IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, M'INOTI & MURGOR JJ.A)

CRIMINAL APPEAL NO.58 OF 2014

BETWEEN

HELLEN ANYANGO OLOO.....1ST APPELLANT

JULIUS OTIENO SYONGE.....2ND APPELANT

PAMELA ATIENO RAMOGI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Homa Bay (Maina, J.) dated 5th December 2013

in

H.C. CR.C. No. 5 of 2012)

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JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court at Homa Bay ***(Maina, J.)*** dated 5th December 2013. By that judgment, the learned judge convicted the three ***appellants, Hellen Onyango Oloo (Hellen), Julius Otieno Syonge (Julius)*** and ***Pamela Atieno Ramogi (Pamela)*** on two counts of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code,*** and sentenced them to death on both counts, but directed the sentence for the second count to be held in abeyance. The appellants were aggrieved and preferred this appeal, in which they challenge both the conviction and sentence.

The information pursuant to which the appellants were tried and convicted charged them jointly with others not before the court, with the murder of ***Joseph Alal Rasugu (Joseph, Count I***) and ***Elizabeth Omollo Alal (Elizabeth, Count II),*** on 10th July 2012 at ***Onuro Village, Ndhiwa District*** in ***Homa Bay County***. The evidence adduced by the prosecution was that on the material day, at about 6 pm, Joseph was on his way home from the market in the company of his son ***Janese Ojwang Alal (PW4***), when they were accosted by Hellen's brothers-in-law,***Juma Otio*** and ***Ombura Otio***. Suspecting that Joseph had bewitched ***Rasto,*** Hellen's son who was ailing, they took Joseph and PW4 to Hellen's house where they ordered Joseph to perform antidotic rituals to counteract the alleged witchcraft, while at the same time assaulting him with the help of two others. As the assault was in progress, the appellants were busy cheering on the attackers and inviting fellow villagers to come and witness how witches were killed.

Subsequently at about 9 pm, the people who were assaulting Joseph led him to his house in the neighbourhood, and after locking him up in the house together his wife, Elizabeth, set the same on fire. Joseph and Elizabeth died in the fire. From the evidence of ***Dr. Ayoma Ojuang (PW7),*** who performed postmortem examination of the bodies of Joseph and Elizabeth, their deaths were caused by 100% severe burns.

According to PW4 who testified that he managed to escape from Hellen's house where the initial beating took place and proceeded home where he witnessed his parents being set on fire, the three appellants were present when Joseph and Elizabeth were set on fire, although they did not participate in setting the house on fire. That was also the evidence of ***Beatrice Ouma Ojwang (PW5),*** the wife of PW4 and a neighbour of Hellen, who testified that Julius held Joseph by the hand when he was led from Hellen's house to his own house, where he was set on fire.

Hellen's sworn defence was that on the material day she returned home at about 8.30 pm from ***Kabando market***, ten kilometers away, where she had been with Pamela, and found no one at home. Her young children informed her that there had been an incident at Joseph's home and that villagers had killed him and Elizabeth. It was her evidence that she did not go to Joseph's house at all. On his part, Julius' defence, equally sworn, was that he had nothing to do with the offence and that he did not know Joseph or Elizabeth or even that they had been murdered. He maintained that on 10th and 11th July 2012, he was engaged in his *shamba*, warding off monkeys from his crops. As for Pamela, she also gave sworn defence, whose substance was that she had been at Kabando market with Hellen. She got home at night and slept until the next day, when she learnt that Joseph and Elizabeth had been attacked by villagers. She then went to see her sick mother at ***Kaderi*** before she was arrested on 14th July 2012 and charged with the offences which she knew nothing about.

After their conviction and sentence, the three appellants lodged the present appeal. Hellen and Pamela, represented by ***Mr. Anyul***, learned counsel, impugned their conviction on the grounds that the learned judge erred by finding that they were part of the people who killed Joseph and Elizabeth; by holding that they were positively identified at Joseph's home while the prevailing circumstances were not conducive for identification; by relying on the evidence of PW4 and PW5 who were biased and not present at the scene when Joseph and Elizabeth were killed; by relying on contradictory and uncorroborated circumstantial evidence; by failing to consider their defences; and by imposing a manifestly excessive sentence. For his part, Julius, who was represented by ***Mr. Okoyo,*** learned counsel, faulted the trial court for convicting the appellants on the basis of common intention, which was not proved.

Prosecuting his clients' appeal in which he argued all the grounds of appeal globally, Mr. Anyul submitted that from the evidence adduced by the prosecution, Hellen and Pamela did not participate in beating Joseph and merely called on fellow villagers to come and see how witches were beaten or killed. He contended further that there was no credible evidence that they were part of the group that took Joseph to his home where he was killed with Elizabeth. In counsel's view, his two clients should at most have been convicted for the offence of assault only. Learned counsel further argued that the conclusion by the trial court that his clients were present when Joseph and Elizabeth were burnt to death was founded on mere speculation rather than evidence.

On identification of the perpetrators of the offence, it was submitted that the identification of Hellen and Pamela was not safe because it was at night and thus under difficult conditions. It was contended that PW4 and PW5 could not have properly identified Hellen and Pamela because it was a dark night and PW5 was hiding, fearing for her own life. Mr. Anyul further submitted that the learned judge erred by holding that common intention was proved because there was no evidence that Hellen and Pamela had planned the attack on Joseph and Elizabeth with those who set them on fire. He also urged us to find that the evidence of PW4 and PW5 was mutually contradictory.

Lastly, counsel urged us to hold that following the judgment of the Supreme Court in ***Francis Karioko Muruatetu & Another v. Republic*****, *SC Pet. No. 16 of 2015,*** the mandatory death sentence prescribed by section 204 of the Penal Code for the offence of murder is unconstitutional and to set it aside. In counsel's view, the role of the appellants in the deaths of Joseph and Elizabeth, if any, was very minimal so as to deserve only a light sentence or reduction of the sentence to the period already served.

Taking his turn, Mr. Okoyo for Julius urged us to find that common intention was not proved to the required standard of proof of beyond reasonable doubt. He contended that there was no credible evidence to show that Julius was at the scene when Joseph was assaulted or that he participated in setting the house on fire. He dismissed the evidence of PW4 and PW5 as contradictory, contending that PW4 testified that he was confused and could not identify the perpetrators of the offence. As for PW5, it was submitted that she was in hiding at the critical time and therefore could not identify those who set Joseph and Elizabeth on fire. We were accordingly urged to find merit in the appeal and to allow the same.

Mr. Sirtuy, learned public prosecution counsel, opposed the appeal, submitting that the prosecution proved beyond reasonable doubt through the evidence of PW4 and PW5 that all the three appellants were at the scene when Joseph was assaulted and when his house was set on fire and that they had participated in the commission of the offence. He contended that the identification of the appellants was safe because it was based on recognition by PW4 and PW5, who are their neighbours. Lastly, counsel submitted that the learned judge did not err by holding that there was common intention between the appellants and those who actually murdered Joseph and Elizabeth, because the appellants were present and participated in the offence by encouraging and cheering them on.

We have anxiously considered the record of appeal, the judgment of the trial court, the grounds of appeal, the submissions of learned counsel and the law. We remind ourselves that this being a first appeal, we are expected to reappraise the evidence, subject it to exhaustive examination and reach our own findings, but always bearing in mind that we do not have the advantage that the trial court had of seeing and hearing the witnesses as they testified. (See ***Joseph Kariuki Ndungu v. Republic Cr. App. Nos. 183 & 186 of 2006).***

On identification, the appellants contend that the prevailing circumstances were not conducive for positive identification because it was at night and by PW4 and PW5 who were hiding some distance away. We do not think that there is much substance in this complaint. The evidence on record from PW4 is that on the material day at about 6.00 pm, he and Joseph were on their way home from ***Got Gojor centre*** when their path was blocked by Juma Otio and Ombura Otio, who accused Joseph of bewitching Hellen's son. They took him to Hellen's home where they started assaulting him in the presence of the appellants, demanding that he performs rituals to undo the witchcraft.

PW4 was present when Joseph was literally abducted and also when he was assaulted at Hellen's house. All this started at about 6.00 pm when there was sufficient light. PW4 was well known to the appellants, as all of them were neighbours. As regards the role of the appellants during the assault on Joseph at Hellen's house, this was the evidence of PW4, which was accepted by the trial court:

> ***"I saw the 2nd (Julius) and the 3rd (Pamela) accused in the 1st (Hellen) accused's home. I confirm that I saw them when my father was being beaten. They did not beat my father physically but they were screaming calling on people to come and see how a witch was being beaten. I was also beaten by Juma and Ombura. I went to hide as they continued beating my father. I ran home. They were beating my father saying he is a witch. They beat me saying I was the son of a witch."***

PW4 further testified that after he escaped from Hellen's house, he went to the assistant chief, ***David Orwa Tabach (PW1***) to report that Joseph was being beaten at Hellen's house. PW1 confirmed that indeed PW4 had made that report to him. Thereafter PW4 went home and at

about 9.00 pm the assailants, in the company of the appellants brought Joseph home where he was subsequently locked up in his house with Elizabeth and set on fire. It was the evidence of PW4 that the three appellants were present when Joseph was brought from Hellen's house, and when he and Elizabeth were locked up and the house set on fire. He could see the appellants from where he was hiding behind a fence, with the help of the blaze and the spotlights in their possession. He was at a distance of about 20 meters. After that he ran to Kobama chief's camp. This was PW4's pertinent evidence:

> ***"They had spotlights. I was able to see the people who were there using the light which they had lit. My father was carried out to our home. I saw him carried. I confirm seeing the three accused persons at the time my father was being beaten and again when the house was set on fire."***

PW5 corroborated the evidence of PW4 in material particulars when she testified that on the material day she came from the farm and found Joseph being assaulted at Hellen's house in the presence of the appellants. She also maintained that the appellants were among the people who took Joseph to his house and that the three were present when Joseph and Elizabeth were set on fire.

In our view, this was not merely a case of identification by PW4 and PW5; it was a clear case of recognition of well-known neighbours, who the witnesses had seen over a lengthy period on the material day, starting from about 6 pm. On recognition, the courts have stated time and again that it is more satisfactory, reassuring, and reliable than identification of a stranger because it is based on personal knowledge of the suspect (See ***Anjononi & Others v. Republic*** ***(1976-80) 1 KLR 1566).***

The crux of this appeal is whether common intention was proved to the required standard. The appellants absolve themselves from liability for the murder of Joseph and Elizabeth and instead blame their fellow villagers who set their house on fire. They contend that at most, they were condemned merely because of their presence at the scene. ***Section 21*** of the Penal Code provides as follows on common intention:

> ***"21. 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."***

In ***Eunice Musenya Ndui v. Republic*** ***[2011] eKLR***, this Court identified five elements of common intention, namely:

> ***i) There must be two or more persons;***
>
> ***ii) They must form a common intention;***
>
> ***iii) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;***
>
> ***iv) An offence must be committed in the process; and***
>
> ***v) The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.***

Accordingly, from the above extrapolation, it was not necessary to prove that the appellants themselves murdered Joseph and Elizabeth by setting them on fire. The appellants will be deemed to have committed the murder of Joseph and Elizabeth if the other persons with whom they had a common intention to prosecute an unlawful purpose, committed the murder as a probable consequence of their pursuit of the unlawful purpose.

In ***Wanjiro d/o Wamario v. R, 22 EACA 521*** the former Court of Appeal for Eastern Africa explained that:

> ***"Common intention generally implies a premeditated plan but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with."***

Similarly in***Rex v. Tabulayenka s/o Kirya & 3 Others*** ***[1943] 10 EACA 51***, the same Court held that:

> ***"To constitute a common intention to prosecute an unlawful purpose...It is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."***

In ***Njoroge v. Republic*** ***[1983] KLR 197,*** this Court held that where persons combine for an unlawful purpose and one of them in the execution of that purpose kills a person, all are guilty of murder, whether they aided or abetted or not. The Court added that the common intention of the appellants could be inferred from their presence at the deceased's home, their actions and the omission of either of them to disassociate themselves from the assault. Lastly in ***Abdalla Kirao Mkare & 2 Others v. Republic*** ***[2014] eKLR***, in finding the common intention in a charge of attempted murder, this Court expressed itself as follows:

> ***"The 3rd appellant valiantly tried to disassociate himself from the other appellants and assumed the mien and poise of an innocent bystander throughout the catastrophic incident. But the evidence accepted by the two courts below indicates that he was the one urging the other appellants on, telling them to kill PW1 and joining in preventing PW1 from getting out of the burning car and keeping off Good Samaritans coming to PW1's rescue...In this appeal, we have set out in detail the involvement of the 3rd appellant in the attempt by the 1st and 2nd appellant to unlawfully cause the death of PW1. We are satisfied from the evidence on record that although it was not the 3rd appellant who assaulted, stabbed and set PW1 on fire,***

from his intimate involvement in the entire transition, he had common intention with the 1st and 2nd appellants to cause the death of PW1."

From the evidence that was adduced before the trial court, it is evident that the appellants and the other attackers of Joseph had a common intention to prosecute an unlawful purpose, namely the assault on Joseph for allegedly bewitching Hellen's son. That assault was initiated by Hellen's brothers-in-law; in Hellen's house; on the assumption that Joseph had bewitched Hellen's ailing child; in the presence and cheering of Hellen and the other two appellants; and ended with Joseph and Elizabeth being set on fire by their assailants in the presence of the appellants, without any effort on their part to disassociate themselves from the actions of the assailants of Joseph and Elizabeth. In these circumstances, we are satisfied that the learned judge did not err by holding that common intention was proved to the required standard.

As regards what the appellants termed major inconsistencies and contradictions in the prosecution evidence, having carefully re-evaluated the evidence, we have not seen any contradictions of a nature that would suggest a concocted or contrived case. As this Court stated in ***John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 2000,***

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

We are accordingly satisfied that the appellants' appeal against conviction has no merit and we hereby dismiss the same.

Turning to the question of sentence, the appellants contend that they were sentenced to death because at the time they were sentenced, it was held that the death sentence was the mandatory prescribed sentence for the offence of murder. However in ***Francis Karioko Muruatetu & Another v. Republic*** (supra) the Supreme Court subsequently held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court expressed itself as follows:

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

In the circumstances of this appeal, we cannot shut our eyes to the fact that the appellants were sentenced to death on the basis of a mandatory provision of the law which the Supreme Court has since held to be unconstitutional. The appellants' mitigation statements are on record. They were all first offenders and family people with young children that were dependent on them. They expressed remorse at what happened and pleaded for leniency. They have been incarcerated for the last five years because they were on bond during their trial. On the other hand, two innocent people lost their lives, obviously in excruciating pain and agony, for no reason. The manner in which they were murdered was rather cruel and inhuman. In the premises, we set aside the sentence of death imposed upon the appellants and substitute therefor a sentence of imprisonment for 30 years from the date of sentence by the trial court. It is so ordered.

Dated and delivered at Kisumu this 7thday of December, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR