



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE, MURGOR & SICHALE, J.JA)

CRIMINAL APPEAL NO. 95 OF 2017

BETWEEN

CHRISTINE MORAA NYABANDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi delivered by Kimaru, J. on the 23rd day of September, 2015

in

Nairobi High Court Criminal Case No. 112 of 2013)

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JUDGMENT OF THE COURT

Christine Moraa Nyabando, the appellant, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 12th day of September, 2013 at Dandora Phase 4 in Njiru District within Nairobi County jointly with another not before the Court, she murdered Jackson Manoti Seme (the deceased).

On 12th September 2013 at around 8.30 p.m, Caroline Mukami PW 1 (Caroline), a resident of Dandora Phase 4 who carries on a green grocer business in the estate was closing her shop when the appellant phoned to accuse her of 'donating' her (the appellant's) husband to Caroline's cousin Purity Mukami who resided with Caroline and helped her with her business. When she asked the appellant whether she knew whom she was talking to, the appellant responded that she knew she was speaking to Mama Njeri. Caroline explained that the appellant was her neighbor and was well known to her since she had, for about one year, resided together with her husband in the 3rd house of the same plot where Caroline resided. Caroline who was aware that the appellant had that morning packed and left her house after disagreeing with her husband, requested the appellant to come and discuss the matter in Purity Mukami's presence.

The appellant came over as agreed, and they went to Caroline's house where the appellant accused Purity of having a love affair with her husband, allegations which Purity had denied. Whilst standing at Caroline's door, the appellant noticed her husband passing by on his way to their house.

At that moment, the appellant turned to her husband and demanded money from him. Speaking in Ekegusii, which Caroline understood, her husband asked what money she wanted, and the appellant responded that she wanted her Kshs. 10,000. Thereafter, the appellant picked up a stone and threw it at her husband who had by then entered their house. She picked up a second stone, but before she could throw it, her husband came out and snatched it from her, and a fight ensued between the two in the corridor, which was lit up by light from their house. They fought for about 20 to 30 minutes until the appellant was overpowered, whereupon she escaped from the plot.

She returned a few minutes later with her brother Onyancha, who was armed with a knife. On entering the plot, they met the deceased who had followed the appellant to the gate of the compound. Onyancha grasped his brother in law's collar, and knocked him down. While holding the knife he said, "I will kill you". At the same time, the appellant punched her husband with her fists as he lay on the ground.

Suddenly, Onyancha lifted the knife to stab the deceased, at which point, Caroline held the knife, but Onyancha twisted it out of her left hand, lacerating three of her fingers. With her hand bleeding, she ran to get help from the ODM office in the plot next door, but found it closed. She returned to the plot 15 minutes later to find that the appellant and her brother had left, and the deceased lying on the ground about

20 metres from the gate where he had fallen. She tried to talk to him, and when he did not respond she ran to **Fred Omosa Bichang'a, PW 2's (Fred)** house that was nearby to inform him of what had happened. It was Fred that accompanied the deceased to the hospital in a taxi. He later informed Caroline that the deceased had died on the way.

**Cpl Kenneth Okello PNo. 73688 PW 4, (Cpl Okello)** who was based at Dandora Police station CID Office, and was the Investigating Officer, to a large extent reiterated the evidence of Caroline and Fred. He added that after the incident was reported, he embarked on tracing the appellant who had by then relocated from the plot. With the assistance of Safaricom, he traced the appellant to Kisii using her mobile phone, where she was apprehended and brought to Nairobi and charged with the offence.

**Spt Stephen Kemboi P No. 230543 PW 5** the Officer in charge – Crime Scenes Support Service, Nairobi County documented the murder scene through photographs, finger prints and sketch drawings. He took six photographs and had them marked. He also prepared a certificate produced as Prosecution Exhibit No. 1 (a) and 2.

After being placed on her defence, the appellant gave sworn testimony. She stated that she was a business lady, married with one child. She used to live in Dandora Phase 4 with her husband, the deceased, to whom she was married since 2010. On 11<sup>th</sup> September, 2013, after they returned from their rural home, her husband became abusive towards her. He had slapped her and pushed her out of the house, and she had slept outside until the next morning. The following day, he removed her belongings from the house, and told her he did not want to see her again. After informing her brother of her husband's actions, he advised her to collect her personal belongings and to come and discuss the problem with him. She met with her husband when she returned to her home to collect her possessions, and again demanded her money; that he had told her to return and collect the money in the evening. On reaching the plot that evening, he refused to return the entire sum claiming he had paid for her hospital maternity fees. When she insisted, he had assaulted her, shortly thereafter, Fred's wife Everlyne, informed her of the deceased demise. She stated that she was shocked and confused since she had left her husband alive. The following day, she travelled to her rural home, where she remained, until she was arrested and charged with the offence 2 months later.

She denied being present at the scene or stabbing the deceased with a knife, or that her brother had stabbed him. All she wanted was for the deceased to return her money. She also denied running away.

Upon hearing the evidence and the submissions of the 5 prosecution witnesses, the trial court (*Kimaru, J.*) found the appellant guilty as charged and sentenced her to death as by law prescribed.

The appellant was aggrieved by the conviction and sentence, and appealed against that decision on the grounds that the learned judge erred in failing to appreciate that no proper identification parade was carried out to identify the appellant; in failing to appreciate that the evidence was not conclusive as there was doubt as to who murdered the deceased; that the trial judge failed to evaluate the evidence and arrive at his own independent conclusion; in failing to find that the murder was not proved to the required standard; in failing to appreciate that the circumstantial evidence that was relied on did not form an unbroken chain of evidence and the prosecution witness evidence was not free from errors; in failing to find that the exhibits produced were tampered with. The appellant also urged us to reconsider the sentence and the mitigating factors taking into consideration the Supreme Court's decision in ***Francis Karioko Muruatetu vs Republic, Petition No 15 of 2015***.

**Mr. R. Oira** learned counsel for the appellant filed written submissions, and in highlighting them via a virtual video platform, submitted that the appellant was convicted on the basis of circumstantial evidence that comprised unresolved gaps; that the appellant had stated that her husband had a love affair with one Purity Mukami, who did not testify. It was further submitted that when the fight took place, there were 10 people present, yet none of them was called to testify; that as a consequence there was a gap in the evidence. It was further submitted that though the fight had taken place in the plot, the deceased was found outside the plot, and as a result, he could have been killed by anyone; that this had resulted in a break in the chain of evidence; that the appellant did not go to the deceased's house to kill the deceased, and therefore the appellant was convicted on evidence that was inconclusive.

With respect to the sentence, counsel submitted that in the event that the Court upheld the conviction, the sentence on account of the Supreme Court decision in ***Francis Karioko Muruatetu (supra)*** should be reduced.

Responding to the appellant's submissions, **Ms Ngalyiuka** learned counsel for the State opposed the appeal, and submitted that the facts and evidence including the common purpose all pointed to the appellant as the person who murdered the deceased.

In analysing the evidence, counsel submitted that a disagreement over money had occurred between the appellant and the deceased and Caroline who was a neighbor saw the appellant and her brother attack the deceased with a knife; that Caroline was injured as she tried to stop them from harming the deceased, and when she returned from seeking for help, she found the deceased lying on the ground. The appellant disappeared after the attack, and was arrested 2 months later. It was further submitted that a common purpose to kill the deceased with Onyancha, who did not testify was established.

On the sentence, counsel submitted that since the trial court did not take into account the appellant's mitigation, we should consider her mitigation with a view to reducing the sentence imposed.

This is a first appeal. Our mandate is as was set out by the predecessor of this Court in the case of ***Okeno vs Republic [1972] EA 32*** at this 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] EA 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 (Shantatilal M Ruwala vs. 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 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 had the advantage of hearing and seeing the witnesses. See Peters versus Sunday Post [1958] EA 426."**

As such the issues for our determination are;

- i) whether the offence of murder was not proved beyond reasonable doubt; in failing to appreciate that the evidence was not conclusive as there was doubt as to who murdered the deceased;
- ii) whether the appellant was properly identified since no identification parade was conducted;
- iii) whether the trial judge failed to evaluate the evidence and arrive at his own independent conclusion;
- iv) whether the prosecution witness evidence was free from errors, and if not whether, this resulted in a break in the chain of evidence upon which the conviction was founded;
- v) whether the exhibits produced were tampered with; and
- vi) whether the sentence should be reduced owing to mitigating factors. We begin with determining whether the offence of murder was proved to the required standard. For this to be established, it is upon the prosecution to demonstrate that the prerequisites for murder were established beyond reasonable doubt. **Section 203** of the **Penal Code** defines these prerequisites as:
  - (i) the death of the deceased and the cause of that death; (ii) that the appellant committed the unlawful act which caused the death of the deceased; (iii) and that the appellant had malice aforethought, as required by **section 206** of the **Penal Code**, when they committed the offence.

A reanalysis of the evidence shows that Caroline saw the appellant return to their compound with her brother, Onyancha who was armed with a knife. The appellant's husband who was at the gate met with the two as they returned to the plot. Onyancha knocked him down, and whilst holding the knife told the deceased that he would kill him. By this time the appellant was pummeling her husband with her fists as he lay on the ground.

Suddenly, Onyancha lifted the knife to stab the deceased, at which point, Caroline held it, but Onyancha twisted it out of her hand lacerating three of her fingers. She then ran to ODM offices to get help and returned after 15 minutes to find that the appellant and her brother had left, and the appellant's husband lying on the ground unable to talk. She went to seek help from Fred who called a taxi and accompanied the deceased to hospital. Sadly, the deceased died on the way.

**Dr. Peter Muriuki Ndegwa, PW 6**, who performed the postmortem observed that the deceased had a stab wound on the left chest, 6 cm long below the clavicle, and a laceration on the right temporal-parietal area. The chest had a penetration wound between the 2<sup>nd</sup> and 3<sup>rd</sup> rib anteriorly on the left side. The pericardium of the heart had been penetrated and the aorta and pulmonary artery, severed. There was haemopericardium and on the left side haemothorax, there was a subcutaneous contusion. The doctor concluded that the cause of death was exsanguination due to penetrating stab wound to the chest. Based on this evidence, it can be concluded that the deceased died from the penetrating stab wound to the chest.

On whether the appellant's actions caused his death, the learned judge concluded that;

***"Although no one actually saw the accused and her brother Onyancha stab the deceased, it was clear to this court that the prosecution has adduced sufficient culpatory circumstantial evidence to connect the Accused and his (sic) brother Onyancha with the death of the deceased. The chain of events from the quarrel to the fatal stabbing of the deceased was not broken and can be attributed to only the Accused and her brother Onyancha and no one else. PW1 saw that the Accused and her brother were intent on causing grievous harm to the deceased. PW1 left the scene where the deceased was lying prone on the ground while being assaulted by the Accused and her brother. No one else could have come to the scene and stabbed the deceased."***

Caroline's evidence discloses that she was present at the scene where she saw both the appellant and her brother, Onyancha who was armed with a knife attempt to stab the deceased. She had tried to stop them by holding the knife, and when she failed, she ran to seek for help. Since Caroline did not see the two actually stab the deceased, the appellant has sought to argue that circumstantial evidence could not be relied upon to convict the appellant because the chain of events was broken and a strong possibility existed that someone else could have killed him when she went to seek for help. However, on reevaluating the evidence, there is nothing that shows that any other similarly armed persons were present at the scene who could have stabbed the deceased.

In addition, when Caroline's evidence that the appellant and her brother were intent on stabbing the deceased is pieced together with her having found the deceased lying injured on the ground when she returned, and construed alongside Dr. Ndegwa's medical report that the deceased died from a penetrating stab wound to the chest, an unbroken chain of events emerges, leading to the inference that it was the appellant and her brother who had stabbed and murdered the deceased while they were on a mission of common intent.

On the third element, the trial court was satisfied that malice aforethought was proved, by the common intention defined by **section 21** of the **Penal Code** that was formed by both the appellant and her brother when they sought to stab the deceased, particularly as it could not be stated with certainty as to who, between the two, had struck the fatal blow.

We would agree. The doctrine of common intention was explained by this Court in the case of Dickson Mwangi Munene & another vs Republic [2014] eKLR thus;

***“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged. [Emphasis added]***

In this case, the appellant and her brother armed themselves with a knife, with the common intention of causing death or grievous harm to the deceased. His death, which resulted from a penetrating stab wound effectively satisfied the ingredient specified under **section 206** of the **Penal Code** thereby proving the offence of murder.

As to whether the learned judge properly evaluated the evidence, our reevaluation of the prosecution witnesses’ evidence is that the vivid description of the events as they unfolded on the material day, considered in conjunction with the appellant’s defence, leads us to the conclusion that the deceased was fatally stabbed by the appellant and her brother leading to his death. Having found as we have, we are satisfied that the trial court evaluated the evidence and rightly concluded that the prosecution proved its case to the required standard.

This would leave two matters for consideration. Firstly, on whether an identification parade was necessary, we are of the view that this would not have added any further value to the case. We say this because, Caroline knew, and recognized the appellant on the day in question. She narrated how they had lived on the same compound for about one year, and that the appellant was married to the deceased. She was speaking with the appellant prior to the fateful moment. She saw the appellant go to their house and throw stones at her husband. There was sufficient light for her to recognize her as a neighbor with whom they shared a women’s’ group. She saw her return with Onyancha, and beat the deceased as he lay on the ground. It can therefore be said with certainty that this could not have been a case of mistaken identity, but identification through recognition. This ground is therefore unmerited.

On whether the exhibits produced were tampered with, since the appellant did not elaborate further on the issue, we do not consider it to be a matter for our determination.

Having found as we have that it was proved beyond all reasonable doubt that the appellant murdered the deceased, we uphold the conviction.

The final issue was the appellant’s sentence which we were urged to review, having regard to the Supreme Court’s decision in Francis Karioko Muruatetu vs Republic (supra) where it was held that the mandatory death sentence for the offence of murder was unconstitutional.

When sentencing the appellant, the trial judge stated thus;

***“I have considered the facts of this case and mitigation of the accused. There is only one sentence provided by Law much as I may sympathize with the accused. She is hereby sentenced to suffer death in a manner provided by the law.”***

In other words, contrary to the decision in Francis Karioko Muruatetu vs Republic (supra) the learned judge imposed a mandatory sentence of death on the appellant which was unconstitutional. So that, when we apply the principles set out in the Supreme Court’s decision to the circumstances of the case, and take into account the appellant’s mitigation that she married at a tender age of 17 years, and had a child aged 3 years, we would substitute the sentence of death with imprisonment of 15 years.

Accordingly, the appeal against conviction is unmerited and is dismissed, and the sentence of death is substituted with 15 years’ imprisonment from the date of conviction in the High Court.

***It is so ordered.***

***Dated and Delivered at Nairobi this 25<sup>th</sup> day of September, 2020.***

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**