IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 104 OF 2019

BETWEEN

JMM.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Wakiaga, J.) dated 12th May, 2018

in

HC. CR. C. No. 40 of 2015)

****

JUDGMENT OF THE COURT

This is a first appeal from the Judgment of the High Court sitting in first instance, and it is our duty to re-evaluate the evidence and reach our own conclusions – see the oft-cited case of **Okeno v Republic [1972] E.A. 32** where the predecessor of this Court had this to say of that mandate:

> ***"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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 has had the advantage of hearing and seeing the witnesses, see PETERS vs. SUNDAY POST [1958] E.A 424."***

The appellant, **JMM** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** particulars in the Information being that on 7th April, 2015 at [particulars withheld] in Njiru, Nairobi, he murdered **RWN**. He pleaded not guilty and a trial took place first before Ombija, J., who took the evidence of eight (8) prosecution witnesses. Wakiaga, J., then took over and after hearing three (3) witnesses the Judge found that there was a case to answer. The appellant gave an unsworn statement and the Judge, on analyzing the case found the appellant guilty as charged in the Judgement delivered on 12th April, 2018. Going through the record we at first thought that the Judge mistakenly wrote two Judgments but, no, the sentence is a separate nine page document where the appellant was sentenced to thirty five (35) years imprisonment, credit being given for pre-trial detention served by the appellant.

This is a summary of the prosecution case.

In the evening of 7th April, 2015 **LMN (PW1 – M)** received a telephone call from his brother in law, the appellant, who told him to go to his (the appellant's) house at Ruai to go and check on his sister-in- law **RWN (the deceased)** who he had hit and left in the house motionless. M informed his wife **AW (PW2 – W)** of the contents of the information he had received and he also called his father-in-law **DN (PW5 – N)** and they all, plus the deceased's mother **PWN (PW3 – W)** agreed to proceed to the appellant's house in Ruai. The rear door was open and they all entered the house where they found a horrifying scene. Lying naked on the bed was the deceased. There was blood all over the bedroom and bathroom. The deceased had various injuries on the face and a deep cut was noticeable on the upper lip and there was a deep cut on the left eye-lid. Part of her hair and weave had been plucked off. There were clothes strewn all over; the deceased's eye-glasses were on the floor and the bedding was wet with water and blood. In the bathroom where there was a lot of blood there were 2 buckets with clothes

in bloody water.

M rushed to Kamulu Police Post where he reported the incident and was accompanied back to the scene by three police officers. Police took charge of the scene; a police officer took photographs of the scene and the body was removed to the mortuary.

According to M the relationship of the appellant and the deceased had been a rocky one.

On 9th April, 2015 (two days after the incident) M received telephone calls including one from the appellant who wanted to know to which hospital the deceased had been admitted. He gave him wrong information which led police to arrest the appellant that evening at Hot Dishes Restaurant on Kimathi Street, Nairobi. It was M who identified the appellant to the police for arrest and, upon being arrested, the appellant threatened to teach him a lesson for leading the police to arrest him.

W testified in addition to the above that:

> ***"The relationship between accused and the deceased was bad. She was being buttered (sic). On two occasions our parents tried to reasonable tension (sic)."***

W, mother to the deceased, testified of the many quarrels between the appellant and the deceased and that in 2009, after a quarrel and beating, she and her husband summoned the deceased to their home. The deceased informed them that she had been beaten up after finding out that the appellant had raped their house help. That time the deceased stayed with them for 2 weeks but later reconciled with the appellant. Further, that the following year there was another quarrel leading her and her husband to summon the deceased home. The deceased stayed with them for about 3 weeks when the appellant, accompanied by his pastor came for the deceased. The cause of friction between the appellant and the deceased was that she had not given him a child and she kept company of two ladies (child-hood friends), company which the appellant disapproved.

According to W on 5th April, 2015 she and her husband had invited all their children with their spouses to visit them at home but the appellant did not attend the family function. On that occasion the deceased informed her family that all was not well at her house; that the appellant was taking alcohol which made him get into uncontrollable temper.

N, father of the deceased, identified his daughter's body to pathologists at Montezuma mortuary for post-mortem.

PC John Kipchoge (PW6) of CID Ruai Police Station is the officer who arrested the appellant who he took, first to Central Police Station, Nairobi, and thereafter to Ruai Police station.

It was **PC Derrick Kiprono Cherutich (PW7)** attached to Kayole Police Station, who visited the scene on the material night and took various photographs of the deceased's body and parts of the house. He made a report and certificate and, with the photographs, he produced them as part of the evidence before the trial Judge.

Corporal Obadiah Muthii (PW8) upon being instructed by the Officer Commanding Station, Ruai Police Station, on 8th April, 2015 visited the scene of crime in company of other officers including **PC Cherutich**. They were led there by M. He found the deceased lying on the bed naked and he noticed physical injuries – cut on the left eye and a sharp deep cut on the upper lip. The beddings were wet; there was blood at several points and there were buckets in the bathroom. He collected an identification card and a bank card in the names of the appellant which he handed over to the investigating officer. He observed PC Cherutich take various photographs and they took as exhibits clothes, a mosquito net and wet clothes in the buckets.

Elizabeth Waithira Oyiengo (PW9), a Government Chemist on 20th April, 2015 received from **Sergeant Dishon Oburu Ababu (PW10 – Ababu)** of CID, Ruai blood sample in a bottle belonging to the deceased; a trouser in khaki paper of the appellant and a short in khaki paper indicated as belonging to the appellant. Upon analysis she found that the DNA profile from the trouser and shirt was that of the appellant and that of the deceased. She filed a report which she produced as an exhibit in the case.

Sergeant Ababu was the duty officer at Ruai Police Station on 7th – 8th April, 2015 when at about 5 a.m. he received report of a murder in the Kamulu area. He was instructed by the OCS to commence investigations. He did that, summoned witnesses and took their statements; he arranged for post mortem and age and mental assessment of the appellant. He produced mental assessment report by Dr. Jumba and, according to him:

> ***"…. After commission of the offence the accused left the deceased in the house and informed the relatives to go and assist her instead of assisting her and I formed the opinion that it is the accused who committed the offence …"***

He produced the trouser and shirt he had recovered from the bathroom as part of the evidence.

The last witness called by the prosecution was **Dr. Johansen Oduor (PW10)** who performed a post mortem on the body of the deceased. He observed that the deceased had bled from the nose and mouth; there was a bruise on the left eye and laceration on the outer part of the left eye 6" x 6". There was laceration on the upper lip on the left side and there were multiple bruises on the face 2 x 1 cm. There was 6 x 8 cm bruises on the upper arm and there was a bruise below the skin of the upper arm and wrist. Internally there were rib fractures on the left side front right side 2nd, 5th and 6th. There were also bruises where the fractures were and there was extensive bleeding under the scalp of the head. There was extensive bleeding on the subtraction hematoma on the membrane that covers the brain. The doctor formed the opinion that cause of death was head injury due to blunt trauma:

"….. It is possible that the injuries were as a result of a fight. For it to cause fracture and bleeding on the brain it must have been severe …."

At the close of the prosecution case the trial court concluded that a prima facie case had been made out. This led to the appellant being placed on his defence and he elected to give an unsworn statement. He was 47 years old; an employee of Nairobi County Market Section where he worked at night. He met the deceased with who he lived as husband and wife for five years and they were in love but this changed when the deceased took to alcohol where she would be drunk every Friday and absent herself from home saying she was in a "chama". He repeatedly warned her, but she did not heed this, that it was wrong for a lady to take to drink. When she would come home drunk it would lead to fights and the love they had enjoyed disappeared. He even involved his pastor but this did not help. On the fateful day he visited a place called Samaki's for lunch and while there the deceased called stating that she was at Friends Inn, Kamulu. He joined her there where she was enjoying Tusker Malt and was already drunk. She started a quarrel; he paid the bill and they drove home and he went straight to bed. Shortly thereafter the deceased entered the bedroom and started to abuse him; she entered the bathroom where she removed her clothes and soaked them in a bucket. Stating that she required house help as she could not alone manage the house he offered that the child he had from a previous marriage could come in to help. This infuriated the deceased who accused him of calling her barren as she had not borne him a child. She picked a bucket and splashed water on him as he lay in bed. They struggled for 30 minutes and, according to him:

"…. She was stronger than me. She wanted to push me to the bed but I managed to dislodge her …."

The deceased was crying which attracted members of the public who came to her aid. Feeling threatened he silently left the house using the rear door; went to the road where he took public transport and in the process called M giving him information that he had fought with the deceased. When he reached the city centre, feeling sleepy, he booked himself at Hot Dishes hotel. He called M who informed him that the deceased had suffered minor injuries; next day he visited Kenyatta National Hospital but did not find the deceased. He was therefore surprised when police in company of M arrested him at Hot Dishes hotel. As a parting shot in defence he referred the trial Judge to the scriptures in Mathew 10:19-20. When we visited the New International Version of the Bible we found that it says:

"But when they arrest you, do not worry about what to say or how to say it. At that time you will be given what to say, 20 for it will not be you speaking, but the Spirit of the Father speaking through you."

The trial Judge analyzed the case by the prosecution and the defence offered and, as we have seen, convicted the appellant and sentenced him accordingly.

There are three grounds of appeal set out in the Supplementary Memorandum of Appeal drawn for the appellant by his lawyers, **M/S Osoro Mogikoyo & Company Advocates.** They are to the effect that the trial Judge erred in law and fact in finding that the offence of murder had been proved beyond doubt; that the Judge should have found that the appellant did not intend to kill as he was intoxicated and, finally, that the sentence of 35 years imprisonment was excessive in the circumstances.

When the appeal came up for hearing before us on 15th June, 2020 learned counsel **Mr. George Kogi** appeared for the appellant while learned State Counsel **Mr. Gitonga Muriuki** appeared for the Republic. Counsel for the appellant had filed written submissions and a List and Digest of Authorities which we have perused. In a highlight of the same it was counsel's submission that there was a fight between the appellant and the deceased leading to death but in those circumstances there was no malice aforethought. According to counsel most of the prosecution witnesses were relatives of the deceased and were biased. Counsel wondered why the prosecution did not call any of the neighbours and submitted that the appellant was attacked by the deceased. Urging us to reduce the offence from murder to manslaughter counsel further urged that the sentence of 35 years imprisonment was excessive. He cited the case of **Ali Abdalla Mwanza v Republic [2018] eKLR** where this Court reduced a sentence of 40 years imprisonment to a sentence of 20 years.

In opposing the appeal Mr. M submitted that the offence of murder had been proved as required in law. According to counsel the appellant terrorized and brutalized the deceased and abandoned her in the house to die. He described the state of the bedroom and bathroom which were found in a chaotic state by witnesses. Counsel reiterated the extent of injuries as related by the pathologist; the injuries were both internal and external. Counsel submitted that the behavior of the appellant post the incident was not excusable – instead of calling an ambulance to take the deceased to hospital the appellant abandoned her naked at night and fled the home. On the defence by the appellant that he was in a fight with the deceased who was stronger than him Mr. M submitted that the appellant did not suffer any injury and that defence could not hold. On sentence counsel submitted that the sentence imposed was lenient in the circumstances where death sentence could have been awarded.

We have considered the whole record, submissions made and the law.

To find a conviction for murder the prosecution must prove beyond reasonable doubt that death occurred; that death was through an unlawful act of omission or commission on the part of the accused person and that the unlawful act was caused by malice aforethought.

Malice aforethought (**Section 206 Penal Code**) is proved or established if the prosecution proves one or more of the following:

a) an intention to cause death 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 the 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, by a wish that it may not be caused

c) intention to commit a felony.

In the case before the trial Judge Murigi received a telephone call in the evening of 7th April, 2015 from his brother in law (the appellant) who informed him that the deceased was in their house in Ruai injured. M passed this information to other relatives and they all proceeded to the house in Ruai where they found the deceased lying naked on the bed, dead. The bed was wet and there were bloodied clothes in a bucket in the bathroom. The bedroom and bathroom were full of blood. A pair of trousers and shirt retrieved from the bathroom by Corporal Muriithi (PW8) were examined by the Government Chemist (Elizabeth Oyiengo – PW9) who found a DNA match profile of the blood of the appellant and that of the deceased.

The deceased's mother (W) testified of the many quarrels the appellant had had with the deceased, the main reason being that the deceased had not bore him a child. The deceased had fled the house in Ruai on various occasions to her parents' home and her parents had asked the deceased to leave the marriage. Two days before the incident (5th April, 2015) W and her husband N had summoned all their children and their spouses home but the appellant had refused the invitation. On that occasion the deceased had expressed her fears to her parents and other relatives, informing them that all was not well at her house.

The pathologist found many injuries including rib fractures and extensive bleeding under the scalp of the head. He also found extensive bleeding on the subtraction hematoma on the membrane that covers the brain.

The trial Judge considered the whole case and held at paragraph 30 of the Judgment:

> ***"In this case the deceased died as a result of extensive head injury. She also sustained fractures of three ribs. The accused thereafter washed her clean and placed her on the bed naked. He thereafter tried to conceal evidence by washing the blood stains and soaking his clothes which had blood of the deceased in water. It is therefore clear to my mind that malice aforethought was established beyond any reasonable doubt."***

Having reevaluated the evidence as it is our duty to do we are of the same view. The appellant battered his wife, the deceased inflicting very severe injuries that led to her death. The scene of murder was chaotic with blood splattered all over the bathroom and bedroom. The appellant must have planned the murder considering all the injuries the deceased suffered. The blood that covered the whole bedroom and bathroom is proof that the battering took a long time. After killing the deceased the appellant attempted to cover up what he had done by soaking bloodied clothes in water in a bucket and he also washed or poured water on the deceased to remove blood that covered her body.

The prosecution proved to the required standard that the appellant murdered the deceased and considering all the circumstances accompanying the murder, the murder was accompanied by malice aforethought.

There was no evidence that the deceased and the appellant were intoxicated or that such intoxication could afford the appellant a defence in law. There was also no evidence that the deceased provoked the appellant in any way at all. The defence offered was displaced by the evidence given by witnesses for the prosecution.

Counsel for the appellant submitted that the sentence of thirty-five years imprisonment was excessive. This was countered by the State Counsel who submitted that it was a lenient sentence.

Considering the facts of the case and all the circumstances we agree with the State Counsel that it was a lenient sentence. The deceased had been repeatedly battered by the appellant and this finally ended in the unfortunate events that led to the death of the deceased. The sentence was well deserved in the case before the trial Judge.

The appeal has no merit and we dismiss it in its entirety.

Dated and delivered at Nairobi this 23rd day of October, 2020.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR