IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 75 OF 2016

BETWEEN

FA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being and appeal from a conviction and sentence of the High Court of Kenya at Kakamega (**Chitembwe J.**) delivered on 3rd May, 2012 in Kakamega HC.CR.C. NO. 55 OF 2006)

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JUDGMENT OF THE COURT

[**1**] This is a first appeal from the Judgment of the High Court, (**Chitembwe J**.) delivered on 3rd May, 2012 in which he convicted **FA** (**the appellant**), for the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and sentenced him to serve a term of 25 years' imprisonment.

[**2**] The appellant was alleged to have murdered **HOJ** (**deceased**) on 28th September, 2006 at around 5.00 am. Seven witnesses testified for the prosecution. Briefly on 28th September, 2006 at around 5.00am, **JOO** (**J**) was asleep in her house. Also asleep in the same house was the deceased who was her husband, and her eleven-year-old granddaughter **SA** (**S**). They were woken up by the appellant who was banging the door demanding that they open. The appellant who is a son to J and the deceased, kicked open the door, entered the house, attacked the deceased and stabbed him on the stomach with a knife, as J screamed and ran out of the house. S who remained in the house, saw the appellant push the deceased to a banana plantation that was 3 metres away from the house.

[**3**] J went and appealed for help from **SMS (S)**, a wife to the deceased's brother who were also living just nearby. Joice and S went back to J's house. As they entered the compound, S hid when she saw the appellant coming from the banana plantation. S observed the appellant as he changed his clothes which had blood. She saw the appellant leave the home and heard him say that ***"he had already kept one dead body, and whoever will enter inside will be a second corpse."***

[**4**] S then heard a voice from the banana plantation calling in a low tone. She moved near and found the deceased who was only in his inner wear, in the banana plantation. S rushed back to the house, came back with a match box and lit a tin lamp. She noted that the deceased had a cut wound on his stomach and on his left hand which was almost severed. He also had a cut on his head. The deceased asked S to go and call his elder brother, one Robert.

[**5**] In the meantime, J had ran to the home of the assistant chief, **Simon Achello Matiko** to whom she reported the matter. **COJ (C)**, a brother to the deceased was also at his home when he heard the commotion. He went to the deceased's home, and found him in the banana plantation with cuts on his stomach, head and other places. The deceased who could still talk informed C that the appellant had killed him. Subsequently, the assistant chief arrived. He noted that the deceased had a deep cut on his stomach exposing the intestines, as well as deep cuts on the head and hands. With the assistance of C and other members of the public, the assistant chief took the deceased to Yala hospital, from where he was referred to Siaya hospital. At Siaya hospital the deceased was taken to theatre and placed on a drip but unfortunately he died.

[**6**] The next day the appellant was arrested by members of the public and taken to Yala police station. **PC Cosmas Wangila** (PC Wangila), an officer who was then stationed at Dudi patrol base, received the report of the assault and proceeded to the scene where he noted that the door to the deceased's house was broken and there was blood inside and outside the house. He recovered a sword which was blood stained outside the house. He also proceeded to the house of the appellant where he recovered clothing which were blood stained.

[**7**] **Dr. Owino Bob (Dr. Owino**) produced a report of a postmortem examination which was carried out on the body of the deceased by Dr. Benjamin Esiabi, whose handwriting he was familiar with. Dr. Esiabi could not testify at the material time as he was a post-graduate student in Nairobi. His report indicated that the deceased had several cut wounds and that his cause of death was shock due to severe hemorrhage arising from the trauma that he had suffered.

[**8**] When put on his defence, the appellant stated that on the material day he was in his house when he heard noise outside. When he came out he found his father lying on the ground near the cow shed screaming. The deceased who had injuries was screaming calling to him to go and help him. His mother came and found him at the scene as he was the first person to arrive at that scene. He called his mother to come out and asked her what had caused the deceased's injuries, but his mother informed him that he is the one who should know who had caused the injuries to the deceased. His uncle C assisted him to take the deceased to Yala hospital. They went to the hospital and then made a report to Yala police station. It was after C talked to the police officers that he was arrested and detained at the police station. He denied having killed the deceased, and explained that the evidence of the witnesses was motivated by a grudge. He explained that he disagreed with his mother because she was selling traditional alcohol. He denied: having used the weapon that was produced in court to commit the offence; having taken alcohol at the material time; having broken into the house of the deceased or having dragged the deceased outside the house before stabbing him. He claimed that Joice did not like him because she is his stepmother.

[**9**] In his judgment, the learned Judge concluded that it was the appellant who went to the deceased's home on the morning of 28th September, 2006 because S and J heard him shouting, and saw him when the door was open, and the two witnesses knew and recognized the appellant's voice as he was not a stranger to them. In addition, S saw the appellant and heard him state that he had already kept one dead body and whoever entered into that compound would be the second corpse. The learned Judge therefore concluded that it was the appellant who had stabbed the deceased and caused his death. Consequently, he convicted him of the offence of murder and sentenced him to serve 25 years' imprisonment.

[**10**] In his memorandum of appeal, the appellant has raised seven grounds contending *inter alia:* that he was not subjected to a fair hearing process as required under Article 50 of the Constitution; that the learned Judge failed to comply with the trial procedures provided under the Criminal Procedure Code; that he was convicted of murder on hearsay evidence; that the learned Judge failed to note that there was inconsistencies in the testimony of the prosecution witnesses; and that the sentence imposed upon him was excessive and unconstitutional.

[**11**] **Mr. Menezes**, learned counsel who appeared for the appellant filed written submissions which he fully relied upon. In the submissions counsel stated that the learned Judge neither considered the appellant's defence, nor did he independently evaluate or analyze the entire evidence based on the law and the facts; that the appellant's trial was unconstitutional as he was detained for more than ten months before his trial took off, and therefore his rights to a fair trial were violated.

[**12**] In addition, counsel argued that the learned Judge relied on hearsay and circumstantial evidence which did not meet the threshold required to prove the charge; that there were only two witnesses who purported to have seen the appellant commit the offence, one of whom was a minor whose testimony was not admissible without corroboration; that the appellant's conviction was anchored on the testimony of a single witness J, whose evidence the court should not have relied on as the appellant proved that she had a grudge against him; and that the key elements of *mens rea* and *actus reus* were not established. The Court was urged to find that the offence of murder was not proved to the required standard. In addition, that the sentence of 25 years' imprisonment was inappropriate as the learned Judge failed to afford the appellant an opportunity to mitigate before sentencing him.

[**13**] In support of his submissions, Mr. Menezes relied on **Republic v Andrew Omwenga** [2009] eKLR; **R. v Kipkering Arap Kosgei & Anor. (1949)16 EACA 135;** and **Mohammed Sango & Anor v Republic Criminal Appeal No. 1 of 2013 [2015] eKLR**.

[**14**] **Mr. Kakoi** of the Office of Director of Public Prosecution (ODPP) appeared for the respondent and relied on written submissions that were duly prepared by Lubanga Varoline of the ODPP. It was submitted that malice aforethought was established under section 206 (a)(b) and 9c) of the Penal Code, through the evidence that was adduced by the prosecution witnesses, showing that the deceased suffered serious injuries which caused his death; that the identity of the appellant as the person who stabbed the deceased leading to his death, was clear from the evidence of S and J who were present at the scene of the crime, and witnessed the appellant stab the deceased; that the evidence of S who is a minor was sufficiently corroborated by the evidence of J, and that of C who found the deceased in the banana plantation with cuts on his body; and that the deceased made a statement that it was the appellant who had killed him, and this statement was admissible in evidence under section 33(a) of the Evidence Act.

[**15**] As regards the cause of death, the respondent pointed to the postmortem report prepared by **Dr. Benjamin Esiabi** who confirmed that the deceased died as a result of injuries inflicted upon him. On the appellant's complaints regarding the violation of his rights to a fair hearing, it was submitted that Article 50 of the Constitution was not in force at the time of the appellant's trial, but that notwithstanding, the appellant was subjected to a fair trial, and the procedure provided under sections 210 and 211 of the Criminal Procedure Code complied with, and his rights explained to him.

[**16**] As regards sentence, it was submitted that the appellant was not sentenced to the mandatory death sentence, but was sentenced to 25 years' imprisonment, and that the sentence was very lenient considering the gruesome manner in which the appellant killed the deceased. The Court was therefore urged to dismiss the appeal in its entirety as it has no merit.

[**17**] As enunciated by this Court in **Okeno v. Republic [1972] EA 32***:*

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (366) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the**

trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post *[1958] E.A 424." See also Kariuki Karanja –vs- Republic 1986 KLR 190"*

[**18**] Being mindful of our duty as above stated, we have considered the record, the submissions, the authorities cited as well as the applicable law. It is clear that the deceased suffered cut wounds from which he succumbed. The question is, who caused those injuries? Did the person have malice aforethought to cause his death?

[**19**] Both Joice and Salome testified that they were asleep in the house with the deceased and that it is the appellant who kicked open the door of the house, and after a short altercation, stabbed the deceased. On his part, the appellant denied having caused the deceased's injuries and explained in his defence that he heard the deceased screaming and upon going out, found the deceased outside his house with injuries. In other words, the appellant was implying that the deceased must have been stabbed by someone else.

[**20**] It is apparent that the deceased was attacked at around 5.00 am. The fact that S, who found him in the banana plantation ran back to the house and brought a tin lamp, confirms that it was still dark. The identification of the appellant as the person who attacked the deceased was based on the evidence of J and S, who swore that they heard him talking, saw him enter the house, and attack the deceased. S was examined by the trial Judge who found her, though a minor aged 11 years, fit to give sworn evidence. Her evidence was therefore received as sworn. This was in accordance with section 19 of the Oaths and Statutory Declarations Act that allows a court, if satisfied, that the witness understands the nature of an oath to receive the evidence as sworn evidence. S not having been the victim of the offence of which the appellant was charged, section 124 of the Evidence Act which requires corroboration of the evidence of an alleged minor victim of an offence, did not apply to her. That is to say, that her evidence did not require corroboration. That notwithstanding, there was sufficient corroboration of her evidence in the evidence of J. Her evidence was also consistent with the evidence of S who saw the appellant emerge from the banana plantation and shortly thereafter, found the deceased in the banana plantation with cut injuries on his stomach and arm.

[**21**] In **Mbelle vs. Republic (1984) KLR 626** this Court held:

> **"In dealing with evidence of identification by voice, the court should ensure that: a) The voice was that of the accused. b) The witness was familiar with the voice and recognized it. c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."**

[**22**] And in **Vura Mwachi Rumbi vs. Republic [2016] eKLR** it was stated:

> **"In the case of Choge v R [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it..."**

[**23**] Both Joice and Salome knew the appellant very well as he was a son and uncle respectively, and with whom they lived in the same compound. The two were able to identify him by his voice and also visually. The possibility of a mistaken identification was not there. In any case, the evidence of S also confirmed that it was the appellant who attacked the deceased, as she saw him not only coming from where the deceased was found lying in the banana plantation, but also warning that he had "***already kept one dead body, and whoever will enter inside will be a second corpse.***"

[**24**] In addition there was the evidence of C

regarding the deceased having identified the appellant as the person who had caused his injuries. In **Philip Nzaka Watu v Republic [2016] eKLR**,

> **"Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements."**

[**25**] The statement made by the deceased to C was a dying declaration which was admissible under section 33(a) of the Evidence Act, as evidence relating to the deceased's cause of death and this evidence, similarly placed the appellant at the crime scene as the person who caused the deceased's injuries.

[**26**] In his defence, the appellant alleged that J had a grudge against him because he is a step son to J. We notice that this defense was never put to J who in her evidence maintained that the appellant was her own son. We find that there is no reason why all the witnesses would have ganged up against the appellant. In any case, even the deceased himself in the dying declaration pointed an accusing finger at the appellant. We are satisfied that the appellant was properly identified as the person who caused the deceased's injuries. The evidence of the doctor was sufficient to prove that the deceased died from the injuries that were inflicted on him.

[**27**] Under section 203 of the Penal Code, murder is where any person who of malice aforethought, causes death of another person by an unlawful act or omission. This means that both the *actus reus* and the *mens rea* must be present. We note that although the learned Judge found that the appellant was the one who committed the act that caused the death of the deceased, the learned Judge did not address the issue of malice aforethought.

[**28**] As was stated in **Joseph Kimani Njau v Republic [2014] eKLR**:

> **"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution."**

[**29**] Likewise, in the appellant's case, the learned Judge failed in his responsibility to evaluate the evidence and make a finding on the issue of *mens rea*. No evidence was adduced regarding the appellant's state of mind. The only witness who gave any explanation for the appellant's behavior was PC Wangila, who claimed that the cause was dispute over land between the appellant and the deceased, as the deceased had refused to allow the appellant to cultivate a portion of land. However, it is not clear where PC Wangila got this information from, as none of the other witnesses who were all closely related to the appellant and the deceased, said anything about such a dispute.

[**30**] Our analysis shows that it was established beyond doubt that the appellant was the one who inflicted injuries upon the deceased. The manner in which the injuries were inflicted left no doubt that the action was deliberate as the appellant went to the deceased's house armed with the murder weapon. This weapon which was produced in court was described variously by the witnesses, as a knife, a knife with a handle like a walking stick, a panga, a panga which looked like a sword and a sword. The bottom line is that the weapon was something which was bigger than the normal knife, and looked more like a panga or a sword. Suffice that the witnesses were able to identify the weapon in court.

[**31**] The injuries that were inflicted on the deceased were of such serious nature as to result in death within hours. We have no doubt that the intention of the appellant was either to kill the deceased or to cause him grievous harm. Under these circumstances malice aforethought can be inferred under section 206 (a)&(c) which states that:

> **"Malice aforethought shall be deemed to be established by evidence proving any one of more of the following circumstances –**
>
> **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. ….**
>
> **c. An intent to commit a felony."**

[**32**] On the appellant's complaint that he did not receive a fair hearing as provided under Article 50 of the Constitution, the evidence that was adduced before the trial court and the information that was laid against the appellant, it is clear that the offence was committed on 28th September, 2006 and that the appellant was arrested shortly thereafter. Article 50 of the current Constitution came into force in August 2010, when the Constitution was promulgated. Article 50 would therefore not be applicable retrospectively. That notwithstanding, under the retired Constitution, the appellant ought to have been taken to court within a reasonable time. The appellant claimed that he was taken to court 10 months after his arrest. The record of the trial court indicates that the trial court first made an order on 20th December, 2006 that the appellant should be produced before the court, but this was not done until 14th June, 2007 when the court threatened to have the prosecutor arrested. It was then that the appellant was produced and plea taken. The appellant's contention that his rights may have been violated is not therefore without substance. Nevertheless, the appellant had the right to pursue the matter as a different cause of action as the delay in producing him in court constituted a different violation, and did not automatically vitiate the criminal trial for the offence of murder.

[**33**] The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty, and that the court has a responsibility to ensure that the appellant's trial is conducted in a fair and just manner. We are in agreement with the following passage from the Supreme Court of India in **Natasha Singh v. CBI, (2013) 5 SCC 741,** where it was held as follows:-

> **"15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same."** *(Emphasis added)*

[**34**] In our view the trial of the appellant in the High Court was conducted in accordance with the requirements of the Constitution then in force, the Penal Code, and the Criminal Procedure Code, and the appellant granted an opportunity to hear the evidence against him, cross examine the witnesses, as well as to give evidence in his own defence. We are therefore satisfied that the appellant was accorded a fair trial in the hearing of the criminal charge against him. He is at liberty to take up the issue of violation of his rights in regard to the delay in bringing him to court.

[**35**] As regards the sentence, the appellant appears not to have been given an opportunity to mitigate before sentencing, as no such mitigation is reflected in the record of the trial court. This was an omission that prejudiced the appellant as he ought to have been given an opportunity to mitigate. In his submissions the appellant urged the Court to reduce the sentence but did not give the Court any mitigating factors that should be taken into account. We note that, notwithstanding the mandatory death sentence, the trial Judge exercised his discretion and imposed a sentence of 25 years' imprisonment. This was taking into account that the deceased was the appellant's father, and that the attack was completely unprovoked. Without any other mitigating circumstances having been placed before us by the appellant, we do not find any

justification to interfere with the sentence.

The upshot of the above is that this appeal is dismissed in its entirety.

Dated and delivered in Nairobi this 5th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR