



**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Criminal Appeal 143 of 2008**

**BETWEEN**

**B.W.K..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence of the High Court of Kenya (Kimaru, J.) dated 3<sup>rd</sup> August, 2007*

**H.C.CR.C.No. 80 of 2004)**

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**JUDGMENT OF THE COURT**

In an information presented to the High Court at Nakuru, the appellant **B. W** was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 17<sup>th</sup> July, 2004 in Nakuru District, the appellant murdered **R. W**.

The background facts as per the evidence given in the case were that, Ruth Wairimu, the deceased, was the wife of the appellant and the couple had three children named **A. N(PW4)**, **M** and **K**. A.N was the first born and was nine years old at the material time.

According to PW4's testimony, the couple shared one bedroom which was separated from the children's bedroom by a sitting-room. On 15<sup>th</sup> July, 2004, only two days before the fateful day, according to the testimony of **S. N (PW6)** who was the deceased's father, the couple had disagreed on certain matrimonial matters and the deceased went to parents' house but on the same day, the appellant went to her parents home and pleaded with the deceased to return back to her matrimonial home which she did, on condition that the differences between them would be sorted out through the appellant's father as an arbitrator of choice. The couple's differences were not settled as per the undertaking given by the appellant to the deceased's father and on 17<sup>th</sup> July at 3.00 a.m. the appellant strangled the deceased to death while their daughter PW4 helplessly witnessed. Following a full trial, the superior court found the appellant guilty of murder on 14<sup>th</sup> July 2007 and sentenced him to death as prescribed by law. Dissatisfied with the verdict, the appellant now appeals to

this Court on the following grounds:-

1. ***“That the learned trial Judge erred in law and (sic) facts by finding me guilty of murder without considering that no one saw me in the actual sic of murder.***
2. .... (not relevant.)
3. ***That the trial Judge erred in failing to consider my explanation (sic) in defence and sentence that there (sic) suffices a possibility of a natural cause of death.***
4. ***That he erred in relying on the evidence of PW4 being a minor without considering the possibility of being influenced by the unfriendly in-laws.***
5. ***That the learned judge erred in failing to see that the evidence in totality fell short of the required standards to justify the conviction.***
6. ***Not relevant.***

During the hearing, the appellant was represented by **Karanja Mbugua**, advocate and the State was represented by **G.E. Mugambi**, State Counsel.

The learned counsel, Mr. Karanja Mbugua submitted that the only direct evidence of the alleged murder was that of the minor PW4 and the rest of the evidence was substantially circumstantial. Concerning the postmortem report which was compiled on 20<sup>th</sup> July, 2004, the learned counsel submitted that it was unsigned and therefore it was accepted by the trial court contrary to the provisions of **section 77** of the Evidence Act. Regarding the stick allegedly used to strangle the deceased, he lamented that it was only marked for identification but wrongly marked as exhibit 2. He further stated that on the night in question, according to the testimony of PW4, the parents’ bedroom had no lights and therefore it was unclear how PW4 used the moonlight when she witnessed the strangulation of her mother. The learned counsel cast doubts on PW4’s evidence of strangulation in that all other witnesses testified that the deceased’s body was naked and had no visual injuries at all. Counsel wondered why it was only the deceased’s relatives who first answered the distress signal at the material time in the absence of any immediate neighbour. In this regard he stated that the evidence of PW4 could have been influenced by the in-laws.

Turning to the appellant’s defence, Mr. Karanja submitted that the trial court had failed to carefully scrutinize the defence as required and in particular the appellant’s contention that the deceased had a pre-existing heart condition which could have caused the death. In this connection, he contended that according to the medical evidence as per the postmortem report the death was caused by a blunt object pressed on the deceased’s chest whereas according to PW4 it was by strangulation using a stick. In the face of these doubts he submitted, death could have been caused by strangulation or a pre-existing heart condition and the consequence of this was apparent inability of the medical evidence speaking with precision on the cause of death. On this challenge he added that the inability of the medical evidence to speak with precision and the failure of the doctor to sign the post-mortem report should have rendered the conviction fatal. In his final submission, Mr. Karanja stated that there was no proof of malice aforethought in the circumstances and on the prosecution’s reliance on the fact that the appellant was the last person to have been seen with the deceased at the material time, this per se was no justification for elevating suspicion to the status of evidence as emphasized in the well

known case of ***SAWE v REPUBLIC*** [2003] I EA 280.

On his part, Mr. Mugambi in supporting the conviction and sentence, contended that failure to sign the postmortem report was not fatal in that the doctor, PW11 did personally testify on the contents after having confirmed that he had indeed performed the postmortem. The report he submitted was corroborated by the direct evidence of PW4 who witnessed the strangulation. Concerning the strength of the lights, PW4 testified that the window of the parents' bedroom door was open and she peeped to observe what was happening. Upon being seen by the appellant, she was immediately slapped by him. The fact that both could see each other across the bedroom door confirms that the visibility was good. On the possibility of the death having been caused by a pre-existing heart condition the State Counsel submitted that the fact that the deceased did in the course of the struggle visit the children's bedroom to reassure them of her safety rendered this cause of death highly unlikely and moreover the trial court had found PW4's direct evidence of strangulation credible. He further stated that the motive of the killing was established by the existence of the evidence of the breakdown of the relationship between the couple only three days before the murder and for this reason, the intention to murder the deceased stemmed from the matrimonial difference, and, in the circumstance, it could not reasonably be argued that the ingredient of malice aforethought was absent.

Pursuant to our mandate as the first appeal Court, we must reconsider and re-evaluate the evidence in order to draw our own independent conclusions. Thus, the duty as expressed in the seminal case of ***PETERS vs SUNDAY POST LTD (1958) EA 424*** is:-

***“It is the duty of a first appellate court to reconsider the evidence, evaluate it and draw its own conclusions thereon in deciding whether to uphold the trial court judgment. However, this is a jurisdiction to be exercised with caution. In view of the fact that the appellate court would not have seen or heard the witnesses who testified.”***

In line with our duty as expressed above, as regards the postmortem report and its evidential value although a signed copy appears not to have been produced in court Dr. Onyango PW11, a doctor, did give evidence on the contents of the report after confirming that he had personally performed the postmortem. As a result, we find that no prejudice was caused by the failure to sign the report. In this regard, we note that the material part of the doctor's testimony concerning the postmortem was:-

***“postmortem was performed on 20<sup>th</sup> July, 2007 at 3.30 p.m. It was a body of a female 30 years old. Body well preserved. There were no apparent injuries on the body. They were synopsis and a deep bruise on the left side of the chest. Most systems were normal i.e. except the cardiovascular system. There was a lot of blood in the chest cavity. I formed the opinion there was cardio respiratory failure caused by heart tamponade caused by blunt injury on the chest. I wish to produce the post-mortem report as presented on exhibit No.1” (emphasis ours.)***

Under cross-examination on this point the doctor stated:-

***“The injuries – internal were directly under where the external injury was ... The injury could have been caused by any blunt object.”***

The material part of PW4's evidence was:-

***“On 16<sup>th</sup> July, 2004 at 3.00 a.m., we were asleep in our room in our house. I heard noises coming from the room of my parents. The noise was as if someone (sic) was being beaten. I woke up and peeped through the door of my parents' bedroom. The window had been***

***opened. I saw my father strangling my mother using a piece of stick. When my father saw me, he slapped me on the head and told me to go to sleep.***

***..... We then heard our mother screaming. Her voice appeared strangled. Our father came from his bedroom while he was crying. My mother was in her bedroom she was not talking.***

Under cross-examination PW4 testified:-

***“I saw the accused press the neck of the deceased when my mother was lying on the bed.”***

On the external appearance of the body, the postmortem report as mentioned stated:-

***“Body in good condition, no apparent fraction. Has bruises on the right atilia region and on the left side cynomi and bruises no other external injuries.”***

On the cause of death, the report stated:-

***“Cardiac respiratory arrest due to heart temponade due to injury by blunt object causing rapture of heart blood vessels.”***

In our opinion, the medical evidence as corroborated by that of PW4 speaks volumes concerning the cause of death. It clearly rules out the possibility of the death having been caused by a pre-existing heart condition of the deceased. If the deceased had any such condition at the material time, she would have informed the children when she visited them the second time on the fateful night, but instead she assured them all was well. It follows that the appellant’s counsel contention that the medical evidence was unable to speak with precision is not borne out by evidence and we find that the trial court did sufficiently consider the appellant’s defence but the same could not displace the overwhelming medical evidence adduced by the prosecution as outlined above. Consequently, we are unable to uphold the challenge based on alleged weak medical evidence. As regards the alleged absence of the ingredient of malice afore thought, this was clearly established by the couple’s matrimonial disharmony.

With respect, we do not accept Mr. Karanja’s contention that the trial court relied on mere suspicion as stated in the case of ***DHALAY v REPUBLIC (1995-1988) 1 EA29*** or the case of ***SAWE v REPUBLIC [2003] EA 280***. While we appreciate the ***ratio decidendi*** in the two cases is to the effect that suspicion alone, no matter how strong, could not take the place of solid and affirmative proof required of the prosecution, in the circumstances of this case, there was cogent evidence pointing to the guilt of the appellant. The evidence adduced went beyond suspicion. All the same, we do commend Mr. Karanja for his industry and research on the need for the courts not to convict on mere suspicion. Perhaps it is also important to point out that we do not agree with the learned counsel’s contention that the case turned on circumstantial evidence. On the contrary, we think the case largely turned on the direct evidence of PW4, an eye witness and also on the direct medical evidence of PW11. The inculpatory facts were therefore derived from direct evidence of PW4 and the medical evidence and therefore counsel’s invitation for us to apply the principles on circumstantial evidence set out in the case of ***REX v KOSKE & ANOR (1949) 16 EACA 135*** and many other cases after it must be rejected.

In the circumstances, the appellant’s defence that the deceased could have had a pre-existing heart condition could not reasonably explain the deceased’s medical condition as reflected in the postmortem report or the evidence that in the

early stages of the scuffle, the deceased was able to go to the children's bedroom to personally assure them that all was well. Moreover, the existence of a visible external injury caused by a blunt object as per the postmortem report is inconsistent with any pre-existing heart condition as the cause of death.

The other related point raised for determination was the effect of **section 77** of the Evidence Act as regards the evidence contained in the postmortem report. We have examined the section and with respect, we find nothing that supports Mr Karanja's contention that the post-mortem evidence was valueless because the report was unsigned. This provision clearly states that a court could still secure any of the analysts or experts described in the report to come to court and testify concerning the reports. This is exactly what the court did in allowing PW11, the doctor to give oral evidence touching on the report. **Section 77(3)** states:-

***“When any report is used the court may, if it thinks fit summon the analyst or geologist, as the case may be, and examine him as to the subject matter thereof.”***

In this regard, the court was not bound by the opinion of the expert in question and the court was at liberty to rely on any other evidence touching on the question at hand. In this case, the child's direct evidence could still be relied on. Whether the cause of death was strangulation or the external injury in the chest as per the postmortem report, the outcome was death and the only person who had an opportunity to cause it was the appellant. The doctor did confirm that it is the external injury which led to the internal injury that caused the death of the deceased. Thus, Mr. Karanja's submission that the medical evidence was not precise on the cause of death would not be sustainable even on the basis of the contents of the report itself. The report speaks for itself as reproduced above. In the case of ***DHALAY*** (supra) the court stated:-

***“While courts were obliged to give proper respect to the opinion of experts, such opinions were not binding on the courts. Expert evidence had to be considered along with all other available evidence and, where there was a proper and cogent basis for rejecting an expert opinion, a court was perfectly entitled to do so.”***

Our own independent reconsideration and re-evaluation of the medical evidence, it reflects a credible tale of the cause of the deceased's death whether by strangulation or by the use of a blunt object having been pressed on the deceased's chest, the deceased could not in the circumstances be reasonably said to have died of natural cause as contended by counsel. Granted that wife/husband murders do leave often the courts with incomplete tales, where they happen in the privacy of their bedrooms, this alone would not justify the courts to fold their hands and refuse to act on the available evidence since real life happenings hardly ever take the shape of scientific precision. To reinforce the point, we adopt fully subject to the necessary modification, the following holding in the Privy Council decision of ***R v SHARMPAL SINGH S/O PRITAM SINGH SHARMPAL SINGH S/O PRITAM SINGH vs R [1962] E.A. 13:-***

***“the incompleteness of the tale must not deter the court from drawing the inference that flow from the evidence available and that on the evidence there was no reasonable doubt that the case was one of manslaughter.”***

In the current case, we say there cannot be any doubt that the medical evidence together with PW4's oral evidence all lead to the conclusion reached by the trial court. It follows that the appellant counsel's submissions that the required standard of proof was not attained in the face of the prosecution evidence as narrated above is unsustainable.

The final ground raised by counsel for the appellant was that the court could have erred in relying on the evidence of PW4 without taking into account that she was a minor and therefore could have been influenced by the deceased's relatives. It is clear from the recorded evidence that when PW4 went to report the incident to the deceased's father and when he failed to respond the other relatives responded thereafter. In our view, this evidence is not consistent with counsel's contention that the deceased family had influenced PW4 to give the evidence she gave. On the contrary considering her age, she demonstrated considerable courage by sticking out her neck in reporting the murder under very difficult conditions considering the time the incident took place. Surely, in a situation where the deceased's family was in the neighbourhood of the locus in quo, the natural thing for PW4 to do was to report to the immediate relations which is what she did. Finally, it must also not be forgotten that even at her young age, she was not shaken by the rigours of cross-examination at all. In our view, her conduct in the circumstances did not reflect any external influence. On the contrary, she was the cornerstone of the prosecution case which floored the appellant.

The upshot is that, this appeal has no merit and it is accordingly dismissed.

It is so ordered.

***DATED and delivered at Nakuru this 28<sup>th</sup> day of May 2010.***

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**