



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: KARANJA, OKWENGU & SICHALE, JJA]**

**CRIMINAL APPEAL NO. 20 OF 2018**

**BETWEEN**

**JOSPHAT OTIENO ALIAS BUSH..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit, J) dated 5<sup>th</sup> November, 2015 IN HC. CR.C NO. 32 of 2012**

**JUDGMENT OF THE COURT**

This is an appeal from the conviction and sentence of the appellant (**Josphat Otieno alias Bush**) rendered on **5<sup>th</sup> November, 2015**, by Lesiit, J. A brief background will give context to the appeal.

The appellant 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 **22<sup>nd</sup> February, 2012** at Dandora Phase IV estate in Buruburu Division within Nairobi County, the appellant jointly with others not before the court murdered **Geoffrey Ochieng**. In support of the case, the prosecution called a total of eight (8) witnesses. There was P.W.1, **Samson Kidiga Dudu, (Samson)**, father to the deceased. He told the court that he used to work with East African Industries; that in **July, 2009**, he was evicted from the house he was living in in Dandora; that he took his household goods to a neighbour called **Nyauchi** and left them there together with his children **Geoffrey Ochieng** (the deceased), **Clinton Onyango** and his cousin; that after some time, **Nyauchi** called him as his (**Nyauchi's**) brother alias **Young** was selling P.W.1's goods. In **September, 2011**, the deceased informed him (P.W.1) that his sofa set had been broken and the timber pieces sold as firewood. P.W.1 went to Dandora and confirmed from **Nyauchi** that **Young** and his other brother had been selling his goods. P.W.1 instructed an advocate who wrote a letter to **Young** and his brother requiring them to report to the advocate's office. On receipt of the letter from the advocate, **Young** took a panga and threatened P.W.1 saying he would see what they will do to his son **Geoffrey** (the deceased) who had apparently reported the disposal of P.W.1's goods. On **22<sup>nd</sup> February, 2012** at 2.00 p.m. when he had just opened his phone, he received a phone call from a person who identified himself as **Young**, informing him that the deceased had been stabbed and died as he had threatened. He knew **Young** and he identified **Young's** voice when he called him.

He also received another call from a police officer who asked him to go to Dandora because his son had been stabbed and had died at Good Samaritan Hospital. He went to Dandora and saw the body of his son. He had a stab wound "**..... on the chest, post sternum and the back**".

**Clinton Onyango (P.W.2)** is a brother to the deceased. On **22<sup>nd</sup> February, 2012** at 1.p.m., he was called by a friend (**Derrick**) who asked him to go to Dandora as something wrong had happened. When he arrived at Dandora, he found his brother, the deceased lying down and the appellant (whom he said is called alias **Bush**) holding a knife. The deceased had been stabbed on the chest and on the back of the neck. The knife held by the appellant had blood stains. The appellant was saying to the deceased that he would cut his legs and take his shoes. P.W.2 asked the appellant to leave the deceased alone. P.W.2 then called his father (P.W.1) and informed him that the deceased had been stabbed; that with the help of others, P.W.2 carried the deceased to Provide Hospital in Dandora where he died while undergoing treatment. On cross-examination, he stated that he knew the appellant as he was a friend of the deceased. He however, did not know of any quarrel between the two of them.

**Musa Tangala Munyu Njoroge, (P.W.3)** lived in Dandora between 1992 and 2013. On **22<sup>nd</sup> February, 2012** at 2.30 p.m., he had gone to pluck vegetables at Nairobi River near Lucky Summer, next to Dandora. From where he was across the river, he saw four youths approaching the bushy area. After sometime, he heard arguments inside the bushy area. The youths were insulting each other, one of them said **“you dog I must kill you today”**. Then, the one being threatened came out of the bush to the edge of the river being followed by the one threatening him; that he was seeing them clearly and even spoke to them; that he identified the one who was being threatened as the deceased and the one who was following him with threats and insults as the appellant; that the deceased was not armed but the appellant was armed with stones which he was throwing at the deceased; that the deceased entered into the river and crossed to where P.W.3 was; that the appellant continued insulting the deceased who did not respond to the insults; that as P.W.3 prepared to leave the shamba and cross the river, the deceased asked him where it was safe to cross the river but P.W.3 did not respond; that P.W.3 entered the shallow end and as he was crossing the river, the appellant followed him and reached near him; that P.W.3 asked the appellant the motive of the quarrel and the appellant said it was a small matter about a phone; that P.W.3 asked the appellant to have the matter resolved amicably but the appellant’s response was that **“he must kill the deceased”**; that as they were swimming to cross the river, P.W.3 looked behind to see where the appellant had crossed to and saw the appellant take out a pen knife, unfold it and crossed the river to where the deceased was; that the deceased looked at P.W.3 and P.W.3 advised him to cross the river and go to the police post which was across the river; that while in the river, P.W.3 saw the appellant aim to stab the deceased but missed; that the appellant aimed at the deceased a second time and this time, the appellant stabbed the deceased on the left chest and on the neck; that the deceased staggered towards P.W.3; that P.W.3 heard the deceased call the appellant saying, **“Bush, why do you want to kill me”**?; that the appellant replied by saying **“you dog, I must kill you, you made a grave mistake”**; that the deceased pleaded with the appellant not to kill him but the appellant told him to stop it; that the appellant lifted his shirt and showed P.W.3 as a small scratch on his stomach claiming that the deceased had injured him using a pair of scissors; that the deceased fell on P.W.3’s legs on the dry ground outside the river; that the appellant came to where the deceased was and started kicking and boxing the deceased on the face and finally, that the appellant took the deceased’s shoes and started walking away. As there were people on both sides of the river watching from afar, two young men, **Jose** and **Earnest Muli** alias **Nahu** came and they tried to lift the deceased but the deceased could not stand; that P.W.3 told the young men to go and call the deceased’s wife and he left them waiting for the deceased’s wife as he carried his luggage to his house which was nearby. It was his evidence that he had been seeing the appellant but did not know his name. Later, the appellant was arrested and a crowd of people wanted to lynch him but he was rescued by the police.

No. **79030 P.C Philip Too (P.W.4)**, attached to CID Dandora from 2011 to 2014 confirmed having recorded P.W.1’s statement on **23<sup>rd</sup> February, 2012** and those of other witnesses in respect to the murder of **Geoffrey Ochieng** (the deceased). He also conducted investigations after which he concluded that there was sufficient evidence to show that the appellant murdered the deceased and charged him. He identified the appellant as the person he charged.

Doctor **Peter Muriuki Ndegwa (P.W.5)** performed a postmortem examination on the body of the deceased on **15<sup>th</sup> March, 2012** at the City mortuary. The body was identified to him by the deceased’s father (P.W.1) and a brother to the deceased, **Samuel Odhiambo Oyoo**. In his report, he found that the deceased had a circular penetrating stab wound on the left anterior chest wall slightly lower and medial to

the left nipple on the left edge of the sternum at the level of 6<sup>th</sup> rib. Internally, the pericardium had been perforated, the heart was perforated and there was blood in the heart sac – haemopericardium. He concluded that the cause of death was “**cardiac tamponade due to penetrating stab wound**”. He signed the report on **1<sup>st</sup> March, 2012** which he produced in evidence.

P.W. 6, **Ernest Muli Wambua**, confirmed that on **22<sup>nd</sup> February, 2012**, he witnessed the deceased and the appellant arguing and fighting over the mobile phone of the deceased’s wife which the appellant had taken from P.W.6. He also witnessed the appellant taking a pair of scissors from the ground and wanted to cut the deceased but the deceased snatched it and used it to cut the appellant on the stomach. P.W.6 stated further that the appellant’s friends were aggrieved and started throwing stones at the deceased after which one of them gave a knife to “**Bush**” (the appellant); that the deceased on seeing the appellant with a knife jumped into the river in a bid to run but he was unable to swim; that the appellant caught up with the deceased in the river and stabbed him; that P.W.6 on seeing this ran to the nearby police post where he reported the incident; that he came back to the scene with the Officer Commanding Police Station and saw the appellant running away from the scene. P.W. 6 pointed the appellant to the police officer but the officer could not go after the appellant because he was alone; that they carried the deceased to the Provide Hospital with the assistance of others. At the hospital, they were informed that the deceased had died.

**No. 233504 I.P. Dominic Omunda** (P.W.7) was then attached to Dandora

Police Station. On **22<sup>nd</sup> April, 2012**, while in company of other officers, he arrested the appellant at a place called Gitari Marigo and escorted him to Dandora Police Station.

**Dr. Zephania Kamau**, (P.W.8) of Nairobi Area Police Headquarters assessed the age of the appellant, examined him for any injuries and also assessed his mental status. He confirmed that the appellant had old injuries in form of scars on the anterior chest wall and on the left lateral chest wall which were probably caused by a sharp object. On his mental status, P.W. 8 found the appellant to be mentally fit. He recorded his findings in a P.3 form and signed. The P.3 form was tendered in court as evidence.

In his defence, the appellant made an unsworn statement of defence. He stated that on **22<sup>nd</sup> February, 2012**, while at Gitari Marigo with another, the deceased went to him and asked for the appellant’s phone; that they went to Nairobi River where they found five young men seated there and the deceased picked a pair of scissors and cut the appellant three times with it; that he lost consciousness and fell down; that after five minutes, the five men poured water on him and gave him glucose and that he was told that the deceased had run into the river. He was later shocked to learn that the deceased had died.

In a judgment delivered on **5th November, 2015**, **Lesiit J**, stated:

***“Having carefully considered the entire evidence adduced by both the prosecution and the defence, I am satisfied that the accused stabbed the deceased and that the deceased died from those injuries. I am satisfied that the accused pre-meditated the attack and so had malice aforethought at the time he stabbed the deceased. I find the offence of murder proved beyond any reasonable doubt. I find the accused person guilty of murder and convict him accordingly”.***

In a ruling on sentence dated **15<sup>th</sup> December, 2015**, the judge stated:

***“I have called for and obtained an age assessment which was done using Radiographic Atlas of Skeletal Development of the hand and wrist. The findings show that as of 23<sup>rd</sup> November, 2015, the accused was above the age of 25 years. The accused was arrested three years and 7 months ago which means that at the time of his arrest, he was about 20½ years of age at the very least, the accused was therefore an adult.***

***Having considered all these factors, I sentence the accused to death as by law prescribed”.***

The appellant was aggrieved with the outcome of his trial and the sentence thereof and has filed this

appeal before us. In a Memorandum of Appeal dated **22<sup>nd</sup> January, 2019**, the appellant raised six (6) grounds faulting the learned judge for:

- (i) failing to resolve the issue of mens-rea which was not proved under section 206 of the penal code,
- (ii) convicting the appellant based on contradictory and inconsistent evidence contrary to the law,
- (iii) failing to analyze and evaluate the entire record as required by law,
- (iv) failing to appreciate that there was provocation,
- (v) failing to appreciate that the case against the appellant was not proved beyond reasonable doubt; and finally,
- (vi) failing to consider the appellant's plausible defence contrary to the law.

On **5<sup>th</sup> November, 2019**, the matter came before us for plenary hearing. **Mr. Kitui**, learned counsel holding brief for **Mr. Karuku Advocates** appeared for the appellant while **Mr. Gitonga**, learned Senior Public Prosecution Counsel (SPPC) appeared for the respondent.

On his part, **Mr. Kitui** relied on the Supplementary Grounds of Appeal dated **9<sup>th</sup> March, 2019** and submitted that whereas P.W.6 testified that the appellant stabbed the deceased, the testimony of P.W.8 was that the deceased had old injuries in form of scars which were probably caused by a sharp object; that the trial court ought to have found that this amounted to provocation and hence there was no intention to kill. He was of the view that the appellant should have been found guilty of manslaughter. He relied on this Court's decision in **Republic vs. Hussein S/O Mohammed [1942] EACA** at page 66 wherein it was held:

***“that when once legal provocation as defined in the Penal Code, has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation”.***

Further, counsel placed reliance on the Supreme Court decision of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** in his proposition that given the age of the appellant, the sentence ought to have been lenient.

In opposing the appeal, **Mr. Gitonga** contended that the issue of provocation and the defence of self-defence were not raised in the trial court and that in any event, the appellant had more than sufficient time to cool down between the period he claimed to have been provoked and the time he stabbed the deceased; that the appellant disregarded the persuasion by P.W.3 to have the dispute, if any, sorted out amicably; that the force used by the appellant was wholly unreasonable; that the deceased was unarmed; that P.W.6 corroborated the evidence of P.W.3 and finally, that malice aforethought was established in the nature of the injury inflicted. On sentence, it was counsel's position that the appellant's mitigation, age, as well as the aggravated circumstances were considered in meting out the sentence.

We have considered the record, the rival pleadings before us, the authorities cited 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 1<sup>st</sup> 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 ....”***

The trial court analyzed the evidence and came to the conclusion, and rightly so in our view, that there were two eye witnesses. P.W.6 saw the altercation from the beginning to the end. The incident occurred during hours of daylight. P.W.2 visited the scene, found the deceased on the ground whilst the appellant was holding a blood stained knife. At the time, the appellant said to the deceased that he could chop off his legs and take his shoes. P.W.2 knew the appellant as appellant was the deceased’s friend.

We have no doubt that it is indeed the appellant who caused the death of the deceased. It was the appellant’s defence that the deceased cut him using a pair of scissors. In court, it was submitted that the appellant acted in self-defense as he was provoked. In respect of the appellant’s defence of self-defense, the trial judge stated:

***“The accused was not entitled to defence of self-defense. Even if being injured by the deceased on the stomach may have angered him, I find that; one, the accused had sufficient time to cool off between the time deceased entered the river, the time he followed him there, and the words of P.W.3 persuading him to let deceased go free and encouraging him to reconcile.***

***Two, I find that the force the accused used was wholly unreasonable and excessive and wholly uncalled for. It was not the accused whose life was endangered; it was the accused that endangered deceased (sic) life. As to whether the accused may have had a false belief that his life was in danger? I find he was not under any such belief. The deceased was unarmed at the time and was even walking away from him. The accused cannot claim that he believed that his life was in danger”.***

We agree.

As regards the lack of malice aforethought, S. 206 of the Penal Code states:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***

***(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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

In the instant matter, the appellant unfolded a pen-knife and used it to stab the deceased. As the deceased lay helpless on the ground having been stabbed by the appellant, the appellant remarked that he could actually, chop off his legs and take the deceased’s shoes. Clearly, the appellant had the intention to cause death.

In our view, the conviction for murder was properly founded. We find no merit in this appeal in so far as conviction is concerned.

However, given the fact that a sentence of death is no longer the only available sentence in a charge of murder (See *Francis Karioko Muruatetu & another vs. Republic [2017] eKLR*) and given the fact that the appellant was a 1<sup>st</sup> offender, a young person of about twenty (20) years at the time of the commission of the offence and the fact that he is an orphan doing apprenticeship at his brother-in-law's garage, we deem it fit to substitute the sentence of life imprisonment to a sentence of fifteen (15) years imprisonment.

It is so ordered.

*Dated and Delivered at Nairobi this 24<sup>th</sup> Day of April, 2020.*

**W. KARANJA**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**F. SICHALE**

**JUDGE OF APPEAL**

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

*Signed*

**DEPTY REGISTRAR**