



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), KARANJA & SICHALE, JJA]

CRIMINAL APPEAL NO. 115 OF 2018

BETWEEN

ERASTUS NGURA ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya

at Nairobi (S.N. Mutuku, J) dated 26th July, 2018

IN

HC.CRC NO. 115 OF 2014)

JUDGMENT OF THE COURT

This is yet another sad incident where a young woman and a mother of a young child aged 1 year lost her life. The appellant (**Erastus Ngura Odhiambo** alias

Baba B) was blamed for her death and charged with the offence of murder contrary to section 203 and read with section 204 of the Penal Code, the particulars on the information being that, on the night of **11th/12th December, 2014**, within Nairobi County, the appellant murdered **Linda Wanjiku Irungu**.

The appellant denied the charge and in a trial conducted by **Mutuku, J**, the prosecution called a total of 13 witnesses while the appellant made a sworn statement of defence and called one witness. Upon conclusion of the trial, the appellant was found guilty of the murder and sentenced to serve twenty (20) years imprisonment.

The evidence on record is that on **11/12th December, 2014**, **Diana Irungu Lodenyi** (P.W.1), a sister to the deceased was living at the deceased's house in Buruburu Estate together with two (2) house girls and the deceased's child. P.W.1 knew the appellant as a husband to the deceased and father to the deceased's child, although the duo were not officially married. P.W.1 narrated to the trial court that on **11th December, 2014**, in the morning, the deceased went to work and came home late after P.W. 1 had slept. It was P.W.1's testimony that she was awoken by noise as the deceased entered the house while talking loudly and arguing with someone on phone; that the deceased informed her that she was talking to **Erastus** (the appellant) adding that "***huyo mtu ni psycho atakuja kuniua***" (*this person is a 'psycho' he will one day kill me*) As P.W.1 had experienced the appellant's previous violence against the deceased, she urged her to leave the house and go to their mother's house, who also lived in Buruburu Phase 2. The deceased heeded P.W.1's advice and as she drove her car outside the compound, the appellant emerged, ran after her and jumped in front of the car, went to the driver's side, opened the door and violently pulled the deceased from the car; that the deceased fell on the ground; that the appellant grabbed the deceased's hair and dragged her by the braids back into the compound; that the appellant continued pulling and dragging the deceased towards the house as P.W.1 tried to intervene to help free the deceased from the appellant's grip; that the appellant then drew his gun and cocked it. P.W.1 ran for dear life and heard a gunshot and also heard the deceased ask, "***umenishoot***"? (*you have shot me*). When P.W.1 looked back to check, she saw the deceased losing balance as she fell down saying "***umenishoot***" (*you have shot me*); that P.W.1 saw the deceased lose consciousness while the appellant continued kicking the deceased on the sides; that as the deceased lay on the ground, the appellant continued kicking her severally, pulling her by the braids while stepping on her stomach; that P.W.1 pleaded with the appellant to stop and take the deceased to hospital; that after a while, P.W.1 managed to call their parents to come and rescue the deceased from the appellant; that their father **Jamleck Irungu**

Karanja (P.W.6) together with her two brothers came and they carried the deceased into the vehicle and took her to Jaaa Mission Hospital where the deceased was pronounced dead.

Peter Amimo Kuya (P.W.12), a resident of Buruburu estate heard a gunshot on **12th December, 2014** at around 4.00 a.m. In the morning (of **12th December, 2014**), while he was going out, he recovered a spent cartridge which was later handed over to the police.

Dr. Charles K. Muturi, P.W.2 performed a postmortem on the body of the deceased on **12th December, 2014** at 2.00 p.m. in the presence of **Dr. Okinyi** who was asked by the appellant's family to witness the postmortem on their behalf. On examination of the body, they observed a bloodstained sleeveless striped and coloured dress, black bra, black panties and a charred dress with a tear at the back which appeared as though it had been burned. On further examination, they noted a bruise on the right upper arm, bruises on the left elbow joint towards the back, abrasions on the right arm and right mid abdomen and frothy blood oozing from the mouth. They also observed that the hair appeared to have been plucked from the anterior hair line (front). There was an entry gunshot wound on the upper right side of the back corresponding on the tear from the dress described earlier which measured 1 cm in diameter. Internally, within the respiratory system, the deceased had rib fractures towards the back on the right side involving the 4th and 5th ribs.

There was haemothorax within chest cavity. The lung appeared collapsed and the right mid-lobe was perforated showing extensive bruising, thus bleeding into the deep tissues due to blunt or sharp trauma. In the muscular-skeletal system, they noted that the right upper humerus had a fracture and they found a bullet fragment lodged within the bone measuring 1x1 cm. They were able to trace the track of the bullet – how it traversed the body and found no exit wound and concluded, ***“It entered at the right upper back perforating through mid-lobe of the lung and tearing through the soft tissues of the right upper arm to lodge in the humerus”***. As a result of the examination, **Dr. Charles K. Muturi (P.W.2)** formed the opinion that the death of the deceased was caused by a single close range gunshot wound to the chest. The autopsy report which was produced in evidence was countersigned by **Dr. Okinyi** who witnessed the postmortem.

Peter Kamau Mwangi, (P.W.3) was a watchman at Buruburu Phase 5 extension. He knew the appellant and the deceased as husband and wife. On **11th December, 2014**, he was on duty at the same place and at around 3.00 a.m. (on **12th December, 2014**), the appellant came into the compound in his Mercedes car and he opened the gate for him twice as he got in and out without entering his house and the second time, he got out of the compound and remained outside the compound in his car. It was P.W.3's further testimony that on that night, he saw the appellant enter through the pedestrian gate and went in front of the deceased's car, stopped it, went to the driver's door, opened it and pulled the deceased out; that there was a quarrel and he saw the appellant beating the deceased; that he asked them to go and resolve their problems in their house; that he saw the house girl and the deceased's sister come to separate the deceased from the appellant; that he heard a gunshot and on checking, he saw the deceased falling down; that he heard screams with someone say ***“umemuua”*** (*you have killed her*); that he was afraid and went to his house; that later, he saw people come and take the deceased to hospital. He also saw the appellant enter into his car which was parked outside the compound and he left. P.W.3 identified the appellant as the person he saw that night.

On **18th December, 2014**, the appellant was taken to **Dr. John Ngugi Gatere (P.W.4)**, a Consultant Psychiatrist with the Ministry of Health by No. 84259 P.C. **Moses Ouma Otieno (P.W.13)**, the investigating officer who also produced as exhibit a gun No. B207904 owned by the appellant. P.W.4 examined the appellant and found him to be calm as he answered all questions intelligently. He formed the opinion that the appellant was of normal mental status and fit to stand trial. He prepared a medical report dated and signed on **18th December, 2014** which he produced in evidence.

On **12th December, 2014**, **Edda Victoria Lulu, P.W.5**, a cousin to the deceased identified the body of the deceased at Jaaa Mission Hospital Mortuary. According to P.W.5, the deceased's hand was black, the hair and braids had been plucked from the front head, the face was swollen, there were black marks on the stomach and she saw a bullet hole at the back when the deceased's body was turned.

S.S.P, No. **230723, Sammy Nyongesa (P.W. 7)**, a Firearm Licensing Officer attached to Central Firearms Bureau investigated civilian firearm certificate No. 8910 which he found not to be genuine as the certificate book showed erasures before insertion of the number 8910. As for pistol make ceska serial No. B207904, P.W. 7 could not trace the file in regard to the names of the person named (**Erastus Ngura Odhiambo**) and the serial number given; that the records revealed that the firearm certificate number 8910 was legally issued to **Jefferson Kamuyu on 19th December, 2012**; that the Ceska pistol S.N. B207904 marked as MF15 was not registered anywhere in the bureau; that the serial number was in the purported certificate of **Erastus Ngura Odhiambo** (the appellant); and finally, that from the records, the firearm was not known or registered in the bureau, hence it was not recognized within the bureau.

On **12th December, 2014**, No. 78498 P.C. **Joseph Kipsang, P.W.8**, a scenes of crime officer attached to CID Buruburu police station accompanied by **P.C Mokaya** proceeded to Kenyatta University mortuary where he took photographs of the body of a female adult which had an injury on the right upper part of the back. P.W.8 compiled the photos and prepared a certificate dated **9th October, 2015**. These were rendered in evidence.

P.C Simon Mokaya, formerly Number 37885 (now retired), (P.W.9) was on duty at the station on **12th December, 2015**. He found a Mercedes Benz motor vehicle registration number KAY 352H at the gate to the station; that the driver of the vehicle (the appellant herein) told him that as he was looking for his wife (the deceased), he discovered she had died and thus he had come to report the death; that P.W. 9 arrested the appellant, placed him in the cells and proceeded to Jaaa Mission Hospital where he found the body of the deceased in an ambulance. The body was subsequently taken to Kenyatta University Mortuary. P.W.9 then organized for a postmortem to be done on the deceased's body and a bullet was removed from the deceased's body. He took the bullet, the clothes and blood samples from the body of the deceased which he handed to **CPL Ouma, (P.W.14)**, the investigating officer.

No. 231165, **Alex Mudindi Mwandawire, (P.W.10)**, based at DCI headquarters is a firearms examiner. On **15th December, 2014**, he received a pistol S/N B207904, a magazine, twelve (12) rounds of ammunition, an expended cartridge and a fired bullet for examination. He examined the Ceska pistol and found it to be in good general and mechanical condition and capable of being fired. He found that the first and second exhibits were firearm and ammunition respectively as per the Firearms Act.

On **12th December, 2014**, No. 77632 CPL **George Wambua Mweu**, P.W.11, was at Buruburu police station when he received the appellant and recovered a firearm, a mini Ceska S/N 207904 with 12 rounds of ammunition from the appellant's car registration number KAY 352H; that P.W.11 took the pistol and the car keys and handed them over to **CPL Ouma**, P.W.14. P.W. 11 identified the appellant as the person from whom he took the pistol and the car keys. He also identified the pistol and the twelve rounds of ammunition in court. P.W. 11 knew the appellant as a businessman in Buruburu.

In his defence, the appellant stated on oath that the deceased was his second wife and they had a child together; that he had known the deceased for three (3) years and that they had a loving relationship; that on **12th December, 2014** at 3.00 am, he went to his home at Buruburu but his wife (the deceased) was not home yet; that he could not reach the deceased on her mobile phone; that he checked for the deceased at the club but could not find her; that he went home the second time at 4.00 a.m. and as he entered the gate, he found the deceased's car reversing; that the deceased was very drunk; that the deceased alighted from her car and they started quarrelling; that the deceased reached for the gun that was in his (the appellant's) pocket; that the gun was cocked and as they struggled, the deceased touched the trigger which went off; that the shot was fired to the air; that they continued struggling; that the deceased fell down; that the appellant tried to assist the deceased but she was very heavy. He denied shooting the deceased. The appellant further stated that P.W.1 called her father (P.W.6) and her brothers who came after about 15-20 minutes and took the deceased to hospital. He went to report the incident to the police whereupon arrival, he was arrested on allegations of having murdered the deceased. In cross-examination, the appellant stated that he was a licensed firearm holder; that he is the one who handed over the gun to the investigating officer from his car and that he identified the gun that was produced in court as the gun that he had for which he held a certificate issued by the firearm bureau since the year 2012.

Dr. Emily Adhiambo Rogena, D.W.2, a Pathologist and professor in human pathology reviewed the post mortem report and photographs of the deceased. D.W.2 stated that she read through the report alongside the photographs and co-related the two (2) in terms of the injuries, external findings, internal findings, locations of injuries on the body and the nature of injuries as seen on the photographs and prepared her report which she signed and produced as D.Exhibit 1. She made conclusions that the post mortem report had a major error as it was indicated thereon that the fatal injury was on the right and not on the left as indicated on the pictures.

In a trial conducted by **S. Mutuku, J**, the appellant was found guilty of the offence and sentenced to serve twenty (20) years imprisonment.

In her judgment, the judge stated:

“In conclusion, it is my finding that the prosecution has presented credible, consistent and well corroborated evidence against the accused. I have with great care considered all the evidence from the prosecution and the defence. I have considered all the submissions and the authorities cited by the defence. I have applied those authorities in my determination of this case. I have given the defence careful consideration and I find that it does not create reasonable doubt in my mind. The defence of the accused does not dislodge the prosecution case. I find all the ingredients of murder proved beyond reasonable doubt. Consequently, I find the accused guilty of the offence of murder as charged and convict him accordingly.”

Aggrieved with the conviction and sentence of the trial court, the appellant appealed to this court. In a Memorandum of appeal dated **24th September, 2018**, the trial judge was faulted for convicting the appellant without sufficient evidence to support the offence of murder; for basing his conviction on evidence that was inconsistent, contradictory and uncorroborated; for failing to consider that the lack of blood stains at the scene of crime cast doubt on the prosecution's case; for failing to consider that there was lack of proper identification of the deceased's body for postmortem; for failing to consider that there were contradictions as regards the recovery of a bullet from the body of the deceased; for casually admitting the evidence of the firearm examiner contrary to the law; for failing to consider that there was no malice aforethought as required by law; for rejecting the defence of the appellant and finally, for convicting the appellant on insufficient evidence.

The appeal came up for plenary hearing before us on **30th October, 2019**. In his oral submission, **Mr. Onyango**, learned counsel for the appellant urged us to find that the evidence adduced was full of contradictions. He pointed out that whereas P.W.1 told the court that there was violence, P.W.3 refuted that contention; that whereas P.W.2 said the body was identified by P.W.6, (the deceased's father), this was not true; that P.W.2 referred to gunshots on the right hand side of the deceased's body but the photographs showed that they were on the left. It was counsel's position that there was no gunshot and the appellant had no malice aforethought.

In opposing the appeal, **Mr. Obiri**, the learned Assistant Director of Public Prosecution (ADPP) pointed out that P.W.1 witnessed the shooting and that the identification of the body was done by P.W.5. As for the wounds, he was of the view that P.W.5 and the officer who took the body to Kenyatta University Mortuary testified that the wounds were on the right upper back of the body. As for malice aforethought, counsel was of the view that the appellant was very agitated before firing at the deceased.

In his response, **Mr. Onyango** contended that agitation is not proof of malice aforethought.

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, in **Okeno vs. Republic [1972] EA 32**, this Court stated thus 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”

There is no denying that the appellant and the deceased lived as husband and wife and they had one child together. It would also appear that their relationship was beset with matrimonial disharmony as well as violence to the extent that the deceased was apprehensive of her safety. On the fateful night, the deceased entered her house whilst talking on phone and informed her sister, P.W.1 that she was dealing with a ‘*pyscho*’ who may one day kill her. P.W.1 advised the deceased to go to their parents’ place who also lived in Buruburu. It was unfortunate as the deceased drove out of the compound, the appellant who had parked his car outside the compound, used a side gate and went to the deceased’s car, got hold of her and violently pulled her out of the vehicle. The ordeal visited upon the deceased by the appellant was witnessed by P.W.1 and P.W.3, the watchman. P.W.1 and P.W.2 also heard gunshots. P.W.1 heard the deceased asking the appellant “*umenishoot*” (*you have shot me*); shortly thereafter, the deceased fell on the ground and in a manner that demonstrates callousness, the appellant continued kicking the deceased on her stomach and her sides. The pleas by P.W.1 that the deceased be taken to hospital fell on deaf ears. It was not until when the deceased’s father (P.W.6) came that the deceased was taken to hospital where she was pronounced dead. The appellant does not deny being at the scene of the murder on the material night. He also owns up to being the owner of the gun that fired the bullet. His version however is that the bullet dislodged from its chamber during the struggle between him and the deceased. In our view, this cannot be true. P.W.3 saw a very agitated man (the appellant) who drove in and out of the compound whilst looking for the deceased. The watchman (P.W.3) saw the appellant park his Mercedes outside the compound as he lay in wait for the deceased. P.W.1 and P.W.3 saw the appellant violently pull the deceased from her motor-vehicle and plucked her braids. Both heard the deceased ask the appellant “*umenishoot*”? (*you have shot me*).

Even after shooting her, P.W.1 who was present the whole time saw the appellant kick the lifeless body of the deceased. It is clear to us that the appellant set out to kill the deceased and this he did in the most brutal and violent manner.

The postmortem report prepared by P.W.2 confirmed that the deceased died of gun shots. **Prof. Emily A Rogena** (D.W.2) found that the post mortem report describes injuries that are mainly on the right side of the body yet the photographs showed that the injuries were on the left hand side of the body. The issue as to whether the physical location of the gun wound was inconsistent with the photographs of the body of the deceased is of no material consequences. Instead, it is P.W.5 who identified the body of the deceased. The other alleged contradiction is that the postmortem report indicated that the gunshot wound was on the upper right back as opposed to the upper left back. Again, in our view, nothing turns on this as the deceased was fatally wounded by the appellant. Any such minor contradiction does not change the fact that the appellant executed this heinous crime. The fact of the matter is that the deceased died of a gunshot wound. In any event, any such minor contradictions are taken care of by Section 382 of the Criminal Procedure Code which provides that:

“S.382 subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”

In our view, the evidence against the appellant was overwhelming and his conviction was well founded. The contradictions as to whether it was P.W.6 or P.W.5 who identified the body for purposes of post mortem is neither here nor there. P.W.2, the Pathologist said it was P.W.6. However, P.W.6 was so distraught, (and understandably so) to identify the body of his daughter which was identified by the deceased’s cousin (P.W.5). The fact of the matter, however is that **Mr. Jamleck Irungu Karanja** (P.W.6) and **Lulu Victoria** (P.W.5) were at the vicinity of the mortuary.

We also hasten to add that given the violent manner in which the appellant killed the deceased, we think he was undeserving of a twenty (20) year jail term.

The appellant appears to be part of a growing number of young persons who enjoy affluence and think that human life is of no value. The deceased who was not armed was in her motor vehicle. She was pulled out of her moving car and shot at close range. This was a cold blood murder. As if it was not enough to kill her, the appellant continued to kick the lifeless body of the deceased, all an indication of malice aforethought. The circumstances depict a man who is dangerous to society and he ought to have received a more severe sentence. We however note that there was no cross-appeal by the State and we shall let the matter lie.

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

Dated and Delivered at Nairobi this 24th day of April, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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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.

Signed

DEPTY REGISTRAR