IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KANTAI, JJ.A.)

NAKURU CRIMINAL APPEAL NO. 370 OF 2012

BETWEEN

DANIEL KIPYEGON TOROITICH..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya at Nakuru delivered by

Wendo, J. dated 28th September 2012

in

H.C.CR.A. No. 94 of 2007

****

JUDGMENT OF THE COURT

1. The appellant, ***Daniel Kipyegon Toroitich***, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. It was alleged that on 24th September 2007 at Elburgon, in Molo District of the Rift Valley Province, the appellant murdered ***Moses Kiboi*** (hereinafter referred to as *"the deceased").* A plea of not guilty was entered and the case proceeded to hearing.

2. During the hearing, 7 witnesses testified for the prosecution. The prosecution evidence was that at about 4.00 p.m., ***PW1***, the mother of the deceased, was at her home when the appellant came alongside his brother and asked for Kshs.1000 to enable them attend their mother's funeral. She told them she did not have the money. After a while, the appellant returned with a jerrican demanding for the Kshs.1000 failing which he threatened to cut her with a panga. The appellant then got into her house and took out some clothes with the intention of burning them.

3. The following day, PW1 requested the deceased and his brother to return some items that belonged to the appellant. Later that day, the appellant came back and called the children to his house. The deceased opened the door and ran away. The appellant began to chase him, caught him and threw him by the valley. PW1 together with her other child began to scream. They followed the appellant and found the deceased dead.

4. ***PW2*** corroborated PW1's testimony. She testified that their mother had asked her brothers and herself to take some items to the appellant's house. When he came back, he was armed with a panga and ordered them to open the door. He locked the two boys in the bedroom. The deceased opened the window and jumped out. The appellant began chasing the deceased. They ran after him, only to find the deceased had been cut on the neck.

5. ***PW3***, a village elder, recalled that on that fateful day he was at home at around 7.00 a.m. when PW1's child came and reported that the appellant was causing disturbance. On his way to PW1's house, he met PW1 who narrated to him the ordeal. They went to where the appellant was to try and confront him. He stated that the appellant also threatened to cut him, and that the appellant had already cut the deceased. He began screaming and members of the public arrived at about 9.00 a.m. He then called the police who came at about 2.00 p.m. He met the appellant at the Police Station when he went to write a statement.

6. ***PW4*** testified that on 5th October 2007, he identified his son's body at Elburgon Mortuary. Other witnesses whose evidence was considered included ***PW5***, PC Douglas Chetimin, who booked the report in the occurrence book and thereafter asked his colleague to

accompany him in search of the appellant. They found him, arrested, and took him to the Police Station.

7. ***PW6***, the doctor who conducted the postmortem on 5th January 2007, formed the opinion that the deceased died as a result of severe hemorrhage due to severing by the wall muscles, and trauma to the spinal cord.

8. When put on his defence, the appellant gave a sworn statement and called no witness. He explained that on the material day he went to work at a farm. At about 11.00 a.m. he went back home and found four people in his house, the deceased and his siblings. The deceased tried to escape through the window which led to a small room which contained iron sheets. According to him, the deceased was cut by the iron sheets. Suddenly he heard screams and saw a crowd approaching him. He got scared and ran away. On cross examination, he confirmed that she knew the mother of the deceased as a friend and that they were living separately. He denied going to PW1's house on the material day.

9. In her judgment, the learned judge was not convinced by the appellant's defence. She found that the appellant's action of running away instead of trying to save the boy's life after seeing him injured was inconsistent with his innocence. In the end, the learned judge was satisfied that the totality of the evidence pointed to the accused as the person who killed the deceased and found him guilty of murder and sentenced him to life imprisonment.

10. During the hearing of the appeal, ***Mr. Maragia*** appeared for the appellant and relied on his supplementary grounds of appeal and submissions.

11. The grounds included: ***that there* was *non-compliance with Section 200 of the Criminal Procedure Code; that the charges were not read to the appellant as required by Section 211 of the Criminal Procedure Code; and that the learned judge disregarded the appellant's defence.***

12. Mr. Maragia submitted that there was no compliance with the provisions of ***section 200*** of the ***Criminal Procedure Code*** since the trial had been conducted before several judges and it was the defence counsel, not the appellant, who urged the trial court to proceed from where the matter had reached; he also pointed out that ***section 211*** requires that the charge be read to an accused person before he tenders his defence but that was not done. Counsel also argued that PW1 and PW2 may have exaggerated their evidence. According to him, had the learned judge considered the evidence carefully she would have reached a different conclusion. He also faulted the trial court for rejecting the appellant's defence. He urged us to allow the appeal.

13. ***Ms. Chelangat***, Prosecution Counsel from the Office of the Director of Public Prosecutions, who appeared for the respondent submitted that as regards section 200, it is the appellant's advocate who stated that the appellant wanted the case to proceed from where ***Maraga J***., (as he then was) had reached. She asserted that the law did not state that it is the accused who must respond, hence that omission was not sufficient to nullify the trial.

14. It was also submitted that in the impugned judgment the court addressed the issue appropriately. The defence of the appellant was also considered. She maintained that there was no proof that PW1 and PW2 exaggerated their evidence; that their evidence was direct and corroborative. Counsel urged the Court to dismiss the appeal in its entirety.

15. This is a first appeal, and the duty of a first appellate court is to re-evaluate the evidence and consider the evidence afresh before arriving at its own conclusion, as was held in the case of ***Okeno v. Republic [1972] EA 32*** thus*:*

> ***"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 v. R. [1957] E.A.336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E.A. 424*."**

16. For a conviction on a charge of murder to hold, three essential ingredients must be proved. These ingredients were set out in the case of ***Anthony Ndegwa Ngari v Republic [2014] eKLR*** as follows:

> ***"…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."***

17. The fact that the deceased died is not in dispute. His body was identified by his father ***PW4***, ***John Kiptagat*** and ***Dr. Caroline Mwololo***, ***PW6***, the pathologist who carried out the postmortem examination, who testified that the deceased died as a result of severe hemorrhage due to severing of the vessels of the neck.

18. The main issue in the appeal therefore is, whether the Court should find that the prosecution case against the appellant was proved beyond any reasonable doubt and uphold the conviction. In every criminal case, the burden of establishing the guilt of an accused person to the required standard of proof beyond any reasonable doubt is on the prosecution.

19. The evidence implicating the appellant was basically that of PW1, PW2, and PW3 who witnessed and placed the appellant at the scene of the crime. The appellant was well known to them as they had both lived within the same neighbourhood. Considering the evidence of the prosecution witnesses as highlighted above, it is evident that it is the appellant who chased the deceased while armed with a panga and ended up causing severe injuries or grievous harm that led to his death.

20. PW2, an eye-witness, was categorical that she saw the appellant chasing the deceased with a panga; they followed him and on arrival at the place where the deceased was, they found the deceased had been cut on the neck. The evidence of the witnesses was consistent with that of the Pathologist. PW7 also testified that she went to the scene and found the deceased's body about 150 meters from the appellant's house and noted the injury to the left side of the neck.

21. We have no reason to fault the learned Judge as she properly directed herself on the law and properly evaluated the evidence and concluded as follows:

> ***"This incident occurred early morning of 24/10/2007, and I doubt that the accused could not have been drunk so early. The incident was a culmination of what the accused had been doing the previous day of chasing and threatening PW1 with harm while armed with a panga after she refused to give him Kshs 1000. From his actions the accused had formed the intention to injure PW1 and/or her children from the previous day. Malice aforethought does flow from the injuries that the accused inflicted on the deceased."***

22. In addition, under ***section 206*** of the ***Penal Code***, there was sufficient evidence upon which malice aforethought could be inferred, as the appellant knew that cutting the deceased with a panga would probably cause him death or grievous harm.

We therefore find no merit in the appellant's appeal against conviction.

23. On alleged failure to comply with the provisions of ***section 200*** of the ***Criminal Procedure Code***, we observe that ***Koome, J***. (as she then was) commenced the trial of the appellant and heard four prosecution witnesses. ***Maraga, J.*** (as he then was) then took over the hearing of the case on 2nd July 2009. The prosecution requested that the case proceeds from where it had reached and the defence counsel indicated that the appellant had no objection.

24. On 2nd March 2011 ***Wendo, J***. took over the hearing and it was recorded as follows:

> ***"Accused – present***
>
> ***Mrs. Ndenda- Court to take over and proceed from where Justice Maraga left.***
>
> ***Mr. Omutelema- No objection***
>
> ***Court: Hearing to proceed from where Justice Koome left."***

25. ***Section 200*** of the ***Criminal Procedure Code*** reads as follows:

> ***"200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***
>
> *(a)* ***deliver a judgment that has been written and signed but not delivered by his predecessor or.....***
>
> ***(2) ….....***
>
> ***(3) Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

The above provisions apply *mutatis mutandis* to trials held in the High Court.

26. From the record it appears that learned judge informed the appellant of the above provisions, upon which his counsel informed the court that her instructions were that the case proceeds from where the other judge had reached. In our view, we respectfully agree with the respondent that there was adequate compliance with the provisions of ***section 200 (3)*** of the ***Criminal Procedure Code*** aforesaid.

27. The appellant also complained that the provisions of ***section 211*** of the ***Criminal Procedure Code*** were not explained to him. According to the appellant, the trial court ought to have read the charges to him. In our view, we find that this complaint is without merit. This is because the record shows that the appellant gave a sworn statement and his counsel then closed the defence case. He was rightfully represented by counsel. We do not think that the appellant was prejudiced in any way. The appeal therefore fails on conviction.

28. With regard to the sentence, the learned judge considered the appellant's mitigation and noted that he was remorseful; he claimed to have lost his family due to the incarceration; and that he had an elderly mother to look after. The learned judge was also alive to the fact that even upon conviction for murder the trial court had to exercise discretion in passing sentence. But considering the brutal killing of an innocent 12 year old child by the appellant, she sentenced him to life imprisonment.

29. In ***Jared Koita Injiri v Republic [2019] eKLR***, this Court reduced a life imprisonment sentence to 30 years' imprisonment. Taking into consideration the above mitigating factors and the fact that the appellant has been in custody since October 2007, we are inclined to allow the appeal against sentence. We hereby set aside the sentence to life imprisonment and substitute therefor sentence to 25 years' imprisonment

from 28th September 2012 when he was convicted by the trial court.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

……..……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR