IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 262 OF 2007

JACINTA NJOKI NDIRANGU …..………………………………. APPELLANT

AND

REPUBLIC…..……………..………………..……………………… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Rawal J.) dated 14th June 2004

in

H.C.C.C. NO. 99 OF 2003)

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JUDGMENT OF THE COURT

This is a first appeal by *Jacinta Njoki Ndirangu* (*the appellant*) against her conviction for the offence of murder contrary to sections 203 and 204 of the Penal Code, respectively. The particulars of the charge read that she on 9th day of November, 2002 at Maili Saba Biafra Nzone Nairobi, within Nairobi Area jointly with another not before the court, murdered *John Anyanga Nyangweso* (*the deceased*).

In a first appeal the Court is under a duty to consider all the evidence tendered and statements read at the trial, re-evaluate the same, draw its own conclusions of course without overlooking the findings of the trial court and also bearing in mind that it, unlike the trial court, did not see or hear the witnesses testify as to be in a position to fully assess their credibility. It is a duty the Court must perform and an appellant is entitled to such an analysis and reevaluation of the evidence and statements. It will be considered a denial of justice if such a duty is not performed.

The conviction of the appellant was wholly based on circumstantial evidence. This is evidence of surrounding circumstances from which a court draws inferences as to what might have happened. In our case here the circumstances are short and straightforward.

The body of the deceased was discovered in a certain quarry lying face downwards. It was soiled and blood stained. Nobody saw it being dumped there, nor was direct evidence adduced as to who killed him or had dumped the body there. It was however, the evidence of Josphat Karume (*PW1*), Peter Mwangi (*PW2*), and Aineah Lusiji Smith (*PW3*), that there was a trail showing that the body had been dragged there. The trail had also some blood a long it and the trail led to the residence of the appellant which was nearby. A pool of blood was seen at the door step and an attempt had been made to cover the blood with

soil.

The appellant's residence comprised a two roomed structure. The appellant was inside with a child whom the witnesses reckoned was about 5 years of age. According to P.W.1 the appellant explained that the deceased had been beaten by two people, a Mkamba and a Mluhya. She gave the name of the former but not the latter. But according to P.W.2 the appellant's explanation was that the deceased fought with another person who stabbed him with a knife and thereafter dumped his body at the quarry.

P.W.3's story agreed with that of P.W.l

It is in evidence that the three witnesses observed the appellant and noted that her clothes were blood stained, and that there were some clothes which were blood stained. Both the rooms had evidence of disturbance as window curtains were pulled down, and were stained with blood. Blood droppings were noted all over the floor of both rooms. The appellant's explanation for the blood on her clothes was that it was as a result of her menstrual flow, a story she later changed when pressed to tell the truth. The new story was that there had been a fight between the deceased and two known people who stabbed him to death and subsequently dumped his body at the quarry.

P.W.1, P.W.2. and P.W.3 were village elders. They apparently did not believe the appellant. They arrested her and led her to Mowlem Police Post. However, before doing so the appellant led them to the home of one Mwanzia, whom she said was the person who fought with the deceased. Mwanzia was not there. The appellant led the three elders to Mwanzia's father' residence where they inquired as to the whereabouts of his son. It was when he expressed ignorance as to his son's whereabouts that the elders led the appellant to Mowlem Police Post. Mwanzia's father was initially a suspect in the deceased's death but he was later released.

The body of the deceased was later taken for post mortem examination which was conducted by Dr. Kamau Maundu. (PW4). In his examination he observed that the body had a deep superficial cut wound on the posterior of the right leg, another cut wound at the rear of the scalp, bruises on the right parietal area with haematoma below the skin with a blood clot which was 3 inches in diameter. There was no fracture of the skull. Inside the head he observed brain hemorrhage. He assessed the cause of death as the head injury resulting in a brain hemorrhage leading to death. Blood samples were taken for grouping. Mr. Jeremiah Kallita Onguti later analysed the blood and found it to be of group B.

The blood in the appellant's residence was also analysed and found to be of group A, B and O but identification tests based on the analysis were inconclusive.

Neither the blood of the appellant nor that of Mwanzia was analysed. This was a serious omission by the police more so when the initial account the appellant had given was that the blood which was found in her house was her own due to her menstrual flow. Besides, there was a skirt, an underpant and other cloth items which belonged to the appellant which were blood stained. On the basis of these it was desirable to take blood samples from the appellant, unless of course she objected to it, to confirm or disprove her story.

In her defence the appellant made a statutory statement denying the offence and giving an explanation as to what happened on the night the deceased allegedly died. She was legally entitled to make such a statement. Her story was that while at her house preparing dinner for herself and her children the time having been 9 p.m, she heard people quarrelling outside. Shortly later she heard a shout from a person whom she recognized as her neighbour. A fight ensued and shortly after that the combatants ended up inside her house. The combatants were one Mwanzia, who was her neighbour and the deceased. A lantern was on and she was therefore able to observe and identify the people fighting. For some undisclosed reason Mwanzia tried to hit her but she avoided the blow, and left the room with her child and went outside where she remained until the fight ended. In the meantime she screamed for help but nobody responded. The appellant did not explain how the deceased sustained the fatal wounds, and since she made a statutory statement no explanation could be sought from her on that. All the appellant said was that she left and went to Mowlem Police Post to make a report, but she did not say a

report on what.

Be that as it may the appellant stated that she made a report of *"the matter"* but the officer on duty said he could not help as fellow officers were out on patrol duties. She was told to return the next day at 8 a.m. She did not however comply because she was arrested by elders before she could do so.

The trial Judge (Rawal J.) considered the evidence before her. She believed PW1, PW2 and PW3 as witnesses of truth. She considered the conduct of the appellant in trying to cover the blood at her doorstep with soil, her conduct in trying to clean the blood, the presence of blood all over her house and also along the trail to the quarry where the deceased's body was found as sufficient circumstantial evidence to lead to the inescapable conclusion that the appellant participated in the killing of the deceased. She disbelieved the appellant's story that she screamed for help but nobody responded, on the basis that she did not raise the matter with the witnesses concerned. For the same reason she also disbelieved her that she made a report at Mowlem Police Post.

In concluding her judgment the learned Judge rendered herself thus:

"The accused evidently was selling chang'aa and the brutal act of murder had been committed in her presence. Even if I am inclined to concede that she might not have committed the actual act of killing, I am convinced that she had brazenly abetted the said crime by not informing the police authority of the commission of the crime and was found in the act of concealing or erasing the evidence by clearing her place and blood stained clothes.

She is thus deemed to have taken part in committing the offence and is guilty of the offence as per the provisions of section 20(1) of the Penal Code (Cap 63)…"

The appellant's memorandum of appeal was home made. That memorandum was abandoned by her counsel, Mr. Oyalo, who instead relied upon a supplementary and further supplementary memorandum of appeal, which raise several grounds.

Mr. Oyalo, however, argued only eight of those.

The trial court record shows that at the close of the prosecution case there is no formal ruling that the accused had a case to answer. The record shows that the court recorded as follows:

"Court:

Defence case on 26th April 2004. Accused remanded in custody. Assessors be paid."

On 26th April 2004, the record as material, reads as follows:

"MR. OIGARA

I am ready for defence with one witness. The accused shall give unsworn statement in Swahili language."

The appellant then proceeded to make her statutory statement details of which we outlined earlier. Mr. Oyalo submitted that the manner the court below proceeded violated the provisions of section 306 of the Criminal Procedure Code which in his view requires the Court to give a formal ruling as to whether or not an accused has a case to answer. We think that while it is necessary to do so, failure to comply with that provision in the manner suggested by Mr. Oyalo, is not fatal to an otherwise sound conviction, if the accused was not denied the right to call evidence and to make a statement according to his election. It is clear from the record that the appellant was made aware she had the right to put forward a defence and to call witnesses on his behalf. It is also clear she was made aware that she had the right to give evidence on oath or make a statutory statement. She was represented by legal counsel who made known to the court the appellant's election. In our view therefore, there was sufficient compliance with the provisions of

section 306 CPC and nothing turns on this ground.

The next ground relates to the opinion of the assessors. In her summing up the trial Judge directed the assessors that they could give a unanimous or individual opinions. This, Mr. Oyalo, lamented, was against the provisions of **section 322** CPC which, before its repeal provided that each assessor would be called upon to give his own opinion as to guilt or otherwise of the accused.

It cannot be gainsaid the opinion of the assessors was not binding on the trial Judge. That is not to say that the opinion was not important. It was important. This was clearly emphasized **in Kinuthia v. R. [1988] KLR 699**. The failure to ask each assessor to give a separate opinion is clearly in breach of the aforesaid section. But it is not every breach of the provisions of the law that will vitiate a trial. **Section 382** of the Criminal Procedure provides that in certain instances such breaches are curable provided the breach does not occasion a failure of justice. What would amount to prejudice will vary from case to case, because what amounts to prejudice is a question of fact. The Court has to look at the evidence and circumstances of each case and come to a finding whether or not the breach resulted in a failure of justice and caused prejudiced to the accused. On the facts and circumstances of this case we are unable to discern any appreciable prejudice to the appellant arising from the procedure the trial Judge adopted.

Likewise, we discern no prejudice to the appellant by the approach the trial Judge adopted in selecting assessors. True, the best approach was to call several people and from that group select three to serve as assessors after interviewing each one on his suitability to serve as an assessor. In the present case three individuals were presented to the Court which asked counsel for the appellant whether he had any objection to any of them serving as an assessor and upon the counsel signifying his approval, they were appointed to serve as assessors. In **Geoffrey Oketch Ouko v. Republic, Criminal Appeal No. 168 of 2006,** decided before the repeal of the provisions of the C.P.C. relating to assessors, this Court held that where there is no clear evidence as to whether those selected to serve as assessors were qualified the doubt should enure to the benefit of the appellant. The question we pose is whether such a doubt exists here. The appellant was represented by counsel at her trial. The said counsel raised no objection to the participation of any of the persons who had been proposed to serve as assessors. Nor did the state counsel raise objection. These people did not just offer themselves to serve as assessors. They must have been approached. This is part of the selection process. It is because of the foregoing circumstances that we hold that we see no discernible prejudice against the appellant arising from the manner of selection of those who served as assessors.

As we stated earlier the appellant was convicted, of murder, as an aider or a bettor of the crime charged. Mr. Oyalo for the appellant submitted before us citing the case of **Dracaku s/o Afia and another v. R**. [1963] EA 363; that for a conviction to lie on the basis of being an aider or abettor , it must be shown that the accused was at the scene at the time of its commission. It must also be shown that the accused encouraged or assisted in the commission of the offence.

It cannot be gainsaid that the appellant was found at her house trying to clean up blood stains inside and outside her house. It is not clear from the evidence when the fatal blow was applied against the deceased. It can however be inferred that he was killed inside the appellant's house because a pool of blood was found therein, and there was a trail which showed that the body was dragged therefrom to the quarry from where it was recovered. Besides the appellant herself stated that she saw the deceased being assaulted by known people. In the circumstances no issue arises as to the scene of the killing. PW1, PW2 and PW3 found the appellant in that house. So the evidence places the appellant at the scene. No other adult person was found at the scene.

The burden of proof was with the prosecution to prove the charge of murder or any lesser charge to the standard required in criminal cases, namely beyond any reasonable doubt. That burden never shifts to the accused. There is however the evidential burden, which shifts depending on the circumstances. This is recognized under section 111 of the Evidence Act, Cap 80 Laws of Kenya, which as material provides that:

"111(1) When a person is accused of any offence, the burden of proving the existence of

circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.......”

The appellant admitted she witnessed an alleged fight which led to the death of the deceased. She explained that the fight involved two or three people, two of whom were the deceased and one Mwanzia. PW1, PW2, PW3 were not quite clear whether the appellant’s explanation to them was to the effect that three people were fighting or just the deceased and Mwanzia. They testified about one of them being a Mluhya. We do not know the tribe of the deceased. However, his tribe may not now be important considering the particulars the police included in the appellant’s P3 form (Exht 3). The police gave brief details of the offence against the appellant as follows:

“’*Accused is a suspect in a murder case where deceased was killed by a known person at large*”

The known person must have been Mwanzia. Mr Oyalo submitted that the police did not bother to look for Mwanzia. Mr Oyalo further submitted that in view of that fact the circumstances are such that they do not exclude other reasonable hypothesis than that the appellant killed the deceased.

We have considered all the evidence and the circumstances of the case. Notwithstanding the conclusions we came to earlier, on the basis of the remarks in the appellant’s p3 form which we reproduced earlier, it is quite clear that the police were persuaded that the deceased was killed, not by the appellant but one Mwanzia. Mwanzia had not been arrested as at the date of the appellant’s conviction. The said statement in the P3 form is categorical:-

“the deceased was killed by a known person at large”

The police having come to that conclusion why did they charge the appellant with the offence of murder of the same deceased? Considering the evidence as a whole there is a doubt as to whether the appellant committed the offence she stands convicted of. Having come to that conclusion, we are unable to agree with Mr. Kaigai, Senior state Counsel, that the appellant should have been convicted of being an accessory to the offence of murder.

To conclude this judgment we wish to state that this case was badly investigated. We pointed out earlier that the blood samples of the appellant should have been analysed to disprove her story that the blood on her clothes was her menstrual flow. Besides, the police did not adduce any evidence regarding the efforts they made to get Mwanzia whom the appellant named as the deceased’s killer. Clearly the police were callous in the manner they handled this case.

In the result we are not satisfied that the circumstantial evidence on record excludes all reasonable hypothesis than that the appellant killed the deceased. Likewise we are not satisfied circumstances exclude co-existing circumstances regarding the guilt of the appellant for the offence of Murder contrary to **section 203** as read with **section 204** of the Penal Code.

Accordingly we allow the appellant’s appeal, quash her conviction for that offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and set aside the sentence of death imposed on her. She should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 9th .day of October, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

…………………………

JUDGE OF APPEAL

J. ALUOCH

…………………………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR