IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, M'INOTI & MURGOR JJ.A)

CRIMINAL APPEAL NO.130 OF 2014

BETWEEN

AMOS WEKESA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Bungoma (Muchemi, J.) dated 25th November 2010

in

H.C. CR.C. No. 24 of 2009)

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JUDGMENT OF THE COURT

The ***appellant***, ***Amos Wekesa Simiyu***, was charged on 25th June 2009 before the High Court of Kenya at Bungoma with the offence of murder, contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code.***The information stated that on 10th day of April 2009, at ***Lusamjela Village*** in the present ***Bungoma County***, the appellant unlawfully murdered ***AS (the deceased)***. The appellant pleaded not guilty and after a trial in which the prosecution called four witnesses, ***Muchemi, J***. convicted and sentenced him to death in a judgment dated 25thNovember 2010. It is apt to point out that the judgment of the High Court was delivered long before the judgment of the Supreme Court in ***Karioko Muruatetu & Another v. Republic*** ***[2015] eKLR***, which held that the mandatory death sentence prescribed by section 204 of the Penal Code was unconstitutional.

The brief facts of the appeal are that the appellant was previously married to ***M W N (PW1***) with whom he had two sons, namely ***AW***, at the material time aged eight years, and the deceased, aged six years. In 2002, the relationship between the appellant and PW1 broke down, each of them went their separate ways and ultimately remarried. For a while the two sons stayed with PW1's parents but in March 2009, less than a month before the death of the deceased, PW1 took the boys back to the appellant, where they started living with him and his wife.

Early in the morning on 11th April 2009, PW1 received a call from her sister, L, who was the appellant's neighbour, informing her that the deceased was sick. PW1 travelled to the appellant's home where she found the body of the deceased on the floor, covered by a sheet and neighbours in mourning. PW1 noted injuries on the deceased's neck and back. According to PW1, her eldest son, Augustine, who was not called as a witness, informed her that the appellant had beaten him and the deceased the previous day as a result of which the deceased died. PW1 testified that Augustine also had injuries on his body and a swollen hand.

On the same day PW1 reported the matter at Kanduyi Administration Camp and subsequently at Bungoma Police Station as a result of which the body of the deceased was recovered to Bungoma District Hospital Mortuary for postmortem. ***PC Said Omari (PW4),*** one of the investigating officers, testified that when they went to collect the body of the deceased, he noted that it had whip marks on the back.

The postmortem examination, conducted by ***Dr. Richard Olunga*** on 14th April 2009, found blueness under the deceased's tongue and subdural hemorrhage on the head and the nervous system. The doctor concluded that the deceased died from cardiorespiratory arrest secondary to subdural hemorrhage caused by head injury due to trauma. ***Dr. George Akano (PW3)***, a colleague of Dr. Olunga, who was familiar with the latter's handwriting, produced the postmortem report in evidence.

In his sworn defence, the appellant stated that he had spent the previous day with his sons looking after his cows and that the deceased was in good health. The appellant was called home, a short distance away, and left the two boys looking after the animals. However they were not diligent enough and allowed the cows to wander into a *shamba*, for which the appellant decided to discipline them. He took a stick and beat the deceased and his brother on the legs. They did not collapse from the beating and indeed managed to walk back home, where they ate supper and slept. It was his evidence that the two boys woke up normally the next day and that he did not cause the death of the deceased.

Upon his conviction and sentence, the appellant preferred this appeal in which he impugns the decision of the High Court on the grounds of failure to properly evaluate the evidence; failure to hold that the prosecution did not prove the offence of murder beyond reasonable doubt; and failure to observe that no exhibit was produced in court linking the appellant to the offence.

Mr. Mauwa,the appellant's learned counsel, urged all the grounds of appeal globally. He submitted that the prosecution did not prove that the deceased died from acts of the appellant or that the appellant had intention to cause the death of the deceased or to occasion him grievous harm. Counsel added, on the authority of ***Joseph Kimani Njau v. Republic*** ***[2014] eKLR***, ***Dickson Mwangi Munene & Another v. Republic*** ***[2014] eKLR*** and ***Nzuki v. Republic*** ***[1993] KLR 171,*** that the prosecution was obliged to prove both the *actus reus* as well as*mens rea* or malice aforethought on the part of the appellant beyond reasonable doubt before he could be convicted of murder. He further contended that the appellant had freely, willingly and happily lived with his two sons and that he had merely subjected them to normal and ordinary disciplinary action. In counsel's view, the learned judge ought to have held that the deceased died of natural causes because there was no linkage between the disciplinary action that the appellant subjected the deceased to and the injuries, which caused death, namely cardiorespiratory arrest secondary to subdural hemorrhage caused by force on the skull by a blunt object.

Lastly, counsel submitted that the circumstantial evidence, which the learned judge relied upon, was of the weakest kind, because it was full of loopholes and missing links. Citing the conditions under which circumstantial evidence may be relied on as explained in the judgments of this Court in ***Abanga alais Onyango v. Republic, Cr. App. No. 32 of 1990*** and ***Sawe v. Republic*** ***[2003] KLR 363***, counsel submitted that there were co-existing circumstances which weakened the inference of guilt on the part of the appellant.

Mr. Sirtuy, Public Prosecuting Counsel, conceded the appeal, submitting that the circumstantial evidence relied upon by the trial court was not reliable and did not link the appellant to the death of the deceased. He also submitted that the learned judge erred by shifting the burden of proof to the appellant when she noted that the appellant had failed to take the deceased to hospital or to report his death to the police. He accordingly urged us to allow the appeal.

Whether or not to concede an appeal is within the constitutional remit of the Director of Public Prosecutions (DPP). However, his views in that regard are not binding on the Court, which is obliged to re-evaluate the evidence and consider the merits of the appeal. The approach that the Court takes when the DPP concedes an appeal was succinctly stated in ***Patrick Omikunda Omung'ala v Republic, Cr. App No. 195 of 2012*** as follows***:***

> ***"While it is the right of the respondent to oppose or concede a criminal appeal, that in itself does not bind this Court. The decision of this Court turns on whether, based on the evidence on record and the law, the conclusions of the first appellate court are proper. The respondent's opposition of an appeal does not invariably lead to a dismissal of the appeal; conversely the respondent's concession of an appeal cannot lead to its automatic success."***

(See also ***Godfrey Ngotho Mutiso v. Republic, Cr. App. No. 17 of 2008*** and ***Norman Ambich Miero & Another v. Republic, Cr. App. No. 279 of 2005).***

Turning to the grounds of appeal, we agree with the appellant that the evidence on which he was convicted was circumstantial. No witness testified to having seen him inflict on the deceased the actual head injuries from which he died. To convict an accused person on the basis of circumstantial evidence, that evidence must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken the chain of circumstances. (See ***Sawe v. Republic, [2003] KLR 364,*** and ***Dhalay Singh v. Republic, Cr. App. No. 10 of 1997).***

The evidence on record is that on 10th April 2009, the deceased was in perfect health and grazing cattle with his elder brother and the appellant. When the appellant stepped away for a short while, he left the two boys to watch over the animals, but in dereliction of duty, they allowed them to wander off into a *shamba* where they were not supposed to go. The appellant was infuriated by his sons' negligence and decided to subject them to disciplinary action. It was his evidence that he used a stick to beat the deceased, but only on the legs. Thereafter the deceased walked home, took supper and slept. Although the appellant claims that the deceased woke up normally the next day, the evidence on record, which the trial court accepted, is that the young boy was dead by early the next morning.

There is no evidence on record that the deceased was, immediately prior to his death, in a violent situation or otherwise, where he could have sustained the injuries from which he died, save the beating that the appellant subjected him to. We are satisfied that the appellant, who readily admitted having beaten up the deceased to discipline him, deliberately played down the nature and extent of the beating that he subjected the deceased to, which from the evidence was far severer than a couple of canes to the legs. There was, in our view, no other reasonable explanation of how the deceased sustained the fatal injuries capable of destroying the inference that he sustained them from the beating that the appellant subjected him to. We therefore cannot fault the trial court for concluding that there was no reasonable possibility of the deceased having sustained injuries other than from the beating by the appellant and that the appellant was responsible for inflicting the deceased's injuries. To hold otherwise in the circumstances of this case would be tantamount to basing the decision on irrational and unreasonable doubt.

In our view, the gravamen of this appeal is whether the appellant caused the death of the deceased with malice aforethought. Malice aforethought is the *mens rea* for the offence of murder, and it is the presence or absence of malice aforethought, which determines whether an unlawful killing amounts to murder or manslaughter. (See ***Stephen Njenga Wanjiru v. Republic, Cr App No 108 of 2013)***. Whether or not malice aforethought is established in any case of unlawful death depends on the peculiar facts of that case. (See ***Morris Aluoch v Republic, Cr. App. No 47 of 1996).***

Under ***section 206*** of the Penal Code, malice aforethought may be established in several ways, among them by evidence proving an intention to cause death of, or grievous harm to any person or the knowledge that the act or omission in question will probably result in death or grievous harm. In this case and having carefully re-evaluated the evidence, we do not find any evidence of an intention on the part of the appellant to cause the death of the deceased or to occasion him grievous harm. The evidence establishes that the beating that the appellant subjected the deceased and his brother to arose on the spur of the moment, after they had let cows enter into a *shamba*. It appears to us that the learned judge arrived at the conclusion that the appellant murdered the deceased, not on the evidence on record, but on the basis of theories and hypotheses which she advanced, such as, the appellant was protesting the parental responsibilities that he had assumed over the boys; he was in financial straits and uncomfortable living with the boys, and that he favoured the children of his second marriage over the deceased and his brother.

We are ultimately satisfied that the prosecution did not prove malice aforethought on the part of the deceased beyond reasonable doubt and accordingly he should not have been convicted and sentenced for the offence of murder. In the circumstances, he could only be convicted of manslaughter for the unlawful killing of the deceased. We accordingly allow this appeal, quash the conviction for murder and set aside the sentence of death. In lieu thereof we substitute a conviction for the offence of manslaughter, for which we sentence the appellant to a term of fifteen years imprisonment from 4th June 2009 when he took plea. It is so ordered.

Dated and delivered at Kisumu this 7th day of December, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR