**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 49 OF 2015**

**BETWEEN**

**MATHIAS OBUYA ARINGO......APPELLANT**

**AND**

**REPUBLIC.................................RESPONDENT**

**(Being an appeal from judgment of the High Court of Kenya at Homabay (Majanja, J.) dated 7*th* *November, 2014 in HCCRA No. 25 of 2012)***

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**JUDGMENT OF THE COURT**

This appeal involves charge preferred against ***Mathias Obuya Aringo***, ***the appellant,*** for the offence of murder of ***Stephen Odhiambo Obuya, the deceased,*** contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars as set out in the information before the High Court at Homabay were that on 19th October 2010 at Disii Village, Komolo Sub-Location in Homabay County, the appellant murdered the deceased. The appellant denied the charges.

After hearing the evidence and the submissions of the parties, the trial court found the appellant guilty as charged and sentenced him to death as by law prescribed.

The appellant was aggrieved by the conviction and sentence, and appealed against that decision on the grounds that;

1. The learned judge erred in law in convicting the appellant primarily on the *evidence of* ***Serfina Akoth Okaka, PW 1, (Serfina)*** *the appellant's spouse, was contrary to the express provisions of section 127 (2) (ii) of the Evidence Act;*

2. The learned judge erred in convicting the appellant on uncorroborated and unsound evidence of PW 6, without analyzing or evaluating the dying declaration of the deceased; and

3. That the death sentence has been declared to be unconstitutional and should be reconsidered to uphold the principles of the Constitution.

Both ***Mr. M.M. Omondi***, learned counsel for the appellant, and learned counsel for the State, ***Mr. Kakoi,*** filed written submissions, and briefly highlighted them in Court.

Mr. Omondi submitted that, since Serfina was married to the deceased, she ought not to have testified against her husband, as this was contrary to the requirements of ***section 127 (2) (ii)*** of the ***Evidence Act***; that her evidence as a consequence was inadmissible and could not be relied upon by the court. Next it was submitted that the deceased made a dying declaration and that though Serfina and PW 6 were in the compound when the attack occurred, the words uttered by the deceased in his dying declaration differed in their testimonies, which rendered their evidence to be unreliable. Citing this Court's decisions in the cases of ***Kihara vs Republic*** ***[1986] KLR 473*** and ***Aluta vs Republic*** ***[1985] KLR 543*** for the proposition that a dying declaration requires to be corroborated, counsel asserted that since Serfina's evidence was incompetent as it was made without adherence to the express requirements of ***section 127 (2) (ii)*** of the ***Evidence Act***, it should be expunged from the record; that once it was expunged, the only evidence that would remain would be the uncorroborated evidence of PW 6, whose evidence could not be relied upon. As a consequence, it was submitted, the remaining evidence was incapable of securing a conviction, with the result that it ought to be set aside.

Turning to the sentence, counsel asserted that with the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic*, SC Pet. No. 16 of 2015** having rendered the death penalty unconstitutional, it ought not to have been imposed on the appellant.

***Mr. Kakoi*** opposed the appeal, and in response to the competency of Serfina's evidence submitted that ***section 127 (3) (c)*** of ***the Evidence Act*** was clear that in criminal proceedings, the wife or husband of the person charged shall be a competent and compellable witness, where the charge against that person is in respect of an act or omission affecting the person or property of the wife or husband of such person or the child or either of them, and therefore Serfina's evidence concerning their son, the deceased, was admissible.

On the allegation that the appellant's conviction was based on the uncorroborated evidence of PW 6, it was submitted that the conviction was based on the eye witness accounts of both Serfina and PW6 of the vicious assault on the deceased, and not on any dying declaration made by the deceased.

With respect to the unconstitutionality of the death sentence, counsel submitted that the Supreme Court in the case of ***Francis Karioko Muruatetu* (supra)** did not declare the death sentence to be unconstitutional, but only declared its mandatory nature to be unconstitutional. In concluding the submissions, counsel asserted that the trial court rightly found that the offence was proved beyond reasonable doubt, and that all the evidence pointed to the appellant as having murdered the deceased.

This is a first appeal, and on the authority of the case of ***Okeno vs Republic* [1972] EA. 32** among other authorities on the issue, this Court is under an obligation to reconsider the evidence, re-evaluate it and come to its own independent conclusions, having regard for the conclusions and findings reached by the trial Court. In doing so, this Court must bear in mind that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses as they testified. See also ***James Ngugi Njoka vs Republic*, Court of Appeal Criminal Appeal No. 315 of 2006.**

In our view the issues to be addressed by this Court are;

1. whether the learned judge wrongfully convicted the appellant primarily on the evidence of Serfina, the appellant's spouse,

2. whether the learned judge relied on uncorroborated and unsound evidence of PW 6, without analyzing or evaluating the dying declaration of the deceased; and

3. whether the learned judge lawfully sentenced the appellant to death.

Before re-evaluating the evidence so as arrive at our own independent conclusion on whether the offence of murder was proved beyond reasonable doubt, it is essential that we begin by setting out the salient facts of the case.

Serfina testified that the deceased was her first born son who at the time was at his grandmother's house. Her husband, the appellant, had come home at 9 pm and asked for food. He also enquired as to the deceased's whereabouts. Serfina's response was that she was preparing his food and that the deceased was in his grandmother's house; that the appellant told her to take the food to him once it was ready, and also asked her to lock the door and take with her the keys. While she was in the kitchen, she heard the door slam, and when she went outside, she saw the appellant go towards his mother's house with a panga and a wooden plank. He ordered the house to be opened and then heard the deceased ask his father, *"Why are you killing me?"* The deceased was standing at the door, and upon turning his back, the appellant hit him behind his head. He fell down, and Serfina ran towards them screaming but the appellant chased her away with the panga. As she went to report the matter to the clan elder, ***Francis Obuya Tumba, PW 2, (Francis),*** the appellant continued hitting the deceased on his head, and when she returned, she found the deceased's body lying outside his grandmother's house. She later identified it at the District mortuary, before the post-mortem was conducted.

***Victor Oginga Obuya, (PW 6), (Victor)***, testified that the appellant was his father and the deceased was his elder brother. He recalled that on the material day after he returned from school he went to the kitchen and asked his mother whether there was any porridge. She replied that she had not prepared any that day, after which he went back to his house. Later, he heard someone knocking on his grandmother's door, and on checking, he heard the appellant and the deceased talking. The deceased had asked the appellant why he was beating him, yet there was nothing they had quarreled over. It was about 9 p.m. and there was moonlight. He saw his father forcefully use the stick with his right hand to hit something. As he stood at the window, he heard the deceased's say, *"…you have not (sic) broken my hand it is better you kill me without feeling the pain".* Thereafter the deceased fell down and did not stand up again. At that moment, PW 6 heard his mother screaming, after which he ran and hid, afraid that his father would turn on him next.

After Serfina reported the incident to Francis, he accompanied her back to her home where he found the deceased lying on the ground. His head had cuts and was dented.

***Dr. Ayoma Ojwang, PW3,*** who conducted the postmortem on the deceased is the Deputy Director of medical Services in Homabay District Hospital. He stated that he carried out the postmortem on 22$^{nd}$ October 2010 which examination revealed two deep cut wounds on the left side of the head, and very extensive skull fractures at the left temporal bone which was smashed in pieces with some parts having been comminuted and others extending externally. He formed the opinion that the cause of death was a severe head injury, caused by a very heavy blunt object.

In an unsworn statement in defence, the appellant denied killing the deceased. He stated that on the material evening he had gone to the bar where he consumed a lot of alcohol. On returning home, he went to sleep, and did not know what was happening as he had drunk heavily. When he woke up the next morning he heard a lot of commotion outside his mother's house, and when he went to the house he found the deceased lying on the ground. He stated that he was drunk and did not know what had transpired the previous night.

For a finding of murder, three ingredients require to be established under ***section 203*** as read with ***section 204*** of the ***Penal Code***. These are,

i) proof of the death of the deceased; ii) that the deceased's death was caused by the appellant's unlawful act; and iii) that the death was caused by malice afore thought on the appellant's part.

On whether the prosecution had proved the deceased's death, the learned judge found that the deceased died as a result of severe head injuries caused by a sharp and blunt object. In so finding, the learned judge stated;

> **"…the evidence is clear, that PW1, PW2 and PW6 identified the body at the Homabay District Hospital Mortuary before the autopsy was conducted. The observation and finding by PW3 the cause of death was severe head injury caused by a heavy blunt object is consistent with the evidence of PW2 that he found the deceased had cuts on his head. PW1 saw the accused with a panga and a wooden plank. She saw the accused hit the deceased while PW6 saw him hit the deceased. In my view, the description of the head injuries particularly the very deep cut wounds on the deceased head and the fracture were caused by the panga and the wooden plank which the accused was seen carrying by PWI".**

When the evidence is re-analysed as to proof of the deceased's death, it clearly shows that both Serfina and PW6 saw the appellant hit the deceased on the head with a wooden plank, as a result of which the deceased fell down. His lifeless body was found by Francis lying outside his grandmother's house in a pool of blood. The deceased had two severe cuts on his head, which according to Dr. Ojwang who conducted the post mortem were caused by a heavy blunt object and was the cause of death. As was the trial court, we are satisfied that the deceased died from severe head injuries.

As to whether the appellant was responsible for his death, the evidence is also clear that the appellant, armed with a panga and wooden plank, went to his mother's house where the deceased was, and attacked him on the head with the wooden plank, whereupon the deceased sustained head injuries that led to his death.

On whether malice afore thought under ***section 206*** of the ***Penal Code*** was established, in his defence, the appellant stated that on the night in question, he was heavily drunk and did not know what was happening. It was not until the next day, that he went to his mother's house and found his son's lifeless body lying on the ground.

The learned judge rejected the appellant's defence of intoxication and stated thus;

> **"I therefore discount his defence that he was too drunk to understand what was happening, the nature… and extent of the injuries show how vicious the assault was and it was only intended to kill the deceased. His calm and collected demeanor the very next day may be as a result of the regret he felt after committing the act and not because he was intoxicated".**

In the case of ***Nzuki vs Republic*** ***[1993] KLR 171*** it was stated that malice aforethought is;

> **"a) Intention to cause death;**
>
> **b. Intention to cause grievous bodily harm;**
>
> **c. Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."**

Once again, the evidence is uncontroverted that, instead of retiring to his quarters as he had indicated to Serfina, the appellant armed himself with a panga and a wooden plank and went to his mother's house where he attacked the deceased. Though he claimed to have been intoxicated at the time, the action of deliberately arming himself with a panga and wooden plank, and attacking the deceased in the manner that he did, established malice afore thought. In so doing, he must have or ought to have known that he would inflict grievous bodily harm on the deceased with the panga and wooden plank that would result in death. Given these circumstances, we are persuaded that malice afore thought was unequivocally established, and that it was proved beyond reasonable doubt that the appellant murdered the deceased.

Having so established, we turn next to address the grounds of appeal. It was submitted that Serfina was an incompetent witness because she was the appellant's wife and ***section 127 (2) (ii)*** of the ***Evidence Act*** expressly prohibited a spouse from testifying against the other. As pointed out by counsel for the State, ***section 127 (3) (c)*** qualifies such evidence, and provides that;

> **"In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness, where the person is charged—**
>
> > **(a)…**
> >
> > **(b)…**
> >
> > **(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the child or either of them, and not otherwise."**

We agree with Mr. Kakoi that Serfina was a competent prosecution witness because the appellant had been charged with the murder of their son, the deceased herein.

In respect of the contestation that PW6's evidence on the deceased's dying declaration was uncorroborated, we agree with counsel for the State that, the appellant was not convicted on the basis of a dying declaration, but on the eye witness evidence of both Serfina and PW 6 who saw the events as they unfolded on the evening in question. They witnessed the appellant hit the deceased's head with the wooden plank, causing him to sustain severe injuries. Dr. Ojwang's evidence was that the cause of the deceased's death were the severe head injuries from a blunt object. Based on the totality of the evidence, we find that, it could not be said that PW 6's evidence was uncorroborated, or that the appellant's conviction was unsafe.

On the final issue of the death sentence, there is no question that in the case of ***Francis Karioko Muruatetu & Another*** ***(supra)*** the Supreme Court did not declare the death sentence to be unconstitutional, but only found its mandatory nature to be unconstitutional. The Court expressed itself in these terms:

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."**

As such, the death sentence is not unconstitutional, but its mandatory application is unconstitutional.

In this case the learned judge imposed the death sentence on the appellant as it was mandatory at the time. In view of the Supreme Court's decision in ***Francis Karioko Muruatetu & Another*** ***(supra),*** the mitigation to the court, the remorse expressed on account of the death of his son, we set aside the death sentence and substitute therefor with a custodial sentence of 35 years' imprisonment to run from the date of sentence in the trial court.

In the circumstances, we uphold the decision of the High Court and dismiss the appeal against conviction, but substitute the sentence of death with 35 years' imprisonment to run from the date of conviction in the trial court.

**It is so ordered.**

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

**D.K MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**