IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 232 OF 2007

BETWEEN
LIADAH KARIUKI NDEGWA …….…..... APPELLANT

AND
REPUBLIC ……..……. RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Nyeri (Makhandia, J) dated 31st October, 2007

in

H. C. CR. C. No. 39 of 2005)
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JUDGMENT OF THE COURT

At about 8.30 pm on 3rd September, 2005, ten year old ***Simon Muraya Muturi*** *("the deceased")* was brutally bludgeoned to death with an axe and severely cut up with a panga and knife severing his spinal code and trachea. The savage attack took place barely 50 metres from the gate of his parents' house in Murichu Village in Nyandarua District. Three weeks (21 days) later, ***Liadah Kariuki Ndegwa*** alias ***Newton Kariuki*** *("the appellant")* was arrested several kilometers away in Mwiyogo Location in Mweiga Division which is his home area, and was charged with the murder of the deceased contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It was alleged that the appellant was the last person to be seen with the deceased shortly before the deceased's life was snuffed out. As there was no eyewitness to the murder, reliance was made on circumstantial evidence from seven prosecution witnesses. The appellant also made an unsworn statement. Upon consideration of the entire evidence, the superior court (Makhandia, J) found him guilty as charged, convicted him and sentenced him to death. This is therefore the appellant's first and last appeal.

The petition of appeal filed by the appellant in person raises twelve (12) grounds but these were combined and restated at the hearing by learned counsel for him, Miss Lucy Mwai, who argued them in three broad areas, namely:

1. *That the case was not proved to the required standard.*

2. *That the circumstantial evidence adduced by the prosecution was misapplied.*

3. *That the alibi defence of the appellant was not considered.*

We shall revert to the submissions made on those issues presently. We must first discharge our duty as the first appellate court in analyzing and re-evaluating the evidence on record with a view to reaching our own conclusions in the matter, but always remembering, and giving allowance for it, that the trial court had the advantage of seeing and hearing the witnesses before it. On the issue of credibility of the witnesses therefore, that court would ordinarily be the better judge.

The deceased was the son of ***Leeves Muturi Mwangi*** (PW6) and ***Mary Wambui Muturi*** (PW 1) (Mary). Leeves was an Army Officer and on the material day, he was on operation duty in Isiolo. His wife, Mary, was in the business of selling second-hand clothes in Ndaragwa town which she did twice a week, but otherwise took care of the home. They had employed the appellant as their herdsboy since September 2002.

On the fateful day, Mary returned home from her business at about 7.30 pm and found the deceased and the appellant. There were also four other neighbours who had come to see her on various matters which she finished and they left. One neighbour was indeed escorted half way to her home by the deceased and he returned. He found Mary with the appellant in the kitchen and they served dinner before Mary and the deceased moved to the sitting room to eat, leaving the appellant to eat his dinner in the kitchen. Shortly thereafter the appellant called out the deceased and the deceased left his half eaten food on the table. When Mary asked what the hurry was for, the deceased told her he was accompanying the appellant to a place near the house where some stranger used to frequent and throw stones at the house. They wanted to mark the footsteps. The deceased took the appellant's torch as they walked away but the appellant was not carrying anything. Mary saw them disappear towards the gate and past it. Suddenly, Mary heard the deceased's screams calling her out *"waii mama"*. In her recollection, it did not take more than one minute after he had seen both the deceased and the appellant go out. She ran out screaming *"waii"* and calling out the deceased. She then heard the appellant's voice saying *"uka na guku"* meaning *"come this way"* and she went towards the direction of the voice screaming. Some neighbours who were close by heard the screams and responded. One of them was ***Isaac Kibe Njama*** (PW2), a teacher, who found Mary in a state of shock saying that her son (the deceased) and the appellant had disappeared mysteriously after leaving the house to look for people who had been throwing stones at their house, and she feared that the two may have been hijacked. They combed the area without success and Kibe decided to take his motorbike and report the matter to Ndaragwa Police Station which he did. Three police officers led by ***Sergeant Peter Muguro*** (PW4), shortly arrived at the scene and the body of the deceased was found lying in a pool of blood about 50 metres from the house gate in a bush by a foot path. Near the body was a panga and a knife which Mary identified as her own and which she had seen and left in the kitchen earlier that morning before she left for work. The body and the

murder weapons were collected. A report of the missing children had also been made to the Assistant Chief of the area, ***Paul Ngunjiri Thuo*** (PW3) who visited the scene the following morning and found many people. They suspected that the appellant may also have been killed and the Assistant Chief instructed the people to split into groups and comb a wider area in search for him. About 150 metres from the scene, they found an axe which was identified by Mary as hers. The appellant was not found.

As investigations continued, the father of the deceased, PW6 who had been informed about the incident immediately by Mary, returned home and identified the body to Dr. Mburu of Nyahururu General Hospital for post mortem. Dr. Mburu's report, which was produced, without objection, by ***Dr. Peter Kioria Wanderi*** (PW7), confirmed that the body had a depressed circular compound fracture of the frontal bone approximately 10 cm in diameter; a deep cut wound severing the spinal column at C_1 and C_2 extending from midline to the left lateral end; and internally there was severed trachea just below the highway bone in the respiratory system. There was oedema of the brain tissue and Dr. Mburu formed the opinion that the cause of death was cardio pulmonary failure due to failure of the diaphragm functioning due to the severed spinal cord.

About twenty one (21) days later on 24th September, 2005, ***Administration Police Constable*** *(APc)* ***Joseph Wambua Kilonzo*** (PW5) was at the chief's camp at Mwiyogo Chief's camp in Mweiga when he received information that the appellant was a wanted person. The appellant had applied for an identity card and was due to collect it that day. The name of the applicant matched with the name of the person his office had been given as a *"wanted person"*. APc Kilonzo arrested the appellant when he called in to collect the identity card and handed him over to Mweiga Police Station from where he was transferred to Ndaragwa Police Station and was charged with the offence of murder.

The defence put forward by the appellant was an *alibi*. He confirmed that he was a herdsboy employed by Leeves (PW2) and Mary (PW1) and that he had been working for them since 2002. On the material day he woke up in the morning, milked the cows, took the milk to the dairy and returned home. At about 7 am, he sought permission from Mary to go home to check on his wife and return on 23rd September, 2005. Mary gave him permission and he went home. On 22nd September, 2005 he went to the APs' camp at Mweiga to collect his identity card but was arrested and subsequently charged with a framed up case. He was not present when the offence was committed in the evening as he had left that morning when the deceased and his mother were at home.

The evidence on record was summed up for the three assessors who assisted the trial Judge and they were in no doubt that the offence of murder was committed and that it was the appellant who had committed it. In arriving at their unanimous opinion, the assessors believed the evidence of Mary (PW1) and Kibe (PW2) on their account of events and also drew adverse inference on the appellant's disappearance from the scene on the day of the murder until 21 days later when he was arrested.

The learned Judge found, and he was right on this, that the deceased was murdered and he posed the crucial question: who murdered him? In answer to that question the judge surmised, correctly in our view, that the answer lay in the careful consideration of the credibility of the oral testimony of Mary, Kibe and the appellant; the circumstantial evidence on record; and the alibi defence put forward by the appellant. On credibility of the key witnesses, the learned Judge had this to say:

> *"I must hasten to state that I carefully observed both PW1 & PW2 as they testified. PW1 & PW2 struck me as honest and truthful witnesses. They were together as they searched for the deceased and accused. They testified in resonance, they were forthright, steady, calm and fully corroborating each other. Of course at some point PW1 broke down during her testimony. This was expected as she was testifying as to what she saw when she came across the lifeless body of her son whom she had just seen alive a while ago. I have no reason to doubt the testimony of these witnesses. Indeed PW2 who is a neighbor of PW1 was with her as they went about looking for the deceased and the accused. It was his evidence that he was informed by PW1 that the accused had left the house in the company of the deceased and shortly thereafter she had heard the deceased calling her out and the accused ordering him around. He assisted PW1, in the search and recovery of the body of the deceased. He also confirmed that the accused was not present when they discovered the body. I have no reason to doubt the testimony of this witnesses (sic) as well. I believe the testimony of PW1 to the effect that it was the accused who was the last person to leave and to be seen with the deceased alive. I also believe the testimony of PW2 as to the search and eventual recovery of the body of the deceased.*
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> *The accused on the other hand gave unsworn statement in his statement. There is nothing wrong with that though. However he did not strike me as candid, forthright, and honest in his testimony. He was at times fidgety and I got the distinct impression that there was much more he knew about the deceased (sic) death than he was willing to tell the court. In the final analysis I would attach more weight and credibility to the evidence of PW1 and PW2 as opposed to the accused."*

As regards circumstantial evidence, the learned Judge sought guidance on the principles applicable from several authorities including **Simoni Musoke v Republic [1952] EA 715**, **Teper v R (1952) AC 480**, **Rex v Kipkering arap Koske & Anor (1949) EACA 135** and **Mkadisho v Republic [2002] 1 KLR 461**. He then examined the facts and circumstances that were consonant with the principles enunciated in those cases and concluded:

> *"There is evidence that PW1 saw the accused leave with his (sic) deceased son on that fateful evening. PW1 was emphatic that she saw the son leave with the accused. It would appear that the deceased was so excited as to what they were about to do with the accused such that he left his cup of milk and roasted maize that he was meant to take on the table as he rushed out with the accused. Soon thereafter the deceased is found bludgeoned to death and the person who went out with him is missing. He disappeared from the scene and it was not until after 20 days that he was arrested elsewhere far from the scene of crime. Having believed the testimony of PW1, I must of necessity discount the alibi defence of the accused. I believe the accused never left the homestead of PW1. He was the last person to be seen with the deceased. If he did not commit the crime why then did he run away? Surely if the accused had been attacked by the other people and him alone and not the deceased managed to escape by the grace of God, did it not behove of him to report the incident to PW1 immediately for appropriate remedial measures to be taken? As there are inculpatory facts that are not only inconsistent with the innocence of the accused but also co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused? The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. It is a burden which never shifts to the accused person. The accused having been the last person to be seen with the deceased alive, is there any possibility that someone else other than the accused could have committed the offence? I do not think so. Soon after the accused left the house, PW1 heard her son call her out and the accused ordering him around. If indeed there had been anybody else involved in the crime, it would not have been necessary for the accused to escape from the scene and go underground for close to 20 days. If indeed he had survived the attack on them by strangers the most probable thing he would have done was to*

have reported the incident to PW1. He did not. This conduct of the accused is in my view inconsistent with his innocence. ……

In the end I hold, after consideration of the entire evidence on record that the circumstantial evidence not only irresistibly points to the accused as the person who killed the deceased, but also excludes any co-existing circumstances which would weaken or destroy such inference."

Finally the learned Judge examined the *alibi* defence of the appellant which he correctly stated, the appellant had no burden to prove. But the Judge observed that the appellant did not raise the issue during cross-examination of the prosecution witnesses but waited until his unsworn defence case when he mentioned it and was not cross-examined. The Judge nevertheless considered the defence to see if it introduced any doubt in the mind of the court that was not unreasonable, but found as follows:

"Looking at the totality of the evidence marshalled by the prosecution as against the alibi advanced by the accused I am far from being convinced that the alibi defence is anything but true. I think it was conjured up by the accused to mislead the court. In fact it was an afterthought. It does not at all introduce in my mind any doubt as to the accused's culpability.
PW1 clearly stated in her evidence that the accused was in her residence. He had supper before taking the deceased out. When she screamed and attracted the attention of PW2 who immediately came to her aid, she immediately told him that it was the accused who had just left with her son. Further when PW3 came to the scene, the same information was relied to him by PW1. PW3 went out looking for the accused thinking that the accused could have been killed as well. Similarly when PW4 came to collect the body, he was informed that the accused had been with the deceased and started looking for him. They did so for a whole day unsuccessfully. Information was then relayed to Mweiga police station to look out for the accused since he came from that area. True enough 20 days later the accused was arrested. PW6, the father of the deceased was also told by his wife that the deceased had been with the accused moments before he was found dead. Now if PW1 had given the accused permission to travel to his home as claimed by the accused, why again would she have turned around and told whoever came to her assistance that the accused had left with the deceased moments before he was found dead. If indeed it was true that the accused left for home on the eve of the death of the deceased there would have been no point in PW1 stating that the deceased had been in the company of the deceased at all. In fact at that stage, there was even fear that the accused may also have been killed, hence the intense search for him as well. That being the case, PW1 could not have lied about the presence of the accused in the homestead on the material day. The alibi story of the accused is simply unbelievable."

It is those findings on the three crucial issues which aggrieved the appellant. Learned counsel for him, Miss. Mwai, submitted on the first issue attacking the credibility of the sole eyewitness, Mary, who purportedly saw the appellant with the deceased for the last time, that Mary was not worthy of belief because she said there were other neighbours present in her home that evening but none of them were called to confirm that the appellant was at the house. It was only Mary who purportedly heard screams and went to the scene and was later joined by others who found the body of the deceased near her homestead and collected murder weapons which belonged to her. The whole incident, in Miss. Mwai's view, was stage-managed by Mary who may well have been a suspect and not a credible prosecution witness. As for the circumstances which were found to irresistibly point to the appellant, she submitted that it was erroneous to make the finding that the appellant disappeared from the scene when there was evidence that he had been granted off duty by his employer. Citing the cases of **Kipkering arap Koske & Another** (supra) and **Sawe v Republic [2003] KLR 364**, Miss. Mwai submitted that the evidence of Mary required corroboration as she was an accomplice, and that there were existing circumstances which weakened the chain of circumstances relied on. Finally she attacked the

rejection of the *alibi* put forward by the appellant without any consideration being made to the fact that the prosecution failed to call an independent witness to dispute the appellant's contention that he was not at the scene of crime.

For his part, learned Principal State Counsel Mr. Kaigai found no reason to criticise Mary who was clear and consistent in her evidence that the appellant was the last person to be seen with the deceased. There was a specific finding, he observed, that Mary was credible and the appellant was dishonest. The trial court, he submitted, was entitled to make such findings as it saw and heard those witnesses. As for allegations of frame up, Mr. Kaigai submitted that there was no evidence on record to support such allegations and the appeal ought to be dismissed.

We have considered the issues raised in this appeal and the submissions of counsel therein and we do not, with respect, find any basis for the complaints raised by the appellant. It may well have been desirable for the prosecution to call several witnesses to confirm that the appellant was at the home of Mary (PW1) on the evening he is said to have gone out with the deceased for the last time. But it is not the quantity of evidence that is necessary to prove a particular fact and no particular number of witnesses is required in law for that purpose – see ***section 143*** Evidence Act. "Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but that does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult." That was stated in **Abdalla bin Wendo & Another v. R. (1953) 20 EACA 166** and has been applied many times over by this Court. Furthermore, the predecessor of this Court, in **Bukenya & others v Uganda [1972] EA 549**, had this to say:

> **"If** (the prosecution) **calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

All the above circumstances in our view do not obtain in this case. Mary's credibility was closely examined by the learned trial Judge and she was not found wanting. We have already reproduced the relevant part of the superior court's judgment giving reasons for believing her evidence. This Court has no basis for simply overturning that finding as the trial court had the advantage of seeing and hearing the witness. Identification of the appellant was also not in issue as it was common ground that he was an employee of Mary and therefore well known to her. Nor was Mary's trustworthy evidence, and other evidence adduced by the prosecution *"barely adequate"* as envisaged in the ***Bukenya case*** (supra) to warrant the drawing of adverse inference for failure to call other persons who were evidently present on the fateful evening, two hours or so before the deceased was killed and the appellant disappeared. Material parts of Mary's evidence were supported by Kibe (PW2) and the ***Assistant Chief Thuo*** (PW3). We find on our own assessment of the evidence that Mary was truthful in her evidence, and the allegation that she was an accomplice has no factual basis. We further find that the appellant was at the scene of crime and was the last person to be seen with the deceased when he was alive. Upon such finding the duty is cast on the appellant under ***section 111*** of the Evidence Act to explain what happened to the deceased but obviously that burden was not discharged. The finding that the appellant was at the

scene is buttressed by the appellant's conduct of disappearance from the scene for a period of three weeks before he was arrested far from the scene. The appellant was well represented by counsel at the trial but at no time was it suggested to Mary in cross-examination that there was any grudge between her and the appellant, or that she had permitted the appellant to go home on the morning of the fateful day, or that she was lying about the reason the deceased and the appellant went out together that evening. The *alibi* defence, as correctly observed by the trial Judge was sprung up at a later stage during the appellant's defence and could not be challenged because he gave unsworn testimony, which was his right. We respectfully agree with the trial Judge on his assessment of the totality of the circumstantial evidence which pointed irresistibly to the culpability of the appellant. We reject the invitation to make a finding that there were other co-existing circumstances which would dilute that conclusion. The deceased was savagely killed by the appellant. It is not for us to speculate on the motive of such killing since the presence or lack of a motive is of no consequence in criminal liability - See ***section 9(3)*** of the Penal Code. The three assessors and the learned trial Judge were right to make the finding that the appellant was guilty as charged.

For those reasons we do not disturb the findings of the trial court or the conviction and sentence of the appellant. We order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 25th day of June, 2010.

E.O. O'KUBASU

……
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