IN THE COURT OF APPEAL

AT ELDORET

CRIMINAL APPEAL 17 OF 2007

COLLINS OMUSE OKWARE ……..……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kitale (Lady Justice W. Karanja) dated 27th February, 2006

in

H.C.CR.C. 24 OF 2001)

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JUDGMENT OF THE COURT

This is a first appeal. Vide Information dated 7th September, 2001, the Attorney General informed the superior court that the appellant, *Collins Omuse, Okware*, was charged with two offences of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the offences were that:-

"Collins Omuse Okware, on the 28th day of April, 2001 at Tumaini farm in Trans Nzoia District within Rift Valley Province murdered Jane Tata Omuse".

and that

"Collins Omuse Okware, on the 28th day of April, 2001 at Tumaini farm in Trans Nzoia District within Rift Valley District Province murdered SLYVIA Atoo Amuse (sic)."

He pleaded not guilty to the two counts, but after a full hearing, with the aid of assessors the superior court (W. Karanja, J) found him guilty of the two counts, convicted him of the offences as charged in the information and sentenced him to death. He was not satisfied with both convictions and sentences and hence this appeal before us premised on grounds filed by the appellant in person on 1st March, 2006 and Supplementary Memorandum of Appeal dated 4th September, 2008 but lodged in the Eldoret Sub-Registry on 5th September, 2008. Mr. Otieno, the learned counsel for the appellant, on realizing that his Supplementary Memorandum of Appeal was filed out of time and without leave of the court, rightly

applied to and was allowed to withdraw the Supplementary Memorandum of Appeal. He proceeded to address us relying on the original Grounds of Appeal filed by the appellant in person. In our view, from grounds cited in that Memorandum of Appeal, namely second, third, fourth and fifth grounds were relevant.

These were in a summary; that the learned Judge of the superior court erred in law and in fact in convicting the appellant on insufficient evidence adduced by the prosecution; that she erred in law and in fact in relying on prosecution case which was poorly investigated; that the prosecution did not prove its case against the appellant beyond reasonable doubt and a conviction should not have been based on such a case; and that the learned trial Judge erred in law and in fact in that she rejected the appellant's defence without any justifiable grounds.

The record shows that the appellant married the first deceased Jane Tata sometimes in the year 2000. The second deceased Sylvia Atoo was their daughter. The other child was Davin who was about five years old. It was in evidence that Jane was married after she had given birth to Davin, but that is neither here nor there. The appellant and his family lived at a place about 2 kilometers from the place where Jane's sister Joyce Akiru Okodoi (PW3) (Joyce) lived. A few days prior to 5th May, 2001, Joyce who had observed that her sister, Jane and her husband had not been at their house for sometimes, went to their house, opened for chicken and when she went near the locked house, she was hit by a foul smell. She called another woman who was nearby Mama Phylis who also confirmed the presence of the foul smell. Joyce went and reported to her parents that there was foul smell coming from the house hitherto occupied by Jane and her husband both of whom could not be traced. Jane's brother James Okodoi Omuse met Joyce and after Joyce had broken the news of the foul smell coming from Jane's house, he went to that house carrying a hammer which he had carried earlier on. He went to the door of Jane's house, smelt the foul smell and entered the house through the window. He went towards the bed, lifted a curtain in front of the bed and he saw the body of Jane lying on the bed. The body of Sylvia, who was then six months old, lay next to Jane's body and there was a hen which was decapitated between the two bodies and a panga on the chest of Jane's body. Jane's two fingers had been severed from the body. There was a letter on the table nearby with the name of Collins on top. It was dated 28th April, 2001.

James read the letter the contents of which blamed appellant's father in law over some matters. The child's body and that of Jane had turned yellow as if they had been scalded with hot water. James and Joyce reported the incident to their father. James also reported to Mathews Ekirapa Omuse (PW5) who went to Jane's house and confirmed that Jane and her daughter Sylvia had died. The matter was reported to Kipsaina Police Post by James. Pc. Eliud Odhiambo (PW7) received the report and on instructions from OCS Kitale, Pc. Odhiambo, Pc.Mbugua and Pc. Kwach proceeded to the scene. They broke into the house again as the window had been broken by James. They too entered the house, found the two bodies on the bed in a pool of blood. Jane's body had cuts on the neck and leg and Sylvia's body had visible injuries. There was a panga placed on Jane's chest. That panga was blood stained. There was also a dead decapitated hen between the two bodies and a letter dated 28th April, 2001 was nearby. These police officers were told by members of the public that the deceased Jane was living in the house with her husband who was at the relevant time on safari and the appellant's name was given to them by the members of the public. Pc. Nelson Wanyonyi (PW6) of Kitale Police Station, was also instructed by the same OCS Kitale to trace any Doctor to accompany him to the scene to perform post mortem on the two bodies, as the relatives were poor and could not afford to take the bodies to hospital and back. Wanyonyi contacted Dr. Meshack Wekesa Liru PW2) and he, together with Doctor Liru went to the scene on that day 5th May, 2001 between 1.00 p.m. and 2.00 p.m. Dr. Liru carried out post mortem on the two bodies, at about 4.00 p.m. He observed five deep cut wounds on the left side of the head and neck. There was an open fracture of the skull; the middle finger of the right

hand and the indent finger were chopped off and were missing. The body also had cut wounds at the wrists and forearm. There were other cut wounds on the body of Jane. He formed an opinion that the cause of death of Jane was bleeding from the severed blood vessels on the neck. Doctor Liru also examined the body of the baby Sylvia and formed the opinion that the cause of her death was brain damage due to incision to the brain. Both injuries on Jane's body and on Sylvia's body could have been caused by a sharp object.

Two days later, on 7th May, 2001 CPL Mwaka Sikondo (PW1) (Mwaka) a policeman serving with Uganda Police Force and attached to Kira Road Police Station in Kampala and who, at the relevant time was stationed at Malaba Police Station at the border on Uganda side, was given a prisoner who was alleged to have surrendered himself at Mbale Police Station and was instructed to escort the prisoner to Malaba Kenya on the same day. CPL Mwaka alleged that as they moved from Malaba Uganda to Malaba Kenya, he asked that person, who was identified by him as the appellant, the cause of murder and that the appellant told him that he wanted to go and live in Kitale but the deceased Jane refused and hence the quarrel. The appellant is alleged to have told CPL Mwaka that the child was killed because her mother used her as a shield during the fight. CPL Mwaka then handed over the appellant to Mbale Police Station Kenya. Later Pc. Nelson Wanyonyi proceeded to Malaba Police Station and the appellant was handed over to him. He took the appellant to Kitale Police Station and later charged him with the two offences of murder. As we have stated above, the appellant, at his trial, denied the charges. In his defence he stated that he left his house on 23rd April, 2001 at 5.00 p.m. and took his sister Mary Atoi to Kitale District Hospital. He did not return home that day. On 24th April, 2001, he went to Makoma in Mbale where his sister's husband stays. He did not find him at home as he (sister's husband) had gone to Jinja. He decided to return on 25th April, 2001. While at the bus stage, he was arrested together with others for failing to pay tax as there was a swoop by the Chief of that area for tax defaulters. He was taken to Mbale Police Station. On 7th May, 2001, he was taken to Malaba Police Station in Kenya and later to Kitale Police Station. On 11th May 2007, he was charged with the offences he knew nothing about. Since 23rd April, 2001 he had not gone back home. His ailing sister he had taken to hospital died. He denied having admitted the offence to CPL Mwaka and insisted that the incident took place when he was away on safari having taken his sister to hospital. He too did not know who had committed the offences.

The above are the salient facts of the entire case upon which the learned Judge of the superior court relied to convict the appellant. In his submission before us, Mr. Otieno, the learned counsel for the appellant raised several issues both of fact and law. He attacked the evidence of Mwaka as being hearsay and inadmissible in law, and argued that there was no evidence to connect the appellant with the murder at all. Mr. Omutelema, the learned Senior Principal State Counsel conceded the appeal concurring with Mr. Otieno that Mwaka's evidence should not have been used as the basis of conviction of the appellant as it was hearsay evidence and was in any event inadmissible. He argued that if Mwaka's evidence was removed then only the absence of the appellant and the finding of the two bodies would remain, but as, according to him, the appellant gave an acceptable explanation for his absence which was supported by what relatives told Pc. Odhiambo (PW7) namely that the appellant was away on safari, and as death of the victims could be explained through other hypothesis, the conviction was unsafe.

This is a first appeal as we have stated above. We are therefore enjoined to revisit the evidence afresh, analyse it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing witnesses and giving allowance for that. (See the case of ***Okeno vs Republic*** *[1972] EA 32).* The superior court rightly, in our view, accepted that the entire case was based on circumstantial evidence. The circumstances that gave rise to the appellant being convicted with the murder of his wife and child were that the two were murdered just

about the time the appellant also allegedly disappeared from the matrimonial house. The murderer or whoever committed the offence apparently used a panga which one witness identified as a panga that was in the appellant's house. The victims were locked in the house where they were apparently murdered, with a padlock and the keys were left in that house; place, that the appellant is said to have surrendered himself at Mbale Police Station and that the appellant is alleged to have confessed to CPL Mwaka that he killed his wife and child during a fight over domestic dispute. The learned trial court in considering the evidence concluded as follows:-

"In our case my view is that there was no possibility whatsoever that another person went to the deceased's house and butchered her and her daughter with her own panga, and locked them inside the house with her own padlock leaving the keys inside the house. In my considered view, the prosecution has established that it was only the accused person who could have done this. As stated earlier, this evidence was supported by PW1's evidence as to how and why the accused person was arrested. I am therefore, satisfied that the prosecution has discharged its onus of proof in this matter."

On our own, we find a number of aspects of this case disturbing. First, the learned trial court admitted and relied on the evidence of CPL Mwaka and in doing so, the learned Judge made a finding that the appellant surrendered himself to Mbale Police Station. Mwaka's evidence read in part as follows:-

"At approximately 10.00 am, I was called by my officer-in- charge crime Malaba Police Station – Detective Ass/IP Owori Richard. He is deceased. He told me that we had a prisoner who earlier on surrendered himself to Mbale Police Station. He is alleged to have confessed to killing his wife and kid."

It is clear to us that in that evidence, Mwaka was reporting what Ass/IP Owori had told him and not what he knew of his own. The truth or otherwise of the statement could only be ascertained by calling Owori, the maker of the statement and cross-examining him on it. Owori was not called and that being the case, the statement, which was a report of what Owori had told Mwaka, remained hearsay and was in law clearly inadmissible. No court should have relied on it as it was in law no evidence at all. Secondly, Mwaka was a Corporal in Uganda Police. He was not a person of the rank of an Inspector in the Kenya Police. In law, he therefore, could not receive confession in May, 2001. Whichever information he allegedly got from the appellant which the appellant in any way denied was not admissible in law. The learned Judge in our view erred in law in admitting and relying on the evidence of Mwaka as concerns the reason for his escorting the appellant back to Kenya and what the appellant is alleged to have told Mwaka. We must, in law ignore those pieces of evidence in the record.

Once those pieces of evidence are removed from the evidence on record, what remains as against the appellant" We agree with Mr. Omutelema that once those pieces of evidence are removed, all that remains in record as against the appellant is that whereas the prosecution says he disappeared at the time his wife and daughter were murdered, he says he took his sister to a hospital at Mbale and was therefore on safari. The other piece of evidence is that whoever murdered his wife and daughter locked them in the house and left the keys to the padlock inside the house and also that the panga allegedly used was identified as being that which was owned by the deceased Jane and was in the house. The learned superior court Judge was of the view, as we have reproduced hereabove that the appellant is the only person who could have carried out the murder as to her, a stranger could not have gone to the deceased's house and murdered the deceased and her daughter with her own panga and then lock them inside the house with her own padlock leaving the keys inside the house. With respect, we find it difficult to accept that only the appellant and none other person could have committed those acts. In the well known case of ***Republic vs Kipkering ArapKoske and another*** *(1949) 16 EACA 135* to which the

learned trial court referred it was held inter alia that:

"In order to justify 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 in the more recent case of *Sawe v. R. (2003) KLR 364* it was held as follows:-

"1. In order to justify 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.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
3.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. This burden always remains with the prosecution and never shifts to the accused.
4. The existence of any general custom, which the court intends to rely on, must be proved by the evidence.
5. The circumstantial evidence in the instant case did not irresistibly point to the appellant to the exclusion of all others so as to justify conviction."

In the instant case, the appellant, in his defence stated that he left home on 23rd April 2001 to take his sister who was then sick to Kitale District hospital. His sister was married and so he proceeded to Muluma Mbale where her husband was staying. He was told that his sister's husband had gone to Jinja and he decided to return home but was arrested at the border for failure to pay tax in Uganda. That statement of the appellant had some support in the evidence of Odhiambo who in cross examination said:

"At the scene, we interrogated the relatives. They told us that the deceased was living there with her husband who was then on safari. We were given the name as Collins Omuse"

The prosecution which had the burden to prove the facts that justified the drawing of the inference of guilt from the facts, did not in any way call any witness from Mbale Police Station to prove under what circumstances, the appellant was arrested there. It thus remains that one cannot draw from the appellant leaving home just about the time his wife and daughter were presumably killed, that he disappeared from the scene of murder. As to trial court's finding that only the appellant could have killed Jane with Jane's panga and locked the bodies in the house with padlock and leave the keys in the house, we cannot appreciate why those incidences would lead any court to irresistible inference that only the appellant could have done so and no any other person could have carried out the murder. There was no evidence that the panga found in the house was the one used in murder. There was evidence that it had blood stains but it was never subjected to any test to ascertain what blood was on it. In any case, there was no evidence that the panga was kept at a certain hidden place that only the appellant could access. As to padlock and keys, we see no reason why any other stranger or any other relative or friend could not have killed the two deceased and used the padlock to lock them inside and throw the keys inside the house. We are not persuaded that any other person other than the appellant could not have committed the twin murders. We are not convinced that the circumstantial evidence that was before the trial court which is on record point to no other person other than the appellant as the perpetrator of this heinous crime. Several hypotheses could explain the murder other than that of the appellant being the one involved.

The above being our view of the matter, we have to interfere with the decision of the learned trial

Judge. The appeal is allowed, conviction on both counts quashed, sentence set aside and the appellant is released forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 26th day of September, 2008,

E. O. O'KUBASU

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JUDGE OG APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR