IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GITHINJI, KARANJA & KANTAI, JJA]

CRIMINAL APPEAL NO. 403 OF 2009

BETWEEN

MICHAEL NDERITU MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi (J.

Lesiit, J)

dated 18th December, 2009,

In

HC.CRC. NO. 53 OF 2009

****

JUDGMENT OF THE COURT

This is a first appeal from the conviction and sentence of the appellant, **Michael Nderitu Mwangi**, who was tried by the High Court of Kenya, Nairobi, for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars in the information were that the appellant murdered **Ann Nyambura Kamande** on the 30th day of May, 2009 at Eastleigh within Nairobi area. Nine prosecution witnesses were called in support of the case and when it was found that he had a case to answer, the appellant gave an unsworn statement.

The learned Judge who heard the case **(Lesiit, J)** in the Judgment delivered on 18th December, 2009 found that the charge had been proved beyond reasonable doubt as required and the appellant was convicted and sentenced to death. The appellant was dissatisfied with those findings and filed this appeal which is premised on the homemade "Memorandum Grounds of Appeal" filed on 28th February, 2017 where five (5) grounds are set out. The appellant complains that he was convicted on insufficient evidence; that the High Court erred in law by failing to evaluate the entire evidence; that the High Court should have found contradictions and inconsistencies in the prosecution evidence and; finally, that the case for the prosecution was not proved as required by law.

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 forth from this Court. For instance that duty was stated in the case of **Stephen M'Irungi v.Republic [1982-88]1KAR, 360** to be:

> ***" Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

It was recognized by this Court in the case of **Bakari Rashid v. Republic [2016] eKLR** that there is no set format for the re-appraisal of that evidence by the first appellate court but that it must be self-evident from the record that the court undertook such an exercise. It is not sufficient to merely summarize the evidence on record and leave it at that - the record must show after such summary that the court delved

into the re-evaluations, reconsideration, re-analysis and re-appraisal of such evidence.

What was the case put forward by the prosecution to prove the serious charge of murder that faced the appellant?

The star witness appears to have been **Duncan Mwenda Irungu** (P.W.4) (**Duncan**). When he was called to the witness stand, he was completely inaudible and the trial Judge took the step of remanding him in the cells to probably encourage him to testify. On being recalled, he related events that can only be described as unfortunate.

On 30th May, 2009, Duncan was at a village called Motherland in the Eastleigh section of Nairobi. He was at about 10 p.m seated outside his house with the deceased who was described as the appellant's wife. The deceased presently left Duncan and entered the house of a woman called **Benta,** 10 feet away. No sooner had this happened than Duncan saw the deceased emerge from that house with the appellant holding her by her neck, seemingly strangling her. Duncan observed that the appellant was holding a knife and this prompted him to flee the scene, and he also noticed that the appellant also fled the scene towards a river nearby. The deceased was screaming, and this attracted the attention of various people including **Purity Njeri Kamande** (P.W.1) (**Njeri**), **Alice Waithera Kamande** (P.W.2) (**Waithera**), **Stephen Kamau Njoroge**, (P.W.3) (**Njoroge**); and **Jane Wambui Kiarie**, (P.W.5) **Wambui**, who all resided next door.

The deceased, **Njeri** and **Waithera** were sisters.

Upon emerging from her house, Njeri saw her deceased sister with the appellant and the deceased was holding her stomach where intestines could be seen hanging out. Njeri attempted to protect her (deceased) sister from the appellant but the appellant threatened her with a knife in his hand prompting her to run to a police post in the area to report the incident. When she reached the police post she found the appellant who had arrived before her and who had already made a report. It was Njeri's evidence that although the incident occurred at night, there was sufficient electric light which was bright. She had seen a pool of blood at the door of her sister's house and her sister later died in hospital that night.

Of her sister and the appellant, she testified in chief:

> ***"Ann and the accused lived as husband and wife. They used to fight often. Njaramba used to start the fights whenever he came home drunk and he beat my sister often …"***

Njeri also testified that the deceased and the appellant sold illicit brew as an occupation and consumed the same.

When **Waithera** heard screams from her sister, she ran out of the house and saw the appellant holding a knife with which he threatened her prompting her to flee. She later joined a group of people who were chasing after the appellant who had fled the scene escaping to a police station and when, later, she returned home, she found her sister who was seriously injured still lying on the ground. Arrangements were made to take the deceased to Kenyatta National Hospital where she died. Like her sister Njeri, Waithera confirmed that the appellant and the deceased sold illicit brew and used to fight often.

Njoroge was in Njeri's house that evening when upon hearing screams, they all ran out. He observed the serious injuries on the deceased and also saw the appellant who was at the scene and was armed with a knife. He was one of those who chased after the appellant and found him at the police post.

Wambui was also at her house with others on the material night when upon hearing screams, she ran out of the house only to find the deceased lying on the ground bleeding profusely and gave assistance to the deceased.

Then there is the evidence of the police officer No. **74743** P.C. **Sospeter Mwangi Wanjohi** (P.W.6) (**Wanjohi**), then of Eastleigh Patrol Base. He received report from Njeri of the stabbing of her sister but while that report was being made, the appellant also reported at the Base stating that he had killed someone. He noted injuries on the appellant's face and he with a colleague took the appellant to Mother & Child Hospital where he was treated by an injury being stitched. He later arrested the appellant and charged him with the offence.

No.232233, I.P **Johnstone Matoke** (P.W.7) (the Inspector of Police) who was at the material time attached to Jamia Police Post was on patrol on 30th May, 2009 when at about 10 p.m he was attracted by noise near the Patrol Base. On arrival, he found many people who were baying for the appellant's blood wanting to kill him. He testified that the appellant had a head injury from which he was bleeding heavily and that the appellant had informed him that he had quarreled with his wife. He took the appellant to hospital in the company of Wanjohi and later arrested and charged him.

Elizabeth Wanjiru Mukuma (P.W.8), a relative of the deceased, identified the body for post-mortem which was carried out by **Dr. Njeru**, whose report was given in evidence by **Dr. Njai Mungai** (P.W.9) (the Doctor). According to the doctor, the deceased had two abdominal sutured wounds one 18 cm long and the other 25 cm long, both on the anterior abdominal wall and cause of death was trauma by a sharp object or stab wound in the chest. In cross-examination:

> ***"…The incision or stab wound on the lung injury is impossible to have***
>
> ***been self-inflicted. The depth of the incision from the abdomen to the lung demonstrated that one could not have thrust an object that deep to reach the lungs on their own. It was not self-inflicted …."***

The learned Judge found that there was a case to answer and the appellant elected to give an unsworn statement in which he readily admitted that he sold an illicit drink – "changaa" with his wife (the deceased) to make a living. On the material day, he had gone about distributing the

drink to customers in various places and, in the evening, it was the time to visit those places to collect payment as the same was not made on delivery. When he reached the last customer at about 9.00 p.m, instead of being paid, he was asked to deliver another order as there was appetite for more. He went back to the house where he found his wife, the deceased lying on the sofa set and he enquired of her why she had retired so early, the day's work still being incomplete. When he attempted to retrieve the drink from a hiding place in the house, according to him the deceased, who was drunk held him and told him that he was not going to deliver any other order. He slapped her and she screamed which attracted the attention of her two (2) sisters, a brother and two (2) nephews. One of the brothers hit the appellant while his wife still held him and:

> ***"… Then my wife took a knife and stabbed me on my left eye brow. I got eight stitches on that eye. The sisters and brother on seeing that also started on me. They all live near us. I could not open my eyes coz blood was oozing from the left eye. They all came with huge sticks which we use to make the brew and they started beating us. I decided to hold deceased so that she does not stab me again. She pushed herself from me and stabbed herself on the stomach…"***

He further testified that it was the deceased's family that had started the fight because of the scream from the deceased. He produced a medical treatment card and a receipt from Mother and Child Hospital as part of the evidence.

The learned Judge analyzed the evidence by the prosecution and the defence offered by the appellant and came to the conclusions which we have already stated.

When the appeal came up for hearing before us on 27th November, 2018, **Miss Celyne Odembo**, learned counsel appeared for the appellant while **Mr. Moses O'Mirera**, learned Senior Assistant Deputy Public Prosecutor appeared for the Republic. Miss Odembo started her submissions by stating that the prosecution's evidence did not prove the charge of murder because an incident had occurred between a husband and wife when they were drunk which led to the death of the wife. According to counsel, it was the deceased who first attacked the appellant and inflicted an injury on his face which was seen by the police officer when a report was made to the police. Counsel cited the cases of **Bakari Rashid** (supra) and **Joseph Kimani Njau v. Republic [2014] eKLR** in support of the proposition that the offence of murder had not been proved. In further submissions, it was counsel's view that the learned Judge had ignored contradictions in the prosecution's case as P.W. 4 (Duncan) had testified that he had witnessed the deceased being strangled but the doctor had not proven such testimony. Counsel concluded her submissions by citing the recent case of **Francis Muruatetu & Others v. Republic [2017] eKLR** and asked us to interfere with the sentence of death that had been imposed though the main prayer was that the appeal be allowed.

Mr. O'Mirera in opposing the appeal on both conviction and sentence submitted that the High Court had relied on the evidence of **Duncan** which according to counsel, had been corroborated by the evidence of **Njeri**, **Njoroge** and **Wambui.** According to counsel, **Duncan** who was with the deceased saw her enter **Benta's** house and emerge moments later being held by the appellant who brandished a knife. She was screaming. Counsel supported the findings of the High Court on the demeanour and honesty of Duncan as a witness and wondered why the appellant was holding a knife with which he threatened Njeri, Duncan and other prosecution witnesses.

On malice, it was counsel's submission that the same had been established when it was shown that the appellant had used a lethal weapon during the incident. On identification, Mr. O'Mirera submitted that witnesses had testified that there was bright electric light and the witnesses knew the appellant before the incident. Counsel concluded his submissions by asking us to uphold the death sentence as it was a case involving a husband killing his wife in circumstances that were aggravated.

We have considered the record of appeal and submissions made.

The learned Judge considered the testimony of each witness. She found that the witnesses – **Njeri**, **Waithera**, **Njoroge** and **Wambui** all knew the appellant and had seen him at the scene holding the deceased while brandishing a knife. There was sufficient electric light and there was no possibility of mistaken identity. The learned Judge considered various cases where circumstantial evidence was considered and came to the conclusion that all circumstantial evidence in the case established that the appellant had stabbed the deceased using the knife which was seen by various witnesses. She also considered the appellant's defence particularly that it was the deceased who had stabbed the appellant on the head or face and concluded that in the case before her, the injury on the appellant must have been inflicted after but not in the course of the attack on the deceased.

Looking at the case as a whole, it was proved through the evidence of Duncan that immediately after the deceased entered **Benta's** house, she emerged from that house with the appellant holding her by the neck. He held a sharp knife with which he threatened various people – Duncan himself, **Njeri**, **Waithera**, **Kamau** and **Wambui.** All these witnesses saw a serious injury on the deceased's stomach where intestines were hanging out. The appellant's defence was that the deceased had stabbed herself in the stomach but this was discounted by the evidence of the doctor who testified that due to the nature of the injuries set out in the post mortem report, it was impossible for such injuries to have been self-inflicted.

Although in the circumstances of the case and in the face of the evidence produced, the learned Judge reached the correct conclusions, we note that in the evidence particularly by the deceased's relatives – **Njeri**, **Waithera** and **Wambui** – it was established that the appellant and his wife the deceased traded in illicit brew as part of their living. They sold it to customers in various places and consumed the same. The said witnesses testified that the appellant and the deceased quarreled and fought often. The appellant did not deny but readily admitted that on the material day, he returned home in the evening to collect more brew to satisfy customers' demands but that his wife stood in his way preventing him from leaving the house and that he slapped her leading to other events culminating in the death. There is sufficient evidence on record to show that the appellant and the deceased engaged in constant fights and quarrels, sometimes during drunken moments.

Although it is unfortunate that a life was lost in the case before the trial Judge, we do not think in the circumstances that the requisite malice aforethought was present or proved to establish the offence of murder. The appellant and the deceased engaged in a quarrel whose origin would probably have been explained by Benta, to whose house the deceased had entered. Benta was not called as a witness and there is no evidence on record whether the appellant was in Benta's house or whether he followed the deceased into that house. What is clear is that it was a fight between spouses where excessive force was used. Malice aforethought was not proved to the required standard. As Section 206

of the Penal Code provides, malice aforethought is deemed to be established if circumstances as specified therein obtains. However, we are not satisfied that those circumstances were proved in this case.

Having re-evaluated the evidence, we have come to the conclusion that the appellant should have been convicted for the offence of manslaughter contrary to Section 202 of the Penal Code as read with Section 205 of the said Code. As we have the mandate to do so, we hereby quash conviction for murder, set aside the sentence of death and substitute a conviction for manslaughter under the said provisions of law.

The appellant will serve a term of imprisonment of twenty (20) years for manslaughter from the date of the sentence by the High Court.

DATED & Delivered at Nairobi this 22nd day of February, 2019.

E. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR