IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 173 OF 2016

BETWEEN

JACKSON NAMUNYA TALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Nairobi (Ombija, J.) dated 25th September, 2014 ***in H. C. Cr. C. No. 75 of 2009)***

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JUDGMENT OF THE COURT

The appellant was tried, convicted and sentenced by the High Court sitting in Nairobi **(Ombija, J.)** for the offence of Murder contrary to ***section 203*** as read with ***section 204*** of the **Penal Code**. It was alleged in the Information filed by the Attorney General on 13th August, 2009 that on the 27th day of July 2009 at Gachie Market of Kihara location in Kiambu, he murdered Christine Atieno **(deceased)**. After hearing eight prosecution witnesses and the appellant in his defence, the trial court convicted him as charged and sentenced him to death.

As this is a first appeal, the appellant expects of us that we shall subject the evidence on record to fresh and exhaustive re-evaluation in order to arrive at our own conclusions. As we do so, we must recall, and give allowance for it, that the trial court had the advantage of hearing and seeing the witnesses and was therefore a better judge on credibility. See ***Okeno vs R [1972] EA. 32***, and ***David Njuguna Wairimu vs Republic [2010] eKLR.***

The facts as drawn from the record are as follows:-

The deceased had visited her aunt, one **Grace Achieng Owino** (not a witness) who was staying with her husband, **Stephen Owino Sichi (PW6)**, in Gachie market, Kiambu. They occupied one room in a flat in the market and they asked their neighbour, **Beatrice Kwamboka Obiri (PW2)** to accommodate the deceased in the room occupied by her children. At about 5.30 am on 27th July 2009, Beatrice heard some crying from the children's room and she went to check only to find the deceased in pain. She told her she had stomachache. She further told Beatrice that she had seen a doctor who had given her an injection. She also disclosed she was pregnant. Beatrice woke up Grace and the two took the deceased to a clinic in Gachie market. She left Grace and the deceased waiting for the clinic to open and went to her vegetable

selling business. Later at 1 p.m that day, Grace told her that the deceased had aborted and was safe. The foetus had come out. Then the following day she was told by Grace that the deceased had died.

For some reason not apparent from the record, Grace never testified but her husband, Owino, did. At the time he gave his testimony in November 2011, he was in Kamiti maximum prison after conviction for a robbery with violence crime. But on 26th July 2009, he was working as a security guard in Nyeri. His wife Grace called him on the phone at 6 p.m and told him the deceased was not feeling well. He went home the following morning at 6.30 a.m and was told Grace had taken the deceased to a clinic in Gachie. He followed them there and found them with the appellant whom he knew before as a specialist in treating teeth and malaria. He asked the appellant what the deceased was suffering from but he did not tell him. He asked Grace to go home and bring porridge for the deceased and she brought it at 11 a.m when Owino left the clinic to go home and sleep. Grace followed him home later before they returned to the clinic at about 3 p.m. He went away to work leaving Grace to take the deceased home if her situation improved. Owino did not return until the following morning at 6.30 a.m when he asked Grace the condition of the deceased but Grace had no idea. He called the appellant but there was no response. He called the appellant's wife who informed him that the appellant had transferred the deceased to another hospital but unfortunately she had died and the matter was reported to Gigiri police station.

The hospital to which the deceased was being transferred to was Kiharu Sub-District hospital where **Dr. Daniel Kirai Wanjai (PW1)** was the Medical Officer in charge. He was at the casualty section when the appellant arrived in a car and told him he had brought a patient who needed urgent attention. They went to the car but found the deceased had died. Dr. Wanjai advised the appellant to report to the police who would handle the matter thereafter.

The appellant proceeded to Kihara police post where he reported to **PC Adan Ganya (PW5)** that the patient had died on arrival at the hospital. PC Ganya took down the appellant's particulars, locked him up and reported to his superiors in Gigiri police station. The Deputy OCS **Chief Inspector Duncan Mulitani (PW8)** took over the matter as the investigating officer and proceeded, together with other officers to Kihara police post where they found the appellant in custody. CI Mulitani called the scene of crime personnel who took photographs and he gave instructions for the body to be taken to the City Mortuary. Together with the appellant and the scene of crime personnel, they proceeded to the appellant's clinic at about 6.30 p.m. They found **Albert Moi Njeru (PW3)**, an employee of the appellant for two years, carrying on cleaning duties at the clinic and CI Mulitani suspected he was trying to conceal some evidence. Njeru was arrested immediately. CI Mulitani then gave instructions for various items including surgical equipment which he suspected were connected to procuring an abortion, to be collected from the clinic. He also took possession of some clothes which the deceased had left behind some of which were bloodstained. All those items, as well as blood samples, were presented to the government chemist for forensic examination but no report was produced to connect them with the deceased or to confirm the suspicions of the investigating officer that the deceased was attempting to procure an abortion with the assistance of the appellant at the clinic.

A post mortem examination of the body was carried out on 4th August, 2009 by **Dr. Johansen Oduor (PW7)** who worked at the office of the chief government pathologist.

The notes accompanying the body showed that the deceased was suspected to have secured an abortion at a clinic. But Dr. Oduor found no evidence of abortion despite confirming that the uterus was bulky and contained a 3-month old foetus which was well *in situ*. There were no abnormalities internally and he was unable to establish the cause of death.

That was all the evidence from the prosecution.

Put on his defence, the appellant stated that he was a certified nurse who was licensed to operate a medical clinic known as **"M.P. Medical Clinic and Laboratory Services"** in Gachie shopping centre. At about 5.30 p.m on 26th July, 2009, he received a female patient, the deceased, who was attending his clinic for the first time. She gave the history of her illness as feeling dizzy, general body weakness, back ache, severe abdominal pains, and vaginal bleeding. The bleeding had taken 8 days which was unusual as

she said it normally lasted 3 to 4 days. She gave the dates of her last periods as 25th to 29th April, 2009 and the appellant enquired about any family planning methods and any medication taken but the deceased said she was not on medication. The history was recorded in a patient register card which is kept in the clinic. The appellant took her temperature and conducted a physical examination which revealed pale eyes indicating loss of blood and a bulky uterus which he confirmed was a pregnancy. He could not tell why the patient would be bleeding in pregnancy and decided to refer her to a radiologist for ultra sound scan. Pending the reference to the radiologist, the appellant decided to boost her appetite and energy by injecting a small dose of *Vitamin B complex*. He also gave her two tablets of *brufen* to null the pain. The appellant then referred her to Kihara Sub-District Hospital since her sickness was beyond him.

The following day at 6.30 a.m, a lady introduced as the aunt brought the patient to the clinic and told the appellant the bleeding had not stopped. The appellant advised her to take the patient to Kihara Sub-District Hospital and the lady left the patient at the clinic as she went to look for a vehicle. She did not return until 11 a.m when she came with a man and a bag of clothes. She cleaned up the patient and changed her clothes as the appellant briefed the man about the sickness and why they should look for a vehicle to take her to hospital. The man left and the appellant continued to treat other patients. When he was able to check on the deceased at about 12 noon, he did not see the aunt. The state of the deceased was deteriorating and so he made a call for his driver who was in taxi business to come and take her to hospital. That is how he ended up at Kihara hospital at 3 p.m but unfortunately, the deceased was pronounced dead on arrival. He reported to the police and was arrested on suspicion that he was responsible for the death. He was taken back to his clinic where the police found his cleaner, Njeru, on duty and they arrested him on similar suspicions. They collected various equipment and medicines from the clinic including the clothes of the deceased and took photographs. Nineteen days later he was charged with the offence of murder which he did not commit.

After considering the evidence, the learned Judge was persuaded that there was direct and circumstantial evidence which proved beyond doubt that the appellant was assisting the deceased to procure an abortion and in the process she bled to death. The Judge held as follows:-

> ***"On the available evidence, it is clear to me that the deceased visited her aunt Grace Achieng Owino at Gachie Shopping Centre in or about July, 2009. Apparently she was in the early stages of pregnancy. In the course of her visit, she decided to visit M. P. MEDICAL CLINIC & LABORATORY SERVICES owned by the accused. Among her major complaints was irregular periods. On examination the accused established that her uterus was bulky with uterus mass. The accused undertook pregnancy test which turned out to be positive. At that stage the accused, at the prompting of the deceased, assisted her to procure abortion. In the process, the patient over-bled or had excessive bleeding culminating into anemia and eventual death. The accused tried to reverse the condition by giving her a cocktail of medicine oral and injectables all in vain. The deceased passed on, while being transferred from accused's clinic to Kihara Sub District Hospital inside a vehicle, registration No. KUN 270, Toyota Corolla, belonging to the accused..... In substance the evidence of the prosecution witnesses may be summarized thus:-***
>
> ***1. that the deceased person visited the Owino's;*** *(sic)*
>
> ***2. that in the course of the visit the deceased, who was apparently pregnant; visited the clinic of the accused with the express intention of having her pregnancy terminated;***
>
> ***3. that the accused assisted the deceased to procure abortion which led to excessive bleeding; thereby necessitating several attempts to salvage the deceased;***
>
> ***4. the excess bleeding led to anemia which culminated into the patient's death;***
>
> ***5. that in the premises, malice-aforethought, an essential ingredient of the offence of murder under Section 206 of the Penal Code was thus established against the accused."***

The defence was dismissed as mere excuse to escape liability.

Those are the findings that aggrieved the appellant and led to this appeal. Learned counsel for him **Mr. Martin Onyango** referred us to the memorandum of appeal listing 7 grounds, one of which he abandoned leaving the following:-

> ***"1. The learned Judge erred in law and in fact in relying on insufficient or no evidence to substantiate the offence of murder in the absence of any of the primary elements of*** *mens rea* ***and*** *actus reus* ***proven.***
>
> ***2. The learned Judge erred in law and in fact in forming and holding opinions and stating facts that were not borne in*** *(sic)* ***the evidence on record.***
>
> ***3. The learned Judge erred in law and in fact in admitting evidence and exhibits whose foundation and chain of custody was suspect and was not laid to the court and applying non corroborated evidence against the appellant.***
>
> ***4. The learned Judge erred in law and fact in failing to recognize and appreciate material inconsistencies in the various accounts of evidence whose doubt should benefit the appellant.***
>
> ***5. The learned Judge erred in law and in fact in upholding his opinion in the place of the evidence of an expert and in off handedly rejecting or disbelieving the evidence of an expert which evidence was exculpatory to the appellant.***
>
> ***6. The learned Judge erred in law and fact in shifting the burden of proof to the appellant contrary to the Constitution."***

Those grounds were urged in written submissions but in oral highlights, Mr. Onyango consolidated them and submitted that there was no cogent evidence to prove *mens rea* and *actus reus* which were the necessary elements of the offence. Instead, charged counsel, the trial Judge invented a theory of attempted abortion as the unlawful act when there was no consistent evidence to support such theory. He blamed the trial Judge for relying on the hearsay evidence of Beatrice (PW2) relating to abortion while other prosecution evidence of the pathologist ruled out abortion. In his submission, there was no direct evidence on abortion in which the appellant was involved and the person who made those allegations, one Grace, was not called as a witness. Furthermore, neither the instruments and equipment collected from the appellant's clinic and forensically examined nor the chemical analysis of the deceased's blood were produced to show any connection with the theory of abortion. Counsel further submitted that the defence of the appellant was unfairly dismissed when he honestly stated that he had advised Grace to take the deceased to the right hospital but she disappeared. He had done nothing unlawful and there was nothing circumstantial that could beef up the prosecution case.

To buttress his submissions, counsel relied on the following authorities:

Benjamin Brown Olenja v. Republic ***Cr. Appeal No. 37 of 1973;*** ***Charles Kyalo Katiku v. Republic*** ***[2014] eKLR;*** ***Waihi & Another*** ***v. Uganda*** ***[1968] EA 278;*** ***Amisi Dhatemwa v. Uganda*** ***Cr. Appeal No. 23 of 1977;*** ***Sawe v. Republic*** ***[2003] eKLR;*** ***Judith Achieng v.*** ***Republic*** ***[2009] eKLR*** and ***Raymond Kiptoo Rotich v. Republic*** ***[2006] eKLR .***

In response, the learned Senior Assistant Director of Public Prosecutions, **Mr. Moses O'mirera** conceded that there may well have been a misdirection in the finding that there was an attempted abortion carried out, but submitted that there was no doubt on the evidence that the deceased walked into the appellant's clinic for treatment and was injected but from then on, she never recovered. The appellant reassured the relatives that all would be well. In counsel's view, the onus of proof was shifted to the appellant under ***section 111*** and ***119*** of the **Evidence Act** to explain what happened to the deceased but he never discharged that burden. It follows that the treatment was not in good faith and it did not matter that the prosecution did not produce the evidence relating to the instruments and blood taken for forensic examination or establish the cause of death through the pathologist. All these reports, asserted counsel, were not necessary to prove the charge. In his submission, there was no law requiring that the cause of

death be proved because each case depends on its own peculiar circumstances. He supported the trial court in relying on the ***Waihi case*** ***(supra)***, for this proposition.

We have anxiously considered this case and we must say on the outset that it was not only poorly investigated but also slovenly prosecuted. The burden was always on the prosecution to prove, firstly, that the appellant caused the death of the deceased in the manner defined in ***section 213*** of the **Penal Code** which provides as follows:-

> ***"A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases:-***
>
> > **a. if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;**
> >
> > ***b. if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to propersurgical or medical treatment or had observed proper precautions as to his mode of living;***
> >
> > ***c. if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;***
> >
> > ***d. if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;***
> >
> > ***e. if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."***

In addition to proving causation, the prosecution was also bound to prove that the death was caused of malice aforethought as defined under ***section 206*** of the Penal Code as follows:-

> ***"a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***
>
> ***b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***
>
> ***c. An intention to commit a felony.***
>
> ***d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony."***

As always, the standard of proof remains beyond reasonable doubt.

In this case, there was no pretence by the prosecution that it was focusing on any one or more of the elements stated above to prove causation or intent. The theory of attempted abortion that was latched on by the investigating officer and eventually accepted and, with respect, unduly embellished by the trial court to found causation and intent, had its source in the witness Beatrice who heard it from Grace. She stated thus:-

> ***"Later I heard from Grace at 1 p.m that the girl aborted and is safe. The foetus came out."***

The trial Judge evaluated the evidence of Beatrice who had accompanied Grace to the clinic at 5.30 a.m as follows:-

> ***"By then the "doctor" had not opened the clinic. She then left the girl and Grace Owino waiting for the clinic to open. Grace Owino later confided in her (PW2) that the girl procured abortion with the assistance of the "doctor" but was so far safe. The foetus had come out."***

So, Beatrice had no direct evidence on what the appellant may have done. Her story would have had some weight if Grace, the source of it, had testified. But she did not, thus rendering the evidence of Beatrice hearsay and inadmissible. There was therefore no basis for the investigating officer to rely on the evidence of Beatrice to pursue the abortion theory. CI Mulitani emphatically disclosed in cross examination, what evidence he hinged his case on, thus:-

> ***"The accused was assisting the deceased to procure an abortion.***
>
> ***Beatrice Obiri (PW2) gave evidence to that effect."***

More importantly, the evidence of Beatrice was directly contradicted by another witness of truth for the prosecution, Dr. Oduor, who trashed the abortion theory as follows:

> ***"The respiratory system was normal: Cardiac Vascular system was normal. Digestive system was normal. The gluten system – uterus was bulky and contained a foetus of about 3 months. The other systems were normal.***
>
> ***As a result of my examination I was unable to establish the actual cause of death. I signed the postmortem form for which I wish to be received as evidence as exhibit 2. The history given by the police and my findings were not consistent. If one dies on abortion the foetus is expected to have been removed. The foetus was well in the uterus. Then that*** *(sic)* ***there were tears of the vagina in the cervix.***
>
> ***If the foetus had refused to move then one could get DCI – deceminated inter vascular coagulation in that condition there are some factors produced by the dead foetus in the mothers body. This will lead to bleeding in all organs in the body which eventually lead to death of the mother. I did not see this in respect of the case.***
>
> ***Infections can also occur if the foetus dies in the uterus. This could take 2 or 5 days or more. One cannot die within a day. I did not see any signs of infection of the body. Mothers can also die with foetus in the body if she has exhaustion. But this occurs when the delivery is about 9 months. But this was 3 months. Hence there could not have been exhaustion. Treatment could have caused her death but I was not told what treatment she was undergoing on the material day."***

The evidence of Dr. Oduor was rejected by the trial court on the following basis:-

> ***"In this regard, although Dr. Johansen Odiwuor (PW7), in his evidence concluded that he was unable to establish the cause of death, there may be exceptional cases where medical evidence is lacking but where there is direct and/or circumstantial evidence of what could have caused immediate death. This is one such case. In this regard, I call in aid the authority of WAIHI & ANOTHER - VS-UGANDA [1968] E.A page 278."***

The general principle established in the ***Waihi case*** was this:-

> ***"where there is medical evidence and it does not exclude the possibility of death from natural causes, only in exceptional cases can a conviction for murder be sustained."***

The direct and circumstantial evidence in that case which made it exceptional was a confession recorded

from the accused persons that they had killed the deceased; evidence that one of the accused was heard to say he intended to kill the deceased; and evidence of possession of the deceased's property by the other accused.

In the case of ***Ndungu v. Republic*** ***(1985) KLR 487***, this court discussed the principle that in some cases death can be established without medical evidence as follows:-

> **"Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."**

What exceptional circumstances has the prosecution shown in this case? In our view none. It was possible for the prosecution to have tendered evidence that the medical instruments and equipment collected from the appellant's clinic and the blood samples, all of which were taken for forensic examination had connected the appellant with attempted abortion and therefore the death of the deceased. But no such evidence was tendered and there was no explanation for it. The crucial evidence of Grace was kept away from the court, and again there was no explanation for it. Whether it was by design or carelessness is not for us to conjecture. There was nothing in evidence to show that the medication given to the deceased by the appellant the day before her death was toxic or was connected with abortion. The appellant's cleaner, Njeru, who testified for the prosecution gave no incriminating evidence against him. With all these gaping holes in the evidence, the prosecution takes refuge in circumstantial evidence and ***sections 111*** and ***119*** of the Evidence Act to shift the burden of proof and require the appellant to prove his innocence. Circumstantial evidence is not merely evidence of surrounding circumstances. It is also trite that a case based on a chain of circumstantial evidence is only as strong as its weakest link. In the case 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.***

All that was stated by this Court in ***Omar Chimera v. Republic*** ***Cr. A. No. 56 of 1998***. In an earlier decision on the same principles, the Court stated:-

> ***"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 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 – TEPER V THE QUEEN [1952] AC 480 at page 489]."***
>
> **Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge."**

See also ***Sawe v. Republic*** (supra).

The circumstantial evidence relied on by the prosecution in this case has not been identified and we have not found any that satisfies the criteria set in the ***Judith Ochieng*** and the ***Sawe*** cases (supra).

Finally, ***sections 111 (1)*** and ***119*** of the Evidence Act provides:

> ***"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.***
>
> ***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 v. Republic [2009] eKLR*** the court made the following observations on the applicability of ***section 111 (1)***:

> **"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."**

The appellant in this case gave an elaborate defence explaining his interaction with the deceased, Grace and Owino (PW6). His evidence was given short shrift and peremptorily dismissed by the trial court without proper and contextual analysis. Indeed at some point, the trial court was of the erroneous view that the appellant should have made attempts to retrieve the patient's register card of the deceased and produce it in his defence. The appellant had no such burden and was entitled to remain silent. At any rate, he was in custody throughout and the patient's card should have been one of the documents retrieved by the investigating officer at the clinic if there was proper investigation. ***Sections 111*** and ***119*** were clearly inapplicable in this case. Even if ***section 111*** was applicable, it is our finding that the appellant gave an explanation which raised reasonable doubts and therefore discharged the onus of proof.

On the whole we are far from satisfied that the offence of murder was proved beyond any reasonable doubt. All that was established was suspicion that the appellant may have had a hand in the death of the deceased, but mere suspicion, however strong, is never probative of an offence in our criminal justice system. We allow the appeal, quash the conviction of the appellant and set aside the sentence of death imposed on him. He shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 19th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR