



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KOOME & SICHALE, JJA]

CRIMINAL APPEAL NO. 90 OF 2017

BETWEEN

BYRON ROBERT OTIENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit, J) dated 4th June, 2015

IN

HC. CRA NO. 12 OF 2014

JUDGMENT OF THE COURT

This is an appeal against the judgment of Lesiit, J, dated **4th June, 2015**. A brief background will give context to this appeal.

Byron Robert Otieno, (the appellant herein) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars on the Information were that on **9th May, 2013** at Kariobangi North, Kasarani District within Nairobi County, he murdered **Dennis Njenga Wambui** (the deceased).

The appellant denied the charge and in a trial conducted by **Lesit, J**, the prosecution called a total of six (6) witnesses. In his defence, the appellant made a sworn statement of defence and had no witness to call. Consequently, in a judgment delivered on **4th June, 2015**, **Lesiit, J**, found the appellant guilty of the offence charged and sentenced him to death as by law provided.

Dissatisfied with the conviction and sentence of the trial court, the appellant filed an appeal to this Court. In a Memorandum of Appeal dated **2nd February, 2018**, the appellant listed ten (10) grounds contending that the learned judge erred in law and fact by relying on the evidence of a single witness without cautioning herself of the dangers of doing so; erred in dismissing the appellant's sworn statement of defence; that the evidence on identification was weak; that the circumstances surrounding the death were not considered; that the trial was conducted in a language not fully understood by the appellant; that no consideration was given to the appellant's initial complaint that he had been assaulted by the police; that the mental examination report of the appellant was not authentic; that the conviction was against the weight of the evidence adduced; that the trial within a trial was irregular and finally, that the totality of the evidence disclosed an offence of manslaughter as opposed to murder.

The appeal came up before us for plenary hearing on **15th October, 2019**. **Mr. Maosa** and **Mr. Ouko**, learned counsel appeared for the appellant while **Mr. Gitonga**, learned Senior Public Prosecution Counsel appeared for the respondent.

In urging the appeal, **Mr. Maosa** urged us to find that the age of the appellant at the time of taking plea was not ascertained; that the appellant was not conversant with the language of the trial; that the alleged appellant's confession was irregularly made in court; that the learned trial judge did not caution herself on the dangers of relying on the evidence of a single witness and finally, that the dying declaration was inadmissible.

In opposing the appeal, **Mr. Gitonga**, learned Senior Public Prosecution Counsel (SPPC) urged us to find that the trial court warned itself of

the dangers of relying on the evidence of a single witness; that there was sufficient evidence; that the appellant's confession was inferred from his own defence and hence there was no need for caution and finally, that the age of the appellant was a non- issue. As for the language, counsel pointed out that the appellant was represented by counsel. Finally, counsel posited that the sentence meted out was lawful, although not necessarily mandatory.

We have considered the record, the rival oral and written submissions and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case has been recognized in many decisions that have come forth from this Court. For instance that duty was stated in the case of **Stephen M'Irungi v. Republic [1982-88]1KAR, 360** to be:

“ Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

On **9th May, 2013** at about 6.00 p.m., **Silas Otieno**, (P.W.2), was with the deceased (**Dennis Njenga** alias **DILA**) when P.W.2 asked the deceased to accompany him to Soko Mahali to repair his phone. As they did not find the repairer, they turned back using a different route. When the duo reached an open field, the appellant came towards them, stopped them and asked for a bag from the deceased. The appellant then removed a knife from the right side of his waist and stabbed the deceased on the left side of the chest. On seeing the appellant stab the deceased, P.W.2 ran back towards the car wash while the deceased ran towards Majengo where his (the deceased's) mother (P.W. 3) lives. The appellant walked back to where he had come from. P.W.2 learnt later that **Dennis** (the deceased) had died. P.W.2 had not known the appellant before but he heard the deceased call his name and that is how he learnt that the appellant was called **“Byron”**.

Mary Wambui Wangari, (P.W.3) is the mother to the deceased. On **9th May, 2013** at about 5.00 p.m., she was with her son, the deceased. They spoke for a while after which the deceased told her he was going to the car wash and would return later. That half an hour later, the deceased came back with his mouth full of blood and the deceased asked her to take him to hospital before he could die.

The deceased informed her that **“Byi”** had stabbed him. She had known **Byron** for two (2) months before the incident as her son and **Byron** were friends; that **Byron** used to visit the deceased at P.W.3's home. P.W.3 rushed into the house to take an umbrella so that she could take the deceased to hospital and on turning back, she saw her son had fallen down at the entrance. He was bleeding. P.W.3 screamed and her neighbours came. They together carried the deceased to a nearby nursing home called Marura where they were informed the deceased had died. She reported the matter to **P.C. Eric Kosimbei** (P.W.6) at Kariobangi Police Station. P.W.6 advised P.W. 3 to take the body of the deceased to the mortuary.

On **18th January, 2014**, she identified the appellant at Kariobangi police station.

On cross-examination, P.W.3 confirmed she had known the appellant for only two (2) months and did not notice any bad blood between the appellant and the deceased as the two were friends. She insisted, it was the deceased who informed her that Byron had stabbed her; that the deceased said **“Bai”/“Byi”** stabbed him and she knew the deceased meant **Bryron** (the appellant herein) as he was the only one known by that name **“Bai/Byi”**

On **21st May, 2013**, P.W.3 identified her son's body during a post mortem conducted by **Peter Muriuki Ndegwa** (P.W.5). On examination of the body, externally, P.W.5 observed a penetrating stab wound on the left pericondum, just below the left clavical. Internally, the left lung was perforated and there was left sided haemothorax. P.W. 5 formed the opinion that the cause of death of the deceased was exstrangulation or haemorrhage due to chest injury due to a penetrating stab wound. He filled and signed a post mortem report which he produced in evidence. On cross-examination, P.W.5 confirmed that the cause of death was haemorrhage due to penetrating stab wound; that the weapon was a long sharp pointed weapon that is why it penetrated unto the lung.

P.C. No. 83072, **Brian Samuel Mitaki**, P.W.4, a police officer attached to Kamukunji Police Station was on patrol duties together with **PC Karuoya** and **PC Abdikadir** along Racourse Road. Acting on a tip-off, P.W. 4 arrested the appellant who was working as a tout of a PSV vehicle. P.W. 4 and **P.C Karuoya** took the appellant to Kamkunji Police Station. The appellant was later transferred to Kariobangi Police Station where the murder report had been made.

P.C. No. 88009 – **P.C. Erick Kosimbei**, (P.W.6) investigated the matter and charged the appellant for the offence of murder. When recalled for further re-examination, PW. 6 confirmed that the appellant was examined by a doctor and the report confirmed that the appellant was mentally fit to stand trial. He produced the P.3 with respect to the appellant's mental assessment in evidence.

During his defence, **Byron Robert Owino**, (D.W.1) in his sworn statement told the trial court that before his arrest, he was working as a conductor for vehicles plying Nairobi-Eastlands route. He confirmed having known the deceased who was his friend for one (1) year. As regards the charge against him, he stated that on **6th May, 2013**, the deceased in company of one **Charles**, a friend to the deceased came to demand Kshs one thousand (1,000.00) which he had borrowed from the deceased on **3rd May, 2013**. The appellant was to refund the money on **6th May, 2013** but he was not able so he explained to the deceased who got angry and went away. That on **9th May, 2013**, as he came from doing his training exercises, the deceased with another man called **Silas** went to the appellant and demanded for the money; that the appellant offered his shoes as security as he waited to get the money but the deceased refused and removed a knife from his waist and aimed at the appellant with it; that the appellant jumped and held the hand which had the knife but the deceased stabbed him on the hand (appellant showed a healed scar of 1½ inch long to the court). According to the appellant, the two of them struggled over the control of the

knife for a while and he was able to overwhelm the deceased; that he then pressed the hand holding the knife and directed the knife to the deceased as the deceased's friend watched from a distance.

The appellant stated further that after pressing the hand with the knife, he directed it to the deceased's chest and stabbed him, after which he heard the deceased screaming while running away. He learnt on the following morning while at his work place that the deceased had died while being taken to hospital.

He did not expect the deceased to die. D.W.1 further stated that he was arrested on **17th January, 2014** while at work. He was later transferred to Kariobangi and later to Huruma Police Station where he was charged for the offence of murder.

In our view, the evidence adduced against the appellant was plain and straight forward. P.W.2 was an eye witness. He saw the appellant stab the deceased and he gave a detailed narration of what transpired both before and after the stabbing. Then there was the evidence of P.W.3, the deceased's mother.

The deceased ran to his mother and told her he had been stabbed by "Byi". P.W.3 understood "Byi" to refer to the appellant, a friend to the deceased who often visited him at her (P.W.3's) home.

In his defence, the appellant does not deny the altercation. He however seemed to say he was acting in self-defence. The evidence of P.W.2 and the dying declaration of the deceased was that the appellant stabbed the deceased. The deceased had accompanied P.W.2 to a phone repairer whilst not armed. The knife belonged to the appellant. He removed it from his person and stabbed the deceased. We find that the evidence against the appellant was direct and overwhelming. It did not require further corroboration. The evidence was not contradictory and neither was it full of inconsistencies.

The appellant was found to be of sound mind. His age was not an issue.

The upshot of the above is that we find no merit in this appeal. It is dismissed.

Dated and Delivered at Nairobi this 7th Day of February, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M. KOOME

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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