IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gicheru, Akiwumi & Tunoi JJ A)

CRIMINAL APPEAL NO. 114 OF 1987

BETWEEN

JOHN NYAMWA OMORO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Mr Justice R S C Omolo) dated 13th May, 1987 in HCCR Case No 18 of 1986)

JUDGMENT

In this appeal, the appellant's complaints against the judgment of the superior court are that in the entire case before the learned trial judge, there was no agreement as to who was present when Anjelina Apiyo Ndege, the deceased, was attacked; how that attack was carried out; and how the weapons used in the attack were carried besides the non-exploration of the issue of provocation. According to Mr Siganga for the appellant, these complaints cast a serious doubt on the prosecution case as to what happened on the day the deceased was attacked and therefore rendered suspect the appellant's conviction for the offence of murder contrary to section 204 of the Penal Code.

Regarding who was present when the deceased was attacked, Mr Siganga submitted that from the deceased's dying declaration, it would appear that Hellen Adhiambo Okeyo (PW2) was not at the scene when the former was attacked for as the latter together with Peter Obora (PW3) and other neighbours approached the scene, the appellant together with his younger brother, Charles Ogidho Omoro, disappeared. Although PW2 insisted in her evidence that she was present when the deceased was assaulted and her husband, Charles Okeyo Ndege (PW1) and PW3 appeared to support her in this respect, the deceased's dying declaration in connection therewith rendered suspect, according to Mr Siganga, the evidence of these witnesses in relation to the presence of PW2 at the scene when the deceased was attacked.

Turning to how the attack on the deceased was carried out, Mr Siganga submitted that the prosecution witnesses were inconsistent as to who assaulted the deceased with what weapon and on what part of her body. This inconsistency was apparent when the evidence of PW1 was pitted against what was contained in the statement which he made to the police on 10th April, 1986. It was also apparent in the evidence of PW2, PW3 and that of William Okwaro Obura (PW4). Mr Siganga's contention therefore was that because of this inconsistency, the appellant's story that he did not assault the deceased but that she was attacked by his younger brother, Charles Ogidho Omoro, and that when he tried to intervene to stop him from assaulting her he was in the process assaulted by PW1 was probably true.

Concerning who was carrying what weapon as between the appellant and his younger brother, Charles Ogidho Omoro, Mr Siganga's submission was that the material evidence of the prosecution witnesses was contradictory and not consistent with the weapons used to assault the deceased. According to PW1, the appellant was carrying a *rungu*, a *jembe* and a Maasai sword hidden under his shirt while his younger brother, Charles Ogidho Omoro, was carrying a *panga*, a *jembe* and a *rungu* when at about 7.30 am on 3rd April, 1986 they descended on the deceased as she was weeding in her maize *shamba* and assaulted her. PW2, however, saw the appellant armed with a *rungu*, a *jembe*, a *panga* and a sword which was hidden under his shirt while his younger brother, Charles Ogidho Omori, was armed with a *panga*, a *jembe* and a *rungu*. PW3 saw the appellant armed with a *panga*, a *rungu* and a sword while his younger brother, Charles Ogidho Omoro, was armed with a *jembe* and a *panga*. On further cross-examination, however, he said that he only saw two *jembes*, one *rungu*, one *panga* and a sword that was with the appellant. PW4 saw the appellant armed with a *jembe*, a *panga*, a *rungu* and a sword which was under his shirt while his younger brother, Charles Ogidho Omoro, had a *jembe*. According to the deceased's dying declaration, the appellant and his younger brother, Charles Ogidho Omoro, were both armed with *pangas*, *rungus* and *jembes*.

On the non-exploration of the issue of provocation, Mr Siganga's submission was that the same was not put to the assessors by the trial judge in his summing-up. According to him, had the assessors been given

proper directions in this regard probably they would have been of the opinion that the case against the appellant was one of manslaughter based on provocation particularly when the main actors in this tragedy were very close relatives who had a running land dispute between them.

According to Mr Siganga, the foregoing deficiencies in the prosecution case against the appellant were not given adequate treatment by the trial judge who appears to have been bent on convicting the appellant as he did on a charge of murder contrary to section 204 of the Penal Code.

In answer to Mr Siganga's submission, Mr Karanja for the respondent said that there was nothing in the prosecution case against the appellant that indicated that PW1, PW2, PW3 and PW4 had made up the story of the deceased's assault by the appellant and his younger brother, Charles Ogidho Omoro. Indeed, according to him, all the four prosecution witnesses saw the assault on the deceased by the two people. They saw the appellant and his younger brother, Charles Ogidho Omoro, dangerously armed with at least a *rungu*, a *jembe* and a sword. It mattered not therefore which of these weapons the deceased was assaulted with nor on what part of her body she was thus assaulted.

Concerning the trial judge's inadequate direction on the issue of provocation, Mr Karanja's view was that this failure by the judge did not prejudice the appellant. In the result therefore, according to him, the appellant's conviction was sound and should be upheld by this Court.

In his judgment dated and delivered on 13th May, 1987, the learned trial judge had this to say:

"the dispute occurred at about 7.30 am so that there cannot be any question of the witnesses having been unable to see clearly what was happening. The injuries the witnesses say were inflicted on the deceased are consistent with those which PW9 found on her. On a full consideration of the whole of the recorded evidence, I am satisfied and I now find that PW1, PW2, PW3 and PW4 were witnesses of truth and they told the Court what basically happened. Of course as is to be expected, there are minor discrepancies in their evidence as to what weapon and what injury was used and caused on the deceased by the accused and his brother Charles Ogidho. But it is clear that the accused in fact used a

rungu to assault the deceased and even the deceased said so in her statement to PW7."

Evidently, the learned trial judge was alive to the discrepancies and therefore what Mr Siganga submitted to us as the inconsistency and contradiction in the material evidence of the prosecution witnesses, that is to say, PW1, PW2, PW3 and PW4. He thought that such discrepancies were minor and were to be expected.

When the appellant and his younger brother, Charles Ogidho Omoro, descended upon the deceased on the morning of 3rd April, 1986 at about 7.30 am she was weeding on her maize *shamba*. She was with her son, PW1, and her daughter-in-law, PW2. The latter two may not have been on the same spot where the deceased was cultivating but according to them, they were on the same *shamba* about 50 yards or so from her. They saw the appellant and his younger brother, Charles Ogidho Omoro, coming towards the deceased armed with *rungus*, *jembes*, *pangas* and a sword. Reaching where the deceased was, the appellant was heard by PW1 saying to the deceased that they were going to kill her that day as she had disturbed them for too long. The appellant then struck her with a *rungu* on her shoulder, chest and thigh. His younger brother, Charles Ogidho Omoro, then struck the deceased on the head with a *jembe* and she collapsed. That blow inflicted on her a cut wound on the frontal region of the scalp measuring 12 cm long and 2 cm deep with a mild depression of the skull with the resultant extensive subdural haematoma on the frontal lobe. The deceased was also assaulted on her right thigh and sustained an open fracture of the right femur. When PW1 saw what was happening to his mother, he went to her rescue and in so doing he too was assaulted by the appellant and his younger brother, Charles Ogidho Omoro, who told him:

"Today we will kill all of you – you have despised us for long."

Subsequently, PW2, PW3 and PW4 arrived at the scene and the appellant together with his younger brother, Charles Ogidho Omoro, left the scene and went away. At about 9.00 am on the same morning, the appellant reported the incident at Ahero Police Station and was arrested. His younger brother, Charles Ogidho Omoro, disappeared and has since not been arrested.

The deceased was on the same day taken to New Nyanza General Hospital where she was admitted and died on 17th April, 1986 at 12.00 noon while

undergoing medical treatment. According to Dr Thomas Nyamache (PW9) who performed the post-mortem examination on the body of the deceased on 19th April, 1986 at 10.30 am, her cause of death was due to cardio-respiratory arrest due to extensive subdural haematoma and meningitis secondary to the open head injury.

With the facts outlined above being available to the trial judge, it is not surprising that he was of the view that the discrepancies in the evidence of PW1, PW2, PW3 and PW4 were of a minor nature. He cannot be faulted in this regard.

Later in his judgment, the learned trial judge said:

"On the whole of the evidence on record, I am satisfied and I find as proved beyond reasonable doubt that the accused in fact attacked the deceased jointly with Charles Ogidho, as stated by PW1, PW2, PW3 and PW4."

He then continued:

"It was the accused who first used a *rungu* on the deceased. Ogidho then joined him using a *jembe* and when Ogidho hit the deceased with the *jembe*, the accused did not in any way disapprove of it or disassociate himself in any way with Ogidho's action in using the *jembe* to attack the deceased. They clearly had a common intention to attack the deceased and accused used a *rungu* to do so while Ogidho used a *jembe*."

That is all correct but towards the end of his judgment the judge said this:

"There is absolutely no evidence of any provocation offered by the deceased to the accused and Ogidho which would justify their attacking her in the manner they did. I reject the contention that the deceased or PW1 could have provoked the accused.

On consideration of all the evidence I am satisfied the accused and Ogidho attacked and killed the deceased because they did not want her to work on the land where she and PW1 and PW2 were working.

The accused and

Ogidho obviously thought they had a claim over that land but that did not and could not justify their arming themselves in the way they did and going to attack the deceased and PW1 as they did. On the evidence on record, I am satisfied the charge of murder laid against the accused is proved beyond any reasonable doubts. I find him guilty of that charge and I accordingly convict him under section 204 as read with section 203 of the Penal Code."

The learned trial judge then sentenced the appellant to suffer death in the manner authorized by law.

Simmering through the entire case before the learned trial judge was the existence of a land dispute between the family of the deceased and that of the appellant. The observation by the trial judge towards the end of his judgment as we have set out above is a clear testimony of this fact. Unfortunately, the nature, extent and the effect to the prosecution case against the appellant of that land dispute was not adequately explored. It is instructive in this regard to refer to some passages in the judgment of this Court in the case of *Michael Nzioka Nzuki v Republic*, Criminal Appeal No 70 of 1991 (unreported).

In that case, this Court said:

"Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

> (i) The intention to cause death;
>
> (ii) The intention to cause grievous bodily harm;
>
> (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of *Hyam v Director of Public Prosecutions* [1975] AC 55.

In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if on a review of the whole evidence, it either thinks that the intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See *Rex v Steane* [1947]; and *Sharpal Singh s/o Pritam Singh v R* [1960] EA 762."

In the present appeal we feel uneasy at the insufficiency of the inquiry into the obvious land dispute that soured the relationship of the protagonists in this tragic incident. We cannot be sure what effect such inquiry would have had on the prosecution case against the appellant. We would therefore hesitate to uphold the appellant's conviction for the offence of murder contrary to section 204 of the Penal Code as

we think the prosecution did not exclude the reasonable possibility that the appellant took part in the killing of the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder

contrary to section 204 of the Penal Code. We think that the appellant was, in these circumstances, only guilty of the offence of manslaughter contrary to section 205 of the Penal Code. In the result, we allow the appellant's appeal, quash his conviction for the offence of murder contrary to section 204 of the Penal Code and set aside the death sentence in respect thereof and substitute therefore a conviction for the offence of manslaughter contrary to section 205 of the Penal Code and sentence him to eight (8) years imprisonment with effect from 13th May, 1987.

Dated and Delivered at Kisumu this 2nd day of December 1994

J.E.GICHERU

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR