Case Number:	Criminal Appeal 191 of 2014
Date Delivered:	27 Jun 2019
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Abdul Majid Cockar, Erastus Mwaniki Githinji, Jamila Mohammed
Citation:	Simon Shisukane v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	HCCRC NO. 72 OF 2003
Case Outcome:	Appeal against conviction dismissed and appeal against sentence allowed
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 191 OF 2014

BETWEEN

SIMON SHISUKANE.....................APPELLANT

AND

REPUBLIC.. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega,

*(**Lenaola, J**.) dated 14th March, 2011*

in

HCCRC NO. 72 OF 2003)

****

JUDGMENT OF THE COURT

Background

1. This is an appeal against the conviction and sentence by the High Court (**Lenaola, J**.) in which the High Court convicted ***Simon Shisukane (the appellant)*** for the offence of murder and sentenced him to death.

2. The appellant 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 that on 11th September, 2003 at Lunyu sub location in Kakamega District of the then Western province he murdered ***Milda Khaluya (the deceased)***.

3. In a trial partly conducted by Ochieng, J and Chitembwe, J, and concluded by Lenaola, J (as he then was) the appellant was found guilty of murder and sentenced to death as the law then prescribed.

4. Aggrieved by the decision of the High Court, the appellant filed the present appeal in which he raised two grounds of appeal to wit, that the learned trial judge misdirected himself in law and in fact in finding as he did, a conviction against the weight of the evidence on record and in total disregard of the glaring discrepancies, contradictions and blatant falsehoods in the evidence tendered by the prosecution witness and in proceeding to write the courts judgment despite not having had the opportunity of taking the evidence of the prosecution witnesses in clear disregard to the relevant provision of the Criminal Procedure Code.

Submissions

5. On 16th October, 2017 the appeal came before us for hearing learned counsel ***Mr. Omondi,*** appeared for the appellant while ***Ms. Wafula,*** the learned Prosecution Counsel appeared for the State.

6. In urging the appeal, ***Mr. Omondi*** pointed out that **Section 200** of the **Criminal Procedure Code** was not adhered to as the appellant was not informed of his rights to have the trial proceed *de novo* or proceed from where it had reached; that the appellant (and not his advocate) was the one to determine whether the matter should be heard *de novo* or proceed from where it had reached; that there was no indication that this position was explained to the appellant and he therefore suffered prejudice; that to a larger extent, even though the appellant was known to the prosecution witnesses, he was not properly identified as a tin lamp was the only source of light hence conditions for proper identification were not favourable; that based on the **Francis Karioko Muruatetu & another v Republic [2017] eKLR (*Muruatetu*)** case, this Court was urged to exercise discretion and set aside the death sentence and substitute with a term considering the time the appellant has served in prison. It was his further submission that the evidence tendered was contradictory and full of discrepancies.

7. *Ms. Wafula* opposed the appeal and relied on her filed written submissions and list of authorities, Counsel submitted that the identification of the appellant was one of recognition; that witnesses were consistent in all material respects; that the maximum sentence meted out was the correct sentence; that the murder of the deceased which the appellant committed in a fit of anger and revenge are aggravating circumstances that should be taken into account. The Court was urged to find no merit in the appeal and to dismiss it.

Determination

8. We have perused the record, the written and oral submissions by counsel, the authorities cited and the law. This being a first appeal, we are expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have to give due allowance. I**n the** well-known case of ***Okeno v Republic (1972) EA 32*** the predecessor of this Court stated that:

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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 Vs. Sunday Post, (1958) EA 424)"

9. At the trial, the prosecution called 8 witnesses. In a nutshell the prosecution case was that the appellant who is deaf and dumb was well known to the witnesses by virtue of being the son in law to ***Josephine Khadiagala (Josephine)***. That on 11th September, 2003 at around 7:00pm the appellant entered ***Josephine's*** house brandishing a *panga* before grabbing ***Josephine***; that the appellant then picked up the deceased and walked out with her; that the appellant was recognized from the light of a tin lamp. A search for the deceased was mounted the following day but the same yielded no fruits. On 13th September, 2003 the appellant was seen by Godfrey leaving the forest and was apprehended on 14th September, 2003 when the search party found the deceased's body in a hole inside the forest.

10. A post mortem examination was performed on 16th September, 2003 by ***Dr. Soita*** and produced by ***Dr. Jason Amukonyi (Dr. Amukonyi***). His findings were that the body had started decomposing with maggots, was pale, and had no obvious swellings or deformities, and that there was a cut on the right posterior head occipital region 2cm long with exposed skull and blood stains from the nose. The doctor formed the opinion that the cause of death was *"cardiopulmonary arrest secondary to head injury."*

11. In his unsworn statement of defence the appellant denied committing the offence and stated that he was in Nairobi at the time of the murder and that all the witnesses lied.

12. The learned Judge made findings that the evidence of ***Godfrey Madegwa Mutsami (Godfrey) Lillian Khamali (Lillian)*** and ***Josephine*** was consistent on the happenings of the material night; that evidence on identification was not faulted; that there was no doubt that the deceased was found three days later and the cause of death was due to a heart attack triggered by a head injury; that circumstantial evidence indicated that the appellant was the murderer; that the appellant's alibi defence was dismissed as being escapist and not strong enough to dislodge the prosecution evidence; that malice aforethought was discernable and the offence of murder had been proved beyond reasonable doubt; and that the appellant was then convicted of murder and sentenced to death as authorized by law.

13. As regards non-compliance with **Section 200** of the **Criminal Procedure Code,** we note that **Section 201(2) as read with Section 200(1) (b)** provides that a Judge who has succeeded another judge who had heard and recorded the whole or part of the

evidence but has not written the judgment, may act on the evidence recorded by the predecessor. Under **Section 200(3),** an accused may demand before a succeeding judge that any witness be summoned again and reheard by the succeeding judge and the succeeding judge is required to inform the accused of that right. **Section 200(4)** provides that where an accused has been convicted upon evidence that was not wholly recorded by the convicting judge, an appellate court may, if it is of the opinion that the appellant was materially prejudiced set aside the conviction and may order a re-trial.

14. The appellant's trial was conducted by not less than three judges. **Ochieng, J**. recorded the evidence of seven witnesses; **Chitembwe, J.** recorded the evidence of one witness before ruling that the appellant had a case to answer, and finally the matter was then taken over by **Lenaola, J**. (as he then was) and at the behest of the appellant's counsel. The matter proceeded under Section 200 of the Criminal Procedure Code and the Judge ordered that the trial proceeds from where it had reached. Thereafter, the Judge recorded the unsworn evidence of the appellant and pronounced the impugned judgment.

15. On 29th June, 2009 when **Chitembwe J** took over the hearing it is recorded:

"We need directions that the matter proceed before your Lordship from where it had reached and the proceedings to be typed. We shall not recall the witnesses who have testified."

16. On 18th November 2010, when the matter came before Lenaola J, (as then was) it is recorded: *"Mr. Amasakha: We shall give unsworn evidence and the matter can proceed under section 200 Criminal Procedure Code."*

17. Clearly, the appellant through his counsel opted to have the hearing in both instances of the in-coming two judges to have the trial proceed from where it had reached. In our view, the appellant cannot be heard to say that he was not given an option when his counsel made the election for him. We find no merit in this ground.

18. On whether the prosecution proved the charge against the appellant beyond any reasonable doubt, the High Court observed that evidence was wholly circumstantial. The appellant removed the deceased from Josephine's house and went away with her. This was a child aged about two years old. Later, the deceased's body was found in a pit in the forest.

19. In the decision of **Judith Achieng' Ochieng' v Republic [2009] eKLR** this Court stated the law as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

20. We find that the Judge cannot be faulted in finding that the circumstances of the case irresistibly pointed to the guilt of the appellant. We find no merit on this ground.

21. From the foregoing, we are satisfied that the offence of murder was proved beyond reasonable doubt against the appellant and that the trial court properly directed itself in convicting the appellant. In the premises, the appeal against conviction fails.

22. As regards the sentence, Section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death**." The Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015,** (Muruatetu's case), held at para 69;

"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

23. In view of the decision in the ***Muruatetu*** case, we deem it fit to consider the appellant's mitigation to the effect that he was remorseful and hereby set aside the sentence of life imprisonment.

24. The upshot of the above is that the appeal against conviction is dismissed and the appeal against sentence is allowed. Accordingly, the sentence of death is set aside and in substitution therefor the appellant is sentenced to 15 years imprisonment with effect from 14th March, 2011 when he was sentenced.

Orders accordingly.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

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