IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 31 OF 2016

BETWEEN

WILLIAM WEKHULO TORONI.....1ST APPELLANT

GLADYS AMANYA WEKHULO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Kakamega, (R. N. Sitati, J) dated 23rd June, 2015

in

HCCRC NO. 39 OF 2009 as consolidated with HCCRC NO. 43 OF 2009)

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JUDGMENT OF THE COURT

This is an incident which occurred in a traditional village setup where the appellants and the family of **Mary Nanzala Toroni *"the deceased"***, lived in the same homestead. They were brothers, wives and children with their houses close by and one could see what was happening in the other house. In fact their houses were hardly 10 meters apart. In a judgment dated 23rd June, 2015 **R. N. Sitati, J** found the appellants, who were the 1st and 3rd accused in the trial court respectively, guilty of murder and sentenced them to death. The 2nd accused, **Florence Wekhulo Toroni, *"Florence"*** a daughter to the two appellants **was** a minor at the time of the offence. She was equally found guilty of the offence but placed on probation for 3 years. The appellants were dissatisfied with the conviction and sentence, hence the present appeal.

The appellants jointly with Florence were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 1st September, 2009 at Maola village, Khaunga sub-location, East Wanga division within Western province they jointly murdered the deceased. They denied the charges and soon thereafter their trial commenced in earnest. The prosecution called a total of seven (7) witnesses in a bid to prove its case. In a nutshell the prosecution case through these witnesses was that PW1 **Dr. Florence Malowa Wanangwe** conducted the post mortem examination on

the body of the deceased on 9th September, 2009. The body was identified to her by PW3, **Patrick Toroni** and PW6, **Felistus Wabomba.** She concluded upon examination that the cause of death was severe head injury secondary to assault.

PW2, **Lydia Mukhandia,** the area assistant chief on 15th August, 2008 presided over a case pitting the 1st appellant against his brother (PW3) and husband to the deceased, in which the 1st appellant had threatened to cut him with a panga. The 1st appellant admitted to the accusation and promised not to repeat the threats. However, they had a subsequent altercation forcing PW2 to refer the matter to the area Chief. The 1st appellant refused to abide by the chief's censure. On 2nd September, 2009 she was called by the chief who informed her that the deceased, had been cut and killed by the 1st appellant. She rushed to the scene and found that the body had been taken to the mortuary but there were blood stains at the door. She moreover learned from PW5, **Albert Juma Mateba** and PW4, **Anna Mukabana** that there had been a quarrel between the deceased and the 2nd appellant earlier in the day.

According to PW3, the husband to the deceased, it was about 6:30pm on 1st September, 2008 while on his way home when he met his children at Khaunga market who informed him that the deceased had been cut by the 1st appellant. He rushed home and found the deceased lying in a pool of blood. She had a deep cut on the head and some fingers had been chopped off. He reported the incident to the chief who in turn called the police.

PW4, a minor then aged 14 years and the only eye witness to the incident recalled that on 1st September, 2009 at about 6.00pm she was at home preparing supper with the deceased. The 2nd appellant confronted the deceased claiming that her chicken had strayed into her farm and were destroying her beans. Shortly thereafter a fight broke out between the two. Florence joined the fray and assaulted the deceased with a stick. As this was happening, the 1st appellant came with a panga and cut the deceased on the head. When the deceased screamed, neighbours came and the trio left.

PW5 was on his way home when he heard screams from the 1st appellant's home. He also heard a woman wail "*William has killed someone"*. He ran towards the home where he found the 1st appellant leaving the deceased's home while holding a panga. He went to PW3's home where he saw the deceased with a cut on her head, and two fingers had been chopped off. He reported the incident to the village elders who informed the Assistant Chief who in turn called police officers from Mumias Police Station. They came and took away the body of the deceased.

PW7, **PC Joseph Ngumbi,** the investigating officer, on 1st September, 2009 at about 8:00pm received information that someone had been killed in the village. He went to the scene with the OCS. They found the body of the deceased at the door of her house. The body had head injuries, and some fingers on the right hand were cut off. He interviewed people at the scene and established that the fight was caused allegedly by the deceased's chicken straying into the 2nd appellant's farm and destroying her beans. The 2nd appellant was annoyed and assaulted the deceased. During the assault Florence joined in and assaulted the deceased as well with a rungu. It did not take long before the 1st appellant came out of his house with a panga and cut the deceased on the head. During the investigations he was able to recover the panga under the bed in the 1st appellant's house. The body of the deceased was taken to St. Mary's Hospital Mortuary. He thereafter caused the arrest of the appellants and Florence all of whom he later charged with the offence of murder.

Put to his defence, the 1st appellant in a sworn statement stated that the deceased was his sister in-law and maintained that on the material day at 6:00pm he was at work on the evening shift at Mumias Sugar Company Factory. He was arrested the following day at about 11:00am on his way home from duty and that is when he learnt of the deceased's death. It was his further testimony that the murder weapon (panga) produced in court was not his, and as a matter of fact belonged to PW3. He claimed that his family did not have any dispute with PW3's family and he personally did not have any grudge against PW3.

Florence in a sworn statement claimed that, she was a form 2 student at the time of the incident. She denied being at home on the material day. Instead she was at her grandmother's home for a memorial service and returned on 2nd September, 2009 and was arrested the following day. She thus denied being involved in the commission of the crime.

The 2nd appellant testified on oath that the deceased was her brother in-law's wife. She denied having murdered her. On 1st September, 2009 at 6:00pm she had gone to the posho mill. When she returned she found the deceased's children crying while claiming that the 1st appellant had cut their mother. The 1st appellant was seated under a tree. She asked the 1st appellant what was going on to which he said nothing. Later in the evening her house was burnt down and she ran to the police station. She denied quarrelling with the deceased over the destruction of her beans by the deceased's chicken.

The learned Judge while convicting the appellants held that the only eye witness was PW4 who was a minor at the time but whose evidence was consistent and was corroborated in large measure by the testimony of the 2nd appellant. The court noted the alibi defences raised by the appellants and held that the defences did not displace the testimony of PW4. That PW4's evidence was corroborated in material particulars by PW1 and PW5. The court did not find any reason why PW4 would have lied against the appellants. The learned Judge further warned herself on the dangers of relying on the evidence of a single identifying witness and held that besides PW4, PW5 had also seen the 1st appellant walk out of the deceased's compound armed with a panga which he had used to cut the deceased. The panga was thereafter recovered by PW7 under the bed in the 1st appellant's house. The court concluded that the appellants together with Elizabeth formed a common intention to either kill or cause grievous harm to the deceased. It was the court's view that assaulting the deceased repeatedly and cutting her several times on the head with a panga was dangerous enough to have informed the appellants that the consequence of such actions was likely to be fatal. *Mens rea* was thereby imputed from those actions. Consequently, the appellants and Florence were all found guilty of murder and convicted accordingly and sentenced to death as already stated.

Aggrieved by the conviction and sentence, the appellants lodged this appeal. Apparently, Florence was comfortable with the sentence and opted not to file an appeal. Seven grounds of appeal have been raised to wit; that the learned Judge erred in law and in fact; by relying on the uncorroborated and contradictory evidence of the prosecution witnesses to convict the appellants; convicted the appellants of murder when all the ingredients of the offence were not proved; by failing to evaluate the evidence on record; convicted the appellants when no formal identification parade was ever carried out; failed to appreciate and consider the content and import of submissions filed by the appellants; convicted the appellants yet the prosecution failed to prove its case beyond reasonable doubt; and failing to find that the mandatory nature of the death sentence set out in Section 204 of the Penal Code, was unconstitutional.

At the plenary hearing of the appeal, the appellant was represented by **Mr. Mbeka,** learned counsel while **Mr. Sirtuy,** Principal Prosecution Counsel appeared for the state.

Relying on his written submissions which he opted not to highlight, Mr. Mbeka reminded us of our duty as a first appellate court to reappraise the evidence and draw inferences of fact. He cited **Okeno v Republic [1972] EA 32** and **Kiilu & Another v Republic [2005] 1 KLR 174** in support of the submission. He went on to fault the trial court for failing to scrutinize the evidence of PW4 and claimed that the *voire dire* conducted in respect of PW4 was not thorough in terms of Section 125 of the Evidence Act and Section 19 (1) of the Oaths and Statutory Declarations Act. That the evidence of PW2, PW3, PW4 and PW5 was inconsistent as it varied with earlier recorded statements with the police. He faulted the prosecution for failing to produce any proceedings or letters from the local administration to show that the deceased and the appellants had a dispute. He contended that in the absence of specific *mens rea* then a charge of murder could not hold. He relied on the case of **Joseph Kimani Njau v Republic [2014] eKLR** for this proposition.

As regards 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 commission of the offence. That the prosecution evidence was based on suspicion and though suspicion may be strong, it cannot provide a basis to infer guilt. Counsel called in aid the cases of **Mary Wanjiku Gichira v Republic, Criminal Appeal Number 17 of 1998 (ur)** and **Joan Chebichi Sawe v Republic, Criminal Appeal Number 2 of 2002** in support of this submission. With regard to sentencing, counsel relied on the now famous case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** to support his submission that the mandatory death sentence imposed on the appellant was unconstitutional and urged that we remit the case back to the trial court for re-sentencing in view of the fact that sentence was passed prior to the Supreme Court decision aforesaid.

The appeal was opposed. Mr. Sirtuy invited us to look at the facts of the case this being a first appeal. He pointed out that the evidence of PW4 was critical and clear as to what ranspired on that day being that the 2nd appellant started a fight with the deceased because the deceased's chicken were destroying her beans. That the appellants and Florence jointly prosecuted the intention to kill the deceased as they hit and slashed her jointly. Counsel argued that the offence was committed in broad daylight and that the appellants had a grudge against the deceased for which a report had been made to the administration regarding the same. That the defence evidence did not displace the prosecution case and the evidence adduced was sufficient to secure a conviction. Counsel urged us to exercise our discretion on matters sentence.

This is a first appeal. It is our mandate as set out in rule 29(1) of this Court's Rules to re-appraise the evidence and draw our own inferences of fact on the guilt or otherwise of the appellants. See also the cases of **Okeno case** and **Kiilu** (supra).

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

On whether the prosecution proved its case beyond reasonable doubt, the prosecution called a total of seven witnesses in support of its case. The trial court chose to believe all these witnesses. The trial court which had the occasion to observe the witnesses when they testified formed an impression that they were truthful and credible witnesses. We have no reason to doubt or even interfere with the learned Judges assessment as to the credibility of the witnesses.

For one to sustain a conviction on the information of murder, however, it is vital to prove that the death of the deceased occurred, the death was caused by the accused and that he had the required malice aforethought. The three essential ingredients must be proved beyond any reasonable doubt. These essential ingredients of murder were restated in the case of In***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."***

We are satisfied that the prosecution met the challenge in the trial court. It is common ground that the deceased died. Post mortem was conducted by PW1 which confirmed this fact. Even the appellants and Florence acknowledged that fact. So that the fact of death was and is not in dispute.

The trial court relied on the evidence of PW4, the key eye witness in convicting the appellants. She testified to having seen the 2nd appellant come to their house and assault the deceased. When she was overpowered by the deceased, Florence came with a stick and hit the deceased repeatedly. Worse still the 1st appellant came with a panga and cut the deceased on the head severally and even chopped off two of her fingers. Her evidence was corroborated by PW5 who saw the 1st appellant walk out of the deceased's homestead whilst armed with a panga. This was about 6:00pm. The appellants, PW3 and PW4 were all related. We have no doubt in our minds that PW4 was able to recognize them on that basis. Similarly PW5 could not have failed to recognize 1st appellant since they are neighbours. The incident happened in broad daylight making it easy for the said witnesses to recognize the appellants. There was no need for an

identification parade or formal identification as alleged by the appellants since this was a case of recognition and not visual identification of a stranger in difficult circumstances. In the case of **Anjononi & 2 Others v Republic [1980] eKLR** this Court stated that:

> *"**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 appellants have questioned the *voire dire* examination conducted by the trial court with regard to PW4. They claim that it was not thorough enough. However, they did not point out to us, what was not thoroughly done. Section 19(1) of the Oaths and Statutory Declarations Act provides as follows with regard to receiving evidence of a child:

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

We have scrutinized the record and we are satisfied that the trial court properly conducted *voire dire* examination.

The appellants have also raised the issue of inconsistency in witness testimonies. The said inconsistencies were not pointed out to us save that their testimony before court was at variance with their earlier recorded statements with the police. It is our view that the implied contradictions if at all were not so material as to prejudice the appellants. It is axiomatic that in every trial there are bound to be some contradictions since witnesses perceive things differently. It is therefore, the duty of the trial and 1st appellate courts to determine whether the said inconsistencies were fundamental and material and therefore prejudicial to the appellants. 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."***

The trial court did not find the discrepancies to be prejudicial or material to the appellants' case and we agree. As regards suspicion and circumstantial evidence, with due respect to counsel, we have not appreciated their relevance to this appeal. The prosecution case was not based on circumstantial evidence or on mere suspicion. It was based on direct evidence. We think that in raising these complaints the appellants are merely embarking on a fishing expedition and we decline to accompany him.

The prosecution is bound further to prove beyond reasonable doubt that the death of the deceased was caused by malice aforethought as defined underSection 206of 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 has 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 report it was evident that the deceased died as a result of the injuries that the appellants inflicted upon her. The 1st appellant cut the deceased on the head seven times and chopped off two of her fingers with a panga. The panga was recovered from the appellants' house hidden under the bed. The deceased also sustained injuries on her back as a result of being assaulted repeatedly by the 2nd appellant and Florence. In so doing the appellants ought to have known that the injuries they were inflicting on her would either cause death or grievous harm. Furthermore, the fact that the 1st appellant was armed with a panga and the 2nd appellant went to attack the deceased in her home is a clear indication that they had the common intent to injure the deceased. The evidence adduced was thus sufficient to establish malice aforethought.

There is no requirement that one must have motive in order to commit the offence of murder and the prosecution is not required to prove the same. However, evidence of motive is admissible in instances where it is relevant to the facts in issue. In the instant appeal, it was proved by PW2 that the 1st appellant and PW3 had an ongoing dispute. She had tried to resolve it but when she failed she referred them to the chief. The chief also failed to resolve the dispute and when the appellants killed the deceased, it was evident even before the trial court that the anger was aggravated by the long standing dispute between the two families. Contrary to the submissions by the appellants that there was no credible evidence led by the prosecution with regard to the existence of a grudge or dispute between the appellant and the deceased's family, we are satisfied that the evidence of PW2 completely dismantles this submission. On the whole we are satisfied like the trial court, that the cut wounds combined with the beatings inflicted on the deceased resulted in her death and that in our view constitutes malice aforethought. Thus all the ingredients for the offence of murder were met in this and the prosecution case was therefore proved beyond any reasonable doubt.

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

> ***"…, 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 …"***

The Supreme Court did not outlaw the death sentence. It can still be imposed in appropriate, suitable and deserving cases. However, taking into account the circumstances of this case especially the fact that the appellants were related to the deceased and the fact that they had been in custody for the past ten years, we find that this is a proper case for tempering justice with mercy. 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 finding on conviction. The appeal against conviction is accordingly dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereof the appellants are sentenced to 30 years imprisonment each with effect from 31st July, 2015 when they were 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.