



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CRIMINAL APPEAL No. 7 of 2016

BETWEEN

JOSEPH MANYAKI MWITA.....1st APPELLANT

ROSELYN ROBI MWITA.....2nd APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Migori, (Majanja, J.)

delivered on 16th November 2016 in H C Cr. C No. 95 of 2014)

JUDGMENT OF THE COURT

1. This is an appeal against conviction and sentence for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. This is a first appeal from the judgment of the High Court. By dint of **Section 379** of the Criminal Procedure Code and in accordance with the decisions such as **Okeno v. R [1972] EA 32**, we are expected to subject the entire evidence tendered before the trial court to a fresh examination. To do this effectively we must summarize the events and evidence leading to the trial of the appellants.
2. The appellants were jointly charged with murder. The Information is that on the night of 22nd and 23rd March 2013 at Boherera Village, Bukumbe North Location in Kuria West District within Migori County, the appellants jointly with others not before court murdered Joseph Mwita Muniko. The information and particulars thereof were explained to the appellants in the Kuria language.
3. The prosecution case was founded on the testimony of one key witness. PW1 Ary Nyakenda Mwita testified as follows:

On 22nd March 2013, I was at home with my parents. My father is Joseph Mwita (deceased) and my mother is Roselyn Robi. During that day, I went to the shamba to work as usual. Later I came home to cook. I found my parents quarrelling. My mother told me to cook vegetables for my father without cooking oil and then she left. I decided to look for oil and when I found it I made the vegetables for my father. I told him to eat quickly so that mother would not find out. But she came and was very annoyed with me and threatened to leave me with my father. My mother left home at 4.00 pm.... she returned at 8.00 pm. There were many people drinking alcohol outside the house. It was my mother's alcohol.... My father had also been drinking. Some of the people who were drinking alcohol left but two of them remained behind – my uncle Nyankore and the 1st accused. He is seated on the dock. He is called Manyaki. I knew him. He was a friend of my father.....

After we finished eating, the 1st accused came outside the house. He did not come in. He stood away two (2) metres. My mother left the house. I heard the two talk. He requested my mother that they go for a funeral. I saw the 1st accused and heard him... My father came so soon thereafter. I am the one who opened the door for him. ... He asked why I had opened the door yet my mother was present. My father and mother were not sleeping in the same house. He stays in a separate house about five (5) metres away. I served him food and went with him to his house. I left him eating. I came back to sleep... As I was sleeping, I heard my father say that my friend should stop killing him.... I woke up and went to his house. I found my mother and the 1st accused beating my father. My mother is the 2nd accused seated in the dock. Manyaki was beating my father with a metal rod. My mother was holding father's hand. My father was seated on the floor in the bedroom...

When I entered the house, both of them saw me. I wanted to scream but they both threatened to kill me if I screamed. It was dark but I knew it was them. The 1st accused had a phone which he used as a torch. He was holding it. My father was not talking. He had

been beaten..... The two accused tied my father with a rope. My mother got a rope and they both tied my father on the neck. They dragged him on the ground. I was told not to leave as I would go and report. They took the body outside and tied him on a mango tree. I went back to the house with my mother. The 1st accused left. The house we returned to is where I was sleeping with my mother. I remained with mother till morning. In the morning, we went to the shamba. My uncle Mwita passed by while in the shamba. My mother called him and told him she had something for him. She told him that his brother, my father, left with a rope to go to the guava thicket. She told him he left about 11.00 am. Mwita went immediately to the thicket. He raised alarm which caused people to come. I also went there with my brother. We were the first to arrive. My father had been tied by the neck on the tree. He had injuries in his private parts. He had been beaten. His neck was broken.

4. PW6, Dr. Aggrey Idagaiza Akidiva, testified as the medical doctor who conducted a post mortem on the body of the deceased. In his report, the body had extensive bruises over the pubic region. The deceased was bleeding from the penis. He had extensive bruises over the abdomen and on the armpits. He had a deep bruise at the back of the neck and the front part of the chest. He was bleeding from both ears. He had subluxation of the neck. He had a deep cut at the back of the head. Inside the brain was bleeding. He had a fracture of the cervical vertebra. The cause of death was due to brain stem damage with neurogenic shock due to multiple body bruises. The spinal cord was damaged. From the analysis, he concluded blunt objects were used.

5. PW8, Inspector of Police Said Osman No. 234880, testified that on 23rd March 2013 he received a call while at the police station that a deceased person had been found hanging on a tree. He proceeded to the scene and home of the deceased. He interrogated the wife of the deceased who is the 2nd appellant. That the 2nd appellant confessed to him that she had assaulted and participated in killing of the deceased. She stated that the 1st appellant also participated in the killing. He then arrested the 2nd appellant and on 24th March 2013, he arrested the 1st appellant.

6. In his defence, the 1st appellant gave sworn evidence. He testified as follows:

On the night of 2nd and 23rd March 2013, I was asleep at my home. I woke up on 23rd March to do my usual chores in my shamba and slept in the evening as usual. On 24th March 2013, I was at home when police officers came to arrest me. I was shocked..... I denied killing Joseph Mwita Muniko. I did not know about the incident..... I have heard all the evidence and I deny that I had anything to do with the death of Joseph Mwita Muniko. I did not conspire with anyone to kill him. I do not have a phone.....

7. The 2nd appellant in her unsworn statement denied killing the deceased. She stated that the evidence of Ary Nyakenda, (PW1) was not true.

8. Upon evaluating the evidence on record, the trial judge convicted the appellants of the offence of murder as charged. The appellants were then sentenced to death.

9. In convicting the appellants, the judge expressed himself as follows:

[22] The testimony of PW1 was clear and direct in implicating the accused. She testified how she woke up and went to her father's house and found both the accused with her father who had been assaulted. She narrated how the rope was tied on her father's neck and how he was dragged to the shamba and hanged to make it look like he committed suicide. I heard PW1

testify and observed her demeanour and I was left in no doubt in my mind that she was telling the truth and I believe her testimony. There was no reason for her to implicate her mother in such a horrendous act.....

*[26] All in all, the evidence is clear and it points to the accused as the persons who assaulted the deceased leading to his death. Their respective defences cannot withstand the weight of the prosecution evidence. It follows therefore that the assault which they inflicted on the deceased was of such magnitude as to constitute malice aforethought within the meaning of **Section 206 (a) of the Penal Code**. The gravity of the injuries leaves no doubt that the injuries were inflicted with the clear intention of causing grievous harm and indeed caused death.*

10. Aggrieved by the conviction and sentence, the appellants have lodged the instant appeal citing the following two grounds in their memorandum:

(i) That the learned judge erred in failing to evaluate the evidence as a whole and failed to find that the prosecution never proved its case beyond reasonable doubt.

(ii) The judge erred by relying on evidence of identification without observing that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any significant identification.

11. At the hearing of this appeal, the appellants were represented by learned counsel Mr. Bruce Odeny holding brief for learned counsel Mr. Cecil Wilson Kouko. The State was represented by the Principal Prosecution Counsel, Mr. S.G. Thuo. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

12. The appellant faulted the trial judge for convicting him on the evidence of PW1 who was a single identifying witness; the judge neither exercised caution nor addressed the circumstances in which the appellants were identified, the proximity and sufficiency of lighting or the possibility of error in the identification of the appellants; PW1 only mentioned one person as the attacker of the deceased; the deceased never

mentioned the name of the person who was attacking him; the deceased never mentioned the name of his wife, the 2nd appellant; and PW1 never explained how she arrived at the details that the 2nd appellant was holding the hands of the deceased while the 1st appellant was beating him with a metal rod.

13. It was further submitted that if at all the deceased was killed in his room as alleged by PW1, the prosecution did not lead evidence as to what happened in the room; there was no evidence that blood was spilt in the room or that a trail of blood that led to the tree was found. Based on the foregoing submissions, the appellants faulted the trial judge for convicting on evidence that was not sufficient. The judge erred for holding that PW1 had no reason to implicate her mother - the 2nd appellant; and on record there is evidence that PW1 had good relations with the deceased and PW1 did not like her mother the 2nd appellant. PW1 used to cook for the deceased. There is sufficient evidence that the deceased favoured PW1 and this was reason enough for the PW1 to implicate the 2nd appellant.

RESPONDENT'S SUBMISSIONS

14. The respondent in its written submissions rehashed the evidence on record particularly the salient features of the testimony of PW1. It was submitted that all the essential ingredients for the offence of murder were proved. Neither cross-examination of the prosecution witnesses nor consideration of the defence evidence cast doubt on the prosecution case.

15. It was submitted that PW1 witnessed the appellants assaulting the deceased; both appellants saw PW1 when she entered the room. PW1 further testified how the 2nd appellant went to get a rope to tie the neck of the deceased; PW6 (Dr. Aggrey Akidiva) in his post mortem report confirmed the injuries inflicted on the deceased; and from the deep injuries inflicted upon the deceased, pursuant to **Section 206 of the Penal Code**, malice aforethought was proved on the part of the appellants.

16. The respondent concluded its submissions by urging that the identity of the appellants as the persons who inflicted the wounds and injuries on the deceased was proved beyond reasonable doubt through the testimony of PW1 whose evidence is identification of the appellants through recognition.

17. On sentence, it was submitted that the offence was committed in a gruesome and heinous manner and the appellants were not remorseful. We were therefore urged us to uphold the conviction and the death sentence meted upon the appellants.

ANALYSIS and DETERMINATION

18. We have duly considered the record of appeal, the judgment of the High Court, the grounds of appeal and submissions by the respective learned counsel. As already stated, this is a first appeal and as was stated in **Okeno v. R [1972] EA 32:**

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 draw its own 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, see Petersv. Sunday Post, [1958] E.A. 424.”

19. The appellant proffered two grounds of appeal. The first is that the trial judge did not properly evaluate the evidence on record. The second is that the judge erred on the issue of identification of the appellants as the persons who committed the offence.

20. We have examined the record of appeal and compared and contrasted the same with the findings of fact by the trial judge. In the judgment, it is manifest that the trial judge considered the issue of identification of the appellants and whether malice aforethought was proved. In his analysis, the judge recounted and narrated the testimony of all witnesses who gave evidence. The defence evidence was also rehashed and analyzed. Based on our appraisal of the judgment of the trial court, we are satisfied that the learned judge comprehensively evaluated the evidence on record.

21. In the instant matter, there is no dispute as to the injuries sustained by the deceased. The post-mortem report tendered in evidence by PW6 speaks for itself. The report shows that the deceased was bleeding from the penis; he had extensive bruises over the abdomen and the armpits; he had a deep bruise at the back of the neck and the front part of the chest; he was bleeding from both ears; he had subluxation of the neck; he had a deep cut at the back of the head and inside, the brain was bleeding. To cap it all, he had a fracture of the cervical vertebra and a severed spinal cord at the base of the skull. PW6 concluded that the cause of death was due to brain stem damage with neurogenic shock due to body bruises. That blunt objects were used to cause the injuries.

22. The pivotal ground urged in this appeal is identification of the appellants. The one and key witness who identified the appellants as the persons who committed the crime was PW1. The appellants submitted that the trial judge erred as the court did not inquire into the condition of lighting that prevailed at the time of the alleged identification.

23. As the first appellate court, we hereby re-assess the evidence on record relating to identification of the appellants. The evidence of PW1 is identification through recognition. Both appellants are persons who were known to PW1 long before the offence was committed. PW1 had seen the 1st appellant at their home on the material day drinking alcohol with other people. PW1 saw the first appellant at night when he came to request the 2nd appellant that they go to a funeral. On the other hand, the 2nd appellant is the mother to PW1. In fact, they used to sleep together on the same bed. From the testimony of PW1, we are satisfied that PW1 knew the appellants very well and there is no possibility of mistaken identity. The identification of the appellants by PW1 was by way of recognition. In this regard, we are comforted by the dicta in **Anjononi & others -v- Republic [1980] KLR 57** where it was held:

“...; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other.”

24. The appellants further contend that the trial judge did not warn himself that he was relying on the evidence of a single identifying witnesses; and that the lighting conditions prevailing in the room at the time of identification were not considered.

25. PW1 in her evidence stated that she stayed in the room throughout the gruesome ordeal and then left with the 2nd appellant (her mother) and went to the house where they stayed until morning. One thing is certain from this evidence. From the time PW1 entered the room where the deceased was being assaulted, she never lost sight of the 2nd appellant. She remained in the room that was the scene of crime and left with the 2nd appellant. She stayed with the 2nd appellant till morning. Even if remotely there were to be a mistaken identity, any doubt is removed on the identity of the 2nd appellant. The said 2nd appellant was with PW1 for the entire duration of the crime till day break. Considering all the foregoing, we are satisfied that the trial court did not err in convicting the appellant on the basis of recognition as there was light provided by the 1st appellant's mobile phone.

26. As regards the 1st appellant, PW1 testified that he had a torch which he was using. On his part, the 1st appellant denied that he had a torch. We believe the evidence of PW1 and find that there was sufficient lighting to enable the appellants to see how they were beating the deceased and how to tie the neck of the deceased. If the appellants could see and tie the neck of the deceased, there is nothing to cast doubt on the testimony of PW1 that she too recognized the appellants and saw in detail how they were assaulting the deceased. The testimony of PW1 that the appellants tied a rope to the neck of the deceased is corroborated by the fact that indeed a rope was found on the neck of the deceased. We are thus satisfied that the 1st appellant was positively recognized by PW1 as one of the persons who committed the offence. The testimony of PW1 places the 1st and 2nd appellants at the scene of crime.

27. In **Bonaya Tutui & Another –v- Republic [2015] eKLR** the court observed that, malice aforethought is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought which is the decisive factor in determining whether the unlawful act amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.

28. This Court in **James Masomo - v- Republic [2015] eKLR** observed that the nature of injuries can be manifestation of malice aforethought. It was expressed:

“In the present case the spear force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region which extended to the skull bones, and exposed the brain. In addition, she suffered a deep cut on her right hand with a fracture of the right hand. She also had cuts on her legs and suffered burns. Everyne Nditi Nyamai had deep cuts on the right elbow and several cuts on the skull. Susan Mbithe also had two deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain. Surely in inflicting these wounds on the deceased the appellant intended to cause them fatal harm.”

29. In the instant matter, on malice aforethought, from the wounds and injuries inflicted on the deceased as confirmed by the post mortem report, we are satisfied that the appellants intended to cause grievous bodily harm to kill the deceased. When the appellants assaulted and beat the deceased causing extensive bruises over the abdomen and the armpits, a deep bruise at the back of the neck as well as fracture of the cervical vertebra and a severed spinal cord, the only inference is that the appellants intended to kill or cause grievous bodily harm to the deceased. Death resulted and we find that malice aforethought was proved. We find that the prosecution proved all the ingredients of the offence of murder beyond reasonable doubt. For the foregoing reasons, we affirm and uphold the conviction of the appellants for the offence of murder.

30. On sentence, the trial court sentenced the appellants to death. We are cognizant of the Supreme Court decision in in **Francis Karioko Muruatetu & another - v - Republic [2017] eKLR** wherein it was held that the mandatory nature of the death sentence is unconstitutional.

31. We have examined the record of appeal and the mitigation by each of the appellants. In mitigation, the 1st appellant prayed for leniency. The 2nd appellant stated she had children and did not know where they were. She asked for leniency.

32. We have considered the mitigation on record. The offence was committed in a gruesome, callous and heart wrenching manner. It was a total repudiation of marital and familial care. It was committed by a mother (1st appellant) in the presence of her daughter (PW1). We cannot fathom what permanent psychological trauma and damage has been caused to the daughter as she witnessed the death of her loving father by the dastardly and unbundled violence of her mother. After killing the deceased, the appellants hang his body on a tree to give the impression of suicide. Dragging a body and hanging it on a tree was grossly inhuman and degrading. The conduct of the appellants in concocting the theory of suicide is abhorrent. One of the goals of sentencing is retribution. It is stated an eye for eye and a tooth for a tooth. We state blood for blood. This is one case in which we find no good reason to interfere with the death sentence meted out upon the appellants. We uphold the conviction of the appellants for the offence of murder. We affirm and uphold the death sentence imposed on the appellants as well. It is the ultimate temporal sentence that can be imposed on them deserving though they are of something worse.

33. This appeal has no merit and is hereby dismissed.

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

Dated and delivered at Kisumu this 3rd day of April, 2020

ASIKE-MAKHANDIA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL