IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OKWENGU, JJ. A)

KISUMU CRIMINAL APPEAL NO. 39 OF 2017

BETWEEN

DAVID MWANGI MONICA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Nairobi (Lesiit, J.) dated 9th July 2015

in

H.C.CR.C. No. 52 of 2011)

****

JUDGEMENT OF THE COURT

1. The appellant herein was arraigned before the High Court at Nairobi to answer a charge of murder contrary to section 203 as read with section 204 of the Penal Code. He is said to have, with malice aforethought killed one **Jessee Macharia Kabua,** (the deceased), on 21st June, 2011. He denied the charge and the matter proceeded to hearing with the prosecution calling a total of nine witnesses in support of its case. On his part, the appellant testified on oath and called his brother, one John Macharia as his witness.

2. The brief facts of the case are that the appellant and (Dorcas Mugure Kariuki) PW4, had been living together as husband and wife for about 4years and had a son together. However, as at the time the incident giving rise to this case occurred they had parted ways and were living separately but within the same locality. On the date in question, PW4 took their son to school in the morning but the appellant appears to have collected him from there in the afternoon. He later called PW4 and requested for a meeting that evening with the agenda of discussing the child's welfare. According to PW4 that is how the two ended up at Makutano Club in Soweto estate, Kayole area within Nairobi County that fateful evening. They went to the parking area at some point and the appellant is said to have ordered PW4 to board his vehicle, which she declined. He pushed her but she resisted and that is when he is said to have drawn a pen knife from his jacket pocket and stabbed her twice on her stomach and on her upper arm as she deflected the penknife aimed at her head.

3. As she ran away to save her life while holding her intestines which were spilling out from her stomach, with the appellant hot on pursuit, David Nderitu Kabue, (PW1) the deceased's brother, who was nearby and had witnessed the incident picked up a stone, aimed it at the appellant and hit him on his head. PW1 also ran after them screaming to catch the public's attention. The deceased who was coming from the opposite direction attempted to stop the appellant, but the appellant stabbed him, and he fell down. Other members of public joined in and overpowered the appellant and restrained him until they handed him over to Sgt. George Masinde who was in patrol in the area in the company of other police officers.

4. The appellant who had sustained injuries after being roughed up by members of public was taken to hospital for treatment. The deceased was taken to Kenyatta National hospital where he succumbed to his injuries on 21st June, 2011. An autopsy conducted by Dr Minda Okemwa revealed that the cause of death was the deep penetrating stab wound to the stomach. The appellant was subsequently charged with the offence of murder as particularized earlier.

5. In his defence, the appellant told the court that as he was leaving the scene in the company of his brother and PW4, three men who he said belonged to the proscribed 'mungiki' cult and who were with PW4 earlier, attacked him using a knife and clubs at the behest of PW4. That one of the men stabbed him on the chest and the other two beat him with a club causing him further injuries on his nose, ear and neck. Further, that the deceased who was one of those men, was stabbed in the abdomen when he fell on the knife during the scuffle. He said that PW4 had also been stabbed by one of those men as the appellant tried to use her as a human shield in a bid to protect himself from the

attackers.

6. The appellant's witness on the other hand said that the attackers had emerged from a dark alley and attacked them indiscriminately and robbed them of valuables including money and mobile phones before disappearing into the darkness. The appellant and his witness maintained that the deceased had fallen on the knife in the cause of the scuffle and that was how he had sustained the fatal stab wound to his stomach.

7. The learned Judge **(Lesiit J)** upon assessing and analyzing the evidence tendered before her, found the appellant guilty of the offence of murder as charged and convicted him. After considering the appellant's lengthy mitigation, the Judge sentenced the appellant to death, saying that it was the only sentence prescribed in law.

8. Aggrieved by both the conviction and sentence, the appellant preferred the instant appeal premised on grounds as appears on his homegrown memorandum of appeal and the supplementary memorandum of appeal filed subsequently by his learned counsel. In a nutshell, the appellant faults the learned Judge on the grounds that the learned Judge erred in fact and law by: failing to find that the prosecution failed to prove the element of *mens rea* so as to establish the offence of murder; failing to consider that the murder weapon was not produced in evidence before the court and; failing to consider the appellant's defence of self-defence.

9. The appeal was urged by way of written submissions with oral highlights by learned counsel Mr. Kamanza for the appellant and Mr. Omirera for the State. Urging the Court to allow the appeal, counsel for the appellant submitted that there were inconsistencies in the evidence adduced by the prosecution witnesses and that the learned Judge had failed to reconcile the two different narratives proffered by the witnesses. He submitted that the learned Judge failed to consider the testimony of PW8, CPL Peter Mutiso, who was the investigating officer to the effect that the appellant made a report to the police stating that he had been attacked, in contradiction to the other prosecution witnesses' testimony.

10. Mr. Kamaanza submitted that one CPL Mwaura, a crucial witness, who commenced investigations was never called to testify. He urged that this prejudiced the appellant's case as the circumstances under which investigations were taken over by another investigating officer were not explained. Further, that failure to produce in court as exhibits the photographs of the deceased's body taken by the police, indicated foul play, and this was prejudicial to the appellant's case.

11. Placing reliance on this Court's decision in **Ahmed Mohammed Omar & 5 Others v. Republic, Nairobi Civil Appeal No. 414 of 2012 eKLR** which cited with approval **R v. McInnes, 55 Cr. App. 551,** counsel submitted that the appellant proved his defence of self-defense to the required standards.

12. Urging the Court to allow the appeal, counsel maintained that the learned Judge failed to appropriately resolve the conflict between the direct and circumstantial evidence in view of the inconsistences in the prosecution case.

13. Opposing the appeal, Mr. O'Mirera submitted that it was apparent that the appeal was premised on the grounds that the learned Judge erred in law: by over-relying on the testimony of PW1; by wrongly basing proof of *mens rea* on usage of the knife without establishing who was in possession of the same; in failing to find that the appellant's defence of self-defense was not dislodged by the prosecution; by failing to comply with section 169 of the Criminal Procedure Code (CPC); by failing to comply with section 200 of the CPC; in failing to evaluate and re-evaluate the entire evidence afresh and; by concluding that the prosecution's case had been proved beyond reasonable doubt.

14. Counsel submitted that the learned Judge in convicting the appellant considered: the identification evidence by PW1; the circumstantial evidence as given by PW3; and the postmortem evidence as given by PW9.

15. On identification counsel submitted that according to PW1's evidence he was an eyewitness, and was able to clearly see the appellant, PW4 and DW2 by the help of bright light from a streetlight when the appellant stabbed PW4 and ran after her. He urged that that evidence was found to be unbiased and credible by the trial court. On circumstantial evidence leading to the appellant's arrest, counsel argued that according to PW3's evidence, the appellant was arrested after he was found to have been captured by members of the public on allegations that he had stabbed two people.

16. Further, that according to PW9's evidence on the postmortem procedure and resultant report, the deceased's death was caused by a stab wound to the upper abdomen below the chest which was consistent with that caused by a penetrating object.

17. On the issue of self-defense, counsel cited **section 17** of the Penal Code and **Palmer v. Republic (1971) AC 814** and **R v. McInnes, 55 Cr. App. 551** submitting that the appellant's allegations that he was stabbed on the chest on the material day was not proved and so the trial court rightly concluded that the appellant's defence of self-defense was not established.

18. On the issue that the trial court failed to comply with **section 169** of the CPC, he urged that such claims were unfounded.

19. We have carefully considered the evidence on record in its entirety, the impugned judgment of the trial Court, the grounds of appeal, the submissions by both counsel, the authorities cited and the law. This is a first appeal therefore the duty of this Court is as was set out by the predecessor of this Court in the case of **Okeno V. Republic [1972] EA.32** as follows:

> **"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 versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 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 finding 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 had the advantage of hearing and seeing the witnesses."

See also: Peters v. Sunday Post [1958] EA424 wherein it was held, inter alia, that:-

"Whilst an appellate Court had jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion; or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to so decide."

20. From the foregoing, the substantive issues falling for the determination of this Court are as follows: whether the prosecution proved its case beyond reasonable doubt; whether the appellant's defence was considered and whether we can interfere with the death sentence handed down to the appellant.

21. On the first issue, the appellant argues that the evidence adduced by the prosecution before the trial court was not sufficient to sustain a conviction. He faults the learned Judge for: failing to find that PW8's testimony that the appellant reported the incident to the police station saying that he had been attacked, contradicted the other prosecution witnesses' evidence that the appellant was arrested by a crowd; relying on PW8's evidence which was hearsay; failing to consider that a crucial witness who was the initial investigating officer was not called hence causing prejudice to his case; failing to consider that no murder weapon and photographic evidence was produced to prove the cause of death.

22. Having revisited the record, we have confirmed that on the question of PW8's testimony, it is clear from paragraph 42 of the impugned judgment that the learned Judge did actually consider the said evidence. It is therefore incorrect for counsel for the appellant to state that the said evidence was not considered. In any event, PW8 was not at the scene when the deceased was stabbed, and further it is not disputed that the appellant was indeed arrested and subsequently charged with murder.

23. On the question of the prosecution failing to call a crucial witness, the appellant argued that one CPL Mwaura who commenced the initial investigations was not called to testify hence this was detrimental to his case.

24. The principles to consider in determining the issue of failure to call crucial witnesses was dealt with in the leading case of **Bukenya and Others v. Uganda 1972 EA 549** Lutta Ag. Vice President held:-

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

29. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

25. In **Sahali Omar v. Republic (2017) eKLR** this Court stated thus;

"Section 143 of the Evidence Act provides that:-

'No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.'"

From the record and the evidence of the eye witnesses we are not persuaded that the evidence of the officer who took over investigations from PW8 was crucial to prove the prosecution case. Failure to call him was not fatal to the prosecution case, nor was it crucial to the appellant's case.

26. On the question of proof of cause of death, the appellant argued that since the photographs taken during investigation were not produced and the murder weapon was never found, the prosecution did not establish its case to the required standard of beyond reasonable doubt.

27. In regard to the murder weapon, this Court faced with the same question in the case of **Karani v. Republic (2010) 1 KLR 73** pronounced itself thus:-

"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

28. Similarly, in **Ramadhan Kombe v. Republic, Mombasa C.A. NO. 168 OF 2002** this Court held as follows:-

"In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the

doctor who prepared the postmortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission."

A perusal of the proceedings of the trial court as appears in the record, shows that circumstances leading to the deceased's death were explained in detail by both the prosecution witnesses and the accused person in his defence. Despite disparities, it is common ground that the appellant was stabbed with a knife. PW9, the Government Pathologist who examined the deceased's body, confirmed that the cause of death was a penetrating 6 cm long stab wound on the left upper abdomen. Therefore, from the evidence tendered there is no doubt it was a knife that was used to inflict the fatal injury on the deceased and as such failure to recover and produce that knife as an exhibit was not fatal to the prosecution case.

29. That ground of appeal therefore fails.

30. On the second issue, from the record, it is clear that the appellant never raised the defence of self defence for the court's consideration. He raised the defence of intoxication which was extensively considered by the court but discounted. The learned Judge cannot therefore be faulted for failing to consider a defence that was not raised. Furthermore, the evidence before the trial court was that the appellant was indeed the aggressor and is the one who was armed with the knife. That was the evidence that was accepted by the court and the issue of self defence could not arise. That ground of appeal therefore falls by the wayside.

31. In regard to the issue of malice aforethought, Section 206 of the Penal Code defines Malice aforethought as follows:-

"206. Malice aforethought 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."

32. Addressing this issue, the learned Judge made the following findings which we quote *in extenso*:-

"47. In MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR) the Court of Appeal while considering what can constitute malice aforethought stated as follows:-

"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later."

48. In DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR), BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

49. I am guided by the above cases. Repeated assault with a weapon can be construed to prove the presence of malice aforethought on the perpetrator. Similarly repeated assault on more than one victim can constitute malice aforethought. I considered that the accused had armed himself with a knife before luring PW4 to the scene of this incident. He then stabbed her twice on the stomach. I find that the accused had both the mens rea and actus rius to cause grievous harm or death of PW4. That constitutes malice aforethought under section 206 (b) of the Penal Code. Luckily, PW4 did not die. The accused was in pursuit of PW4 when he met and stabbed the deceased. That constitutes malice aforethought under section 206 (a) of the Penal Code, as clearly, the accused was after PW4 not the deceased.

50. The accused stabbed the deceased as is clearly shown in the evidence of PW1 and 4, both eye witnesses. It was a single stab wound. However it followed after three stabs against PW4 the intended victim of the attack. It is clear accused had had no altercation or confrontation with deceased prior to that. It is doubtful that accused knew the deceased before, and he does not say he did. The attack on the deceased was clearly transferred malice since it happened as the deceased ran towards the

accused to keep him off from attacking PW4 any further.

51. In this case it is clear that the accused had formed an intention to cause death or grievous harm on the wife PW4, from whom he had just become estranged. At the time the accused stabbed the deceased, he was pursuing PW4 to stab her the fourth time. It is clear that the accused intention was to cause death or grievous harm on PW4, given the number of times he stabbed her. The accused was pursuing PW4 to stab her some more and in the process of his pursuit he met with and stabbed the deceased because he intercepted him or stood in his way. I find that malice aforethought is proved as stipulated under section 206 (a) of the Penal Code."

33. We hold the view that the learned Judge's exposition of the law was correct and she cannot be faulted for arriving at the conclusion that malice afore thought was established. The nature of the injuries inflicted to the deceased and also to PW4, who was admitted in hospital for 18 days tells a story of a person who wanted to either cause death or inflict grievous bodily harm to his victims. Malice aforethought was established as by law required.

34. Before we conclude, we wish to address an issue raised by the state counsel on compellability of PW4 as a witness. We note that this was not an issue that was raised before the trial court nor before this court by the appellant. Our view of the matter is that firstly, although PW4 was referred to as "wife", there was no evidence that she was a 'wife' as envisaged under **section 127(4)** of the Evidence Act. Secondly, there was evidence that the two were estranged and were not living as husband, and wife as at the time the offence was committed; thirdly the appellant did not object to PW4's testimony being admitted; and lastly, even assuming she was the appellant's wife the law by dint of **section 127 (3)c** of the Evidence Act allowed her testimony as she was the target and also victim of the attack by the appellant.

35. Ultimately, for the foregoing reasons, we find the appeal against conviction totally devoid of merit and dismiss it accordingly.

36. On the issue of sentencing, it is evident from the proceedings of the trial Court that the appellant was afforded a chance to provide mitigation before he was sentenced by the trial court and that the court addressed its mind to the mitigating factors before sentencing the appellant. We note, however, that by the time sentence was passed, the death sentence was perceived to be the only lawful sentence. Jurisprudence has changed since the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, where the Court held that although the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction of murder is recorded only a death sentence should be imposed. Consequently, the Supreme Court declared the mandatory nature of the death sentence provided under section 204 of the Penal Code as unconstitutional.

37. In our view, the appellant should benefit from this jurisprudential paradigm and have his death sentence set aside. The appellant's mitigation is on record and we can therefore deal with his sentence as requested. We have considered the said address in mitigation and the circumstances surrounding this case as aptly noted by the learned Judge, along with the sentiments expressed by learned counsel for the state.

Having done so, we set aside the death sentence meted out by the trial court and in its place substitute thereof a term of 30 years' imprisonment. This appeal therefore succeeds to that extent only.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR