REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 69 of 2004

DAVID CIAYU NJOGU……..……APPELLANT

AND

REPUBLIC……..……..….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

Nairobi (Mutitu, J) dated 8th August, 2003

in

H.C.CR.C. NO. 31 OF 2001

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JUDGMENT OF THE COURT

The appellant, David Ciayu Njogu, was arraigned before the High Court, in Nairobi, for the offence of murder contrary to section 203 as read with section 204 of the Penal Code, was later tried with the aid of assessors and was found guilty and thereafter convicted. He was then sentenced to the mandatory death sentence. The evidence which was tendered against him was straightforward, even though his counsel Mr Njanja, submitted that it was vague and lacking in particularity regarding the identification of the appellant as one of the people who attacked and fatally wounded Joseph Maina Kiama, the deceased.

The prosecution case was that on the night of 1st August 2000 at 4.30a.m, thieves entered the house of John Njoroge Mwangi (PW1) (John) at Maringo Estate, Nairobi, and made away with several items, among them a television set, and a radio. John had gone to draw water at the time. As he approached his house on his way back, he saw someone coming out of the house carrying his television set. He suspected the person was a thief and accordingly shouted for help. He did not identify the thief at that time. Several people answered his alarm and chased the thief who then dropped the television set, and ran into the house of one Samuel Muriuki Wanjohi (PW3) (Samuel) which was then open. Samuel's wife had left it open when she went to draw water from a nearby water point.

The house was surrounded by a crowd which had gathered intending to catch the thief. The person made an opening in the roof and jumped down. He was not noticed. When the crowd realized he had escaped, some people who said they had recognized him gave his name as the deceased herein. The crowd went for him. Among those in the crowd was the appellant. Witnesses testified that they saw him armed, and when they got the deceased, the appellant was named as one of the people who violently assaulted him with either a metal bar or club.

As a result of the beating, the deceased sustained bodily injuries including a fracture of the left leg. He was later rushed to Kenyatta National Hospital where he succumbed to the injuries and died on 2nd August 2000. According to his wife, Jenniffer Waithera (PW8) (Jenniffer), the deceased told her that the appellant and one Wacaiyu were the people who inflicted blows on him. This and other similar information from other persons who said they witnessed the appellant, among other people, inflict injuries on the deceased prompted the police to arrest and charge the appellant as earlier on stated.

The appellant testified on oath in his defence and called one witness, Samuel Bundi Muthike (PW2) (Muthike) the gist of whose evidence was that he did not see the appellant in the crowd that was beating the deceased. In his statement, the appellant admitted that he, like other residents of Maringo Estate, responded to the alarm about a thief's presence in the estate. He was present when the deceased was taken out of his residence, which was a kiosk. He saw the mob beating him and heard them demand to be told by the deceased where he had hidden some of the items he had allegedly stolen. He was also with the mob when it led the deceased to the residence of one Nick in whose house he allegedly said those items were kept. He, however, denied he participated in beating the deceased as was alleged by some prosecution witnesses. It was his case that the deceased was killed by a mob.

R.M. Mutitu J, was the trial Judge. At the close of the defence case and after submissions, he summed up the case to the assessors. He outlined the evidence of each witness and analysed their evidence after which he invited the assessors to

"**decide on whether the charge has been proved beyond any reasonable doubt and that it was the appellant who caused the death of the deceased with malice aforethought. The decision is entirely yours. Remember that the burden in a criminal case(is) on the prosecution and that the accused assumes no burden to prove his innocence."**

The assessors returned their respective findings. The first assessor announced that he did not find the appellant guilty. The second found the appellant guilty of murder, while the third one found him guilty of the lesser charge of manslaughter. The trial Judge agreed with the second assessor, and in doing so remarked as follows:

"**Given that there is no evidence to show or suggest that the deceased stole from the house of the accused person, and given the fact that the accused ignored the pleas of PW3 and PW7 as well as pleas from other people to stop beating the deceased person I am unable to find that the accused person was provoked to beat the deceased. I am unable to agree with one of the assessors opinion on this case that the charge should be reduced to manslaughter."**

The learned Judge was satisfied the appellant had committed the offence of murder, convicted him of the offence and sentenced him to suffer death and thus provoked this appeal.

In his memorandum and supplementary memorandum of appeal, the main complaint is identification. Mr Njanja for the appellant submitted at length on that issue. In his view the circumstances at the scene of the deceased's beating were such that it was not possible to identify the people who beat and fatally wounded the deceased. He was attacked by a mob, at day break, and there was poor lighting in the area. In his view that would explain the contradictions in the testimony of the prosecution eye witnesses, and more specifically, John, Jairus Maina Mwangi, Samuel, Rose Wangechi Wambui and the doctor who performed the post mortem examination on the body of the decease.

Mr Kaigai, Senior State Counsel, on his part submitted that the appellant having admitted he was at the scene, his identification as having been in the mob that beat and wounded the deceased cannot be doubted. He also referred to the deceased's dying declaration that the appellant was one of the people who beat him up. In his view the doctrine of common intention applied, and the appellant was properly convicted of the murder charge.

That the deceased was attacked and fatally wounded by a mob of about 50 people is not in dispute. Nor is there any dispute that the deceased died from the resultant wounds. The deceased was pulled out

of the kiosk, where he resided, and beaten by the mob. Whether or not the appellant actually participated in the beating is a question of fact. The trial magistrate observed and heard the witnesses testify. He believed their respective testimonies. Those who testified were in agreement that the deceased escaped through the roof of a house where he hid himself for some time. He ran into his place of abode. He was frog matched from there to the house from where he had allegedly stolen a television set and a radio, among other items. Witnesses did not, therefore, observe him momentarily. We are satisfied that the appellant was identified as one of the people who assaulted the deceased. He was also mentioned by the deceased before he died. There was no suggestion made that the witnesses conspired to frame up a case against the appellant.

We agree that there are a few contradictions in the evidence of some prosecution witnesses, particularly with regard to the weapon the appellant used, and whether or not an injury was inflicted at the back of the deceased's head. Dr. Kirasi Olumbe, performed the post mortem examination on the body of the deceased. The deceased had a laceration on the forehead which had been sutured. There was an accumulation of blood underneath the scalp on that region, a bruise on the left forearm, simple fracture of the left leg. His opinion was that the deceased died as a result of a head injury caused by a blunt object. Eye witnesses testified about the appellant landing a heavy blow on the back of the head. The doctor did not notice any injury there. However, according to his evidence there was an accumulation of blood underneath the scalp, namely, the top of the head. That is quite close to the back of the head and it was said to have been caused by a blunt object. In view of that and other reasons the stated contradictions are not of a fundamental nature. If anything those contradictions show the witnesses did not rehearse their testimony.

One issue which we need to specifically deal with is the question of malice aforethought. Mr Kaigai submitted that the doctrine of common intention applied to this case.

Section 21 of the Penal Code provides:

"**When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

There was no evidence that the people who beat the deceased, whoever they were, met together and agreed to attack the deceased. It was a spontaneous act. In those circumstances, although as Mr Kaigai said, the appellant did not heed entreaties to stop further beating of the deceased, we are unable to read malice aforethought in his actions. The evidence shows an unruly mob attacked the deceased. In those circumstances it cannot be said the circumstances support the finding that the killing was with the necessary malice aforethought.

In the circumstances we think that the appellant should have been found guilty of the lesser charge of manslaughter contrary to **section 203** as read with **section 205** of the Penal Code. Accordingly, we set aside the appellant's conviction for the offence of murder under **section 202** as read with **section 204** of the Penal Code and the sentence of death, and substitute therefor, a conviction for the offence of manslaughter, aforesaid.

As regards sentence, the appellant has been in custody since August 2000, a period of nearly seven years. He was treated as a first offender. Nothing was said in mitigation to give the Court a bit of his background. The deceased lost his life leaving behind a wife and children. The notorious practice of mob justice should be discouraged. We think that in the circumstances a sentence of 10 years imprisonment is appropriate. We accordingly sentence the appellant to that term of imprisonment with effect from the date of conviction by the trial court. It is so ordered.

Dated and delivered at Nairobi this 27th day of July 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR