not been established and that there was no direct evidence of the act; that a ***Mr Kimani*** a brother in law of the deceased who had said that on the fateful evening he had picked a quarrel with him in the bar and that the deceased wanted to beat him was never called as a witness; that key witnesses and the mother of the deceased, who was said to have been the landlady of the appellant had not been called as witnesses although the appellant had alluded to the existence of a family land dispute; that the appellant's constitutional rights had been violated in that although the alleged murder was committed on 24th June 2004 the appellant was not brought to Court until 8th September, 2004 a period of three months seven days and in all the appellant stayed in the cells for a period of one year and eight months; that the language used was not recorded (counsel abandoned this ground when the Court drew her attention to a language entry in the record); that the superior court did not discharge its duty of evaluating the evidence. In addition, she submitted that a ***Mr Ng'ang'a*** who also appeared to have known of the death was not questioned or called as witness

although he appeared to have known where the deceased was between 10.30 p.m. and 11.00 p.m.; that other killers could have visited the scene since the opportunity was there; that PW2 had said that he had identified the appellant as the person who chased them when they last saw the deceased alone but PW3 testified that he did not see the appellant but only identified him by voice and the weapon he had dropped was a panga not a butcher's cleaver and further it was suspicious how ***Mr Kimani*** had known in advance the appellant's shoes had bloodstains; that all in all the circumstantial evidence relied on to convict the appellant was unsafe and finally that malice aforethought had not been proved.

Mrs Ouya, learned Deputy Prosecution Counsel in supporting the conviction and sentence contended that although the evidence relied on by the prosecution was circumstantial it was manifestly clear that it pointed to the guilt of the appellant as per the evidence of PW1, PW2 and PW3. In particular the appellant when found by the three witnesses at the scene where the deceased was last seen alive had insulted and chased the witnesses from the scene saying that he was guarding the deceased and approximately thirty minutes later the appellant was seen at the scene of crime, where he immediately dropped the murder weapon namely a butcher's cleaver which had blood stains, which the DNA sampling confirmed to be that of the deceased. Concerning the challenge that three potential witnesses mentioned namely the deceased's mother, Mr Kimani, and a Mr Ng'ang'a, all of whom were not called as witnesses, counsel contended that the prosecution case was strong enough and therefore the evidence by all these witnesses was unnecessary and therefore failure to call them could not result in an adverse inference being drawn.

Turning to the alleged violation of the appellant's constitutional rights for being held beyond the period stipulated in the Constitution, Mrs Ouya submitted that the ground was never raised in the superior court to enable the prosecution to respond although the appellant was represented by counsel. On the challenge that there was inordinate delay in conducting the trial, Mrs Ouya stated that the record of the court set out the reasons for the delay, including a lengthy period when both the prosecution and the defence had embarked on plea bargaining and finally concerning the alleged absence of proper evaluation of the evidence by the superior court, learned counsel submitted that the superior court judgment did take into account the totality of evidence in reaching its verdict.

As the first appellate Court we are aware of our duty and although we have restated the duty many times, we consider it all the same useful to set it out here lest we forget such an important appellate duty which has over the years served as an important step in the administration of justice by the Court. In our view the discharge of the duty ensures that the quality of appellate justice is enhanced and maintained.

Thus, we have a duty to reconsider the evidence which was before the superior court, evaluate the evidence and draw our own conclusions and at the same time give due allowance for the fact that we have neither seen nor heard the witnesses – see ***Ogeto v Republic*** **[2004]2 KLR 14**.

We have carefully considered the grounds of appeal which were argued in a global manner by the appellant's counsel and as a result there is in our view considerable overlap. For this reason our review of the evidence will therefore inevitably provide an answer to several grounds at the same time. Evanson Kanyangi Kimwaki (PW1) testified:

"My brother in law –Kimani. He was living with the deceased, Mbugua, my brother Kamau came to see me at night. He told me Mbugua wanted to beat him. Mbugua was drunk and was lying next to Neighbours Bar. That Mbugua wanted to beat him at the bar ……. I told Kimani - we go and drag Mbugua home – about 10.30 p.m. When we got to the place, he told me Mbugua was no longer there. We missed him. Somebody else came – supporting himself on the wall. It was in the dark. Light was coming from Checkpoint Bar. I saw him a little. When the man came to the light he dropped a metal. I recognized this man who was carrying the metal. I knew he was Karanja."

Concerning the same piece of evidence Peter Ng'ang'a PW2 stated:-

"We saw the person lying was Mbugua – he was drunk. He was my workmate I knew him. He was alive. He was just drunk; no injuries. Time – about 10.00 p.m. While we were there another man approached. He had a panga – used by butchers. He abused us – called us dogs. Told us to leave, for

he was the one guarding Mbugua. Since he said Mbugua was their landlord and he was guarding him. He came and chased us away – saying he was guarding Mbugua. We were about 9. I knew the person – Karanja; He was our village mate."

When called to testify Justus Mbugua PW3 repeated the story as narrated by PW2 above.

Regarding the items linked to the appellant Mr Noah Njuguna (PW4) testified:

"At that time, Karanja had been told to sit down on the floor, by the police. Karanja sent Kimani to his house – to bring shoes and jacket. Kimani requested me to accompany him. I did. He had specified the type of shoes that should be brought because his shoes might get lost in the police station. We took the shoes we first saw. Kimani then said the shoes had blood stains. It was dark. When we went where there was light, I saw blood spots on the shoes. We handed them over to the police. They were white sports shoes. Both sides had bloodstains. These are the shoes we got from Karanja's house. The police officer stopped the shoes from being won. He kept them aside."

Listen to what ***Police Constable Mwaura*** (PW5) had to say concerning the appellant's clothing:-

"We took Karanja to his house. When we arrived, inspector Otikiri had a torch. He flashed on clothings of the accused. We found that the trousers had bloodstains. We asked him to remove the trousers. …….. I took possession of the said trousers. In the house I found a carton. One of the flaps had bloodstains. I took a knife and cut out the bloodstained part. ……Later we returned to the scene. We took the body, pair of shoes, butcher's cleaver. We also took the 3 suspects."

Concerning the injuries sustained by the deceased, ***Dr Peter Muriuki Ndegwa*** testified:-

"Body of African male adult – 5ft 6 inch, well preserved externally; lots of blood on face; deep cut on scalp; fractured skull, cut 14x70 cm long. Deep cut on shaft of penis, testis removed. Internally - fracture of skull with large hemorrhage – bleeding clotted in brain. Conclusion; cause of death – head injury; significant deep cut to penis – all inflicted by a sharp object."

Finally John Kimani Mungai (PW8) the government analyst based in the Government Chemists Department summarized the position of the exhibits as follows:-

1. Exh A – white/blue sports shoes – and ExhB – cleaver ExhB ExC – Red Jeans. ExC piece of carton Ex. ExG – Blue Jeans, ExhH – Light blue long sleeved shirt. The other DNA profiles generated tabulated.

The conclusions reached by the witness were:-

i. DNA fresh blood stains on EXA, Exh B, ExC, Exh H – all matched DNA profiles from bottle marked MATHEW MBUGUA DECEASED – with a probability of a match of it in 155X105.

ii. DNA from piece of carton (Exh D) – marked DNA sample in bottles (accused Samuel Karanja) probability of a match in 1.47x103" ……..
The blood showed the person in question as the one concerned. If you take pop of 1.55x105 one person will have the profile 1.55 trillion people – only 1 person will have that kind of blood profile."

What emerges from the evaluation of the evidence as set out above are the following independent conclusions from us; first, the appellant was properly and safely identified by the three witnesses who also knew him. Second, the items found in his house placed him at the scene of the crime in view of the DNA sampling. Third the totality of the circumstantial evidence irresistibly pointed to his guilt and the suggestion by counsel that any other person had an opportunity to commit the offence within the 30 minutes gap where he was last seen lying at 10.30 and when his body was discovered at 11.00 p.m. had no basis whatsoever. Fourth, the appellant counsel's suggestion that three uncalled potential witnesses namely Mr Kimani, Mr Ng'ang'a and the deceased's mother, knew something about the killing was not

supported by any evidence and the fact that they were not called as witnesses could not reasonably invite an adverse inference from the trial court because the prosecution evidence was already strong enough to support a conviction. In our view mere suspicion by counsel concerning Mr Kimani's involvement did not constitute evidence. In any event Mr Kimani did assist in locating the body of the deceased and was generally instrumental in giving a report to the deceased's brothers which in turn led to the actual killer being identified on the same night. We think that in the circumstances if Mr Kimani had something up his sleeves he would not have talked about the condition of the deceased to his brothers or mention that the deceased wanted to beat him in the bar. We find the conduct of Mr Kimani inconsistent with his involvement in the crime.

Touching on the significance of the motive, the appellant's counsel suggested that the investigations should have covered the family relationship with the appellant or that the motive for the killing was unclear. We think that nothing turns on this in that motive is generally irrelevant as regards criminal responsibility. ***Section 9(3)*** of the Penal Code states:-

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intent is immaterial so far as regards criminal responsibility."

In other words the prosecution does not have to prove motive for the commission of any crime and evidence of motive is not sufficient by itself to prove the commission of a crime by the person who possesses the motive – see ***Ogeto v Republic*** **[2004] 2KLR 14**.

Again regarding Mr Kimani's mention that the appellant's shoes had blood stains, it is clear to us that his statement was based on Mr Kimani's observation of the condition of the shoes while in the company of witnesses who in turn testified concerning the presence of the blood on the shoes.

As regards ***Mrs Nyamongo's*** submissions that in the circumstances the important ingredient of malice aforethought was not present, with respect, we think that this submission is far-fetched in that ***sub-sections (a)*** and ***(b) of section 206*** of the Penal Code define the ingredients as follows:-

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 grievous harm to some person – whether that person is the person actually killed or not although such knowledge is accompanied by indiference whether death or grievous bodily harm is caused or not or a wish that it may not be caused.

From the above definition of malice aforethought there cannot be any doubt whatsoever that the appellant had intention to kill the deceased taking into account that there was evidence that he chased all others in order to have the opportunity to commit the crime. In addition the nature of the injuries sustained is further proof of malice aforethought as is clear from the postmortem report.

Finally on the allegation that the appellant was held beyond the constitutionally permitted period of 14 days, we note that in the superior court the appellant was represented by counsel. In the superior court, this ground was not raised contrary to ***section 84*** of the repealed Constitution, thereby denying the prosecution an opportunity to explain the alleged detention. In the circumstances we think even if there was any element of truth in the allegation the appellant is deemed to have waived his rights when he failed to raise it as required. Indeed, concerning this point we cannot possibly do better than re-echo the now celebrated decision of this Court in the case of ***Julius Kamau Mbugua v Republic Cr.Appeal No. 50 of 2008*** where the Court cited the Grenada case of ***Martin v Tauraga District Court*** ***[1995] 2 LRC 788*** where the Privy Council held:-

" I see no reason to vindicate the right of one who allows the process to run into course without objection or complaint and then asserts the right at its culmination."

In our view, in the circumstances of the case before us, the appellant is deemed to have waived his right

to seek enforcement of the right.

Finally we think that unless the appellant can demonstrate that the alleged violation had a direct linkage with the trial his remedy if any lay with the enforcement under section 84 of the Constitution now repealed.

What has emerged is that this appeal has no merit and the same is hereby dismissed.

It is so ordered.

Dated and delivered at Nairobi this 13th day of May 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI
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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR