IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 23 OF 2008

JOHN IRUNGU MACHARIA …..……..... APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Apondi, J) dated 22nd January, 2008

in

H. C. CR. C. NO. 69 OF 2005)

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JUDGMENT OF THE COURT

The appellant, ***John Irungu Macharia***, was tried by the High Court of Kenya at Nairobi (Apondi, J) with the aid of assessors (as the law then provided) on an Information which charged him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the Information were that on diverse dates between 11th March, 2005 and 18th March, 2005 in Nairobi within Nairobi area he murdered ***Catherine Njeri*** (the deceased).

The trial of the appellant in the superior court commenced on 13th November, 2006. The prosecution presented 10 witnesses. The summary of the evidence before the court was that the appellant and the mother of the deceased, ***Elizabeth Nyawira Gitari*** (PW 1) (Elizabeth) were, at one time, in a romantic relationship. In her evidence before the superior court Elizabeth explained that the appellant was her boyfriend from August 2003 to 24th October, 2004 when they broke up after the appellant attempted to commit suicide. However, on 5th March, 2005 the appellant came to visit Elizabeth at her house during day time and continued doing so throughout that week. On 10th March, 2005 he went to Elizabeth's house, this time at 9.00 pm, and insisted that he sleeps in Elizabeth's house. When Elizabeth rejected his advances, he assaulted her in the presence of her cousin Jane Wanjiku and her daughter, the deceased. Elizabeth threatened to call the security guard, and the appellant left. The following day, Elizabeth prepared her daughter, the deceased, for school. She dressed the child, gave her packed lunch, and dropped her to school. That was the last time she saw her child. The child never returned home. At 4.30 pm on the same day Elizabeth went looking for her child. There was no one at school. She proceeded

to the home of another child, ***F.G*** (PW 7) (F) who was her daughter's class mate. F had the deceased's school bag, including the packed lunch, un-eaten. F handed out these items to Elizabeth, and explained that her daughter had been collected from school by the appellant at about 12.00 noon. The following day Elizabeth went looking for the appellant all over the place, including his place of business at Busara Market, and was told that the appellant had not been seen since the previous night. Eventually, at 7.00 pm that day, the appellant showed up at Elizabeth's house, explaining that he had indeed gone to see Elizabeth's daughter at school, but that he had not taken her out of school. Elizabeth then reported her daughter missing to the latter's teacher, ***Charity Wambui*** (PW 3) (Wambui), and to village elders who decided that the matter be reported to the police, and that the appellant be arrested. On 18th March, 2005 Elizabeth saw her daughter's photograph on Citizen TV in a report which explained that the child had been killed. The matter was reported to Pangani Police Station and the appellant was arrested. A week later, the deceased's body was found floating in a sewerage, with broken legs, and missing upper teeth. The body was removed to the mortuary where an autopsy was performed by ***Dr. Jane Wasike Simiyu***, who was unable to ascertain the cause of death because of the decomposition of the body.

When put to his defence the appellant chose to give unsworn statement. He denied having killed the deceased. He stated that on 11th March, 2005 he had gone to Bisli area to buy meat. He slept there, and on the following day he resumed his business at Shauri Moyo Market. Later in the evening he was informed that Elizabeth's daughter had gone missing, and that Elizabeth was looking for him. He was subsequently arrested and charged with the murder of the deceased.

The learned Judge heard the final submissions and then summed up the case to the assessors who returned a unanimous opinion of guilty as charged. The Judge also came to the same conclusion. In concluding his judgment, the learned Judge said:

"In this case, though the accused gave an alibi that he had gone to Bisli area, Kajiado to buy meat his defence never cast any doubts on the evidence of PW 3 and PW 7. Both witnesses were independent, candid and cogent. Significantly also, none of them had any grudge or malice towards the accused. In any event, why would a proprietor of a school and a primary school pupil want to implicate the accused in such a serious offence like murder? From the evidence on record, it is apparent that the same only leads to one conclusion.

The accused collected the deceased and killed her before dumping her in a sewage where she was found. Unfortunately the accused committed the offence after being jilted by the mother of the deceased. Though the killing was senseless, it is obvious that the same was done to punish the PW 1 who is the mother of the deceased. In conclusion this court has no doubt whatsoever that the prosecution has proved its case beyond any reasonable doubt against the accused. The defence of the accused is hereby rejected since the same is a fabrication that was meant to mislead the court. In any event, the accused never impressed the court to be an honest nor truthful person. The upshot is that the accused is hereby found "guilty" of the offence of murder, contrary to section 203 as read with section 204 of the Penal Code."

Being aggrieved by the foregoing the appellant now comes to this Court by way of first and final appeal. That being so the appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and to have this Court's decision on that evidence. But as we do so, we must bear in mind that we have not had the advantage (which the learned Judge had) of hearing and seeing the witnesses and give allowance for that (see ***Okeno vs Republic*** ***[1972] E. A. 32*** and ***Mwangi vs Republic*** ***[2006] 2 KLR 28).***

In his home-made memorandum of appeal, the appellant outlined four main grounds of appeal, which revolve around two key issues: (i) that his constitutional rights under ***section 72 (2) (b)*** of the Constitution were violated in that he was held in custody for a period longer than is allowed, and (ii) that the circumstantial evidence relied upon was not sufficient or strong to uphold a conviction of guilt.

At the hearing of this appeal on 2nd December, 2009, Mr. Ratemo Oira, learned counsel for the appellant, addressed us at length on the constitutional issue that the appellant's trial was a nullity in view

of section 72 (3) of the Constitution. It was his submission that the appellant was arrested on 12th March, 2005 and taken to court on 15th July, 2005, without any explanation as to the delay. He relied on the cases of ***Gerald Macharia Githuku vs Republic, Criminal Appeal No. 119 of 2004 (UR)***; ***Albanus Mwasia Mutua vs Republic, Criminal Appeal No. 120 of 2004 (UR)*** and ***Paul Mwanga Mwunja vs Republic, Criminal Appeal No. 35 of 2006***.

In his response, Mr. J. Kaigai, learned Principal State Counsel for the respondent was of the view that a delay was not ipso facto a breach of the constitutional provisions. He submitted that the trial was in the High Court which is a constitutional court where the appellant was represented by a competent advocate. Mr. Oira, learned counsel for the appellant admitted, and the record shows, that this issue was not raised before the High Court and is being raised for the first time in this court. As correctly submitted by Mr. Kaigai, the appellant was before the High Court which is a constitutional court where this same issue being raised here for the first time could have been raised. If they had raised it the prosecution would have investigated and given an explanation for the delay. We find an answer to what has been raised by Mr. Oira in the provision of ***section 84 (1)*** of the Constitution which provides:

"Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

In view of the foregoing, we would agree with Mr. Kaigai that the ground raised by Mr. Oira has no merit and is hereby rejected.

The second major issue raised in this appeal relates to circumstantial evidence.

In the superior court, the prosecution called a total of ten witnesses. The testimony of four witnesses – Elizabeth (PW 1), Alice Muthoni Thogo (PW 2) (Alice), F.G (PW 7) (F) and Wambui (PW 3) was crucial.

These witnesses gave clear testimony that the appellant visited Elizabeth on the night of 10th March, 2005; that he made advances to Elizabeth, who rejected the same; that he assaulted her in the presence of two other individuals; that he left in anger; that on the following day he went to the deceased's school and lured the child away by promising that he would buy her soda; that, that is the last time the child was ever seen alive; and that when the child's decomposed body was eventually found, she was still in her school uniform. The deceased's teacher, Wambui, testified that the appellant had indeed taken the child from the school at 12.00 noon under the pretext that he would buy her soda, and thereafter return her to school. F also gave similar testimony. However, F' testimony was challenged by the appellant's counsel who argued that the learned Judge did not inquire into the child's ability to tell the truth before accepting his evidence. We are of the view that there is merit in that argument and we would exclude the testimony given by F. However, that still leaves the powerful testimony of Wambui, combined with the evidence of Elizabeth and Alice.

Having considered the evidence tendered in the superior court it is clear that the appellant was convicted on circumstantial evidence since there was no eye witness to the killing of the deceased. In ***Mwita vs Republic [2004] 2 KLR 60 at p. 66*** this Court said:

"It is trite that (sic) ***in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see Simon Musoke vs Republic [1958] EA 715 where the following extract from Teper vs R. [1952] AC 480, 489, was quoted [1958] EA at page 719:-***

"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 would weaken or destroy the

inference."

And in ***Mwangi vs Republic*** ***[2004] 2 KLR 28*** the court said:-

"It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs Kipkering Arap Koske & Another (1949) 16 EACA 135."

In the earlier decision of ***R. vs Taylor Weaver and Donovan [1928] 21 Cr. App. R. 20)*** the principle as regards the application of circumstantial evidence was enunciated in these words:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

We think it is in view of the foregoing that the learned Judge came to the conclusion that it was the appellant who killed the deceased. The three assessors unanimously were of the same view. Like the assessors and the trial judge we are satisfied that it is the appellant who killed the deceased.

Accordingly, and for reasons stated, we find no merit in this appeal and order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 26th day of February, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

…….……

JUDGE OF APPEAL

ALNASHIR VISRAM

…….……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR