IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, MURGOR & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 59 OF 2016

BETWEEN

COSMAS NZUKI VALIKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

***Machakos (Thuranira, J.) dated 27th June, 2013* in HCCR No. 48 of 2010)**

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JUDGMENT OF THE COURT

The appellant, **Cosmas Nzuki Valiki,** was arraigned before the High Court at Machakos and was charged with murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. The particulars of the offence were that on 29th July 2010 at Kiangwa Village, Ikanga Location in Kitui District, the appellant murdered Joseph Valiki (deceased).

The appellant denied the charge leading to a trial in which the prosecution called 10 witnesses in support of its case. During the trial it emerged that the appellant fatally attacked and murdered the deceased with a machete. A little background on the complexity of the Valiki family dynamic will shed light as to what prompted the appellant to commit such a heinous crime against his own father.

The deceased had three wives, though the second one had passed away. At time of his death he was living at the third wife's homestead. The trial court was informed that the dispute revolved around the distribution the deceased's wealth which engendered a disagreement between the deceased and the first wife. It was adduced by the prosecution that the disagreement was twofold; the first was about the sale of land by the deceased with the members of the first house claiming not to have received their share of the proceeds; the second was that the deceased took all the cattle he had allocated to the first house and relocated them to the third wife's homestead and was selling them without sharing the proceeds with the first wife and her children. It emerged that those two issues so greatly angered the appellant that he threatened to kill the deceased prior to committing the crime.

As per the accounts of the witnesses, on the fateful night at about 8pm, the appellant went to the third wife's homestead in the company of another individual. Mary Mumbe Valiki, **PW4**, the daughter of the deceased, who was in the kitchen together with **PW3**, George Musili Mwanthi, ushered him into the house. The appellant requested to speak to the deceased, and **PW4** went ahead and informed the deceased that he had visitors. According to her testimony, she did not suspect any foul play at the time. However, to her utter shock, she saw the appellant attacking the deceased with a machete and in the process heard the deceased utter the following words ***"Nzuki why are you killing me?"*** This question, which amounts to a dying declaration, was also heard by **PW2**, Ruth Valiki, the deceased's 3rd wife who was in the bedroom when she heard a commotion causing her to rush to the scene.

At the close of the prosecution's case, the learned Thuranira, J found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied murdering the deceased. He claimed that he was at his home resting on the fateful day. He further claimed that even though he had a disagreement with the deceased over property, their relationship was cordial. His alibi was sought to be confirmed by his wife Sarah Nzuki, DW2. She testified that the appellant was in the house with her on the fateful day from 6pm.

The learned judge evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to death.

Aggrieved by that decision, the appellant preferred the instant appeal, based on a supplementary memorandum of appeal raising 5 grounds,

which we summarize as that the judge erred in law and fact by;

a) Failing to analyse and evaluate the evidence as required by law.

b) Holding that the appellant was positively identified.

c) Shifting the burden of proof to the appellant and thereafter rejecting his alibi defence.

During the hearing of the appeal, learned counsel **Mr Oyalo** appeared for the appellant while the State was represented by **Ms Ngalyuka**, the learned Prosecution Counsel. The appellant filed written submissions, but there were no submissions on record from the respondent.

Mr Oyalo argued that the appellant was not positively identified at the scene of the crime. Counsel submitted that had **PW3** and **PW4** had positively identified the appellant at the scene, they would have given that information to the police as soon as they arrived at the scene of the crime, and not days later as was the case.

Mr Oyalo further contended that the learned judge erred by shifting the burden of proof to the appellant yet the same rested squarely on the prosecution. Additionally, the alibi defence as raised by the appellant was never considered by the court which was a breach of natural justice.

Ms Ngalyuka submitted that in opposition the appellant was positively and clearly identified at the scene of the crime. The Prosecuting Counsel argued that the alibi defence did not shed any doubt on the prosecution's case and therefore did not hold any water. Furthermore the prosecution proved the element of malice on the part of the appellant who was motivated by money.

We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as a first appellate Court as was stated in **REUBEN OMBURA MUMA & ANOTHER - V - REPUBLIC [2018] eKLR**;

> ***"This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."***

We have distilled the issues to be considered as whether the prosecution proved its case beyond a reasonable doubt and whether the alibi defence was sufficient to cast doubt on the appellant's guilt.

The appellant complained that the learned judge misdirected her by failing to properly analyse and evaluate the evidence tendered by the prosecution. It is trite that the evidentiary threshold in criminal matters is beyond a reasonable doubt. It is therefore the responsibility of the courts to ensure that the prosecution attains this threshold before a conviction is returned against an accused person. Thus the prosecution must at all times prove the concurrence of *mens rea* and *actus rea*. This Court pronounced itself on this in **JOSEPH KIMANI NJAU V REPUBLIC [2014] eKLR** as follows;

> ***"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard."***

From the record, the appellant was identified at the scene by both **PW3** and **PW4**. It is evident that **PW4**, as the step-sister of the appellant knew him very well. Also, **PW3** had worked at the homestead of **PW2** for over 3years and was therefore familiar with the appellant. Contrary to the appellant's assertions we are satisfied that the identification of the appellant was that of recognition and the learned judge did not err in so holding. The issue of when the information of the identity of the accused was relayed to the police, as was raised by the appellant, does not in any way affect the authenticity of the identification. We reiterate the strength identification by recognition stated by the Court in **HASHON BUNDI GITONGA V REPUBLIC [2016] eKLR**;

> ***"It is trite law that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See: Anjononi & Others v Republic [1980] KLR 59."***

PW4 placed the appellant at the scene of the crime as she is the one who ushered him into their homestead and proceeded to inform the deceased of the appellant's request to see him. Crucially, she witnessed the appellant attacking the deceased with a machette and she also heard his dying declaration which was corroborated by **PW2**. The testimony of the kind of weapon used to attack the deceased was corroborated by the Dr Patrick Mutuku, **PW6** who found the cause of death to be head injury secondary to assault with force and using a sharp object.

On the second limb of *mens rea*, this is a very crucial ingredient in a charge of murder as without it a conviction cannot be entered against an accused. This has been provided for in

Section 203 of the **Penal Code** as;

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

Malice aforethought is defined in **Section 206** of the **Penal Code** as;

> ***"(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."***

From the injuries inflicted on the deceased, it is clear that the appellant intended to cause the death of or at the very least grievously harm the deceased. **PW6** testified that the deceased had not only been cut twice around the region of the skull but that he also had multiple bruises on the anterior chest wall. These injuries were evidently inflicted on the deceased by the appellant with the intent to kill him.

Additionally, the prosecution presented evidence of motive on the part of the appellant. Even though motive is not a requirement in order for offence of murder to stand, it is however helpful in establishing the element of malice aforethought. It was so held by this Court in **JOHN MUTUMA GATOBU V REPUBLIC [2015] eKLR** as follows;

> ***"There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."***

The prosecution called upon the relatives of the appellant in their quest to prove that the appellant had motive to murder the deceased. **PW2** affirmed the existence of a grudge between her husband and the first wife. This must have affected her daughter, **PW4** who testified that she considered the members of the first house as enemies. **PW8**, Lawrence Wambua Mueti, a brother to the deceased described how the members of the first house had reported the deceased to DO claiming that he had undertaken the sale of land without their consent.

Finally, there was the testimony of the appellant's sister, Elizabeth Kambua, **PW5** who testified that the appellant and the rest of her brothers had already received their share of the proceeds of the sale of the land but still went ahead to claim that they had not. Without a doubt therefore, the appellant's motivation was greed. The appellant refused to have a reconciliatory meeting with the deceased in order to resolve the matter. It was during this time of frustration that the deceased called her and informed her that the appellant had vowed to kill him. He told her that if he ever died of unnatural causes then the appellant would be responsible for it.

From the foregoing, we are satisfied that the *mens rea* of the appellant was proved beyond a reasonable doubt. The learned judge did not err in holding that the motive behind the killing was due to family wrangles and we reject the complaint on that score.

Finally, the appellant argued that the learned judge ignored his alibi defence thereby breaching the rules of natural justice. An alibi defence seeks to disprove or cast doubt on the prosecution's case by showing, on a balance of probabilities, that the accused did not commit the offence not having been at the *locus in quo*.

However, the same ought to be heard against the evidence tendered before the court. In this instance, the alibi defence raised by the appellant was a mere denial and did not shake the overwhelming evidence tendered by the prosecution. The learned judge did not err in rejecting it. This Court in **Hashon Bundi Gitonga v Republic (Supra)** stated as follows;

> ***"On the alibi defence raised by the appellant, we find that the two courts below also arrived at the correct finding to the effect that the evidence of the complainant and the other eye witnesses had dislodged the appellant's alibi. His defence was a mere denial, and a vague attempt at the defence of alibi."***

In sum therefore, we find that the case against the appellant was iron-clad, his conviction was sound and we shall not interfere therewith.

Finally, we note that the appellant was sentenced to death. It is trite that sentencing is at the discretion of the trial court and the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC & 4 OTHERS [2017] eKLR** brought to light the importance of judicial discretion in the determination of sentences. We do not find anything in this case that would persuade us to disturb the death sentence as meted out by the learned judge. The appellant committed a vile patricide fuelled by a false sense of entitlement and was fully deserving of the ultimate sentence of death.

Consequently, we see no reason whatsoever for us to depart from the holding of the High Court and we therefore dismiss this appeal in its entirety.

Orders accordingly.

Dated and delivered at Nairobi this 25th 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