IN THE COURT OF APPEAL
AT KISUMU

(CORAM: BOSIRE, WAKI & AGANYANYA, JJ.A)
CRIMINAL APPEAL NO. 446 OF 2008
BETWEEN

ELIUD OSWAGO OUDU.....APPELLANT

AND

REPUBLIC .....RESPONDENT
(An appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Karanja, J.) dated 28th October, 2008
in
H.C.CR.C. NO. 41 OF 2008)
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JUDGMENT OF THE COURT

This is the first appeal by ***Eliud Oswago Oudu***, from his conviction by the High Court sitting in Kisumu, for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It was alleged in the Information filed by the Attorney General on 6th October, 2008 that on the 16th day of September, 2008 at Bandani Estate in Kisumu East District, he murdered ***Risper Odeyo Oudu*** (*"the deceased"*).

The deceased was the appellant's 80 year-old mother. Her death occurred suddenly on 23rd September, 2008 following complications arising out of a burn injury suffered on her thigh one week earlier on 16th September, 2008. ***Dr. James Obondi Otieno*** (PW8) produced a report of one ***Dr. Cephas Otieno*** who carried out a postmortem on her and confirmed that she had a 2nd degree burn on the left outside part of her thigh covering 12% of the thigh area. It was not possible to identify what caused the burn. Her face muscle was also affected by trauma. The thigh burn had worsened and the cause of death was due to infection getting into the body system leading to cardiac arrest. None of the other seven prosecution witnesses called to prove the case against the appellant testified as to the manner the thigh burn was caused and by whom. Reliance was therefore made on circumstantial evidence. That means that the prosecution had to link up a chain of events so strong and consistent that it irresistibly pointed to none other than the appellant who caused the burn which led to the deceased's death and that he did so of malice aforethought as defined under the Penal Code. In the words of this Court in the case of **Chimera Omar Chimera v Republic**, **Cr.A. No. 56 of 1998 (ur)**:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the

accused,

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

But that is not all. The prosecution must also prove that there were no other co-existing circumstances that would weaken or destroy the inference of guilt – see **Simoni Musoke v R [1958] EA 715** and **Mwangi v R [1983] KLR 522**.

What was the chain of circumstantial events that was laid out before the trial court to satisfy the principles stated above?

The deceased and the appellant were living in a family house in Bandani Estate in Kisumu. It also had several rooms for rental and two of them were rented out to ***Lutta Evarist Mwita*** (PW1) (Mwita), a 66 year-old security guard with M/S. Kamaliza Security Guards; and ***Joseph Omondi Onyango*** (PW2) (Onyango), another security guard with M/S Cornerstone Security Guards. At about 9 a.m. on 16th September, 2008, Mwita was in his room which was next to the deceased's. The deceased and the appellant , who was commonly known as *"Taabu"*, were in their house. Mwita heard the two quarreling then the appellant left the house. He returned at 11 p.m. and once again Mwita over-heard the two having a row over the deceased having invited the appellant's sister-in-law to the home which the appellant did not like. Mwita did not intervene in the quarrel. The reason he gave was that he had known the appellant for the last 1 ½ years he had been the deceased's tenant, to be a violent person and was therefore careful not to interfere otherwise he would be risking his life. Then Mwita heard the deceased cry out "*why are you killing me*?" She left the house and went to stay with a neighbor overnight. The following morning she returned and Mwita saw that she had burns on her thigh. She said she sustained them from the appellant. She rejected Mwita's suggestion that she should go to hospital or report the matter to the police for fear that her son would get into trouble. He gave her shs.300 for transport to visit her daughter in Nairobi.

The same morning at about 9 a.m., the deceased went to the business premises of her daughter-in-law, ***Gladys Chelimo Mboya*** (PW6) which was nearby. Gladys was married to the deceased's son who had passed on but subsequently she was thrown out of the home by the appellant who took all the property belonging to her husband, the appellant's brother. She established a stall/kiosk in Bandani Estate, near Caltex where she carried on business. The deceased was in tears when she met Gladys. She showed her the burn injury on her thigh, neck and chest. She told her it was the appellant who had burned her at night with a panga. She also told her the appellant always raised problems when he was drunk. Gladys then arranged for her to go to hospital and she received some medication before going back home. Gladys later met the appellant but he refused to explain anything. He only answered her harshly. A few days later she confirmed that the appellant had burned the deceased's clothes. The deceased had become distressed and on 23rd September, 2008, she collapsed and died.

The uneasy relationship between the deceased and the appellant was confirmed by ***Jane Ochola Oudu*** (PW3) the deceased's daughter and the appellant's elder sister. She was a business lady in Nairobi but only learned about her mother's death on 23rd September, 2008 and travelled home. According to Jane, the deceased and the appellant always had rows, because the appellant wanted the deceased to leave the family plot for him. Similar rows and quarrels were reported by their other tenant, Onyango (PW2). He saw her in a depressed state on 18th September, 2008 and on asking what was ailing her she showed him the burn on her thigh which she said was caused by the appellant. The deceased declined his suggestion that she should go to hospital. He also heard from the deceased that she had quarreled with the appellant.

The Investigation Officer was ***Sgt. Earnest Tanui*** (PW5). His investigations confirmed that there was a quarrel between the deceased and the appellant arising from a visit by Gladys to the home. In his own words he found as follows: -

"The suspect Oswago – there – was not happy about that visit. A misunderstanding followed and the

accused took a panga, heated it and assaulted the mother with it. He burnt her buttocks and private parts. She did not go for treatment. She died."

No panga was recovered from the appellant as the murder weapon and none was produced in evidence. The officer also referred to some statement recorded from another witness who was not called stating that the injury was caused by waste paper burned on the deceased thigh but the officer did not believe that evidence. The deceased herself never reported the incident of burning to the police and there was therefore no statement from her.

In his defence, the appellant protested that the story about him burning his mother was all a fabrication because he loved her and they had no quarrels. All he could recall was that on the 16th September, 2008 he came home at about midnight and found the deceased asleep. He woke her up and went to his room. The deceased was thereafter bringing food to him when it fell and poured out. She fell on the food and it burned her. At no time did he use any panga to burn his mother nor did he quarrel with her over Gladys's visit. Gladys, according to him, was chased away by their father because of her misconduct after her husband died and she went away to marry someone else. She had always wanted to inherit her late husband's property. It was therefore Gladys who instigated his arrest and prosecution for an alleged offence he did not commit.

Upon consideration of all that evidence, the learned trial Judge surmised, correctly so, that there was no direct evidence. But he believed the evidence of Mwita that he overheard the deceased's cry during a quarrel at night with the appellant, and that he witnessed the burn on her thigh the following morning. He also believed Gladys and Onyango that they were shown the same burn which was attributed by the deceased to the appellant. In view of the fact that there was no clear evidence of the object which caused the burn that led to the deceased's death, the learned Judge reasoned his judgment as follows: -

"Who inflicted these burns that worsened and later were infected, which infection ended in Risper's death? The very strong suspicions and the impression left on this court is that the accused inflicted the fatal burns on his mother. The court did not believe his story that she fell with the food she was taking to him and it burnt her. He told the court that he told his mother that he would take her to hospital. Did he? No evidence. Yet he was the son living at home with the mother – the deceased. As a son he could have been concerned about the incident and taken her to hospital as well as report to his brother living at Lodwar and sister living in Nairobi (PW3). He did neither! Yes, the accused did not go into hiding. But if indeed his mother fell and the food she was taking to him burnt her, does the accused's conduct accord with such a state of things as normally expected? Not at all. Did PW1 fabricate a story against the accused? Not at all. The court thought that he was an honest elderly man stating what he heard on the material night. Then he was shown the injuries by the deceased the following day. He even offered her money to travel to her daughter in Nairobi. The deceased was not anticipating death. She even began to improve. What he had told PW1, 2 and 6 that the deceased inflicted the burns on her cannot be faulted. She told the truth. Then infection set in and she suddenly collapsed one morning and died. The burns were deep and serious. Dr. C. Otieno described them as 2nd degree, severe and affecting 12% of the body surface. By inflicting them the accused should have foreseen that they could cause death and they surely did. In the circumstances of this case, the accused murdered his mother."

It is from those findings that the appellant raised six grounds of appeal through learned counsel for him Mr. P. Ochieng Ochieng. The grounds were as follows: -

"*1. The superior court erred in law by conviction (sic) upon circumstantial evidence when the appellant's explanation was cogent, reasonable and believable.*

2. The superior court erred in law by relying upon suspicion to convict instead of the required standard of proof that is "beyond reasonable doubt".

3. The superior court erred in law and fact by relying upon contradictory evidence to convict.

4. The superior court erred in law and fact by failing to properly analyse the evidence before

convicting.

5. The superior court erred in the law by failing to find that the omission by the prosecution to call material witness without explanation could only lead to the presumption of the likely fact that such witness would be adverse to their case.

6. The conviction went against the weight of the evidence."

At the hearing of the appeal, ground 3 was abandoned while grounds 4 and 6 were argued together. The major complaint raised in all the grounds was that the learned Judge did not evaluate the evidence on record as was his duty to do, and only devoted 1 ¼ pages out of 18 pages of his typed judgment to analysis. In the end the analysis boiled down to mere suspicion that the appellant committed the offence. Mr. Ochieng further submitted that the learned Judge based his judgment of a dying declaration made by the deceased to three witnesses but never cautioned himself, as he should have, about the danger of relying on that evidence without corroboration. The Judge also unduly attacked the appellant for failing to take his mother to hospital when it was on record that she had refused to go to hospital despite being urged to do so by two other persons. Mr. Ochieng further submitted that there was an omission to summon a crucial witness, a grandson of the deceased, who had recorded a statement with the police and had discounted the story advanced by the prosecution that a panga was used by the appellant to burn the deceased. This, in his view, raised the presumption that the evidence would be adverse to the prosecution's case. On circumstantial evidence, Mr. Ochieng submitted that the evidence on record did not irresistibly point to the appellant since his defence that the deceased was burned by food was supported by the doctor who performed her postmortem and was unable to identify the nature or cause of the burn. The benefit of doubt should therefore have gone to appellant. Finally, he submitted that the standard of proof was reduced to mere suspicion and disbelief of the appellant's story instead of proof beyond reasonable doubt.

On the other hand, learned State Counsel Mr. Kiprop, submitted that there was sufficient analysis of the evidence on record which led to a strong impression being made on the trial Judge. The conduct of the appellant after commission of the offence was particularly telling as it betrayed the commission of the offence. As for the submission that a "*dying declaration*" was relied on, Mr. Kiprop submitted that the consistent information given by the deceased to three of the witnesses established the truth of what she was saying in relation to her quarrels with the appellant. As for failure to call the grandson of the deceased, Mr. Kiprop submitted that it was unnecessary since other evidence was sufficient to prove the offence charged. It was circumstantial evidence, he submitted, and pointed only to the appellant as the cause of the fatal burn.

We have keenly considered the evidence on record, the submissions of both counsel and the various authorities cited before us relating to dying declarations, circumstantial evidence and standard of proof. In the end we have come to our own conclusion that there was no certainty on the cause of the deceased's death, and that there was no sufficient evaluation by the trial court of the evidence by the prosecution that there was a quarrel between the deceased and the appellant who was in a state of drunkenness.

Three prosecution witnesses, Mwita, Gladys and Onyango testified that the deceased showed them the burn on her thigh and told them it was the work of her son, the appellant. There is no clarity in that evidence that the deceased explained how the burn was inflicted and the object used. The admission by the investigating officer that there was an alternative explanation offered by a grandson of the deceased who was not called as witness did nothing to improve that uncertainty. Indeed the doctor who performed the postmortem compounded matters further when he was unable to identify the object which caused the burn. But one thing is clear and irresistible; that the burn, whichever way it occurred, was caused by the appellant. That is because he was the only person present with the appellant when a quarrel and commotion followed by a scream "*why are you killing me*" was heard by Mwita. That witness was believed by the trial court in what he said and we have no reason to doubt his credibility. It was not a dying declaration as such, and we think the trial court was right in so finding. There was no expectation of death as the deceased expected to heal. Even if it was, the law on dying declaration is now well settled. We take it from **Okale &Others vs Republic [1965] E A 555** which was cited with approval in

Aluta vs Republic [1985] KLR 543; thus:-

"It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (*R. v. Eligu Odel* (6); *Re Guruswami* (7), and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See, for instance the case of the second accused in *R.v. Eligu Odel* (6) and *R.v. Epongu Ewunyu* (8). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration."

There is thus no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction on an uncorroborated declaration. The weight attaching to such declaration shall depend on the circumstances in which it was made. There was consistency in what the deceased stated to the three witnesses at different times and we are in no doubt about the truthfulness of the deceased's implication of the appellant in causing the burn which was the direct cause of her sudden death one week later. It did not matter that she did not submit to medical treatment or that the treatment she received was wanting. ***Section 213 (a)*** of the Penal Code which defines *"causing death"* applies.

Was *mens rea* established in this case? We think not. Once again it was prosecution evidence that there was a quarrel or row between the appellant and the deceased. The deceased herself was quoted by witnesses who were believed to be truthful, as stating that the row occurred when the appellant was drunk. In the absence of any clear evidence on the circumstances surrounding the causing of the burn on the deceased, we hold the view that there were co-existing circumstances which weakened the inference of his guilt for the offence of murder. The learned Judge did not fully consider the evidence and circumstances relating to the quarrel and we cannot discount the possibility that the appellant was labouring under diminished responsibility in terms of ***section 13*** of the Evidence Act. The section provides that intoxication shall not constitute a defence to any criminal charge save in certain circumstances. But ***subsection (4)*** thereof states as follows: -

"(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

For those reasons it is our finding that the appellant was improperly convicted for the offence of murder and we set aside that conviction. In substitution therefor we enter a conviction for the offence of manslaughter contary to ***section 205*** of the Penal Code.

The remarkable feature of the judgment of the trial court was that no sentence was meted out on the appellant! We were unable to find the record of sentence in any of our records including the original file. There is instead a lengthy and impressive exposition of the principles applicable before sentence arising from this Court's decisions in **Kenga Foto Mangi vs Republic Criminal Appeal 259 of 2006** and **Godfrey Ngotho Mutiso vs Republic Criminal Appeal 17 of 2008**. An order was then made that the sentence shall await compliance with ***sections 324*** and ***329*** of the Criminal Procedure Code. In the circumstances, we remit the matter to the superior court to comply with those sections and the authorities cited and mete out the appropriate sentence for the offence of manslaughter. The appellant shall accordingly be produced before the High Court in Kisumu within 14 days of today's date for that purpose.

It is so ordered

Dated and delivered at Kisumu this 3rd day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR