



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: GITHINJI, M'INOTI & SICHALE, JJA]

CRIMINAL APPEAL NO. 99 OF 2016

BETWEEN

CALEB OTIENO NYONGESA Alias ATITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Homa Bay (D.Majanja, J) dated 16th February, 2016

IN

HOMA BAY HCCRC NO. 29 OF 2013

JUDGMENT OF THE COURT

This is an appeal against the judgment of **Majanja, J** delivered on **16th February, 2016**. A brief background to this appeal is that the appellant herein, **Caleb Otieno Nyongesa** alias **Atiti** was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on **9th September, 2009**, at Homa Bay Township of then Nyanza Province, jointly with others not before the court, he murdered **Job Omondi**.

The trial was conducted by **Majanja, J** who in a judgment rendered on **14th February, 2015** found the appellant guilty as charged. The appellant was sentenced to death as the law then prescribed.

The appellant was dissatisfied with the conviction and sentence. In a Memorandum of Appeal dated **5th July, 2019**, the appellant listed 3 grounds of appeal. The learned trial judge was faulted for convicting the appellant in the absence of sufficient evidence; for relying on evidence that was marred with immense inconsistencies and finally, for imposing sentence that was under the circumstances excessive, harsh, unconstitutional and unlawful.

On **1st August, 2019**, the appeal came before us for plenary hearing. **Miss Olonyi**, learned counsel for the appellant highlighted the appellant's submissions dated **5th July, 2019**. It was counsel's submissions that the only eye witness was P.W.1 who told the court that she saw **Moses** beat the appellant with a panga, that it is P.W.1 who mentioned **Atiti** as according to her, the appellant is called **Atiti**; that there was no evidence that the appellant, whose identity card reads **Caleb Otieno Sabiano** is the **Atiti** referred to by P.W.1.

Counsel further contended that the appellant remained at his place of work until when he was arrested on **11th September, 2009**; that his conduct was inconsistent with the appellant's guilt. In the alternative, counsel urged us to consider re-sentencing the appellant in view of the jurisprudence emanating from the Supreme Court in the decision of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**. She was of the view that a sentence of ten (10) years would suffice.

In opposing the appeal, **Mr. Sirtuy**, the learned Principal Prosecution Counsel (PPC) submitted that the appellant was positively identified and that as the appellant was known to P.W.1, this was a case of recognition. He did not think much turned on the fact that the appellant's identity card did not bear the name "**Atiti**". On the issue of sentence, counsel left it to the Court to determine the appropriateness of the sentence meted by the trial court.

This is a first appeal before us. The position of the law as regards a 1st appeal is that we are enjoined to re-evaluate the evidence and arrive at

our own independent conclusion. In so doing however, we must pay homage to the findings of the trial court because, unlike it, we did not have the benefit of seeing and hearing the witnesses, unless of course it can be shown that the findings of the judge are not supported by the evidence or that the findings were perverse. See **OKENO VS. REPUBLIC [1972] EA 32** wherein this Court stated as regards our mandate as a 1st appellate Court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions 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 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”

We have considered the record, the appellant’s written submissions and oral highlights before us, the respondent’s opposition to the appeal and the law.

In our view, the facts of this case are fairly straight forward. P.W.1 was married to **Moses**, although at the material time they were living separately. **Moses** was suspicious that the deceased was having an affair with his wife. **Moses** together with **Beryl**, the woman he was living with then, came to P.W.1’s house. **Moses** took a panga from P.W.1’s house and locked the house from outside. It would appear that the deceased was in this house and having locked the door from outside, Moses called for help on the pretext that he had found a thief in his house. P.W. 1 saw **Moses** ‘slap’ the deceased with the blade of the panga. She also heard **Moses** call for help and **Atiti** arrived from a nearby bar. **Atiti** inflicted severe injuries on the deceased that caused his death as confirmed by **Dr. Ochieng** (P.W.2). The trial court considered the appellant’s contention that he is **Caleb Otieno Sabiano** and not **Atiti** and concluded, rightly so in our view:

“What is important is that the accused is the person whom P.W.1 saw and who was positively identified by her as the person who committed the act that led to the death of the deceased. The attack on the deceased was at night but both P.W.1 and P.W.4 testified that there was sufficient light emanating from the security lights and the incident took place behind the bar where P.W.1 lived. P.W. 4, who went to the premises early that morning, testified that the place was well lit as the bar had security lights at the rear part of the bar and also light emanating from the nearby bar and workshop. Moreover, P.W.1 was at the scene of the incident for a sufficiently long time to witness the event which was next to her house. The circumstances of the attack and the fact that the accused was a person known to P.W.1, negatives any notion of mistaken identity”.

We have no doubt that P.W.1 identified the appellant by recognition and that it is the injuries inflicted by the appellant (and **Moses** who is at large) that caused the death of the deceased.

As regards the sufficiency of evidence, it is correct to state that the conviction of the appellant was based on the evidence of a single identifying witness, **Joyce Achieng Onyango** (P.W.1), a married woman who at the time was estranged from her husband, **Moses Atieno Agutu (Moses)**, a suspect who is still at large. On 9th September, 2009, P.W.1 was asleep in her house when her estranged husband stormed in, took a panga and locked the house from the outside. P.W. 1 made her daughter go through the window to open the door from outside for her and the other occupants of the house. She witnessed **Moses** “slap” the deceased with the flat side of the panga. She also saw the appellant whom she knew as **Atiti** cut the deceased with the panga. P.W. 1 testified that she had known the deceased for about 2 years as he often bought things from her at the market. She also knew the appellant as he worked in a bar called Texas which was in the vicinity of her abode.

The post mortem report produced by **Dr. Francis Ochieng** (P.W.2) revealed that the deceased had cuts on his left forehead, below the right eye and a deep cut wound on the right upper limb. The doctor formed the opinion that the cause of death was “**cardiorespiratory failure due to heamorrhggic shock due to deep cut wound involving radial and ulna artery**”.

In his defence, the appellant gave a sworn statement. He denied having caused the death of the deceased.

In his judgment, the judge stated:

“I have carefully scrutinized the testimony of P.W.1 and warned myself of the danger of relying solely on her testimony, I do not find any reason why she would implicate the accused in the murder of the deceased. There is no evidence of a grudge and she would have nothing to gain from implicating him. She has separated from her husband Musa and did not in any way shield him from involvement in the murder by implicating the accused. In her testimony, she implicated the three persons as having acted in concert. I find her testimony credible.

On the basis of the evidence I have outlined, I find that it is the accused who struck the blow that killed the deceased. The blow that struck the deceased as it did with great force demonstrates malice aforethought. The blow could only have been intended to cause the death of or do grievous harm to the deceased. There is no evidence that the accused was provoked or acted in self-defense. I therefore find that the prosecution proved malice aforethought within the meaning of Section 206 (a) of the Penal Code.

I therefore find the accused CALEB OTIENO NYONGESA also known as CALEB OTIENO SABIANO alias Atiti guilty of the murder of JOB OMONDI and I convict him accordingly”

On our part, we find that the trial court carefully analyzed the evidence of P.W.1 and the judge warned himself of the dangers of convicting on the evidence of a single identifying witness. We find no merit in the appellant’s appeal against conviction.

However, on sentence and as rightly pointed out by the appellant's counsel, a sentence of death is not the only sentence available for the offence of murder. The Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** removed the bar to the discretionary power of the court in sentencing. Given the above change in the law and in resentencing the appellant, we take note that the appellant was a 1st offender. We have also taken into consideration that the appellant came to join in a fight that was not his. Taking the totality of the circumstances into consideration, we set aside the sentence of death and substitute thereof with a sentence of twenty (20) years imprisonment with effect from **16th February, 2016**, the date when the appellant was convicted and sentenced.

It is so ordered.

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

E.M GITHINJI

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR