IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE JJA)

CRIMINAL APPEAL NO. 76 OF 2013

BETWEEN

FRANCIS KUBAI M'IKIOME.....1ST APPELLANT

MOSES NDANDU MWITO……2ND APPELLANT

AND

REPUBLIC …….....….RESPONDENT

(*Appeal against Conviction/Judgment of the High Court of Kenya at Meru (Lesiit, J.) Dated 25th October, 2012)* in (Meru H. C. Cr.A. NO. 43 OF 2012)

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JUDGMENT OF THE COURT

The evidence tendered by the prosecution witnesses namely PW1, **Dr. William Mutembei Ringera (Dr. William**), PW2, **Maritha Ciomwambia (Maritha),** PW3, **Samuel Akimbo (Samuel),** PW4, **George Kaunyangi (George),** PW5, **Zipporah Mwakerimi (Zipporah),** PW6, **Cpl. Flovian Wamalwa (Cpl. Flovian),** PW7, **Cpl. Mohamed Golo (Cpl. Mohamed)** and PW8, **Dr. Raphael Nderitu Gichere (Dr. Raphael)** was that on the 3rd January, 2003 the deceased **Jacob Ntonja** (deceased) was in the home he lived in with **Maritha** and **Samuel** performing manual chores. Towards the evening of the fateful day, he excused himself to buy something from the local market according to **Maritha** and to buy cigarettes, according to **Samuel**. He came back shortly thereafter with potatoes in a sack. Hot on his heels were the two appellants **Francis Kubai M'ikiome (Francis)** and **Moses Ndandu Mwito** (**Moses**). The two were armed with pangas and sticks. They demanded something from the deceased which **Maritha** and **Samuel** did not hear. The two then started assaulting the deceased. **Maritha** pleaded with them to receive a goat in return for whatever the deceased may have taken from them but they would hear none of it. They tied the deceased's hands at the back using ropes and a sweater and led him away to "**Sheria**" whatever they meant by that. **Maritha** and **Samuel** raised no alarm because according to them the neighbours' homesteads were scattered with the nearest being about a kilometer away.

Early the next morning **Maritha** and **Samuel** left in search of the deceased, which search led them to **Francis's** home. A short distance from **Francis's** gate they noticed a trail of blood and evidence of a struggle in the compound and some burning. **Maritha** recovered the deceased's belt in the compound.

There was more blood stains and evidence of burning of an object in the house. There were dragging marks from the compound leading to a thicket in **Francis's** shamba near the road where they spotted the lifeless body of the deceased. It had burns, the eyes were gouged out and it had multiple other injuries.

On the same day that the deceased body was spotted, both appellants made a report to **Cpl. Flavian** of Maua Police Station of seeing a dead body in a bush on the road near **Francis's** home and on being told to wait for transport to take police to the scene, they disappeared. Police visited the scene later that same date and made the same observations as those noted above. The body was removed to the hospital mortuary where a post mortem was carried out on the 11th January, 2003 by **Dr. Raphael.** The observations by the pathologist were that the body had severe burn injuries involving the trunk, neck and limbs, bruises all over the body, inhalation of fumes in the nose; blunt trauma with evidence of blood in the abdominal cavity; the spleen was raptured; the scrotum was swollen as a result of burns; beards and nostrils were burnt; there was a fracture of two back bones on the neck area. In his opinion, the cause of death was multiple injuries, burns and fractures separately or in combination.

On the 3rd April, 2014 **Francis** was arrested with the help of **George. Francis** led police to his **(Francis's)** house where **Moses** was arrested. They were thereafter arraigned in the High Court of Kenya at Meru on the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 3rd day of January, 2003 at Liakau village Nginyanga Location in Meru North District within Eastern Province they murdered **Jacob Ntonja**. The appellants denied the charge prompting the trial in which the evidence outlined above was tendered.

When put to their defences the appellants contended that it was not them who dragged away the deceased while alive from his home. It was only in the morning of the next day that **Francis** spotted a dead body besides a road in the vicinity of his home and alerted **Moses** about it. The two then reported the matter to Maua police which in fact they did at 10.15 am as was confirmed by both the OB entry and the testimony of **Cpl. Flovian**. They waited for a vehicle to take police to the scene, which they eventually did contrary to the testimony of **Cpl. Flovian** that they disappeared soon after reporting. After the body was removed by police, the two continued with their lives as before in the same village until they were arrested over a year later and charged with an offence they knew nothing about.

After summing up to the assessors, whose opinion was that both appellants were guilty, the learned Judge **Lesiit J** rendered a judgment on the 25th October, 2012 wherein she found the prosecution's case proved to the required threshold, found both appellants guilty of the offence charged, convicted them and sentenced each to death.

The appellants are now before us on a first appeal. They initially separately raised eight (8) and nine (9) grounds of appeal in homemade memorandums of appeal respectively. Save for grounds 3, 4 and 7 in the set filed by **Francis** and 4, 5 and 8 in the set filed by **Moses**, learned Counsel **Mr. Mutegi Mugambi** appearing for both of them abandoned the rest. The adopted grounds are similar in material particulars as follows:-

The learned trial Judge erred in both law and facts:-

> **1. in failing to make a finding that the prosecution's witnesses gave invariably contradictory evidence.**
>
> **2. in failing to make a finding that the circumstantial evidence tendered did not point directly to the guilt of the appellant.**
>
> **3. in failing to make a finding that the provisions of section 169(2) of the CPC (sic)**

In his submissions, **Mr. Mugambi** learned counsel for the appellants urged us to allow the appeal on the grounds that the learned Judge never inquired about the intensity and the source of the light at the alleged time of 7.00 pm when the appellants allegedly dragged the deceased away with them; the learned trial

Judge never reconciled contradictions in the testimonies of **Maritha, Zipporah** and **Dr. Raphael**; and lastly the learned trial Judge failed to interrogate and rule on the issue of malice aforethought which is a key ingredient in the proof of the offence of murder.

To buttress his argument **Mr. Mugambi** cited the case of **Joel Salyanga Ole Mwariki & Another versus Republic [2007] eKLR** for two propositions namely that:-

> **i. there is need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness; and**
>
> **ii. that there is an obligation on the court to ensure that a person is convicted only when it is beyond per adventure that he was properly identified**.

In response to **Mr. Mugambi's** submissions **Mr. E. O. Ondari** the learned Senior Assistant Director of Public Prosecutions urged us to dismiss the appeal on the grounds that the evidence of identification was water tight as it was evidence of recognition as both sides admitted knowing each other as neighbours; **Maritha** and **Samuel** gave a plausible explanation as to why they did not raise alarm; circumstantial evidence through the eye witnesses **Maritha** and **Samuel** was cogent and pointed to the appellants as the persons who committed the murder as these witnesses saw them grab the deceased and lead him away from **Maritha's** homestead never to be seen alive again. The appellants failed to give an explanation as to why the deceased who left with them while alive was found dead the next day near **Francis's** home stead.

Turning to the alleged contradictions in the prosecution evidence, it was **Mr. Ondari's** submission that there were no contradictions in the prosecution case. Alternatively if there were any, these did not break the chain of circumstantial evidence that pointed irresistibly to the appellants as the persons who committed the murder.

In reply to the respondent's submissions, **Mr. Mugambi** maintained that the deceased was never at any one particular time in the company of the appellants before he met his death.

This is a first appeal. It is therefore our duty and obligation to re-evaluate and re-analyze the evidence that was adduced in the court below to enable us reach our own conclusions on the matter. When doing so we are required to bear in mind that we never had the opportunity of observing or hearing the witnesses give evidence and observe the manner and demeanour of the said witnesses. See **Okeno versus Republic [1973] EA 32** where in the predecessor of the court had this to say:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya versus Republic (1957) EA 330 and to the appellate courts our decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M'Ruwela versus Republic [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions only then can it decide whether the magistrates findings would be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters Versus Sunday Post [1958] EA 424"**

We have considered the record in the light of the rival arguments set out above. In our view the issues that fall for our interrogation and determination are those raised by the appellants in their home made memorandums of appeal as adopted by their learned counsel **Mr. Mugambi**.

We note however, that two additional issues were raised by **Mr. Mugambi** in his submissions namely, the learned Judge's failure to interrogate both the source and the intensity of the light when the appellants allegedly dragged away the deceased with them, and second, the failure of the learned Judge to interrogate and rule on the issue of malice aforethought. A better way of raising these issues if **Mr.**

Mugambi felt that these were pertinent to his client's appeal should have been by way of amendment or filing a supplementary grounds of appeal. In the absence of that, they remain nothing but submissions devoid of specific grounds sufficient enough to invite us to intervene, interrogate and rule on them. See **Rule 72(a)** of the Court of Appeal Rules.

With regard to alleged existence of contradictions in the prosecution evidence, the approach the learned Judge was obligated to take in assessing such evidence is that laid down by the court in **Njuki & 4 others versus Republic [2002] IKLR 771** where at page 782 paragraph 15 the court made observations thus:-

> **"In certain criminal cases, particularly those which involve many witnesses' discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused, if so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.**

See also **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993** where this Court held thus**:-**

> "**In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording in section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."**

The alleged discrepancies and contradictions related to the evidence of **Maritha** and **Zipporah**. **Maritha** said the deceased's private parts were missing, while **Zipporah** said that these were intact. Secondly **Maritha** said he knew the appellants very well as they were her relatives while **Zipporah** who said she was sister to **Maritha** said that she did not know the appellants before and was seeing them in court for the first time.

When considered in the light of the above principles, it is our view that the issues as to whether the deceased's body had its private parts intact or not was inconsequential to the fact that the deceased's body had multiple injuries as a result of which the deceased met his death. Likewise the issue as to whether **Zipporah** knew the appellants as her relatives before the incident was inconsequential to the appellants identification in connection with the death of the deceased as **Zipporah** was not one of the witnesses who saw the appellants with the deceased while alive. We find no merit in this ground. The same is accordingly dismissed.

With regard to circumstantial evidence, the predecessor of this court in **Rex versus Kipkering Arap Koske & (2) Kimure Arap Matatu 16 EACA 135** where in the following principle was laid down:

> **"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

In **Simoni Musoke versus Republic [1958] EA 715** it added the following caution:-

> "**It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the evidence**".

In **Dhalay Singh versus Republic Criminal Appeal No. 10 of 1997** the court held:

"For our part we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proven beyond any reasonable doubt and an accused is entitled to an acquittal"

In **Mwita versus Republic [2004]2 KLR 60**, the Court added the following:

"**It is trite that in a case depending exclusively upon circumstantial evidence the court must before dealing upon a conviction find that the exculpatory facts are in compatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt**."

The learned trial Judge in determining the culpability or otherwise of the appellants in connection with the murder of the deceased, correctly reminded herself that the evidential burden rested with the prosecution to prove beyond reasonable doubt that the appellants by an unlawful act or omission caused the death of the deceased.

In the learned Judge's view, **Maritha** and **Samuel** were credible witnesses and therefore believable. She however, cautioned herself, and rightly so, that she was obligated to consider the totality of both the prosecution case and the appellants' defences. Upon doing so, she found that of the defences of the appellants were displaced, by the testimonies of **Maritha** and **Samuel** who were believable and had partially been corroborated by **Cpl. Flovian** and the entry in the OB where appellants admitted reporting seeing the deceased with injuries.

Upon making a finding that the deceased was alive when the appellants dragged him out of the home he lived in with **Maritha** and **Samuel**, the learned Judge set out the provisions of **Section 111(1) and 119** of the Evidence Act Cap 80 Laws of Kenya, construed them, and applied that construction before her and was of the view that the appellants as the persons in whose company the deceased was last seen while alive had the evidential burden to discharge the rebuttable presumption of their involvement in the death of the deceased by explaining how they parted company with the deceased or alternatively how the deceased met his death.

Sections 111(1) and 119 of the Evidence Act (supra) provides:

"111 (1) When a persons 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.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

'119 The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'".

When confronted with similar circumstances in the case of **Douglas Thiong'o Kibocha versus Republic [2009] eKLR** the court made the following observations on the applicability or otherwise of **section 111(1)** of the Evidence Act (supra)

"**When parliament enacted Section 111(1) above, it must have recognized that there are**

situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1) above places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in nature of an admission of a material fact."

In the instant appeal, the learned Judge rightly invoked the provisions of **section 111(1) and 119** of the Evidence Act (supra) and ruled that the appellants had a rebuttal legal burden to explain how they parted with the deceased or how he met his death because she believed the testimonies of **Maritha** and **Samuel** who identified the appellants as the persons who dragged the deceased while alive away from the home he lived in with **Maritha** and **Samuel;** noticed evidence of a struggle, blood and burning both in the house and compound of **Francis**. Also recovered was the belt of the deceased in **Francis's** compound. The appellants also reported to the police that they had seen the deceased the previous day with injuries which was consistent with the testimonies of **Martha** and **Samuel** that the two assaulted the deceased as they led him away. There was no evidence of any other person who could have inflicted the injuries on the deceased apart from the appellants. Taking the evidence, assessed by the learned Judge she was of the view, and rightly so, that cumulatively it left no doubt that the appellants had not dislodged the legal burden placed upon them by the above principles of law.

With regard to the existence of circumstantial evidence pointing irresistibly to the culpability of the appellants in the murder of the deceased, the learned Judge, noted that the scene where the deceased's body was found was only 200 meters from **Francis's** home; that there were signs of struggle and burning in the home of **Francis**; and that there was a trail of blood stains at **Francis's** gate, house and compound which eventually led up to the place where the deceased's body was found lying. The learned Judge further found that the evidence of **Zipporah** and **Cpl. Flovian** on the state of the home of **Francis** were consistent with the accounts giv+

n by **Maritha** and **Samuel** already set out above. To the learned Judge, and we think rightly so, all the above circumstantial evidence unerringly pointed to the guilt of the appellants and when taken cumulatively form a chain so complete that there was no way the appellants could possibly have escaped from the conclusion that within all human probabilities the murder of the deceased was committed in the home of **Francis** by both appellants.

We have considered the above reasoning and the conclusions reached by the learned Judge in the light of the above principles of law governing the reception of circumstantial evidence as a basis for a criminal conviction and in our view, in the light of the totality of the evidence assessed by the learned Judge and as revisited by us, we arrive at the same and only reasonable conclusion that the learned Judge took the right approach when analyzing the evidence before her and was right both in her reasoning and final conclusion. She was thorough in her analysis and in our view she balanced the scales of justice fairly and impartially. We find no reason to interfere.

The last ground of appeal which appears to be incomplete had something to do with noncompliance with **Section 169** of the Criminal Procedure Code which provides:

"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

Going by the thorough summary of the evidence carried out by the learned Judge as well as the logical reasoning and application of principles of law reflected above, we find nothing to suggest that the learned Judge failed to discharge her mandate as was expected of her under the above provision of law. No wonder the appellants were unable to spell out the exact complaint they intended to raise under the said provision of law.

In the result and for the reasons given above we find no merit in this appeal. The same is dismissed in its entirety.

Dated and Delivered at **Meru** this 18th day of July, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR