IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 108 OF 2017

BETWEEN

MOSES MWANGI KARURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (**L. Kimaru, J**) dated 25th *February, 2014 in* HC.CR. C. No. 6 of 2010)

****

JUDGMENT OF THE COURT

[**1**] **Moses Mwangi Karuri**, the appellant herein was tried and convicted by the High Court (**Kimaru, J**) for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 31st January 2010, he murdered **John Kanyara Gathulito (Deceased)**.

[**2**] During the hearing, 8 witnesses testified for the prosecution. The prosecution evidence was briefly that **Simon Gitau** (**Simon**) was in his house in Majengo, when the appellant who is a neighbor, went to his house and called the deceased by name. The appellant and the deceased started quarreling, and the appellant stabbed the deceased with a knife and ran away. According to Simon, both the deceased and the appellant were drunk. The deceased who was stabbed once on the chest, died on the spot. Simon rushed out and raised an alarm and the appellant was chased and apprehended in Eastleigh section III. According to Simon, a knife was recovered from the appellant at the time of his arrest. The appellant was taken to the Chief's camp at Eastleigh Section III. Later, the police came and took the body of the deceased to the mortuary. Simon stated that he did not know why the appellant and the deceased were quarrelling. He denied having had any dispute with the appellant and explained that the appellant was arrested about 100 metres from his house.

[**3**] **Robert Mugo Wachira** (**Robert**) a businessman in Eastleigh area testified that he was outside his shop when he saw the appellant who is his neighbor, holding a knife which had blood stains. When Robert went to where the appellant was coming from, he saw the deceased holding his abdomen doubling over. The deceased was bleeding from an injury on his abdomen. Robert tried to chase the appellant as he ran across the road. According to Robert, the appellant had just removed a knife from his pocket which he threw away, but the appellant was apprehended and the knife retrieved. Robert maintained that he saw the appellant purchase a paper bag with the intention of putting the knife inside. He denied having attempted to stab the appellant. Robert explained that the appellant and the deceased had earlier in the day fought, but that the problem had been resolved and the appellant was told to move from the area and relocate. Later the parties met, and it was agreed that the appellant should remain in the same area.

[**4**] **David Munyiri Thiga** (**David**) testified that he learnt from Robert that the appellant had stabbed the deceased. Shortly thereafter, he saw the appellant on the opposite side of the road buying a paper bag. The appellant removed a knife from his pocket and put it in the paper bag. David and others went across the road, arrested the appellant and took him to the Chief's office.

[**5**] Other witnesses whose evidence was of interest included **Cpl. John MMasi** of Land Fraud Investigation Unit CID headquarters who visited the scene of the murder, which according to him was at Shauri Moyo. He took photographs showing the chest injury on the deceased. Of interest is a knife found at the scene already recovered and which he also placed next to the body and took a photograph. Cpl. Mmasi produced the photographs in evidence. **Stephen Kithurigu Kanyera (Kanyera**) the father to the deceased who identified the body of the deceased to the pathologist, Dr. Njau Mungai. Kanyera recalled seeing a stab wound on the chest of the deceased. Dr. Mungai who is attached to the National Public health laboratories examined the body of the deceased and observed that he had only one injury, which was a penetrating wound to the upper abdomen, with contents of the abdomen and upper bone and omentum protruding with a lot of bleeding in the abdominal cavity. He formed the opinion that the deceased died as a result of severe internal hemorrhage due to the penetrating abdominal wound.

[**6**] **PC Daniel Muteshi** (**PC Muteshi**) an officer attached to CID Shauri Moyo station, collected the exhibits which included two knives, a shirt and a trouser, which he produced as evidence before court. He testified that one of the knives handed over to him was blood stained, so were the shirt and the trouser. Under cross-examination the witness stated that he took the blood stained knife to the Government Analyst together with the blood stained clothing. However, he never received the results back. He explained that the knives were brought to the station by members of the public and it was claimed by the witnesses who recorded statements, to have been in the appellant's possession.

[**7**] When put to his defence, the appellant gave an unsworn statement and called no witness. He explained that on the material day he went to look for work at a construction site in Eastleigh. He then decided to walk back home. It was while walking, that he was confronted by some members of the public who claimed that he was "the one". Simon who was standing next to him and who had a knife, claimed that the appellant had stabbed someone and ran away. The appellant was taken to the Chief's camp and then to Shauri Moyo police station. The appellant explained that Simon had a grudge against him that was why he falsely implicated him with the crime. The appellant pointed out that the evidence of the prosecution witnesses relating to the knife was contradictory and inconsistent, and that three knives were produced in evidence. He explained that the deceased was his neighbor and that they had disagreed many times, and that he had even reported the matter to the police.

[**8**] In his judgment, the learned Judge found that the incident occurred at about 5.30 pm. when there was sufficient light. Therefore, Simon was certain that it was the appellant who stabbed the deceased. The learned Judge found that although the evidence of Simon, Robert and David appeared to be contradictory, the evidence was not contradictory as the three witnesses narrated various stages, that the appellant was seen with a knife, and even tried to conceal it in a paper bag. He found that all the three witnesses were in agreement that the knife was recovered from the appellant, and that although forensic evidence was not adduced, there was clear evidence that the knife was blood stained. The learned Judge therefore concluded that the prosecution had proved its case against the appellant to the required standard.

[**9**] The learned Judge found that the appellant went to the house of the deceased while armed with a knife, and that he used the knife to stab the deceased, showing that he carried the knife with the intention of using it to harm the deceased. The learned Judge therefore found the appellant guilty of murder, and sentenced him to suffer death as provided by law.

[**10**] During the hearing of his appeal the appellant relied on a memorandum of appeal setting out grounds which he had prepared in person and supplementary grounds of appeal that were prepared by his counsel. The grounds raised by the appellant included: the insufficiency of identification evidence; contravention of the appellant's right to a fair hearing; failure to call critical witnesses; and relying on inconsistent and contradictory evidence.

[**11**] In the supplementary grounds, the issues raised included the insufficiency of the evidence of identification that was relied upon by the prosecution; the absence of forensic evidence, as no report of the government analyst was produced to confirm that the blood stains on the knife belonged to the deceased; the failure by the prosecution to prove the case against the appellant beyond reasonable doubt; and the failure by the learned Judge to accept the appellant's strong alibi defence. The appellant urged the Court to reconsider the sentence and the mitigating factors in accordance with the Supreme Court decision in **Francis Karioko Muruatetu & Anor vs. Republic [2017] eKLR**.

[**12**] Learned Counsel, Ms. Wanjohi who appeared for the appellant pointed out that although the appellant was allegedly identified through recognition, the issue was not raised in the first report that was made as the name of the appellant was not given. Counsel also pointed out that there was no evidence regarding the lighting conditions under which the recognition was made, nor was any information given regarding the proximity of the identifying witnesses and the appellant, or the circumstances under which they were acquainted.

[**13**] In addition, counsel submitted that Simon was the only witness who allegedly saw what transpired between the appellant and the deceased. It was argued that the evidence was not sufficient, particularly noting that there was no forensic evidence that could connect the appellant with the crime. It was argued that the appellant had put forward a strong alibi defence which included a report that had been made to the chief, and that the prosecution did not rebut the alibi defence. Finally, the Court was urged to find that the appellant's mitigation was not taken into account.

[**14**] **Mr. H. Abdi**, an officer from the Director of Public Prosecutions who appeared for the respondent urged the Court to find that the conviction was sound. He pointed out that the incident happened at midday and that there were eye witnesses who actually testified to what happened; that the evidence of these witnesses was consistent with the appellant's defence as the appellant admitted having been at the scene; that the failure to produce the report of the Government Analyst did not affect the oral evidence of the witnesses; and that the sentence imposed upon the appellant was justified as his own advocate indicated that he was not remorseful.

[**15**] This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case has been recognized in many decisions that have come from this Court. In the case of **Okeno v. R [1972] EA 32** the Court stated thus*:*

> **"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 v. R.[1957] E.A. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

[**16**] For a conviction on the charge of murder to hold, three essential ingredients must be proved. These ingredients were set out in the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR** as follows:

> **"…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."**

[**17**] In addition, as rightly stated by the learned Judge,

> **"In every criminal case, the burden of establishing the guilt of an accused person to the required standard of proof beyond any reasonable doubt is on the prosecution. The prosecution is required to adduce evidence which establish the guilt of the accused on the charge brought against him. An accused person has no responsibility or burden of proving his innocence..."**

[**18**] The fact that the deceased died is not in dispute. His body was identified by his father Stephen Kanyera, and Dr Njau Mungai the pathologist who carried out the postmortem examination, testified that the deceased died as a result of severe internal hemorrhage due to a penetrating abdominal stab wound. The main issue in the appeal is therefore, whether the appellant was properly identified as the person who caused the injury to the deceased that resulted in his death, and if he was properly identified, whether he caused the injury to the deceased with malice aforethought. In other words, whether the Court should find that the prosecution case against the appellant was proved beyond any reasonable doubt, and uphold the conviction, and whether this Court should exercise its discretion and interfere with the death sentence imposed on the appellant.

[**19**] The evidence implicating the appellant was basically that of Simon, Robert and David, who saw the appellant at or near the scene of the crime on the fateful day. Simon said he knew the appellant as they had both lived within the same neighborhood for a period of one year. Simon further stated that the appellant and the deceased often quarreled when they both got drunk. Robert also testified that he lived in the same neighborhood with the appellant. He also said that the deceased was living with Simon and that earlier that day, the appellant and the deceased had fought. David, the third witness, also said that he had known the appellant for a period of one year before the appellant died.

[**20**] According to Simon and Robert, the incident happened at about 5.00 p.m. David did not give the time but for some reason which is not clear, learned counsel for the respondent, Mr. Abdi submitted that the incident occurred at midday. This was obviously not supported by the evidence. We find that the incident happened around 5.00 p.m. as stated by Simon and Robert, and that ordinarily there would be sufficient day light at that time. Considering the evidence of Simon, Robert and David, one comes to the conclusion that the appellant is not a stranger to the three witnesses as they were all neighbors and knew each other. The three witnesses each separately recognized the appellant at the scene. It was therefore a case of recognition as opposed to that of identification of a stranger.

[**21**] The Court takes cognizance of the fact that even in the case of recognition, mistakes can be made as stated in **R vs. Turnbull** [1976] All ER 549 at page 552:

> **"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".**

[**22**] Nevertheless, we are satisfied that in this case, the appellant went to the house of Simon and called the deceased loudly. Simon had ample opportunity not only to recognise the appellant physically but also by voice. Robert also saw the appellant at the scene with a knife which had bloodstains, and shortly thereafter saw the deceased holding his abdomen doubling over. Robert also participated in apprehending the appellant. We have no doubt that these two witnesses clearly saw and recognized the appellant at the scene, and the issue of mistaken identity cannot arise.

[**23**] Simon, the eye witness was categorical that he saw the appellant stab the deceased with a knife before running away, and that he raised an alarm, and the appellant was subsequently apprehended. The evidence of Simon was consistent with that of the pathologist who observed that the appellant had a single stab wound on the chest. It is evident that there was contradiction regarding the recovery of the knife, Simon saying that only one knife was recovered and that it was recovered from the pocket of the appellant, while Robert stated that the appellant removed the knife from the pocket and threw it away but it was retrieved, and David stated that the appellant was holding a knife which he wanted to put in the paper bag and that he had removed the knife from his pocket.

[**24**] We agree with the learned Judge that all the three witnesses were consistent that the appellant had a knife, which was recovered at the time of his arrest and that the appellant had attempted to throw away the knife. This knife was identified in court by the three witnesses. The witness whose evidence was inconsistent was PC Muteshi, who talked of two knives but this witness was not an eye witness, and his evidence was not reliable as he did not explain from whom he got the exhibits, nor did he produce the report from the Government Analyst in regard to the blood stained knife and clothing. We find that a knife was recovered from the appellant and this corroborated the evidence of Simon. We are therefore satisfied that the learned Judge had reliable evidence from three witnesses whom he believed and that he was entitled to rely on that evidence.

[**25**] We note that at the time the appellant was apprehended and the knife recovered from him, there were other members of the public who were present and who were not called as witnesses. In **Mwangi vs Republic [1984] KLR 595** this Court stated:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the Court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motives."**

[**26**] We are satisfied that the evidence of Simon, Robert and David regarding the arrest and recovery of the knife was sufficient to dislodge the appellant's alibi and prove the case against the appellant. In our view, there was no evidence of any prejudice caused to the appellant by the failure to call any other member of the public. We concede that the failure to produce the results from the Government Analyst was a material omission as the forensic evidence would have helped the court. That notwithstanding, in light of the clear evidence that was before the learned Judge that the appellant stabbed the deceased, that omission was inconsequential.

[**27**] We have no reason to fault the learned Judge as he properly directed himself on the law and properly evaluated the evidence concluding as follows:

> **"The prosecution proved its case to the required standard of proof beyond any reasonable doubt that it was the accused who caused the unlawful death of the deceased by stabbing him with a knife. The eye witness account of PW1 was not rebutted by any evidence adduced on behalf of the accused. PW1 narrated how the accused provoked a quarrel with the deceased in their house before stabbing him with a knife. The accused went to the house of the deceased while armed with a knife. The fact that he used the knife to stab the deceased showed that in carrying the knife to the house (sic) the deceased, he had the intention to use it."**

[**28**] In regard to malice aforethought, there was sufficient evidence that the appellant stabbed the deceased with a knife and that although it was a single stab wound, the deceased died from that stab wound. Under Section 206 of the Penal Code, there was sufficient evidence upon which malice aforethought could be inferred, as the appellant knew that stabbing the deceased with a knife would probably cause him death or grievous harm. We therefore find no merit in the appellant's appeal against conviction.

[**29**] In regard to the sentence, the learned Judge considered the appellant's mitigation but noted that he was not remorseful. That notwithstanding, the circumstances of this case as such that a death sentence may not have been appropriate. The appellant only struck the deceased once. Both the appellant and the deceased were said to have been drunk. It was also noted that the appellant was a first offender. We believe that in these circumstances, the learned Judge should have considered a sentence other than the death sentence. We would therefore set aside the death sentence and substitute thereto a sentence of 20 years imprisonment.

[**30**] The upshot of the above is that we dismiss the appeal against conviction, but allow the appeal against sentence, set aside the death sentence imposed against the appellant and substitute thereto a sentence of 20 years imprisonment with effect from 25th February, 2014 which is the date of the judgment of the High Court. To that extent only, the appeal has succeeded.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 20th day of November, 2020.

HANNAH OKWENGU

…….

JUDGE OF APPEAL

M. WARSAME

……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR