IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 161 OF 2015

BETWEEN

AMOS OMANYALA MUNYEKENYE.....1ST APPELLANT

CHRISPINUS OUMA OMOLLO.....2ND APPELLANT

KAROLI SANDE SOKONI.....3RD APPELLANT

CHRISTOPHER EKESA MUNYEKENYE.....4TH APPELLANT

WILBERFORCE OKUMU AMOLLA.....5TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Busia, (Tuiyot, J) dated 9th June, 2015

in

HCCRC NO. 12 OF 2015)

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JUDGMENT OF THE COURT

On 20th October, 2008, at about 9pm, thugs numbering about five or more invaded the home of **Barasa Omanyala Ekine *(the deceased)***. They forced open the door to the deceased's grass-thatched house and coming upon him viciously attacked him by cutting him with pangas and thereafter set him and the house ablaze using petrol as the accelerant. The deceased's daughter, **Josephine Amonding *(PW1)*** who was with him at the time was simultaneously attacked and cut on the face. However, she had recognized the thugs as they stormed the house with the assistance of light provided by a tin lamp as well as the torch that one of the thugs had. She recognized the thugs as the appellants who were both her relatives and neighbours. Upon being cut, she managed to escape and ran outside the house and shortly thereafter as the house was burning she was able again to recognize the appellants as they left the scene. The light from the burning house was so bright that she could not have mistaken the appellants for other people. She reiterated that she belonged to the same clan as the appellants some of whom were even her paternal uncles and others were cousins and neighbours as well.

PW1's mother **Margaret Nasimiyu Barasa *(PW2)*** and sister **Consolata Amoit Barasa *(PW3)*** were in the kitchen when they heard some commotion from the deceased's house that night. Though the deceased was husband to PW2 they were estranged and lived separately but within the same compound. Both PW2 and PW3 reacted to the commotion and ran towards the house of the deceased that was now ablaze. Both PW2 and PW3 were able to see the appellants as they left the scene because of the bright flames from the burning house. When they reached the scene they found PW1 on the ground injured while the deceased was inside the burning house. They tried to rescue the deceased from of the burning house to no avail due to intense heat. They easily recognized the appellants since the 1st, 3rd and 4th appellants were nephews of the deceased whereas the 2nd and 5th appellants were neighbours. They confirmed that at the time of his death the deceased had a land dispute with the 4th appellant. PW3 was able to see how the appellants were armed.

According to her, the 1st appellant was armed with a panga, the 2nd and 3rd had clubs, whereas the 4th and 5th appellants were armed with machetes and clubs. **Francis Oicho Papa, *(PW4)*** a village and clan elder as well as a brother to the deceased on 20th October, 2008 at about 8pm received information from PW2 that his brother had been killed. He proceeded to the scene and found the body of the deceased burnt in the house beyond recognition. He was aware though of a land dispute pitting the deceased against the 1st, 3rd and 4th appellants. Indeed a week to the incident the 1st appellant had complained to him that the deceased was disturbing him with regard to land and had vowed to beat, kill and burn him but he cautioned him against such a move.

Moses Peter Opiyo, *(PW5)* the Local Chief on the material day at about 10pm was visited by the 3rd and 4th appellants who told him that their uncle, the deceased had been killed and his house burnt down by unknown persons. Because it was late, he told them to go back home. Later that night at about 11pm, the 1st appellant came to him with the same information but he told him that he was already aware. The following day at about 6.30am, PW2 came to his house and reported the incident. As they left for the scene, PW2 told him that she had recognized the 1st, 2nd and 5th appellants among those who had participated in the killing of the deceased and setting ablaze his house.

The death of the deceased was reported to Busia Police Station on 21st October, 2008. Upon receipt of that report, **IP Stephen Irungu Mwangi, *(PW6)*** and **P.C Bernard Gitau, *(PW7)*** in the company of other police officers visited the scene. At the scene, they found a grass thatched house that had been completely burnt down. They also saw the remains of a human being which had been completely charred. The remains were removed from the scene and taken to Busia District Hospital Mortuary. Before then members of the public present at the scene pointed out two suspects who were also at the scene. The two were the 2nd and 4th appellants whom they promptly arrested. The other appellants were arrested later on different dates.

While the remains of the deceased lay at the mortuary, a post mortem was conducted on it by **Dr. Njau** on 24th October, 2008. The body was completely charred and in the opinion of the doctor the cause of death was severe burns of 100% and 6th degree. **Dr. Patson Kubuta, *(PW8)*** produced the post mortem report on behalf of Dr. Njau who had at the time of giving evidence passed on. He explained that 6th degree burns are burns to the bone.

Upon conclusion of the investigations by PW6 and PW7, an information dated 7th November, 2008 charging the appellants with murder contrary to section 203 as read with 204 of the Penal Code was laid and or filed in the High Court at Busia. The particulars in the information were that on 20th October, 2008 at Lupida Sub-location, Bukhayo West Location in Busia District within Western Province, jointly with others not before court the appellants murdered Barasa Omanyala Ekine. The appellants denied the information and were put on trial.

It is upon receipt of the evidence as set out hereinabove that the trial court placed all the appellants on their defence. The appellants chose not to offer any defence. In other words, they opted to keep quiet.

In convicting the appellants of the offence, the trial court reasoned thus:-

> *"The result of my analysis is that all the five (5) Accused Persons attacked the Deceased and PW1 on the night of 20th October, 2008. The five injured the Deceased and PW1 and thereafter set the Deceased's house on fire. The Deceased was caught up in the fire and died under its flames. His body was burnt completely burnt (sic) and charred. There was evidence by PW2, PW3, PW4 and PW5 that the attack may have been motivated by an ongoing land dispute between the parents of A1 and the Deceased. Even if this Court was not able to find that there was indeed such a dispute and that it provided the motive for the Accused Persons to attack and kill the Deceased, the Court nevertheless finds that the 5 Accused Persons had malice aforethought because of the brutal manner in which they attacked and killed the Deceased. When they set the house on fire with an old and injured man in it, their only intention could have been that he should burn to death. I hold and find that the Prosecution established Malice aforethought in terms of Section 206 of the Penal Code."*

Upon convicting the appellants as aforesaid, the trial court sentenced each one of them to death.

The appellants were aggrieved by the conviction and sentence and therefore proffered this appeal on the grounds that the trial court erred in law and fact when:- it relied on uncorroborated and contradictory evidence to convict them; the ingredients of the offence were not proved; there was no proper evaluation of the evidence on record by the trial court; identification parade of the appellants was not carried out; the appellants' submissions were not properly considered and finally, the mandatory nature of the sentence imposed was unconstitutional.

These grounds of appeal were argued through written submissions with limited oral highlights. **Mr. Mbeka**, learned counsel for the appellants submitted on three broad grounds to wit; evidence, standard of proof and sentence.

On evidence, it was submitted that from the evidence of PW1, it was clear that she was the only one who saw the appellants commit the act. However, her evidence was not cogent or lucid. There were glaring inconsistencies. Further, from her testimony it was not clear whether she knew the appellants before the incident. It was further submitted that PW1 may not have been conscious when the house was set on fire. Relying on the case of **Wamunga v Republic [1989] KLR 424**, counsel submitted that visual identification in criminal cases if not approached with caution and circumspection can cause a miscarriage of justice and should be carefully examined by the court before being used as a basis to convict an accused. Counsel submitted further that the trial court did not exhaustively scrutinize the evidence tendered by the PW1 with regard to identification of the appellants. Considering the glaring inconsistencies and that the source of light and its intensity having not been interrogated, the possibility of mistaken recognition could not be ruled out completely.

Regarding the testimony of PW4, counsel submitted that though he testified to there being a land dispute between the 1st appellant and the deceased and that the 1st appellant had told him a week earlier that he would kill and burn the deceased, no report to that effect was made to the police.

Turning to the testimony of PW5, counsel submitted that the effort the appellants took in reporting the incident to the administration including PW5 demonstrated their innocence. On the evidence by PW6 and 7, counsel submitted that the duo entirely relied on the allegations made to them by PW1, 2, 3, 4 and 5 to charge the appellants. Their allegation regarding a land dispute between the appellants and the deceased was based solely on hearsay gathered from prosecution witnesses. It was further submitted that the evidence adduced was insufficient to form the *mens rea*. For this proposition, counsel relied on the case of **Joseph Kimani Njau v Republic [2014] eKLR**.

On standard of proof, counsel maintained that the prosecution relied on unreported and unproved allegations that the appellants had a land dispute with the deceased and that, that constituted sufficient motive for the killing of the appellants. Counsel maintained that the prosecution case was built on suspicion and contended that even though suspicion may be strong, however, the same cannot form the basis for inferring guilt on the part of the appellants which must be proved by evidence. For this submission, counsel relied on the case of **Mary Wanjiku Gichira v Republic – Criminal Appeal No. 17 of 1998 (Ur).**

On sentence, counsel submitted, relying on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** that the death sentence was no longer a mandatory sentence for the offence of murder and that the appellants did not deserve the death penalty. He therefore urged us to remit the file back to the trial court for re-sentencing based on the Constitution and the above Supreme Court decision. On the whole, however he urged us to allow the appeal in its entirety.

Opposing the appeal, **Mr. Muia** submitted that this being a first appeal, it is the duty of the court to re-evaluate the evidence before the trial court afresh and reach its own independent conclusion. Counsel submitted that the appellants were identified at the scene of crime by way of recognition. The appellants were relatives and neighbours of the deceased and some of the witnesses who testified knew them very well. Though there were inconsistencies in the evidence of some of the prosecution witnesses, the inconsistencies were not material and did not affect the prosecution case substantially or materially. With regard to malice aforethought, counsel submitted that the same was proved through the evidence of PW8; who concluded that the cause of death was *"severe burns of 100% and 6th degree"*. On sentence, counsel submitted that the appellants were sentenced to death. However, in view of the decision of the Supreme Court in **Francis Karioko Muruatetu** (supra), it was now a notorious fact that the mandatory nature of the death sentence was declared unconstitutional though it could still be imposed in deserving cases. In this case because of the manner in which the offence was committed, the death penalty was well deserved. He therefore urged us to dismiss the appeal in its entirety.

This is a first appeal. The role of this Court as a first appellate court has been set out in a string of decisions of this Court. Suffice to mention the case of **Njoroge v Republic [1987] eKLR** in which it was stated that the role of such court is to re-evaluate the evidence laid before the trial court, assess it and reach its own conclusions whilst bearing in mind that it had neither seen nor heard the witnesses as they testified and hence make due allowance for that fact.

The issues for determination in this appeal are whether; first, the appellants committed the offence charged and; second, whether the sentence imposed was deserved. The conviction of the appellants turned on the evidence of identification by recognition by PW1, PW2 and PW3 of the appellants at the scene of crime. It has been said time without number that the process of visual identification in difficult circumstances in criminal cases if not weighed and considered carefully can cause a miscarriage of justice and should be carefully examined by the court before being used as a basis to convict an accused person. As was stated by this Court in the case of **Wamunga v Republic [1989] KLR 424**:-

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can be safely make it the basis of conviction…"**

In the case of **Kiarie v Republic [1984] KLR 739**, this Court once more held with regard to identification and or recognition thus:-

> **"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction…"**

From the record, it is quite apparent that the trial court bore all the foregoing in arriving at the decision to convict the appellants based on their identification by recognition. It exhaustively scrutinized the evidence tendered by PW1, PW2 and PW3 with regard to the identification of the appellants, the circumstances under which they alleged to have seen the appellants commit the crime, the source of light and its intensity. It was then that it concluded that those circumstances were ideal for positive identification of the appellants by recognition. From their evidence it was clear that the primary source of light used to identify the appellants was a tin lamp, the light from the torch held by one of the appellants and finally the light from the burning house.

The prosecution case was that PW1 was in the same house with the deceased when the appellants stormed it, cut her as well as the deceased and thereafter set ablaze the deceased as well as the house. The evidence which was corroborated by PW2 and PW3 in material aspects was that the appellants were either relatives or neighbours and were well known to these three witnesses. According to PW1, when the appellants stormed the house, it was lit by a tin lamp. Though the entry was sudden, the 4th appellant thereafter put off the light from the tin lamp but not before PW1 had seen and recognized the appellants. The suddenness coupled with the putting off the lamp soon after their entry would no doubt have made it difficult for the witness to see the appellants, however, given that the appellants were relatives and did not at all disguise themselves, it would not have been difficult for this witness to see and recognize the appellants within a very short time of their entry.

It was also her evidence that she saw the appellants by a torch carried by the 4th appellant which he flashed around in the house. Once again though it is not possible to tell from the record for how long the 4th appellant kept flashing the torch but again based on the fact that the appellants were relatives and neighbours and not having disguised themselves at all, it would not have been impossible for this witness to recognize them.

However, the most damning evidence with regard to positive recognition of the appellants was when PW1, PW2 and PW3 saw them as they left the scene of crime. It is in evidence that PW1 managed to escape from the burning house. From where she stood outside the burning house she was able to see all the appellants clearly because of the bright light coming from the burning house. Similarly when PW2 and PW3 arrived on the scene they described the intensity of the light from the burning house as very bright. They saw clearly each of the appellants as they took off from the scene. Given the foregoing we would agree with the assessment of the trial court that the fire emanating from the burning house was intense and the flames there from provided a bright light that could easily have enabled both PW1, PW2 and PW3 to see the appellants clearly so as to recognize them.

PW2 and PW3 were consistent in their evidence that on hearing the commotion from the house of the deceased, they immediately ran to that house and were able to recognize the appellants as they left the scene courtesy of the bright flames from the burning house. Indeed PW2 and PW3 even went ahead to provide details regarding which appellant was armed with what weapon. According to PW2, 1st appellant had a machete, 2nd and 3rd appellants were armed with axes whereas the 4th and 5th appellants were not armed at all. On his part, PW3 saw the 1st appellant armed with a machete, 2nd, 3rd and 5th appellants with axes and 4th appellant had a club. The fact that these witnesses were able to see the weapons that each appellant wielded lends credence to the fact that there was bright light at the scene of crime which enabled them to recognize the appellants.

Further, PW2 soon after the incident, indeed in the morning of the following day gave the names of the appellants to PW5 as the perpetrators of the crime. Besides she also gave the same names to the investigating officer, PW6. There can therefore be no doubt at all that these witnesses; PW1, PW2 and PW3 had opportunity to see and recognize the appellants at the scene of crime. Thus we are in agreement with the trial court when it postulates that:-

> *"… she, PW2 and PW3 were able to see the accused persons using the bright light from the flame, leaving the compound of the deceased very soon after the deceased and PW1 had been attacked. True, the accounts of witnesses had some disparities but as a whole, the disparities, in my view, were not material. The recognition by PW2 and PW3 bolsters the account of PW1 that it was the accused person who attacked her and the deceased on that fateful nig*ht. *All the accused person were well known to the three witnesses…"*

As held in **Anjononi v Republic (1976-1980) KLR 1566**, the recognition of assailants is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. This was one such case. We are thus in agreement with the trial court that considering the prevailing conditions, there was positive identification of the appellants at the scene of crime by recognition. This being a case of recognition, it was not necessary to conduct a police identification parade. It would have been superfluous to undertake such an exercise, contrary to the submissions of the appellants.

Of course, we are not oblivious to the fact that there were some contradictions and inconsistencies in the prosecution case. The inconsistencies revolved around what PW1 was doing when the appellants stormed the house, whether she knew the appellants, whether she was conscious when the house was set ablaze, the lighting conditions at the scene and when PW4 and 5 received the report of the death of the deceased. In the case of **Joseph Maina Mwangi v Republic – Criminal Appeal No. 73 of 1993**, this Court held that:-

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

We hasten to add that each case must turn on its own particular facts. There are cases where the inconsistencies are so minor that clearly they will be of little effect and certainly does not necessarily mean that the witnesses were lying or that their testimonies cannot be relied on. This was the case here. Having subjected the evidence to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, we are unable to find that the same were material enough to warrant our interference with the decision.

Section 107(1) of the Evidence Act provides inter alia:-

> **(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

The standard of proof placed on the prosecution is to prove the guilt of an accused person beyond reasonable doubt. See **Republic v Gachanja [2000] KLR 428.** It is a cardinal principle of law that the burden to prove guilt of an accused person lies with the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is to be weighed on a balance of probabilities. In this case the prosecution proved with cogent evidence the fact and cause of death of the deceased, that, the said death was caused by the direct consequence of unlawful act of the appellants and as they were seen cut the deceased and thereafter set him and his grass thatched house ablaze whilst the deceased was trapped inside. There is no doubt at all that the killing of the deceased was with malice aforethought. By cutting the deceased and setting him ablaze and using petrol as the accelerant, the appellants' intention was clear, to cause the death of the deceased. Indeed the cause of death was established by PW8 to be severe burns of 100% and 6th degree. On the whole, we are satisfied just like the trial court that the prosecution discharged its burden of proof contrary to the submissions by the appellants.

On sentence, the trial court observed:-

> *"… The only sentence I can impose is the mandatory death sentence. This now is the sentence in court. I sentence each of the five(s) accused persons to death as prescribed by the law…"*

The Supreme Court in the case of **Francis Karioko Muruatetu** (supra) has since held that the mandatory nature of the death sentence as

provided in section 204 of the Penal Code was unconstitutional. The court observed:-

> **"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless, to impose a set sentence imposed fails to conform to the tenets of fair trial that accrue to accused person under Article 25 of the Constitution an absolute right…"**

We are cognizant of the fact that the decision of the Supreme Court was made after the trial court had imposed the sentence on the appellants. The decision is binding on this Court and since the appeal before us is both on conviction and sentence, the decision is obviously applicable.

The appellants have prayed that we remit the file back to the trial court for re-sentencing based on the Constitution and the Supreme Court decision aforesaid in the event that we dismissed the appeal on conviction. As is already apparent, the conviction of the appellants cannot be impugned.

Considering the manner in which the murder was committed, and all the surrounding circumstances, it seems clear that the offence was calculated. It was cruel and heinous and done with the intention to not only them, but kill and obliterate the deceased. They also badly injured PW1. They exhibited extreme impunity.

In the circumstances, we opine that the death sentence was patently deserved in this case and would therefore not interfere therewith. We therefore dismiss the appeal on sentence as well.

This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.