



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), OKWENGU & SICHALE, J.J.A.)

CRIMINAL APPEAL NO. 129 OF 2016

BETWEEN

OTIENO EVANS ODUOR.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment and conviction of the High Court of Kenya at Homabay (D. Majanja, J.) dated 28th June, 2016 and delivered by H. Omondi, J. in Criminal Case No. 9 of 2014)

JUDGMENT OF THE COURT

Upon finding that the charge of murder against the appellant was proved, and upon the High Court (Majanja, J.) convicting him, Omondi, J. who, from the record read the judgment on behalf of the former, sentenced the appellant to death, prompting this appeal.

After analyzing the evidence presented at the trial, Majanja, J. was persuaded that the following facts were not in dispute: First, the date was 28th February 2014, at around 10.00 pm in Mbita, when Kevin Ochieng' Pollo parked his motorcycle outside the house belonging to PW5, a lady with whom he had spent a good part of that afternoon. When he came out to leave, the motorcycle was missing. In the vicinity was the appellant, who was sitting in a Probox vehicle. It is the appellant who disclosed that the deceased rode away with the motorcycle. The deceased happened to be PW5's boyfriend. Indeed, when he was finally found he explained that he took the motorcycle to punish Kevin, for having a love affair with his girlfriend. After he was apprehended in the morning the deceased cooperated and led the appellant and Kevin to where the motorcycle was.

But before going to Onungo Stadium where the deceased had agreed to take them, the three proceeded to Mbita Bus Stage first to report the incident to the Chairman of Mbita Piki Piki Association. When they did not get the Chairman in the office, they went to his home. All this time, it was the appellant who was driving the Probox car. From the Chairman's home the three, proceeded to Onungo Stadium, where they found the motorcycle.

The Chairman later arrived at the stadium and found a large crowd, which included the appellant beating the deceased, who had been tied with a sisal rope. The Chairman specifically testified that he saw the appellant beating the deceased on the buttocks and back; and that he pleaded with him, in vein to stop beating him. At that point, he left to go and call the police. When he returned with some officers to the scene, the crowd dispersed and the police took away the deceased, who was rushed to Mbita District Hospital for treatment due to severe injuries. The deceased, unfortunately succumbed to the injuries that afternoon. Dr Ojwang recorded his observations on the body of the deceased as follows;

“The body is already peeling off. No cuts on the body. Bruises present all over his body. No fractures of the bones. There was bleeding onto the scalp at the occipital region. There was bilateral chest bleed (sic) in both chest cavities. No rib fractures”.

He certified the cause of death as heamothorax and violent trauma from the mob.

The appellant was arrested and charged with causing the death of the deceased. In the sworn testimony, he denied taking part in administering instant justice on the deceased, though confirming the events of the night in question and the next morning. His point of departure, however is that, when they got back to the Bus Stage from the Chairman's home, they found a hostile crowd shouting, “thief, thief”; that as soon as he parked the vehicle, the group opened it and flushed everyone out. He pleaded with them not to damage the vehicle and they listened and let him go.

Later, as he passed by the Stadium, he found a group of people including the Chairman, who, for no apparent reason, threatened him with unspecified consequences, at which point an Administration Police Officer ordered him to proceed to the Police Station; and that while at the police station, the deceased, who had visible injuries on his body was brought.

Upon considering and analyzing the above summarized evidence by both sides, the learned Judge was convinced that, by the provisions of **Section 21** of the Penal Code, and on the authority of **Wanjiro d/o Wamerio vs. R.**, 22 EACA 521, the appellant was engaged in an unlawful act that led to the death of the deceased, even if such death may not have been intended or anticipated by him; and that, although there was no evidence of an initial pre-meditated agreement or joint purpose to kill, the same could rightly be inferred from the mob action of jointly attacking the deceased in which the appellant was a party.

With that, the Judge ultimately concluded that the appellant was identified; that he took part in an unlawful act that caused the death of the deceased; and that he did so with malice aforethought, deserving a punishment of death.

Aggrieved by both the conviction and sentence, the appellant now brings this first appeal, arguing, through Mr. Oriwa holding brief for Mr. Menezes, that the learned Judge was in error for failing to find that the prosecution had not discharged its duty of proving beyond any reasonable doubt the charge of murder. Citing the case of **Festus Mukati Marawa vs. R.**, (2013) eKLR, the appellant urged us to find that his conviction was against the weight of the evidence; and that taking together the evidence for the prosecution with his *alibi* defence, the learned Judge ought to have found that he was innocent.

He further argued that the Judge ought to have been persuaded that the defence of *alibi* was not displaced by the prosecution evidence; that the Judge was bound but failed to apply the principle that the burden of proving the appellant's guilt lay with the prosecution; and that all the appellant was required to do was to present a plausible defence, which he did, to the effect that he was not at the scene at the time of the offence; and that thereafter the burden shifted to the prosecution to disprove the *alibi*.

The appellant maintained that the learned Judge misapplied the principles of circumstantial evidence as no independent evidence was called to corroborate the circumstances relied on by the prosecution as incriminating the appellant.

Finally, the appellant submitted that the sentence imposed by the Judge was harsh and manifestly excessive in the circumstances of the case.

Mr. Kakoi, learned counsel for the respondent disagreed with those submissions, maintaining, for his part, that the evidence against the appellant was overwhelming and all the ingredients of murder were established; that witnesses saw the appellant with the deceased immediately prior to the latter's death; that it was the appellant who led Kevin, PW5 and the rest to the deceased; that he drove the appellant to Onungo stadium, the crime scene; that the deceased was attacked and beaten in broad daylight and in full glare of people; that the appellant was identified by PW3 as one of those who attacked the deceased, and that it was from the injuries sustained during the beating that the deceased died. The prosecution, for those reasons asked us to conclude that, from the nature of those injuries, the appellant had malice aforethought. According to counsel, though there was only a single eye witness (PW3) who linked the appellant to the death of the deceased, the unbroken chain of circumstantial evidence, corroborated his evidence.

On the sentence, counsel, while appreciating the implications in the Supreme Court decision of **Francis Kariuko Muruatetu & Another vs. R.** (2017) eKLR, nonetheless, urged us to consider the gruesome way in which the deceased met his death and retain the sentence imposed by the trial court.

The jurisdiction of this Court on a first appeal arising from a criminal trial is always considered a re-hearing but based on the evidence on record. By this, we mean, that as a first appellate court, we must go beyond a mere discussion of what is on record or simply repeating the findings of the trial court. We have to subject the entire evidence to a fresh scrutiny so as to arrive at our own independent conclusions on the factual issues in contention, and to determine on our own, the guilt or otherwise of the appellant. The only limitation to bear in mind, as we do this, is that we do not have the advantage of the trial court, of seeing and observing the witnesses. For this, due allowance must be made. See **Eliud Waweru Wambui vs. R.** [2019] eKLR.

We do not think we need to determine the fact of the death of the deceased. We also are persuaded that the reason for his attack was never in question. What is at the heart of this appeal is whether the learned Judge had before him material from which it could be concluded that the appellant caused the death of the deceased. This is a question of both identification and causation. Evidence of visual identification is of great importance in criminal cases. It must however be properly evaluated and tested to avoid a miscarriage of justice. This is what Lord Widgery C.J. in the time-honoured decision in **R v. Turnbull and others** (1976) 3 All ER 549, reminds us of, when he said:

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light.....?”

On the other hand, proof of causation is intended to establish that it was as a result of the suspect's acts or omission that the deceased lost his life. Section 213 of the Penal Code provides for circumstances under which the cause of death of a person will be attributable to another person.

Both identification and causation are critical in the matter before us because this was a case of what is generally referred to as mob “justice”, an attack by a multitude of people on a criminal suspect. The people who attacked the deceased were described variously by the witnesses as “a group of many people” “many people” “a mob of people” and “very many people”, all suggesting that there were many people. In the

circumstances, it is important to ascertain, by analysis of the evidence, whether the deceased's death could be attributed to the appellants' actions; whether his blow together with others led to the deceased's death.

Section 21 of the Penal Code stipulates that:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The courts have defined what constitutes a common intention in numerous situations. For example, in the Court of Appeal decision in **Dickson Mwangi Munene & Another vs. R.** NRB CA Criminal Appeal No. 314 of 2011[2014] eKLR, it was stated that;

“[56] [C]ommon intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia v R [1963] E.A.363 where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief”.

This has always been the law. See also **Njoroge vs. R.** [1983] KLR 197.

So that if several persons come together for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who were present and contributed to the death.

Before applying this to the facts in the case before us, we must answer the question of identification. The appellant, in his defence under oath confirmed the events of the night of 28th February, 2014 and the morning of 1st March, 2014 respectively. It was his testimony that from the Chairman's home he dropped off the deceased, Kevin and PW5 at the bus stage; that later on as he drove past the Stadium, he found a group of people, which included the Chairman and an AP Officer; that he proceeded to the Police Station as directed by the latter; and that, it was while at the station, that he saw the deceased too being brought in.

That was his version.

No doubt, the evidence implicating the appellant turns on the testimony of one witness, PW3, who testified that he saw the appellant beat the deceased on the back, head and buttocks with a one foot 4 by 2 piece of timber. PW3 also was able to identify one Victor, who had a long stick with which he hit the deceased two times; that he begged the two to stop beating the deceased but the appellant ignored him while Victor did and left the scene.

To start with, though adversarial, our system of criminal justice is structured in a way that ensures that an innocent person is not convicted and punished for wrongs not committed by him or her. To begin with, courts are enjoined, as we have said earlier, to consider evidence of identification with great care. The law also recognizes situations where the only evidence against a suspect is that of one witness. Again, greatest emphasis is laid on the care that must be exercised before convicting on the identifying evidence of a single witness. Just to stress that, the law is not so much concerned with the number of witnesses called but with the quality of the testimony. That is why by **section 143 of the Evidence Act** no particular number of witnesses is required to prove any fact.

Thus, the law does permit a conviction on the testimony of one witness identifying the accused as the person who committed the crime. However as is now firmly established, it is necessary to treat such evidence with greatest care and to rely on it only if satisfied that the identification is positive and free from the possibility of error. See **Charles O. Maitanyi vs. R** (1988-92) 2 KAR 75

For our part, we think PW3 gave a truthful and detailed account of the events, describing keenly what he saw the appellant and Victor, specifically do and what was happening generally at the scene. His unassailed evidence implicated the appellant with the offence of murder. The conditions for identification were suitable and the appellant was a person known to him before the incident.

That account is confirmed by the appellant's own admission that he was at the scene and even witnessed the deceased being beaten; and that it was while he was still at the scene, that an AP officer directed him to go to the police station, a soft way of stating that he was arrested at the scene.

In terms of **section 21** of the Penal Code, we have no doubt that, though many people were involved in administering instant justice on the deceased, from our own re-evaluation of the evidence, the appellant formed a common intention with those others to prosecute an unlawful purpose whose consequence was the unnecessary and unfortunate death of the deceased.

With that conclusion, we turn to consider whether in committing the act, causing the deceased's death, the appellant had malice aforethought.

From the injuries noted, bruises all over his body, injuries on the head leading to bleeding onto the scalp at the occipital region and a bilateral bleeding in both chest cavities, death or grievous bodily harm was intended, proving malice aforethought in terms of **section 206 of the Penal Code**.

On sentence, though the appellant is blaming the learned Judge for not giving him an opportunity to mitigate, our perusal of the record tells a different story.

When given a chance to mitigate, the appellant, through his advocate at the trial, simply said, **“I will not submit on mitigation and we**

intend to appeal”.

We also note that the appellant had a previous robbery criminal record where he was sentenced to 2 years’ imprisonment.

In the circumstances, we do not think that the appellant deserves to benefit from the **Muruatetu** decision.

This appeal, for those reasons, must fail. It is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021

W. OUKO, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR