IN THE COURT OF APPEAL

AT NAIROBI

(CORAM KOOME, MUSINGA & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 89 OF 2017

BETWEEN

THOMAS KIPKEMOI KIPKORIR.....1ST APPELLANT

JOSEPH KOMEN YATICH.....2ND APPELLANT

SEBASTIAN YANO KOMEN.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nairobi,

(S.N. Mutuku, J.) dated 21st July 2016

in

***H.C.CR.C. No. 29 of 2012*.)**

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JUDGMENT OF THE COURT

1. The three appellants were Police Officers. They were charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars of the offence were that:

> ***"1. No. 66003 SGT. THOMAS KIPKEMOI KIPKIROR;***
>
> ***2. NO. 217643 APC. JSEPH KOMEN YATICH; AND 3. NO. 21652 APC, SEBASTIAN YANO KOMEN: On the night of 30th March 2012 at Kwitu Classical Bar in Eastleigh Section III within Nairobi County jointly murdered NICHOLAS OCHIENG ODONGO."***

2. The appellants pleaded not guilty to the charge, but after a full hearing, the High Court found them guilty as charged, convicted and sentenced each of them to death. The appellants were dissatisfied with both conviction and sentence and preferred this appeal before us, premised on common grounds filed by the appellants in person and further Supplementary Memorandum of Appeal filed on diverse dates by the appellants' advocates.

3. In a nutshell, the appellants are aggrieved that the trial court erred in law and fact in convicting them on insufficient evidence adduced by the prosecution; in relying on evidence which contained material contradictions; that the prosecution did not prove its case against them beyond reasonable doubt; that the learned judge failed to consider that all the ingredients of the charge were not met; and that the learned judge erred in law and fact in failing to consider their defences, thereby arriving at a wrong conviction.

4. A summary of the prosecution case is that the appellants and the deceased had gone to Kwitu bar on the material date. The owner of the bar met the three appellants at the bar. He was later informed by the bar attendants that a fight had ensued at the bar involving the three appellants and the deceased. According to the prosecution, the three appellants were placed at the scene by PW3, PW4, PW6, PW8 and

PW10.

5. PW4 and PW6, the bar attendants, confirmed that there was an altercation at Kwitu bar between the three appellants and the deceased. They also confirmed that they cleaned the blood on the floor after the deceased was severely injured by the appellants. PW4 stated that she found the three appellants talking to the deceased. The deceased was asking for his national identity card from the 1st appellant. When the deceased was leaving, he accidentally hit the appellants' table and their bottles of beer fell to the ground. Immediately thereafter, the three appellants attacked the deceased and started beating him up. The deceased fell down and while on the ground facing up, the 2nd appellant stepped on his head as the other two appellants continued to assault the deceased. PW4 was able to identify the 1st and the 2nd appellants at an identification parade as the people who assaulted the deceased.

6. PW10 saw the 1st appellant and the deceased engaged in an argument outside Kwitu bar. Shortly thereafter the deceased was assaulted by both the 1st and 2nd appellants. PW2 testified that he was in the company of the deceased and someone else outside the bar when the 1st appellant asked them to buy him beer. They responded that they did not have money and the 1st appellant walked away. The deceased entered the bar. Later on, PW2 learnt that the deceased had been assaulted by some people and he decided to go to Kwitu bar to check on him. PW2 found the deceased in the hands of the 1st and 2nd appellants, who said they had arrested him and were taking him to Eastleigh Police Patrol Base. The deceased had blood at the back of his head and was crying in pain.

7. PW9, who was in-charge of Eastleigh Police Base, testified that at around 9.25 p.m. while on duty he visited the Report Office and found two people, the 1st and 3rd appellants, making a report on the Occurrence Book (0B). Since the two were not his officers, PW9 questioned them. They said they were booking a report about a suspect they had arrested for causing disturbance at Kwitu bar. The suspect had a big injury on the head, blood on his clothes and face. The suspect told PW9 that he had been assaulted by the two appellants. PW9 told the two appellants that it was not in order to place a suspect in cells with such injuries and directed them to take the deceased to hospital for treatment before booking him and the 1st and 3rd appellants left with the deceased.

8. It appears that the 1st and 3rd appellants did not return to the patrol base, they abandoned the deceased and refused and/or failed to take him to hospital as directed by PW9. The prosecution maintained that the appellants took the law in their hands and assaulted the deceased with the intention to kill or cause him grievous harm. A postmortem on the deceased's body was conducted by PW5. He found that the deceased had a 5 cm laceration at the back of his head, deep cut to the soft tissues, bruises on the shoulders and lower limbs, a black left eye; internally the deceased had injuries on the abdomen and intra-abdominal bleeding with perforated small intestines and outpouring of abdominal contents causing an infection. The heart had tiny bleeds attributed to shock and the brain had mild contusions.

9. When the appeal came up for hearing, ***Mr. Nyagito*** appeared for the 1st and 2nd appellants while ***Mr. Mokaya*** appeared for the 3rd appellant. ***Ms. Ngalyuka***, Senior Assistant Director of Public Prosecutions was on record for the respondent. In his written submissions dated 5th February 2019, the 1st appellant raised several issues of law and fact. He faulted the learned judge for failing to find that there was no proof of *mens rea* and *actus reus*.

10. It was submitted that for an accused person to be convicted of murder, it must be proved that he/she caused the death of the deceased with malice aforethought by an unlawful act or omission. According to him, the prosecution failed to meet the above threshold as it did not discharge its burden of proving the case against him beyond reasonable doubt.

11. The 1st appellant also contended that he was already very drunk at the time of the altercation. He argued that it was not clear why the deceased followed him to the bar. He alleged that the deceased's intoxication made him the author of his own misfortune.

12. On *actus reus*, the 1st appellant asserted that he did not do anything that caused the death of the deceased. According to him, it is PW9 who had the fiduciary duty to take care of the deceased after realizing that he was being booked at the Police base by officers from a different jurisdiction.

13. He also contended that there was no common intention that constituted *mens rea*, and that he was only made aware of the commotion inside the pub and later walked out to excuse himself from the bar brawl. He maintained that the death of the deceased was neither planned nor premeditated. He also faulted the trial court for failing to accord him a fair trial as per ***Article 25(c)*** of the ***Constitution***.

14. He further submitted that ***section 306 (2*****)** of the ***Criminal Procedure Code*** (CPC) was not complied with as the charge was not read to him again when the evidence of the witnesses for the prosecution was concluded as required. In his view, had the charge been read to him again he would have had the opportunity to call the witnesses who were at the Police Base at the time to substantiate whether they were found booking the deceased in the OB. He added that the officer who was manning the OB desk was a vital witness and ought to have been called to testify.

15. He further asserted that the learned judge failed to evaluate and analyze the whole evidence on record thereby failing to take note of the glaring contradictions on the witnesses' testimonies. He criticized the learned judge for failing to comply with ***section 169(1)*** and ***(2)*** of the ***CPC*** in that she did not give reasons for failure to consider his defence.

16. The 2nd appellant through his advocate raised the issue of material contradictions in the prosecution evidence. On this, he submitted that the trial court based its conclusion on the material evidence of PW4 which was contradicted by PW6 and PW3 among others. According to him, the fact that the learned judge discredited the evidence of PW6 as opposed to the evidence of PW4 showed a pre-conceived mindset on the learned judge's part.

17. On proof of guilt beyond reasonable doubt, the 2nd appellant submitted that the trial court did not clearly show the role he played on the basis that the account of witnesses as to what transpired on that fateful day was full of contradictions.

18. The 2nd appellant also advanced the issue of common intention; that according to ***section 21*** of the ***Penal Code***, the prosecution did not at any point raise the issue of common intention or the meeting of minds of the three appellants. He also raised the issue of intoxication, stating that at the time of commission of the offence all the appellants as well as the deceased were drunk.

19. He equally faulted the trial court for failing to consider his sworn defence and for shifting the burden of proof to him contrary to ***section 111*** of the ***Evidence Act***; that it was wrong for the trial court to infer that the appellants did not deny the prosecution's evidence; and that the trial court allowed the defence counsel to submit before the prosecution, exposing the appellants to prejudice.

20. He further faulted the learned judge for failing to evaluate evidence as a whole, contending that the judgment only analysed the evidence of three witnesses in arriving at the final decision, disregarding the other thirteen witnesses, which led to the conclusion that the whole prosecution evidence was not considered, hence adversely affecting the outcome of the case.

21. The 3rd appellant through his advocate's written submissions dated 10th May 2019 argued that the prosecution failed to adduce evidence placing him in the unlawful act which caused the death of the deceased; that the learned judge relied on the evidence of a single witness, PW4, who never identified the 3rd appellant at the identification parade but rather vaguely stated that they "*all knocked and punched*" the deceased, which was erroneously taken by the learned judge to mean that all the three appellants were guilty as charged.

22. The 3rd appellant stated that he never booked the deceased person into the police cells as alleged but only escorted him to the Police Station in the company of his co-accused; no direct evidence was adduced implicating him in the commission of the offence; the prosecution failed to establish that there was a common intention with the co-accused persons which could constitute *mens rea* of the offence.

23. He also argued that the right to a fair trial was violated in that ***sections 306*** and ***211*** of the ***CPC*** were not complied with; that had the charge been read to him again as required, his defence would have taken another direction; that crucial witnesses were not called; and that the trial court failed to give reasons for not considering his defence. The appellants urged that the appeal be allowed, and the conviction and sentence be set aside.

24. In response, the respondent filed submissions addressing three core issues, that is; *proof of the fact and cause of death; proof that death was as a result of the direct consequence of an unlawful act or omission of the appellants;* and *proof that the said unlawful act or omission was committed with malice afterthought by the appellants.*

25. On the first issue, the respondent submitted that PW1, who was a friend to the deceased, testified that he witnessed the deceased being escorted to Eastleigh Police Base by two people with blood on his face. The deceased kept calling out on him not to leave him as the people who had arrested him were going to kill him. PW1 followed from a distance and called the wife of the deceased, PW14, and together they proceeded to the Police Post. After some time, they took the deceased to Mother and Child Hospital where he was attended to. It was not long before his condition deteriorated, whereafter he was rushed to Kenyatta National Hospital where he died. A postmortem conducted by PW5 confirmed the cause of death as perforated small intestines with infection due to blunt trauma.

26. As regards the issue of proof that death was as a result of the direct consequence of an unlawful act or omission on the part of the appellants, it was the respondent's submission that the court relied on the testimony of PW4, who gave an eyewitness account of the events at Kwitu bar on the evening of 30th March 2010; that an altercation arose between the appellants and the deceased when the 'Kanzu' that the deceased wore got caught on the appellants' table, leading to the falling of the beer bottles and glasses; that she saw the three appellants knocking and punching the deceased; that the deceased fell to the ground and was bleeding profusely; that the 2nd appellant stepped on his head; that after the ordeal, the 1st and 3rd appellants dragged the deceased outside the bar while the 2nd appellant remained at the bar and forced her, (PW4) to clean up the blood stains on the floor.

27. Furthermore, PW9 who was in charge of Eastleigh Police base, testified that he found the 1st and 3rd appellant booking in the deceased but he declined to take him in since the suspect had an injury at the back of his head. He testified that it was a big injury and the deceased had blood stains on the clothes and face; that the deceased said that the two officers making the report had assaulted him; and that despite his advice that the suspect be taken to hospital the officers did not do so.

28. On the third issue of proof that the said unlawful act or omission was committed with malice afterthought, it was submitted that the appellants had the intention to cause death or to do grievous harm to the deceased; that the appellants were police officers with a duty to protect life and property; that the appellants by virtue of their duty had the power of arrest and would have exercised the same on the deceased if he had committed an offence without resorting to assaulting him.

29. It was the respondent's further submission that the circumstances of this case were peculiar in that the appellants had an option, being law enforcement officers. Relying on ***section 21*** of the ***Penal Code***, it was submitted that the appellants jointly set out to assault the deceased, hence occasioning him injuries that resulted to his death. According to the respondent, the appellants' right to fair trial was at all material times respected and upheld by the trial court.

30. The respondent further submitted that the appellants did not suffer any prejudice by the non-compliance with ***section 306*** of the ***CPC*** as their advocates duly responded on their behalf in compliance with that section. In conclusion, the respondent submitted that the appellants' appeal lacks merit and urged the Court to dismiss it.

31. This is a first appeal. We are therefore enjoined to revisit the evidence afresh, analyse it, and come to our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing witnesses and therefore give allowance for that. (See the case of ***Okeno v Republic [1972] EA 32)***.

32. It is not in dispute that the deceased died on 2nd April 2012 at Kenyatta National Hospital while undergoing treatment after sustaining visible multiple injuries. According to prosecution witnesses, the deceased was first attended to at Mother and Child Hospital in Eastleigh

and released to go home. His health deteriorated whilst at home and he was then rushed to Kenyatta National Hospital where he met his death after about 4 days from the date he sustained the injuries.

33. The High Court held that the fact and cause of the death were proved beyond reasonable doubt and as such it was an unlawful death that was occasioned by the appellants.

34. The learned judge, in considering the evidence concluded as follows:

> ***"In conclusion, it is my finding after applying my mind to the evidence and the law, that the prosecution has proved beyond reasonable doubt all the ingredients of murder. It was submitted that motive has not been proved. Motive is not one of the ingredients of murder, but presence of motive may be useful to the court to inform the court in understanding why the accused acted as he/she did or what led him/her to act as he/she did. Even so, in this case, I have stated that the events of what happened inside the pub may have been as a consequence of what may have happened outside between the 1st accused and the deceased. I also remind myself that the deceased accidentally as testified by Agneta, knocked off the beer bottles and glasses down. Consequently, I find each of the three accused persons guilty of murder as charged and enter conviction against each of them. Orders shall issue accordingly."***

35. In our own assessment, the issues that fall for our determination are; *whether the evidence relied on was contradictory and if so, the effect thereof; whether there was common intention on the part of the appellants to cause death or grievous harm, and whether the offence was proved beyond reasonable doubt.*

36. On the first issue, it was contended by the appellants that the testimonies of PW4 and PW6 as to who committed the murder was contradictory, even though they were purportedly present at the scene. By highlighting the inconsistencies in the testimonies of PW4 and PW6, the appellants questioned the credibility of the said witnesses. According to them, the learned judge erred when she discredited the evidence of PW6 while admitting that of PW4, thereby relying on a single witness to convict them. The question that arises is whether those inconsistencies affected the credibility of the witnesses.

37. In her judgment, the learned judge was alive to the legal principle that evidence of a single witness can be relied upon to convict, provided caution is taken that it may not be safe to rely on such evidence.

38. This Court had occasion to address this issue of discrepancies in evidence in ***Phillip Nzaka Watu v Republic (2016) eKLR***, where it expressed: -

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."*** *(Emphasis supplied)*

39. In this case, we must reiterate that unlike the trial judge, we did not have the benefit of seeing the witnesses testify and thus assess their demeanor. We note, for instance, that the trial judge noted that PW4 impressed her as being calm, firm and consistent, while PW6 looked unsure of herself, that she mostly contradicted herself on her evidence, and struck the learned judge as someone who was trying to conceal most of what happened or someone who was so panicked that she did not properly observe material happenings.

40. We also note from the proceedings that PW6 was not at the scene as she had gone to look for change and only came back and found the deceased on the ground being dragged outside. In this regard, we respectfully agree with the learned judge that PW4 was better placed to narrate what transpired as she was in the pub and witnessed the deceased being assaulted. We doubt if she had any interest in the matter and there was therefore no reason for her to lie to the court. Her testimony was very key to the prosecution case.

41. In ***Kazungu Katana Ngoa v Republic [2017] eKLR*** this Court held that: -

> ***"In this case, it is without doubt that the testimony of PW2 was central to the prosecution case. Not only was she one of the two eye witnesses, she had a close interaction with both the deceased and the appellant throughout the chain of events."***

That may be said of the evidence of PW4.

42. Also as stated by this Court in ***Erick Onyango Odeng' v Republic [2014] eKLR***: -

> ***"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."***

43. On its part, the trial court resolved the matter by stating that:

> ***"Having discredited the evidence of Anne (pw6) to the extent that it does not agree with most of what Agneta (pw4) told the court and given that she claimed to have been outside until after the fight had ended, I find that I am left with the evidence of Agnetta,***

the only eye witness, as to who assaulted the deceased…"

44. The learned judge considered the prevailing circumstances of the case and resolved the issue of the contradictions by finding that PW4 was a credible witness. It is thus our considered view that the finding was proper. We are satisfied that the cited contradictions were not material and did not occasion any miscarriage of justice. Further, as we shall demonstrate, the trial court did not rely entirely on the evidence of PW4 to convict the appellants.

45. On the issue of whether there was common intention, given the conduct of the appellants at the scene and the nature of the injuries inflicted on the deceased, there is no doubt that the appellants had intent to cause grievous harm to the deceased.

46. The trial court was satisfied that malice aforethought was proved by the common intention as defined by ***section 21*** of the ***Penal Code***. The appellants sought to cause grievous harm to the deceased. The section states as follows:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

47. The doctrine of common intention was explained by this Court in the case of ***Dickson Mwangi Munene & Another v 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 supplied]*

48. In this case, PW1 testified that he found the deceased being harassed by the 1st and 2nd appellants and being held by the back of his trousers. The 3rd appellant was holding a gun and was also among the people harassing the deceased; that the deceased shouted for help, telling him not leave him as he would be killed. The witness followed them closely to Eastleigh Police Base with the wife of the deceased. After a while they went to the Police Base and found the deceased missing. They went home and found him bleeding, after which they rushed him to Mother and Child Hospital. This was corroborated by PW2 and PW3. The only inference that can be deduced from the testimonies is that the appellants had common intention to harm the deceased, stemming from their action of harassing, beating, and causing him grievous harm.

49. PW9, Inspector Gichuhi, also corroborated the evidence of PW1 and PW2. It appears that the appellants purported to arrest the deceased and attempted to book him at Eastleigh Police Base, only to abandon him elsewhere, although they had been directed to take him to hospital.

50. Even assuming the deceased had caused disturbance at the pub and the appellants were acting within their statutory powers to arrest him, there was no justification whatsoever for them to use excessive force by inflicting severe injuries to the deceased.

51. One of the objectives of the ***National Police Service Act*** is to give effect to ***Article 238*** of the ***Constitution***, and ***Article 244*** sets out the objects and functions of the National Police Service, which include, respect of human rights and fundamental freedoms and dignity of the people.

52. ***Sections 49(5)*** and ***61*** of the ***National Police Service Act*** sets out the circumstances under which a police officer may resort to the use of force and firearms. ***Part A*** of the ***Sixth Schedule*** provides for use of force by the police in the following terms:

> ***"1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.***
>
> ***2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.***
>
> ***3. When the use of force results in injuries-***
>
> ***(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and***
>
> ***(b) shall notify relatives or close friends of the injured or affected persons."*** (Emphasis supplied)

53. In light of the above, the appellants failed in their duty to discharge their obligation and we are inclined to agree with the learned judge that they acted with impunity. Considering the nature of the injuries inflicted on the deceased and the manner in which the appellants jointly assaulted him, we are satisfied that malice aforethought as defined under ***section 206*** of the ***Penal Code*** was established.

54. The defence of intoxication that was raised by the appellants was not applicable.

In order to successfully invoke that defence, certain conditions must be met. These are outlined under ***section 13 (2)*** of the ***Penal Code*** which requires that:

> ***"Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –***
>
> ***a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***
>
> ***b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission***." [Emphasis supplied]

55. That ground therefore lacks merit and must fail.

56. As to whether the offence of murder was proved beyond reasonable doubt, having ourselves re-evaluated all the evidence on record, we are satisfied that the learned judge properly evaluated the prosecution evidence and weighed it against the defence tendered by the appellant and arrived at a proper conviction. The appeal against conviction must therefore fail.

57. On sentence, we take note that a mandatory death sentence is not the only sentence available for the offence of murder in view of the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, where the Court held that mandatory death sentence is unconstitutional; that courts must consider the circumstances of each case, the mitigation provided, if any, and impose an appropriate sentence, including the death penalty where deserved.

58. Before the trial court passed sentence, each appellant was given an opportunity to mitigate. ***Ms Odembo***, learned counsel for the 2nd accused during the trial who also held brief for ***Mr. Nyagito*** and ***Mr. Koech*** for the other co-accused, told the trial court that none of the accused persons wished to offer any mitigation. The learned judge asked the appellants whether they wished to mitigate, and each responded: ***"I have no mitigation to make."*** In the circumstances, the learned judge remarked:

> ***"In the matter before me, the accused persons have waived aside their right to mitigate. Even where mitigation is offered and received by the court, it does not play its intended role in informing the court of the proper sentence to pass in a murder trial just like in any other capital offence trial. The reason for this is obvious. There is only one sentence for murder, and it is death as provided under section 204 of the Penal Code."***

59. The learned judge held that she had no discretion in the matter and therefore sentenced each of the appellants to death. We think that the appellants' failure to mitigate may have been informed by the fact that at the time of the conviction the law did not provide any alternative sentence upon conviction for murder. The position has since changed, thanks to the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic*** (supra).

60. It is therefore in the interest of justice that we remit this matter to the trial court for re-sentencing only. To that extent, the appeal against sentence succeeds. For avoidance of doubt, the appeal against conviction is dismissed in its entirety.

Dated and delivered at Nairobi this 18th day of December, 2020.

M. K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR