IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 314 OF 2012

BETWEEN

JEFF MUTUNGA MULWA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Wendoh, J.) dated 27th October, 2006

in

HC. CR. A. No.34 of 2003)

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JUDGMENT OF THE COURT

Somewhere in Makueni County, there lies a small town, a village really, named Ngovi. There, as at the time the events leading to this appeal arose, an enterprising Kenyan who answered to the name Mbithi ran a small shop, a kiosk, where football matches were relayed on cable television and there was also a pool table where customers played at a fee.

In the afternoon of 14th November 2002, at about 4 pm, the appellant herein **Jeff Mutunga Mulwa** arrived at that kiosk and found some football fans already there. They included **Nicholas Mwaniki Wambua** (PW2) and **Muema Nzuki Mwangangi** (PW3). A few minutes later, one **Ingui Nthuku**, the deceased herein, arrived in the company of **Kiiti Maingi** (PW1) his friend and neighbour. Upon seeing the deceased, the appellant demanded to know why the former had beaten him the previous night, an accusation the deceased denied. This does not seem to have gone down well with the appellant who seized the deceased by the hand as the latter ran off trying to free himself with the appellant in hot pursuit while holding an object described by PW3 as a knife. That short chase ended with the deceased screaming and then lying dead in a bush bleeding from a visible wound on the left chest at the back.

The appellant was later arrested and charged with the murder of the deceased, a charge he denied leading to a trial in which the prosecution called seven witnesses. Put on his defence, the appellant made an unsworn statement denying the charge but Wendoh, J. found the murder charge had been proved and convicted him before sentencing him to suffer death by hanging as by law provided.

Aggrieved by the conviction and sentence, the appellant has appealed to this Court complaining in a self-crafted memorandum of appeal that the learned Judge erred in convicting him on the basis of visual identification not preceded by a prompt first report; convicting him in the absence of evidence of his arrest; failing to consider that his rights had been breached in view of his "*long castration behind police custody*" (he must mean incarceration); failing to consider that the prosecution case was riddled with doubts and contradictions; convicting him on charges that were unproved and by rejecting his defence and his counsel?s submissions.

Those are the grounds that were urged before us by **Mr. Oira**, the appellant?s learned counsel, who submitted that the case against the appellant was circumstantial in character and did not meet the threshold of proof beyond reasonable doubt as "*the three supposed eye-witnesses did not actually see the appellant stab the deceased*." He also urged rather fuzzily, in our respectful view, that there was a contradiction on the cause of death as, according to counsel, "*a stab wound cannot lead to haemorrhage*." To further confound issues, she took issue with the fact that the killer knife was not taken to the *„ballistic expert'* for examination. She finally urged us to consider that the sentence of death imposed by the trial court was improper.

Opposing the appeal, **Miss Wang'ele**, the learned Senior Principal Prosecuting Counsel contended that there was strong circumstantial

evidence against the appellant in that he chased after and stabbed the deceased. Those circumstances led irresistibly to the conclusion that the deceased was stabbed by the appellant and that the same was premeditated. The post-mortem report, which showed that the deceased had a sharp penetrating stab wound, was also corroborative of this. It was a single but deliberate stab wound. On sentence, the learned Senior Assistant Director of Public Prosecutions indicated that the issue lay with the Court for decision.

This being a first appeal, we have, as required by ***Rule 29(1)*** of the Court?s Rules, gone through the entire record of evidence which we have re-evaluated and analyzed a fresh with a view to forming our own inferences of fact and arriving at our own conclusions on the culpability or otherwise of the appellant. We have proceeded by way of re-hearing but cognizant that we do not have the advantage the learned Judge had of hearing and observing the witnesses as they testified live before her, for which we make due allowance. See ***OKENO vs. REPUBLIC [1972] EA 32***, ***MWANGI vs. REPUBLIC [2004] 2 KLR 28***.

The first ground upon which the appellant challenges his conviction is the learned judge?s reliance on "*visual identification by recognition"* in the absence of a prompt first report. With respect, we find no substance in this complaint. It is not at all in doubt that the appellant, the deceased and the witnesses who testified as having been present at the scene all knew each other very well. They were village-mates and friends who knew each other by their full names. The incident happened in the mid-afternoon in broad day light and so there was nothing at all to impair the witnesses? recognition of the appellant as the assailant. PW1, PW2 and PW3 all gave detailed accounts which gave a clear picture of how the appellant confronted and aggressed the deceased and then chased after him before removing a knife from his pocket. Shortly afterwards the deceased emitted a scream and, moments later, was found lying lifeless on his tummy with a stab wound on his left shoulder. It is from this wound, described in the post-mortem report as a deep sharp-edged 3.5 cm long penetrating stab wound "*located at the left chest posterially*" that the deceased bled to death. Meanwhile the appellant had fled the scene.

Even though no witness saw the appellant actually plunge the knife into the deceased?s chest from behind, the evidence seems to us overwhelming that having chased him while brandishing a knife and having been seen taking off with the same knife and leaving in his wake a lifeless body with a stab wound consistent with infliction with a knife, and all within the space of a few minutes with no other person or event intervening, than the aggressive, pursuing and knife-wielding appellant was the one who made the fatal stab. That really is the essence of circumstantial evidence in that it calls for the only logical and reasonable conclusion from events that occurred on that fateful afternoon. It is not rocket science and we do not think that there was need for a prompt first report in order for the recognition of the appellant to be sustainable.

We are thus satisfied that the appellant was the last person to be seen with the deceased alive and that his menacing conduct towards him culminating in his unleashing of a knife as he chased the deceased led to the irresistible conclusion that he inflicted the single, fatal stab. See ***KIPKERING KOSKEI & ANOR vs. REPUBLIC [1949] EACA 135.***

There is nothing in the appellant?s unsworn statement that did anything to weaken the inference to be naturally drawn that he was the killer. Like the learned Judge we find it to be a mere denial. Moreover, given the manner in which he confronted and chased the deceased, and considering the location of the stab in the back, the wound penetrating into the chest and causing him to bleed to death, there is no doubt that the appellant intended to inflict the death or grievous harm on the deceased. Such intention amounts to *malice aforethought* as defined by **section 206** of the **Penal Code** which, once proved as it was plain in this case, renders a homicide a murder.

The inevitable conclusion we arrive at upon our consideration of the evidence is that the appellant caused the death of the deceased and did so while impelled by malice aforethought. There was no mistake as to his identity and his conviction of the offence of murder was fully justified the charge having been proved beyond reasonable doubt. The appeal against conviction is accordingly dismissed.

On the sentence imposed both the defence counsel and the prosecutor, as well the learned Judge, clearly proceeded on the basis that the sole penalty for murder was the mandatory death sentence. That would explain why what was said in mitigation had a ring of futility to it and it cannot be said there was any attempt to have a real sentencing hearing. The record of what transpired on 27th October 2006 is as follows;

> ***"Court: Judgment read.***
>
> ***Mr. Konya: Accused is a first offender. He is a young man. I leave it to court.***
>
> ***Mr. Omirera: Only one sentence is provided for once convicted. The sentence is one of death by hanging.***
>
> ***Court: There is only one sentence provided by the law for the offence of murder. That of death by hanging. Accused is therefore sentenced to death by hanging as by law provided. Right of appeal 14 days."***

While we do not castigate the learned Judge as at the time the general understanding was that the sentence of death for the offence of murder was mandatory, it would still have been useful to have a fuller mitigation and for the learned Judge to also make detailed notes and observations at the sentencing stage as this would have been useful for purposes of considering remission of sentence or parole by the relevant authorities and also for a consideration of the same on appeal.

The centrality of a properly-conducted sentencing hearing assumes greater significance when considered in light of the

Supreme Court?s decision in ***FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC eKLR 2017*** where mandatory death sentences were declared unconstitutional. Thus, it is not the case that a murder conviction must necessarily lead to the imposition of the sentence of death. The courts? hands are no longer tied.

Sentencing being a trial court function, the proper order to make in this dismissed appeal is that the case be and is hereby remitted to the High Court for re-hearing in sentencing only consistent with the guidelines pronounced by the Supreme Court in the **MURUATETU** case (supra). To that end the case shall be mentioned before the Judge hearing Criminal cases at the High Court at Makueni within the next

fourteen (14) days for appropriate directions as to the sentencing rehearing.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of January, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR