REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 460 of 2008

CHARLES OMWENGA MATOKE..... APPELLANT

AND

REPUBLIC

……..RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii (Mr. Justice K. Bauni) dated 30th November, 2006

in

H.C.CR.C. NO. 17 OF 2005)
****

JUDGMENT OF THE COURT

The appellant herein, ***CHARLES OMWENGA MATOKE,*** was arraigned before the superior court on 20th March, 2005 on an information in which he was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were as follows:-

> ***"CHARLES OMWENGA MATOKE: On the nights of 11th and 12th day of February, 2005 at Misesi Sub- location in Gucha District within Nyanza Province murdered MARY NYABOKE."***

The appellant's trial commenced on 18th May, 2005 before Bauni J. with the aid of assessors (as the law then provided) when the prosecution called its five witnesses – Janes Kwamboka (PW1), Dr. Ezekiel Ogando Zoga (PW2), Matoke Momata (PW3) Johnson Obirio Osaso (PW4) and Pc Bernard Sila (PW5). It was the evidence of Janes Kwamboka (Kwamboka) that on the material night she was asleep in her house when the appellant called her saying that the deceased Mary Nyaboke had taken poison and that he (the appellant) was seeking assistance. As a result Kwamboka accompanied the appellant to his house and found the deceased lying on the bed- she was already dead! The same night Matoke Momata (PW3) the father of the appellant was also called by the appellant who told him that he had differed with the deceased and as a result the deceased had taken poison. Momata (PW3) would not enter the house of the appellant as that was against the custom of that community. Johnson Obiri Osaso (PW4) was another witness, who was called during the material night and went to the appellant's house only to find the deceased lying on the bed dead. Pc Bernard Sila (PW5) visited the scene and found the body of the deceased with some injuries on the neck and legs. Dr. Zoga performed postmortem examination on the body of the deceased on 25th February, 2005 and in his opinion the deceased died due to cardiopulmonary arrest due to head injury. Dr. Zoga did not find any signs of poisoning.

The learned trial Judge put the appellant on his defence. He chose to make unsworn statement in which he stated that on 8th February, 2005 he returned home at about 8.00 p.m. when his wife (deceased) prepared supper and after eating, their child fell sick. They gave the child some tablets but at midnight the child's condition worsened. Due to that condition of the child the deceased decided to take poison. She asked for some water and after that they both went to bed. The appellant fell asleep. When the appellant later called his wife she did not respond. He therefore went to call neighbours who came and confirmed that she was dead.

The trial Judge summed up the evidence and the law to the assessors and each of the three assessors returned a verdict of guilty.

The learned Judge reserved his judgment which he later delivered on 30th November, 2006. The learned Judge was satisfied that the prosecution had proved the case against the appellant. In convicting the appellant the learned Judge concluded his judgment thus:-

> ***"In this case the circumstances are such that one can conclude that it was the accused who committed the offence. He was alone with the deceased at the house. There was no evidence that there was any other person who had an access to the house who would have inflicted the injuries. It is only the accused who had the opportunity to kill the deceased, and there are no doubts that he did so. After committing the offence he cheated his father (PW3), sister-in-law and cousin that the deceased took poison and died. He knew this fact was not true. In fact his defence was a total sham. One would not imagine that one's wife would take poison and he would go to sleep. The deceased could not have inflicted those serious injuries on herself. She could not have fractured her skull and inflict injuries on the neck and the legs. Deceased (sic) know the injuries he inflicted which were serious would likely lead to the death of the deceased. He therefore had the requisite mens rea to cause her death though it was not clear why he did so. He did not cause the death accidentally.***
>
> ***The upshot of the above is that I find that the prosecutions (sic) have proved the case against the accused beyond all reasonable doubts. I find him guilty as charged and convict him."***

The learned Judge then proceeded to sentence the appellant to the mandatory death sentence.

Being aggrieved by the foregoing the appellant, through his advocate (Mr. P. Ochieng'), filed this appeal based on the following grounds of appeal:-

> ***"1. The superior court erred in law and fact by not complying with the mandatory requirements of section 77 (2) (b) and (f) of the constitution as is evidenced in the proceedings.***
>
> ***2. The appellant's constitutional rights having been breached under section 72 (3) of the constitution with no explanation for the said breach the entire trial in the superior court was a nullity.***
>
> ***3. The superior court erred in the law when it failed to appreciate, that there did exist logical explanation other than the guilt of appellant in the case presented by the prosecution, which was grounded upon circumstantial evidence.***
>
> ***4. The superior court erred in the law by failin to adopt the principal (sic) of presumption of likely facts when the prosecution failed to call key witnesses in its case.***
>
> ***5. The superior court erred in law and fact by failing to appreciate that the chain of evidence had been severed and could not be relied upon and further failed to warn the assessors of the same while summing up.***
>
> ***6. The superior court erred in law by introducing extraneous evidence while summing up."***

This is the appeal that came up for hearing on 30th November, 2009 when Mr. P. Ochieng' appeared for the appellant while Mr. D. I. Musau (Senior Principal State Counsel) appeared for the State.

Mr. Ochieng' abandoned ground 2 of the memorandum of appeal and combined grounds 3, 4 and 5 which he argued together. It was his submission that the appellant's conviction was based on circumstantial evidence when the superior court held that it was only the appellant who had the opportunity to kill the deceased. Mr. Ochieng' submitted that the appellant gave an explanation that the deceased died after taking poison which in his view the superior court ought to have accepted. Mr. Ochieng' further submitted that those who came to the scene

immediately did not see any injury on the body of the deceased except Dr. Zoga (PW2) who conducted the postmortem examination on the body of the deceased. Mr. Ochieng' faulted the doctor's evidence on the ground that the doctor did not testify how he knew that the body was that of the deceased. In Mr. Ochieng's view there were other co-existing circumstances which destroyed the inference of the appellant's guilt.

On the first ground of appeal Mr. Ochieng' submitted that the record of the superior court did not indicate what language was used during the proceedings. In his view constitutional rights of the appellant were breached contrary to ***section 77 (2) (f)*** of the Constitution.

On his part Mr. Musau submitted that the appellant's constitutional rights were not breached and that the appellant who was represented by counsel never raised any complaint about the language used during the proceedings in the superior court. Mr. Musau further submitted that from the postmortem form the body that Dr. Zoga examined was that of the deceased and that the doctor testified that the body had injuries. It was Mr. Musau's submission that the appellant was convicted on very sound evidence. He therefore asked us to dismiss this appeal.

This being a first appeal it is in the nature of a re-trial in the sense that the Court is enjoined to reconsider the evidence, re-evaluate it and come to its own conclusions but always remembering that we have neither seen nor heard the witnesses testify – see ***Okeno v R [1972] E.A. 32***. In this appeal we have endeavoured to set out the summary of the evidence from various witnesses and the defence of the appellant. The evidence shows that on the material night the appellant and his wife (deceased) were in their house when the appellant went out and summoned his neighbours. The reason for this disruption of that night's peace was that the appellant's wife had died and the neighbours found the dead body of the deceased on her bed. The appellant's explanation was that the deceased had taken poison when their child became seriously ill. That is what the appellant said in his defence in court. But what was the appellant's immediate and initial explanation on the material night? In her evidence in chief Janes Kwamboka (PW1) stated, inter alia:-

> ***"Accused called me from outside. He told me that the deceased had taken poison and wanted me to go and assist her."***

In his evidence in chief Matoke Momata (PW3) the appellant's father testified inter alia:-

> ***"Accused came and called me. He told me they had differed with the deceased and the deceased had taken poison."***

On his part Johnson Obiri Osaso (PW4) the appellant's cousin testified inter alia:-

"Accused came and woke me up with my wife. He told us his wife had taken poison."

From the foregoing it would appear that the appellant's explanation as regards the death of his wife was that she had taken poison. The reason for taking poison varied. To his father the appellant said that he had differed with his wife and that is why she took poison. To the court in his defence he stated that the deceased had taken poison because their child's condition had worsened. But according to postmortem report the deceased died due to cardiopulmonary arrest due to head injury. In his evidence Dr. Zoga (PW2) testified as follows:-

> ***"On 25/2/2005 I performed post mortem on body of Mary Nyaboke at Kisii District Hospital mortuary. She was African female aged 26 years old. She had bruises on the neck, head, right thigh and left leg. Internally I found a fracture of skull bone and there was bleeding into the brain I formed opinion that she died due to cardiopulmonary arrest due to head injury. I filled and signed post mortem report. I produce it – Exhibit 1.I did not find any signs of poisoning."***

In view of Dr. Zoga's evidence the story by the appellant as regards poisoning was completely displaced. This then leaves us with a situation whereby the appellant is found with the dead body of his wife in their house with no explanation. The body had injuries as stated by Dr. Zoga and Pc Sila (PW5) who visited the scene immediately after a report was made to the police. It is important to note that the appellant's explanation of poisoning which was displaced by Dr. Zoga's evidence was not consistent. According to the evidence of Momata

(PW3) the deceased took poison because she had differed with the appellant; but according to the appellant's defence in court during the trial the deceased took poison because their child's condition had worsened. From the foregoing we conclude that the appellant's story about poisoning cannot be true. Hence we are left with circumstantial evidence to the effect that the appellant was the only person in the house where the body of his wife was found with several injuries which led to the death of the deceased. In our view circumstantial evidence points to the appellant as the person who killed his wife (deceased) for reasons known to himself and then to cover up his unlawful act decided to make up a story that the deceased had taken poison. That story could not be true in view of clear evidence of the doctor who performed the postmortem examination on the body of the deceased. In ***MWITA v R*** [2004] 2 KLR 60 at p, 66 this Court said:-

> ***"It is trite that 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 v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted ([1958] EA at page***
> ***"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."***

Applying the foregoing to the facts of this case we are satisfied that circumstantial evidence was such that it could not be explained on any other hypothesis than that of the appellant's guilt, and incompatible with any other innocent explanation.

Before we conclude this judgment we need to say something about what was raised in the first ground of appeal – the language used during the trial in the superior court. The record shows that on 18th May, 2005 there was a Court Clerk by the name of Mobisa. It was then recorded as follows:-

> ***"Information and particulars read and explained to the accused in Ekegusii."***

The appellant is recorded as having answered as follows:-

> ***"Not true"***

The trial then commenced on 29th September, 2005 when assessors were selected and prosecution witnesses testified. The appellant was represented by Mr. Nyauntu who cross-examined these witnesses. When put to his defence the appellant chose to give unsworn statement. In that statement he explained what happened and how their child became sick leading to the deceased taking poison. Taking all this into account we are unable to agree with Mr. Ochieng' that the appellant's constitutional rights were breached. It was unfortunate that the learned trial Judge did not indicate the language used by the witnesses but on careful perusal of the record it is clear that the appellant understood and participated in the proceedings. He was not in any way prejudiced. We must therefore reject the submissions on ground one.

In view of what we have said about the evidence against the appellant we are in agreement with Mr. Musau that the appellant was convicted on very sound evidence. Having re-evaluated the evidence we are satisfied that the appellant's conviction was inevitable. Consequently, we find no merit in this appeal and we order that the same be and is hereby dismissed.

Dated and delivered at KISUMU this 4th day of December, 2009.

R. S. C. OMOLO
……
JUDGE OF APPEAL

P. K. TUNOI
……
JUDGE OF APPEAL

E. O. O'KUBASU

……..
JUDGE OF APPEAL

certify that this is a true copy of the original

DEPUTY REGISTRAR