



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MUSINGA & J. MOHAMMED, J.J.A.)**

**CRIMINAL APPEAL NO. 84 OF 2016**

**BETWEEN**

**NICHOLAS MUEKE MWANIA.....1<sup>ST</sup> APPELLANT**

**JONES MUTANGILI MWANIA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(An appeal from the Judgment of the High Court of Kenya at Machakos (Mutende, J.) delivered on 20th May 2014

*in*

*H.C. CR. No. 72 of 2008.)*

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**JUDGMENT OF THE COURT**

1. *Nicholas Mueke Mwanja*, the 1st appellant, and *Jones Mutangili Mwanja*, the 2nd appellant, together with one *Thomas Muuo Mwanja* (co-accused) were charged with murder contrary to *section 203* as read with *section 204* of the *Penal Code* before the High Court at Machakos. The particulars of the offence were that on 21st June 2007 at Kithumani village, Kakutha Location in Makueni District, jointly with another not before court murdered *Richard Ndula Mwanja*, (the deceased).

2. After a full trial, the appellants were convicted and sentenced to death as by law then prescribed. Their co-accused, *Thomas Muuo Mwanja* was set free. Being aggrieved by the said conviction and sentence, the appellants preferred an appeal to this Court.

3. This being the first appellate court from a conviction and sentence by the High Court, the Court has a duty to re-consider the evidence that was tendered before the trial court, evaluate, and draw its own conclusions. The Court must however take into account that it did not have the benefit of seeing and hearing the appellants as the learned trial judge did and must therefore give due allowance for that. See *Okeno v Republic [1972] E.A. 32*.

4. We shall therefore proceed to set out, albeit briefly, the evidence that was adduced and thereafter evaluate it in light of the grounds of appeal that we shall shortly state.

5. *Dorcus Mueni Muia, PW1*, the wife of the deceased, testified that on 21st June 2007 she accompanied the deceased to till their land (shamba) which had been given to them by her late father-in-law. The deceased and a casual worker, *Joshua Muthenya, PW2*, went to one side of the shamba while PW1 was working on a different side of the same shamba.

6. Apparently, the deceased's brothers were not happy about the fact that the shamba had been given to the deceased and the deceased's clan had attempted to resolve the dispute without much success, PW1 stated. That was also affirmed by *Godwin Nyamasyo Mwanja, PW4*, the deceased and the appellants' brother.

7. On the material day at about 10.00 a.m., the deceased joined PW1 in the area where she was cultivating. Shortly, the deceased noticed the presence of some people in the area where he had been harvesting beans. It turned out that the people were the appellants, who are the deceased's brothers, together with the 1st appellant's son and their nephew. As the deceased approached them, PW1 heard the 2nd appellant

say that they should accomplish their mission.

8. Suddenly, the 1st appellant cut the deceased with a panga behind his head. The deceased fell and the 2nd appellant also cut him again at the back of the head.

9. PW1 took off and reported the incident to the area Chief, **Shadrack Mulwa, PW3**, who in turn reported the incident to the police, having gone to the scene and found the lifeless body of the deceased.

10. When PW3 returned to his office, the appellants and their co-accused went to PW3's office and told him that they had a quarrel with the deceased and the 2nd appellant "**may have cut Ndua, the deceased.**" Shortly thereafter, the police arrived at the Chief's office. Upon interrogation by **PC Michael Kilongozi, PW5**, the appellants' co-accused led the police to a thicket where he recovered a blood stained panga.

11. PW5 went to the scene and together with **Chief Inspector Wilfred Mogere, PW6**, collected the body and took it to Makindu District Hospital Mortuary, where a post-mortem examination was conducted by **Dr. Sammy Masyuki, PW7**. The cause of death was identified as severe brain injury and haemorrhage following a deep cut wound to the deceased's head.

12. In their defence, the 1st appellant stated that on the material day he was at Kithumani Market with his son, **Marvin Mueke**, and the 2nd appellant, when they were arrested and taken to Sultan Hamud Police Station. He denied having committed the offence as charged. He denied that there existed any land dispute between them and the deceased. The 2nd appellant gave a similar defence as the 1st appellant.

13. The learned judge, (**Mutende, J.**) was satisfied that the prosecution had proved that the appellants, with malice aforethought, had caused the death of the deceased, convicted them of murder and sentenced them to death as earlier stated.

14. Being aggrieved by the said conviction and sentence, the appellants preferred an appeal to this Court. The appellants, through their learned counsel, **Mr. Amutallah Robert**, raised

7 grounds of appeal, faulting the learned judge for: placing reliance on the evidence of PW1; failing to find that there was no common intention between the appellants; failing to evaluate and analyse the appellants' defence of alibi, adopting evidence recorded by three previous judges without cautioning herself that she never heard any of the prosecution witness testify; failing to properly evaluate and analyse the entire evidence; for holding that the prosecution had proved beyond reasonable doubt all the elements of the offence of murder; and for passing the death sentence which they contended is harsh and unconstitutional.

15. The appellants' counsel filed written submissions and a bundle of authorities, which he briefly highlighted. Counsel submitted that the learned judge erred in relying on the evidence of a single witness, PW1, to convict the appellants, without warning herself of the danger of adopting evidence which had been recorded by other judges, and which he contended was not credible.

16. Counsel added that **Lenaola, J.** (as he then was), heard 5 prosecution witnesses, **Waweru, J., Kariuki, J.** (as he then was) and **Dulu, J.** heard the other 2 witnesses, then the learned judge heard the defence case only and wrote the judgment. Citing **Abdi Adan Mohammed v Republic [2017] eKLR**, the appellants' counsel submitted that it is important for the final arbiter to be in a position to weigh the evidence together with his or her own observation of the demeanour of witnesses.

17. Mr. Amutallah further submitted that the learned judge did not properly analyse the prosecution evidence as well as the appellants' defences, saying that the evidence of PW1 did not tally with the evidence of PW2. Lastly, he submitted that the learned judge erred in law in passing the mandatory death sentence. He urged this Court to review the sentence, in line with the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

18. In response, **Ms Wang'ele**, Senior Principal Prosecution Counsel, opposed the appeal. She submitted that the appellants were explained the provision of **section 200** of the **Criminal Procedure Code** and they opted to proceed with the case from where it had reached.

19. Regarding the evidence of PW1 and PW2, the respondent's counsel submitted that PW1 was a credible witness and her evidence was watertight, that PW2 was not together with PW1 when the offence was committed; that each gave an estimate of the time when the offence was committed; that the evidence of PW1 and PW3 placed the appellants at the scene and therefore the defence of alibi was not credible at all; and as regards sentence, the murder was a cold blooded one and therefore the death sentence was warranted. We were urged to dismiss the appeal in its entirety.

20. We have considered the record of appeal and the submissions by counsel. Starting with the issue of credibility of PW1's evidence, the learned judge cautioned herself that the evidence as to who caused the death of the deceased was of a single witness, PW1, and therefore there was need to test such evidence with the greatest care, as held in **Mburu & Another v Republic [2008] 1KLR 1229**. She however observed, and rightly so, that a conviction can be founded on the evidence of a single witness, which she did.

21. In our view, the learned judge cannot be faulted for so holding. The offence was committed in broad day light. According to PW1, the attack took place at about 10.00 a.m., whereas PW2 said that it was around noon. Those were just time estimates, and nothing much turns on the specific time when the offence was committed. It is however not in dispute that PW1 was with the deceased when he was confronted by his assailants and hacked to death. And who were the assailants? PW1 stated: -

***"We walked and met the 1st, 2nd and 3rd accused together with Kimeu son of Nicodemus, (1st accused). They were where my husband had harvested beans. The 1st accused was sitting down, and his son standing beside him. 2nd and 3rd accused were also***

***standing. When my husband approached them, they said that they should accomplish their mission. The 1st accused stood up and cut him with a panga behind his hand. After being cut, the deceased fell down, and the 2nd accused cut him on the head at the head (at the back) and the brain matter came out.***

22. PW1 exonerated the appellants' co-accused as well as the 1st appellant's son, saying that they did not do anything to the deceased. As PW1 was running away, she met PW2, who was working on the far side of the shamba and told him what had happened. The evidence adduced by PW1 was not controverted. In our view, she was a credible witness. Shortly after she reported the incident to PW3, the appellants presented themselves to PW3 from where they were arrested.

23. We are therefore satisfied that the prosecution proved beyond reasonable doubt that it was the appellants who murdered the deceased. There can be no doubt that they had malice aforethought, considering how the offence was executed.

24. As regards the defence of alibi, the same was rightly rejected because there was overwhelming evidence that they were at the scene at the material time.

25. Turning to the ground that alleges non-compliance with the provisions of **section 200** of the **Criminal Procedure Code**, the record is clear that on 28th August, 2013, the learned judge explained to the appellants in the presence of their defence counsel the provisions of the said section. The 1st appellant responded: -

***"I have understood the provision of the law as per section 200 of the Criminal Procedure Code explained. I elect to proceed from where it had reached. I do not want to have any witness recalled."***

Similarly, the 2nd appellant responded:

***"I elect to proceed from where the matter reached. I do not want to have any witness recalled."***

We find that ground of appeal totally unfounded and dismiss it.

26. We are satisfied that the learned judge carefully analysed all the evidence that was adduced by both the prosecution and the defence and arrived at a well-founded decision. We therefore reject the appellants' appeal against conviction.

27. As regards sentence, we must state that at the time the learned judge passed it, death was the mandatory sentence for anyone convicted of murder. The learned judge's hands were therefore tied. That notwithstanding, the recent Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic*** (*supra*) held that mandatory death sentence is unconstitutional as it denies the Court its legitimate duty of considering an accused's mitigation before passing sentence.

28. The appellants' counsel urged the Court to consider that the appellants and the deceased are brothers; that there was a family land dispute; that the appellants have been in custody for more than 10 years and that they have very good recommendations by the Officer-in-charge, Kamiti Main Prison as to how they have been reformed and trained in various skills over the years. He urged us to review the sentence appropriately.

29. Taking into consideration, the current jurisprudence as stated above and all the mitigating factors as outlined by the appellants' counsel, we are inclined to allow the appeal against sentence, which we hereby do.

Consequently, we set aside the death sentence and substitute therefor a jail term for each of the appellants for a period of 30 years from 21st June 2007 when the appellants were arrested and held in custody, where they are to date. To that extend, the appeal against sentence succeeds.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**