



**Obuyi v Republic (Criminal Appeal 141 of 2017)
[2023] KECA 682 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 682 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 141 OF 2017
PO KIAGE, F TUIYOT'T & WK KORIR, JJA
JUNE 9, 2023**

BETWEEN

SAMUEL MALOBA OBUYI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at
Kakamega (Sitati, J.) dated 31st March, 2016 in HCCR No. 38 of 2006)*

JUDGMENT

1. The appellant, Samuel Maloba Obuyi, was arraigned before the High Court at Kakamega on July 6, 2006 charged with murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#). The particulars of the offence were that on May 26, 2006 at Ebukame village, Ebusakami sub-location, South Bunyore location in Vihiga District within Western Province, he jointly with another murdered Patrick Tuti (deceased).
2. The appellant denied the charge leading to a trial in which the prosecution called 4 witnesses in support of its case. The evidence that was led by the prosecution was that, on the night of May 27, 2006 at 3 am, PW1, the then Assistant-chief of Ebusakemi village was woken up by the village elder who informed him that the deceased had been killed by the appellant while they were fighting over an axe. PW1 rang the OCS, Luanda police station, to inform him about the incident and the following day at 8.30am they visited the home of the deceased where they found his body lying in the sitting room. The deceased's body was taken to Vihiga District Hospital Morgue. The axe was recovered from the deceased's house and the appellant and his father were arrested.
3. PW2, the deceased's father testified that on May 26, 2006 at 5pm while he was grazing his cattle, he was informed by his children that the appellant, his father who was the second accused person in the trial court, and the deceased, were fighting. From a distance he observed the appellant strike the deceased



- in the abdomen with an axe and on the back with a stone. He later learnt from the deceased before his demise that they were fighting over an axe which the appellant had borrowed from the deceased but returned blunt. PW2 deposed that the deceased died in his house after the fight at about 1.00am. They reported the incident to the village elder and the Assistant-chief, PW1.
4. It was adduced that on May 27, 2006, PW3, the investigating officer and the OCS for Luanda Police Station then, received a telephone call from PW1 informing him that someone had been murdered. PW1 together with the family of the deceased later went to the police station and made a report. PW3 mobilised his officers and they went to the scene of the crime where they found the body of the deceased lying in his sitting room. They arrested the appellant and his father and took away the body of the deceased. On investigating the matter, PW3 was informed that the appellant had borrowed an axe from the deceased to split firewood but returned it when it was damaged. When the deceased inquired about the damage, the appellant started beating him and his father joined in. PW3 further stated that he recorded statements from witnesses, including one from Ayub Anganga in which he stated that he witnessed the appellant and the deceased quarrel and fight over an axe on the fateful day.
 5. PW4, presented the post-mortem report that had been done by his colleague doctor with respect to the body of the deceased. According to the report, the deceased died from cardiopulmonary arrest due to a spleen rupture with intra-abdominal haemorrhage which was as a direct result of trauma.
 6. At the close of the prosecution's case, the learned Judge found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and called no witness. He claimed that on May 26, 2006 he carried out his farming activities as usual and on May 27, 2006 he was arrested by the police.
 7. Sitati, J heard the witnesses, evaluated the evidence tendered before the court, found the appellant guilty as charged and sentenced him to death.
 8. Agrieved by the judgment and sentence of the High Court, the appellant preferred the instant appeal, based on 7 grounds, which are that the judge erred in law and fact by;
 - a. Relying on uncorroborated and contradictory evidence of the prosecution witnesses.
 - b. Convicting the appellant of murder when all ingredients of the offence were not proved.
 - c. Failing to re-evaluate the evidence on record.
 - d. Convicting the appellant when no formal identification was carried out.
 - e. Failing to consider the submissions of the appellant.
 - f. Failing to find that the prosecution did not prove its case beyond reasonable doubt.
 - g. Failing to hold that the mandatory nature of the death sentence is unconstitutional.
 9. During the hearing of the appeal, learned counsel Mr Mbeka appeared for the appellant while the respondent was represented by Mr Okango, the learned Senior Principal Prosecution Counsel.
 10. Both parties relied on their filed written submissions, which they highlighted briefly.
 11. For the appellant it was submitted that all the seven grounds of appeal lead to the question whether the prosecution proved its case beyond reasonable doubt to warrant the death sentence, and whether the sentence was constitutional. It was contended that the evidence tendered by the prosecution was riddled with inconsistencies, and did not prove its case beyond reasonable doubt. The inconsistencies cited include that, while PW2 testified that he had seen the appellant borrow an axe from the deceased,



and that he had witnessed a fight between the two over the axe, in cross-examination he stated otherwise. It was asserted that in cross-examination PW2 contradicted himself in his testimony that by the time he arrived at the scene, the fight between the appellant and the deceased had ceased. Moreover, he also testified that he neither saw the appellant borrow nor return the axe to the deceased.

12. Mr Mbeka drew this Court's attention to [*Joseph Kimani Njau vs Republic \[2014\]eKLR*](#) where the High Court held that for a murder charge to stand, the prosecution must prove both the actus reus and the mens reas. In this respect he maintained that the prosecution did not prove its case beyond reasonable doubt. Counsel argued that in view of the Supreme Court decision in [*Francis Karioko Muruatetu & Another vs Republic \[2017\] eKLR*](#) (Muruatetu), where the mandatory nature of the death sentence was declared unconstitutional, this Court should remit this matter to the trial court for resentencing.
13. For the respondent Mr Okango submitted that PW1's unrebutted evidence was that there was a quarrel and a fight over an axe, and the appellant hit the deceased with that axe in the stomach. Counsel, however, conceded that the evidence on record was not sufficient to sustain a murder charge. He urged that the charge be reduced to manslaughter and the sentence equally be lowered to 15 years imprisonment.
14. We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as a first appellate Court as was stated in [*Reuben Ombura Muma & Another Vs. Republic \[2018\] eKLR*](#);

' This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses.'
15. The two issues to be considered in this matter as rightly pointed out by counsel for the appellant are whether, the prosecution proved its case beyond reasonable doubt; and whether the sentence imposed was constitutional.
16. For a charge of murder to be sustained under section 203 as read with 204 of the Penal Code, the offender must be shown to have caused the death by an unlawful act or omission and 'of malice aforethought.' PW2, the father of the deceased testified that on the fateful day, while he was grazing his cattle, he was informed by his children that the appellant and the deceased were fighting and from a distance he saw the appellant strike the deceased in the abdomen with an axe and on the back with a stone. PW3, the investigating officer gave evidence that he recorded statements from witnesses, one of them being Ayub Anganga who averred that on the material day while at his home he heard people quarrelling at a nearby road. When he went there, he found the appellant and the deceased quarrelling over an axe. The quarrel between the two initially ended but resumed later at which point he saw the appellant armed with bricks which he threw at the deceased hitting him on the ribs. The appellant was therefore directly placed at the scene of the crime by PW2 and Ayub Anganga. PW4 produced the post-mortem report which established that the deceased died from cardiopulmonary arrest due to spleen rupture with intra-abdominal haemorrhage, a direct result of trauma. Just like the learned judge, we are satisfied that the deceased died from injuries inflicted upon him by the appellant, and thus the fact and cause of death was proved beyond reasonable doubt.



17. What needs our independent determination is whether, in the circumstances of this case, the appellant caused that death while actuated by malice aforethought. The learned judge in her judgment was convinced that the appellant acted with malice aforethought in killing the deceased. She reasoned;

' 26. In this case, the deceased died because of a ruptured spleen. The evidence on record is that the accused hit the deceased in the abdomen. In my considered view, anyone who hits another in the abdomen with an object such as an axe must have intended to cause the death of or grievous harm to the deceased. I therefore find and hold that the accused had the necessary malice aforethought to kill the deceased.'

18. Before us, the prosecution conceded that this was a case of manslaughter and not murder, and counsel urged us to reduce the sentence to 15 years' imprisonment. The death of the deceased having arisen from a fight between the appellant and the deceased, we agree that the appellant may not have intended to kill the deceased, hence the requisite mens rea for the offence of murder was lacking. We note, further, that a person charged with murder may instead be convicted of the offence of manslaughter by virtue of Section 179 of the *Criminal Procedure Code*, even though he was not charged with the latter.

19. Being of that mind, we quash the conviction of murder and substitute it with manslaughter. We set aside the sentence to death and in its place order that the appellant shall serve a sentence of fifteen (15) years in prison, commencing from March 31, 2016 when he was sentenced by the High Court.

20. Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

