IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO (P), J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 93 OF 2018

BETWEEN

DAVID WEKESA NAMACHANJA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, ***(Githinji, J.)*** *dated 9th October, 2017)*

in

H.C.CR. C. NO. 9 OF 2014)

****

JUDGMENT OF THE COURT

Background

[1] This is a first appeal from the judgment of the High Court **(Githinji J.**) delivered on 9th October, 2017 convicting the appellant, **David Wekesa Namachanja** for the charge of murder contrary to ***Section 203*** as read with ***Section 204*** *of the* ***Penal Code*** and sentencing him to death.

[2] The particulars of the offence were that on 19th March, 2014 at Makutano Village, Tuuti Location within Bungoma County, the appellant murdered **Carolyne Nekesa Nasibwondi** (the deceased).

[3] From the prosecution evidence, the appellant and the deceased were husband and wife. The appellant denied the charge and the matter proceeded to full hearing with the prosecution calling five (5) witnesses.

[4] A summary of the prosecution case is that **Nathan Wanjala Wanyonyi (Nathan) (PW1)** testified that at about 11.00 AM on 17th March, 2014 he was walking towards his home when he saw the appellant chasing the deceased. When he got closer to the couple, he recognized the two as the appellant (his brother- in -law) and the deceased (the appellant's wife). Nathan further testified that he saw the appellant beating the deceased. That he saw the appellant kick the deceased and when the deceased fell down, the appellant kicked her on the breast. It was Nathan's further testimony that he noted that the deceased had injuries on the head and that he separated the appellant and the deceased and the appellant left the scene.

[5] Nathan further testified that the deceased stood up and walked towards her mother's home. **Nathan** followed her and informed her mother, **Petronilla Nasambu (Petronilla, PW2)**, that he had beaten the deceased. Subsequently, Nathan left Petronilla and the deceased.

[6] Petronilla testified that at about 10:00 am on the material date, the deceased went to her home and informed her that the appellant had beaten her and that he had been beating her frequently. Petronilla testified that the deceased informed her that she would not survive that day's beating as the appellant had hit her on her head, ribs and legs. **Petronilla** noted that the deceased's head and legs were bleeding. The deceased asked for a place to rest and also asked **Petronilla** to pray for her. The deceased then succumbed to her injuries and **Petronilla** reported the matter to Bungoma Police Station.

[7] Martin Simuyu, (Simiyu, PW3) the deceased's uncle, testified that at about 6:00 am on 20th March, 2014, he was called by the deceased's brother who informed him that the deceased had died and that it was alleged that she had been killed by her husband, the

appellant. **Simiyu** reported the matter at Bungoma Police Station and attended the post mortem examination of the deceased's body.

[8] PC Ezekiel Abe Maduga (PC Maduga, PW4) testified that on 20th March, 2014, he was informed by the Officer Commanding Station (OCS) that a sudden death at Makutano had been reported. Accompanied by colleagues, he went to **Petronilla's** home and found **Petronilla** in the sitting room where the deceased's body was lying on a mattress. There were injuries on the deceased's forehead, breast and on both legs. The police officers questioned **Petronilla** who informed them: that the deceased had arrived on 17th March, 2014 and been at her house for 3 days; that the deceased had not obtained medical treatment; and that she had died at about 9:00 pm on 19th March 2014. The police subsequently took the deceased's body to the mortuary.

[9] It was PC Maduga's further testimony that later that day, **he** was informed that the appellant had been arrested by members of the public. He and his colleagues went back to **Petronilla's** home where they re-arrested the appellant and took him to Bungoma Police Station. **PC Maduga** recorded a witness statement and subsequently the appellant was charged.

[10] Dr. Harun Ombongi (Dr. Ombongi, PW5) based at Bungoma County Hospital produced the post mortem report following post mortem examination of the deceased's body conducted by him on 22nd March 2014. According to **Dr. Ombongi,** the time of death was 48 hours before the post mortem examination. Externally, there were bruises on the frontal forehead, right breast and on both knee joints. Internally, there was fluid collection in the lung cavity and blood collection in the forehead. **Dr. Ombongi** formed the opinion that the death of the deceased was caused by head injury secondary to blunt force trauma.

[11] After weighing the evidence, the learned Judge found that a *prima facie* case had been established against the appellant and put him on his defence.

[12] In his defence, the appellant gave sworn testimony that the deceased was his wife; that he did not kill her; that he did not beat her on 17th March, 2014; that she left their home on 15th March, 2014 to attend a funeral; that on 17th March, 2014, he saw her at her home but did not speak to her; that when he got back to their home, he sent one of his daughters, **Sheila Nanyama** to ask the deceased to return home; that at or about 9:00 pm on 19th March, 2014, the deceased's mother, **(Petronilla)** in the company of other people, went to his home; that **Petronilla** was crying and said that the appellant had let her child die and that she was still in her house; that the appellant fled when Petronilla started burning items in the house; that the appellant slept elsewhere that night and returned to his house the following morning and was arrested at about 3:00 pm on the same day.

[13] On the fact of death of the deceased, the learned Judge found that her death was not in dispute and that it was firmly settled. On the cause of her death, the learned Judge found that there was no doubt that it was the appellant who occasioned the injuries sustained by the deceased. In making this finding, the learned Judge relied on the evidence of **Nathan** who witnessed the appellant chasing and beating the deceased. The learned Judge also relied on the evidence of **Petronilla** who testified that the deceased informed her that the appellant had beaten her.

[14] The learned Judge found the evidence of **Nathan** and **Petronilla** to be honest, forthright, cogent and credible and that the two witnesses had no reason to frame the accused. Further, the learned Judge concluded that the cause of death of the deceased was directly linked to the injuries occasioned by the appellant based on the evidence of **Dr. Ombongi** who after conducting the post mortem examination concluded that the cause of death was due to head injury, secondary to blunt force trauma.

[15] Regarding the element of malice aforethought, the learned Judge found that the appellant's conduct of inflicting further injuries on the deceased while she was on the ground showed that he intended to do grievous harm to her. The learned Judge dismissed the appellant's defence finding that it was a mere denial, that it did not disclose how the deceased sustained the injuries that led to her death and that when weighed against the prosecution case, it amounted to a sham or a smoke screen defence.

[16] The learned Judge found that the offence against the appellant was established by the prosecution beyond reasonable doubt. He therefore convicted him of the offence of murder contrary to ***Section 203*** as read with ***Section 204*** *of the* ***Penal Code***. In sentencing, the learned Judge considered the mitigation made by the appellant that he was remorseful; that he was a first offender; and that he has four children who are now under his care following his wife's demise. The learned Judge passed the sentence of death which was the only sentence, believed to be prescribed by law at the time.

[17] Dissatisfied by that decision, the appellant preferred this appeal on the grounds that the learned Judge erred in law and fact by convicting him for the offence of murder when the evidence discloses the offence of manslaughter. Further, that the sentence imposed on him was manifestly harsh and excessive and was not commensurate with the facts and circumstances of the case.

Submissions

[18] This appeal was heard virtually through an online platform due to the risks associated with the novel COVID-19 pandemic, and in accordance with the Practice Directions issued by the Chief Justice on 20th March 2020 in ***Gazette Notice No. 3137***. The parties canvassed the appeal through written submissions with brief oral highlights.

[19] Mr. Miyienda, learned counsel for the appellant, relied on the appellant's written submissions and urged the Court to allow the appeal on conviction and sentence on grounds that: the evidence on record supports the offence of manslaughter not murder; that there was no evidence that the appellant had hit the deceased on the head as **Nathan** testified that the appellant had no weapon and that he did not see the appellant hitting the deceased on the head; that **Nathan** testified that he witnessed the incident on 17th March, 2014 while the charge sheet indicates 19th March, 2014 indicating that the deceased had sustained head injuries prior to 19th March, 2014; that **Nathan** was the only eye witness to the commission of the offence and his evidence was not corroborated; and that **Petronilla's** evidence that the deceased informed her that the appellant had hit her on the head, ribs and legs was not corroborated. Counsel further submitted that the sentence meted on the appellant was manifestly harsh and excessive in the circumstances of the case.

[20] In opposing the appeal, **Ms. Okok, Prosecution Counsel** for the State, urged us to uphold the conviction and sentence. It was her submission that the prosecution established that the appellant had malice aforethought in that **Nathan** testified that he witnessed the appellant chasing and beating the deceased by which time the deceased had already sustained injuries on her head. Learned prosecution counsel further submitted that the fact that the appellant beat the deceased was corroborated by **Petronilla** and that the findings on cause of death indicated on the post mortem report were similar to the injuries sustained by the deceased. Counsel contended that the prosecution proved the offence of murder beyond reasonable doubt.

[21] On the issue of sentence, counsel submitted that the sentence of death was meted on the appellant before the Supreme Court decision in the case of ***Francis Karioko Muruatetu & another v Republic [2017] eKLR Petition No. 15 & 16 Of 2015 (Muruatetu case)*** and that it was not illegal in the circumstances. To buttress this argument, counsel submitted that the evidence of **Martin** and **Petronilla** indicated that the appellant had assaulted the deceased even before the incident leading to her death. Counsel further submitted that there was no indication that the appellant was remorseful for his actions which led to the death of his wife, the deceased.

[22] In a brief rejoinder, **Mr. Miyienda** submitted that from the evidence of **Petronilla**, it was clear that the appellant was remorseful in that the appellant compensated the family of the deceased with a cow. **Mr. Miyienda** reiterated that this was also clear from the evidence of **Martin.** Counsel further urged the Court to consider that the deceased was buried at the appellant's home - a lifetime reminder of the incident. Finally, counsel urged the Court to consider ***Muruatetu case (supra)*** in determining the appropriate sentence in the circumstances of this case.

Determination

[23] We have considered the record, the submissions, the authorities cited and the applicable law. The issues arising for our determination in this appeal are: whether the prosecution proved the charge of murder beyond reasonable doubt and whether this Court should interfere with the sentence meted out to the appellant on grounds that it is manifestly harsh and excessive.

[24] In considering the issues before us, we are guided by ***Okeno v. Republic [1972] EA 32*** which summarized the duty of the 1st appellant court in the following terms:-

> ***"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.***
>
> ***(336) 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***

[25] To prove the charge of murder beyond reasonable doubt, the prosecution is required to prove the death of the deceased, that the death of the deceased was caused by the person accused and that the accused had malice aforethought in committing the murder.

[26] Having considered the evidence on record afresh, we find that the prosecution established the death of the deceased through the evidence of **Petronilla** who was with the deceased when she died and reported the death to the police, **Martin** who identified the deceased's body for the post mortem examination and **Dr. Ombongi** who conducted the post mortem examination and produced the post mortem report. We also take note that the appellant did not dispute the fact of the deceased's death.

[27] On the complaint about the discrepancies on the dates of death, we find that these were minor and of no consequence to the appellant's conviction. We are guided by ***Joseph Maina Mwangi v Republic, CA. No. 73 of 1992*** where this Court stated as follows:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

[28] Further, we find that the prosecution established that the death of the deceased was caused by the unlawful acts of the appellant. The appellant challenges this finding on grounds that there was no evidence that he hit the deceased on the head and that **Nathan** testified that when he witnessed him beating the deceased, he did not have a weapon. We, however, find no merit in this contention as there was evidence by **Petronilla** that the deceased informed her that the appellant hit her on the head, ribs and legs. In this regard, the appellant contended that this was a dying declaration and was not admissible without corroboration.

[29] **Section 33 (a)** of the **Evidence Act** provides that statements by a deceased person are admissible when relating to cause of death

> ***"when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."***

[30] Further, this Court in ***Philip Nzaka Watu v Republic*** ***[2016] eKLR,*** set out the principle of admissibility of a dying declaration as follows:-

> ***"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. …….. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."***

[31] In the instant appeal, it is clear that **Petronilla's** evidence that the deceased informed her that the appellant hit her on the head, ribs and legs was a dying declaration. In determining the cause of death, the learned Judge relied on both the dying declaration and the evidence of **Nathan** who witnessed the appellant chasing and beating her and during the incident noted that the deceased had already sustained a head injury to lead to the conclusion that the death of the deceased was caused by the appellant. We therefore find that the learned Judge relied on the deceased's dying declaration with the proper caution.

[32] The next issue in contention is whether the element of malice aforethought was established by the prosecution. **Section 206 of the Penal Code** provides:-

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or 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) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(c) An intent to commit a felony;***
>
> ***(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

[33] In ***Republic v Tumbere S/O Ochen*** ***(1945) 12 EACA 63***, the Eastern Africa Court of Appeal, set out the following factors to be considered in determining whether malice aforethought has been established;

> ***"The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."***

[34] In the instant appeal, we find, like the learned Judge did, that malice aforethought was established by the prosecution. It is clear that the appellant intended to cause the deceased grievous harm by hitting her on the head and by continuing to beat her when she was on the ground until they were separated by **Nathan**. Therefore, we are satisfied that the prosecution proved the offence of murder beyond reasonable doubt as correctly held by the trial court.

[35] The next question for our determination is whether this Court ought to interfere with the sentence meted out to the appellant on grounds that it is manifestly excessive. Before this Court can interfere with a sentence passed by the trial court, it must be satisfied that the trial court erred in the exercise of its discretion. This principle was enunciated in ***Ogolla s/o Owuor v Republic, (1954) EACA 270,*** as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

[36] Section 204 of the **Penal Code** provides that ***"Any person convicted for murder shall be sentenced to death."*** In the ***Muruatetu case (supra)***, the Supreme Court of Kenya found that this provision was unconstitutional to the extent that it prescribes for a mandatory death sentence without the consideration of mitigating factors put forth by the accused.

[37] Thus, to guarantee the accused person's right to fair trial, it is upon the Court to determine what sentence would meet the ends of justice on a case by case basis. As a guide, the Indian Supreme Court, in the case of ***Alister Anthony Pareira v State of Maharashtra, [2012] 2 S.C.C 648 para 69***, held that:

> ***"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"***

[38] The Supreme Court of Kenya did not outlaw the death sentence. It held at para 69 that;

> ***"For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

[39] In determining whether or not to impose the death sentence, it was held in ***Bachan Singh v The State of Punjab (Bachan Singh), Criminal Appeal No. 273 of 1979 AIR (1980) SC 898,*** cited in the ***Muruatetu case (supra),*** that:

> ***"It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."***

[40] This Court in ***HSJ v Republic [2020] eKLR, Criminal Appeal No. 28 of 2016*** faced with similar circumstances of murder due to domestic violence, applied the ***Muruatetu case (supra)*** to set aside the death sentence that was imposed on the appellant and substituted the same with a sentence of 30 years imprisonment.

[41] As earlier stated, in the instant appeal, the learned Judge sentenced the appellant to death as it was the only sentence prescribed by law at the time of sentencing. We take note that the sentence was passed before the ***Muruatetu case (supra)*** and the learned Judge did not take the appellant's mitigation into account.

Thus, we are inclined to interfere with the sentence. Accordingly, we take into account the mitigation advanced by the appellant that he is remorseful; that he is a first offender; and that he is a father of four children. We also consider the circumstances under which the offence was committed as well as the need to deter domestic violence and the commission of the offence of murder.

[42] In the result, the appeal against conviction is dismissed while the appeal against sentence is allowed. The sentence of death is therefore set aside and in substitution therefor, the appellant is sentenced to 30 years imprisonment with effect from 9th October, 2017 when he was sentenced.

[43] Orders accordingly.

Dated and delivered at Nairobi this 9th day of July, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

J. MOHAMMED

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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