IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 18 OF 2016

BETWEEN

IBRAHIM MARAMBA MUKABANA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega, (George Dulu, J) dated 23rd February, 2015

in

HCCRC NO. 27 OF 2009)

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JUDGMENT OF THE COURT

On 27th July, 2009 the High Court of Kenya, at Kakamega was informed by the respondent that the appellant, **Ibrahim Maramba Mukabana** had murdered Gabriel Onyango Makomero, **(the deceased)** contrary to Section 203 as read with Section 204 of the Penal Code. The court was further informed that the incident occurred on 12th April, 2009 at Bumangale village, North Butsotso location, Central Kakamega district within Western province. At the conclusion of investigations, the appellant was arrested and charged with the offence. He denied the information and his trial begun in earnest. In a bid to prove its case against the appellant, the prosecution called a total of eight (8) witnesses whose evidence in brief was as follows:

PW1, **Frida Onyango** a wife of the deceased, on 12th April, 2009 at about 10:00pm was asleep in the house when she heard screams and a voice that was similar to the deceased's. She immediately woke up her son Moses and daughter PW6 **Eglayi Sofia Atiba.** They rushed in the direction of the screams which was near a river. It was then that she saw the appellant sitting on the chest of the deceased in a trench. She was able to identify the appellant from the flash of lightening as it was raining. She held him by the shirt and asked him why he had killed her husband but the appellant pushed her away and ran off.

PW6 a daughter to both the deceased and PW1 had visited her parents on 26th March, 2009. She had known the appellant as a neighbour since 2008. On the material night at about 10:30pm PW1 knocked on her door while screaming. She reiterated the testimony of PW1 above save that when the appellant was asked where the deceased was he answered the deceased had walked into the sugarcane plantation. However, when PW1 pulled the appellant from the trench she discovered the deceased's body in the trench.

PW2, **Francis Abundo** a neighbourt of the deceased learnt of his death the following morning from the other neighbours and the appellant was a suspect. When he saw the appellant passing near his homestead at about 3:00pm he alerted the assistant chief and the police on phone and also mobilized members of the public who chased and arrested him.

PW3, **Raphael Kwetu** on the night of 12th April, 2009 at about 10:30pm heard PW1 scream that the deceased had been killed. He rushed out and went to the edge of the river and saw the body. He insisted that there was moonlight though visibility was poor. It was PW1 who informed him that she had found the appellant sitting on the chest of the deceased.

PW4, **Fanuel Mwangi** rescued the appellant from the members of the public who were baying for his blood and handed him over to the police.

According to PW5, **Meshack Onyango,** a relative of the deceased PW1 was asleep in his house when he was awoken by screams on the night of 12th April, 2009 at about 10:30pm. He ran outside and though it was raining, PW1 informed him that the appellant had killed the deceased. He went to the scene and saw the body.

PW7, **Dr. Muchana** produced the post mortem report prepared by Dr. Oreke. According to the report, the deceased had a bruise at the back left side of the skull. Internally there was fluid in the airway. The report concluded that the cause of death was lack of oxygen due to immersion in water.

PW8, **PC David Sugut** produced a written statement by the investigating officer, **CPL John Langat** who had by then died. The investigating officer had received a report of the incident and after investigations found the appellant culpable and opted charge the appellant with the offence.

Put on his defence, the appellant elected to remain silent.

The trial court (Dulu, J.) upon evaluation of evidence found the appellant guilty of the offence. In so doing, the court held that the fact of death of the deceased was proved as people who went to the scene saw the deceased's body and post mortem conducted on the body confirmed the death as well. That the cause of death was medically determined as asphyxia due to drowning. On whether the appellant caused the death, the evidence of PW1 and PW6 was considered in the context of other relevant evidence. PW1 saw the appellant sitting on the chest of the deceased through a flash of lightning. PW6 saw the appellant squatting in a trench where the deceased's body was found. The court noted that this was a case of visual identification under difficult circumstances as it was dark at night and raining heavily. It therefore warned itself and rightly so, in our view, of the dangers of relying on such evidence of identification to found a conviction. Having so warned itself and taking into account all the surrounding circumstances it determined that identification was positive and free from possibility of a mistake. Accordingly, it convicted the appellant of the offence and sentenced him to death.

Dissatisfied with the conviction and sentence, the appellant lodged the present appeal on seven (7) grounds to wit; that the trial court erred in law and in fact; by failing to appreciate that the cause of death was not attributable to the appellant; in finding malice aforethought proved when no such evidence was available on record; going beyond and outside the evidence on record and making conclusions not based on evidence and using the same to convict the appellant; in failing to appreciate and resolve in favour of the appellant the glaring contradictions; the circumstantial evidence set out by the prosecution was capable of several other hypothesis; the judgment was against the weight of the evidence; and the sentence imposed was manifestly harsh and excessive taking into account the mitigation on record and the circumstances of the offence.

At the plenary hearing of the appeal, **Mr. Bagada,** learned counsel holding brief for **Ms. Onsongo,** appeared for the appellant while **Ms. Gathu,** senior prosecution counsel appeared for the respondent. Parties relied on their written submissions and opted not to make any oral highlights.

The appellant elected to argue the seven grounds in three broad thematic areas; the cause of death, whether the prosecution case was proved beyond reasonable doubt and the sentence imposed. It was submitted that PW1 never saw the appellant kill the deceased and there was no eye witness to the crime. Counsel submitted that there were several inconsistencies and contradictions in the prosecution case making it too unreliable to sustain conviction. It was further submitted that the witnesses who blamed the appellant for committing the crime were the deceased's relatives but never saw him drown the deceased. They also haboured a grudge against the appellant over a land boundary dispute. Counsel faulted the investigating officer for failing to conduct a rigorous investigation and relying on contradictory hearsay evidence. That the allegation that the appellant had fled the vicinity after committing the offence was not true as he was arrested while going about his business the following day. The evidence on identification of the appellant according to counsel was not sufficient to sustain a conviction hence the trial court lowered the standard of proof to the prejudice of the appellant. As regards sentence, the appellant submitted that the circumstances of the offence were such that he should have been convicted of manslaughter and that the trial court did not appreciate that it had discretion on sentencing. He therefore urged us to allow the appeal, quash the conviction and set aside the death sentence. However, in the event we were to uphold the conviction, he urged us to substitute the sentence of death with an alternative but appropriate sentence.

Opposing the appeal, the respondent reminded us of the duty of this Court as a first appellate court and relied on the cases of **Njoroge v Republic [1987] eKLR** and **Kamau v Mungai [2006] 1 KLR 150.** It was submitted that malice aforethought had been established under subsections (a), (b) and (c) of Section 206 of the Penal Code in that medical evidence showed that the deceased died as a result of drowning in water. The appellant was also found sitting on the chest of the deceased. Holding somebody under water and making sure that he suffocates was proof of malice aforethought. It was submitted further that the identity of the appellant was not in doubt because PW1 and PW6 knew him as a neighbor. PW1 saw him sitting on the chest of the deceased in a trench near the river. PW1 also pulled the appellant off the chest of the deceased as she talked. PW6 witnessed all these. On consistencies regarding the prosecution case it was submitted that both PW1 and PW6 were consistent in their testimony that they saw the appellant sitting on the chest of the deceased in a trench, PW3 and PW5 came out of their houses when PW1 screamed and saw the body and were immediately informed by PW1 that the appellant was responsible for the death of the deceased. That the prosecution case was proved beyond reasonable doubts in terms of the standard of proof envisaged under Section 107 of the Evidence Act. That cross examination of the prosecution witnesses did not dent the prosecution case. On circumstantial evidence and relying on the case of **Peter Mwangi Waithaka v Republic, Criminal Appeal No. 153 of 2016,** Counsel maintained that the inference of the appellant's guilt was beyond question as there were no co-existing circumstances that would have weakened or destroyed the inference. She therefore urged us to dismiss the appeal in its entirety.

As this is a first appeal, it is our duty as set out in rule 29(1) of the Court of Appeal Rules to re-appraise the evidence tendered before the trial court and draw our own inferences of fact on the guilt or otherwise of the appellants See also **N**joroge **v.** Republic (supra)**.**

We have perused the record of appeal, submissions by counsel and the law. The issues for determination are whether the prosecution case was proved beyond reasonable doubt and whether we should interfere with the death sentence imposed on the appellant.

On whether the prosecution proved its case beyond reasonable doubt, the prosecution called a total of eight witnesses. The trial court chose to

believe all these witnesses. For one to sustain a conviction on the charge of murder, it is necessary to prove the death of the deceased, that it was caused by the appellant and that he had the required malice aforethought when committing the crime. These essential ingredients must be proved beyond any reasonable doubt. They were restated 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."*** **Emphasis ours.**

We entertain no doubts at all that the prosecution was equal to the task and that the trial court did not err in convicting the appellant. There is no doubt that the deceased died. PW1, PW3, PW5 and PW6 all went to the scene on the fateful night and saw the body of the deceased. Post mortem was subsequently conducted by PW7 on the body of the deceased which confirmed the fact. In any event the appellant did not contest the fact of the death of the deceased. His contestation was that he was not responsible.

So did the appellant unlawfully cause the death of the deceased? The trial court relied on the evidence of PW1, PW6 and all other relevant evidence including medical evidence and the fact that the appellant disappeared for a while before being arrested in convicting the appellant. PW1 testified to having seen the appellant sitting on the chest of the deceased in the trench. She pulled him off and asked him why he had killed the deceased. Her evidence was corroborated by that of PW6 who had seen the appellant squatting over the deceased's body in the trench. Medical evidence showed that the deceased died as a result of drowning. When she screamed and neighbors responded she immediately informed PW3 and PW5 that the appellant was responsible for the death of the deceased the appellant was a neighbour to the deceased and well known to the witnesses. Because of close proximity at the scene of the accident and PW1 having even spoken to him before pulling him off the deceased's body and the appellant having not disguised himself at all to make his recognition difficult, we doubt that these witnesses would not have recognized him even under those difficult circumstances.

The trial court observed and rightly so in our view that the identity of the appellant was visual identification under difficult circumstances. However, as already stated and is worth repeating, PW1 and PW6 claimed to have seen the appellant at the scene of crime. The appellant was well known to the two witnesses as their neighbour and it was even claimed they had a land boundary dispute. At some point the appellant spoke to the two witnesses when he said the deceased had walked into the sugarcane plantation. Why did the appellant find it necessary to lie that the deceased had walked into the sugar plantation when he was actually sitting on him? There is no dispute that the evidence on the source of light was unsatisfactory. According to PW1 and PW6 there was no moonlight but there were flashes of lightning as it rained. PW3 and PW5 insisted that there was moonlight though visibility was poor. Be that as it may, PW1 was able to get closer to the appellant and talked to him. She clearly recognized him. She even mentioned the appellant by name to all the other witnesses who came to the scene. In **Lesarau v R [1988] KLR 783**, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. The witnesses were consistent in cross examination on the sequence of events on the material night including the identity of the appellant and at no time did PW1 not mention the appellant by name as the person who had killed the deceased. It cannot be said that the witnesses formulated a story so consistent as to implicate the appellant. They had no reason to lie to court. In the case of **Cleophas Otieno Wamunga v Republic [1989] eKLR**, this Court while dealing with the complexities of an identification of an assailant stated:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification of 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 safely make it the basis of a conviction".*** Emphasis ours.

Further, In **R v Turnbull [1976] 3 All ER 551,** Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state:

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

Similarly, the difference in approach between identification and recognition was expressed thus by the court in **Anjononi & 2 Others v Republic [1980]eKLR**;

> ***"This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

The trial court duly warned itself of the dangers of mistaken recognition. We have no doubt just like the trial court that in the circumstances of this case, the appellant was properly recognized not by one but two witnesses who placed him at the scene of the crime. The chances of both witnesses having been mistaken in their recognition of the appellant are remote..

The appellant has also raised the issue of inconsistencies in the evidence of prosecution witnesses. The alleged inconsistencies were not pointed out save that PW1's testimony before court was at variance with the earlier recorded statement with the police. The trial court found these inconsistencies to be minor and we find no reason to interfere with that finding. We take the view that the implied inconsistencies were not so material as to prejudice the appellant. In any event, in every trial there are bound to be some contradictions and/or inconsistencies and it is the duty of the trial and appellate courts to determine whether the said inconsistencies are minor, major or fundamental as to go to the root of the prosecution case. In the case of Joseph **Maina Mwangi v Republic CA No. 73 of 1992** 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 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."

It is common ground that none of the prosecution witnesses saw the appellant drown the deceased. When they got to the scene, the deceased was already dead. So besides the recognition of the appellant at the scene, the prosecution case was also built on circumstantial evidence. From the totality of the circumstantial evidence, the chain of events links firmly and completely with the guilt of the appellant. When PW1 and PW6 went to the scene, they found him with the body of the deceased. PW1 then pulled him away and he ran into the sugarcane plantation. Prior to this he had lied to PW1 and 6 that the deceased had walked into the sugarcane plantation. He did not return until the following day at about 3:00pm when he was arrested. We have no doubt in our minds that these circumstances formed a complete chain that pointed directly and irresistibly to the appellant as the person who committed the offence and leaving no room for the possibility of the offence having been committed by any other person. In **Erick Odhiambo Okumu v Republic [2015] eKLR**, this Court addressing the issue of circumstantial evidence stated as follows:

"Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra):

'Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:

'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else'. "

We are satisfied just like the trial court therefore that the circumstantial evidence led by the prosecution met the above threshold.

The prosecution was bound further to prove beyond reasonable doubt that the appellant caused the death of the deceased with malice aforethought defined under Section 206 of the Penal Code thus:

(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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony."

This Court's Predecessor in the case ***Republic v Tubere s/o Ochen [1945] 12 EACA 63*** acknowledged that in determining whether malice aforethought has been proved the following elements should be considered:

"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." See also: George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic [1991] KLR 622.

From the post mortem examination it was evident that the deceased died as a result of being drowned. The appellant was found sitting on his chest in the trench which is consistent with the medical report that the deceased's airwaves were blocked. In the course of drowning the deceased, the appellant ought to have known that his actions would cause him death or grievous harm. The evidence adduced was sufficient to establish malice aforethought. We are therefore satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt.

As regards the death sentence imposed by the trial court, the Supreme Court in the case of **Francis Karioko Muruatetu case** (supra) held that:

"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty…It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"

We restate that the Supreme Court did not outlaw the death sentence. Death sentence is therefore still a legal sentence capable of being imposed in appropriate and deserving cases. However taking into account the mitigation on record in this appeal that the appellant was remorseful, was a first offender, aged 32 years then, had been in custody since April, 2009 we find that this is a case that warrants us to temper justice with mercy in exercise of our discretion. The death sentence therefore imposed was not warranted. In the circumstances, a sentence of imprisonment would serve the interest of justice.

Consequently, we find no reason to interfere with the trial court's conviction of the appellant. The appeal against conviction therefore fails and is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereof the appellant will serve 30 years imprisonment with effect from the date when he was sentenced.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, J.A. passed on before he could sign 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.