IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & SICHALE JJ.A)

CRIMINAL APPEAL NO. 10 OF 2017

BETWEEN

MOHAMED BARISA GUYO... APPELLANT

AND

THE REPUBLIC..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi, (Omondi & Meoli, JJ.) delivered on 10th February, 2012

in

H.C.Cr.C No. 17 of 2006)

****

JUDGMENT OF THE COURT

1. This is a first appeal against the conviction and sentence meted out against the appellant for the offence of murder contrary to section 203 as read with section 204 of the Penal code. The brief circumstances leading to the said conviction, as presented by the prosecution, are that on 11th October, 2006, **Alfred Baya** (PW1) was in Lamu working as a shamba boy (gardener). After working in the shamba with **Kazungu Ngumbao** (the deceased) who was also his cousin, the two went for lunch at the deceased's house. The lunch was prepared by the deceased's wife who also had some guests over. After lunch, PW 1, the deceased as well as the deceased's wife saw the guests off.

2. Since the deceased had to check in at his place of work, otherwise known as Faraji farm, he left his wife to continue to escort the guests while he and PW1 went off to the farm. On arrival they found cattle inside the shamba. The deceased, who was employed to oversee the land, asked PW 1 to assist him in driving the cattle out. While the two were dealing with the cows, the appellant approached them. He too, was an employee at the farm, responsible for herding the said cattle. The appellant demanded to know why they were getting the cattle off the shamba; to which the deceased responded that the animals were destroying the plants therein. PW 1 and the deceased managed to get the cows into their usual boma (cattle shed).

3. Irked by their actions, the appellant retrieved a metal bar and approached the duo once more, furiously telling the deceased off and telling him that he was not his equal. Seeing this, the deceased tried to take the metal bar from the appellant. In the ensuing scuffle, the appellant retrieved a knife and stabbed the deceased in the chest and he fell down.

4. Awoken from his slumber by the commotion outside, a fellow worker, **Saidi Galgalo** (PW2) who was staying with the appellant at the time, emerged from their sleeping quarters and saw the deceased lying a few meters away, with the appellant standing beside him holding a knife. He rushed to the scene and tried to lift the deceased but he was too heavy. It was then apparent that blood was oozing from the deceased's chest and on seeing this, the appellant ran away. In a bid to save the deceased, PW 2 enlisted the help of neighbours who took the deceased to hospital.

5. One such neighbor was **Mohammed Mahidi (PW 3)** the village elder who later reported the matter to the police. Meanwhile, PW 2 went to inform the owner of the farm of what had transpired. Following the assault report made to the police, **PC No. 61437 Ezekiel Mutei (PW 6)** visited Lamu District hospital where the deceased had been rushed and on arrival, he was informed that the deceased had succumbed to his injuries. In the post mortem report, Dr. Mutua gave the cause of death as cardiac failure as a result of the stabbing. A copy of the post mortem report was produced as exhibit by Dr. Maurice Buni (PW8).

6. Attempts by the police to locate the appellant proved futile but later that evening, he voluntarily surrendered himself at the police station

and was arrested and detained. The bloodied knife was also recovered from him and he was then taken to court where he was charged with the deceased's murder.

7. The appellant denied the charge and hearing began, with a total of eight prosecution witnesses being called to testify. Convinced that the appellant had a case to answer, the learned trial court placed him on his defence and the appellant opted to make an unsworn statement and called no witnesses. He acknowledged having been in the company of PW1 and the deceased on the material date and time. He claimed that he urged the two to drive the cattle out of the shamba and back into the boma. He stated that the deceased and his brother berated him for letting the cows loose into the shamba in the first place; that while at it, they claimed that he had maliciously set the cows loose in the shamba knowing fully well that the animals would invariably eat the crops therein and thereby cause PW 1 to loose his job.

8. They then left but returned shortly thereafter, with the deceased carrying a plank of wood ominously telling the appellant that this was his last day. They both descended on the appellant and at some point, the deceased retrieved a knife from his pocket but the appellant was able to wrestle the knife from him and in the scuffle, the deceased was accidentally but fatally stabbed. He stated that since he had no ill will towards the deceased, he pulled the knife off the deceased and used a shirt to try and stop the bleeding. He made no mention of where he went to thereafter but he stated that he later surrendered himself and the knife to the police.

9. After considering the evidence as restated above, the High court (**Omondi, J)** convicted the appellant as charged and sentenced him to suffer death. That conviction and sentence is what provoked this appeal; which is premised on the appellant's homemade grounds of appeal as well as the grounds of appeal filed by his counsel.

10. On the whole, the appellant contends that the learned trial Judge erred by; failing to find that the case was never proven beyond reasonable doubt; failing to analyze the evidence and find that there were material inconsistencies in the testimony of PW1; failing to find that malice aforethought was never established and the conviction can therefore not stand; placing undue reliance on the uncorroborated testimony of a single identifying witness; failing to appreciate that the appellant's voluntary surrender to the police, is inconsistent with a guilty mind; failing to consider the credible defence tendered by the appellant; basing a conviction on the findings of assessors which were unsupported by the evidence on record and; introducing theories that were never canvassed at trial and thus reaching findings that were unsupported by the evidence.

11. Urging the appeal on behalf of the appellant was learned Counsel **Mr. Nabwana,** who began his submissions by stating that the evidence on record did not merit the conviction of the appellant. To begin with, one of the assessors fell by the wayside in the course of trial, leaving only two assessors and that this should have resulted in a mistrial. However, counsel contended that since the appellant has been in custody since 2006, ordering a retrial at this point would be most prejudicial; he therefore urged this court to set the appellant at liberty. Aside from the foregoing, counsel also invited the court to take cognizance of the disparities and resolve the same in the appellant's favour. One such disparity, he said, was with regard to the appellant's age; he argued that if, at the time of trial, the appellant was 21years old, then he must have been 10 years old when the offence took place. Another inconsistency pointed out was as regards the date of the offence; that while the charge sheet talks of 17th October, 2006, PW 1 said the offence occurred on 11th October, 2006 while PW 2 stated the date as 17th December, 2006.

12. Furthermore, that there was contradiction as to whether the deceased and the appellant were co workers as well as contradiction as to who picked the metal rod. All these inconsistencies should have been resolved in favour of the appellant. He added that the defence of provocation as tendered by the appellant was never considered and that the act of fighting is not disputed. Accordingly, counsel urged this court to reconsider the sentence imposed.

13. Opposing the appeal was learned counsel **Mr. Jami** who appeared for the state. He stated that the discrepancy about the dates is attributable to a typographical error and does not affect the veracity of the conviction. Mr. Jami conceded that the failure to explain the exclusion of one assessor was wrong but not fatal. As regards the metal bar, Mr. Jami contended that from the evidence, the metal bar was in the appellant's possession and that in any event, it was the knife which constituted the murder weapon. As regards provocation, counsel submitted that the deceased was stabbed in the chest. He agreed that there was adequate mitigation which the court should take into consideration in considering the appropriate sentence.

14. This being a first appeal, this Court's role is to re analyze and re evaluate the evidence tendered before the trial court and come up with its own independent findings; all while making 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** and also **Okeno v R** [1972] EA 32). From the grounds of appeal and the submissions of the parties, we have narrowed down the issues for determination as follows:-

a) Whether the necessary ingredients to prove the charge of murder were established;

b) what sentence (if any) should be meted out.

15. On the first issue, the appellant has contested his conviction on the basis that the evidence on record was insufficient to sustain a murder charge. In this regard, he has cited inconsistencies in the evidence, want of corroboration of the testimony of the single identifying witness, as well as the failure by the prosecution to prove its case beyond reasonable doubt. With regard to the alleged material inconsistencies, the disparity as regards the date of the offence as stated by the several witnesses is in our view inconsequential, given that the appellant had admitted having had a hand in the deceased's death. In any event this disparity is curable under section 382 Criminal Procedure Code.

16. Similarly, the allegation that the testimony of the sole identifying witness needed corroboration is also without basis given the appellant's admission that he stabbed the deceased. Besides, there is no known law, nor has any been cited, in support of the argument that in a case such as this, the testimony of a sole identifying witness must be corroborated. That contestation must of necessity, fail.

17. This leaves us with the contestation regarding proof beyond reasonable doubt. **Section 203** of the **Penal Code** defines murder as follows:-

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

In order to establish a case for murder, the prosecution must prove not only that the act of killing (*actus reus*) was perpetrated by the accused, but also that he had the intention to kill the deceased (*mens rea*). This Court, in the case of **Joseph Kimani Njau V Republic [2014] eKLR** stated as follows:

> ***"In all criminal trials, both the*** actus reus ***and the*** mens rea ***are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the*** actus reus ***and*** mens rea ***have been proved to the required standard.***

In this case, the fact that the appellant fatally stabbed the deceased is without doubt. The appellant never controverted it. In fact, in his defence, he stated as follows:

> ***'I got a chance and grabbed both hands of the deceased and we struggled over the knife as I wanted to snatch it, deceased brother hit me from the back and I fell and the impact caused deceased to fall and I fell over him this fall resulted in the deceased falling on the knife and I stabbed him. I was in shock and the deceased told me "Mohammed my friend, I am dying, please pull out the knife from my abdomen" …'***

The *actus reus* was therefore established.

18. The pertinent issue in this case is whether *mens rea* was proven to the required standard. *Mens rea* is what is otherwise known as malice aforethought. It connotes the existence of a deliberate intention on the part of the accused to kill the deceased. In this case, as per PW1, the deceased produced the knife with which he was later stabbed in the course of his brief struggle with the appellant. On his part, the deceased had a metal bar. The production of these crude weapons was accompanied by insults traded between the two. PW 1 stated in part as follows:

> ***'Kazungu told accused he was a fool. The deceased replied that he was equally stupid'***

PW1 was the sole eye witness to the whole saga.

19. From the testimony of PW1 and that of the appellant, it can safely be deduced that the existence of a deliberate intention on the part of the appellant to kill the deceased was never established. To the contrary, what emerged was a case in which both the deceased and the appellant provoked each other into a fight, with catastrophic consequences. From our analysis of the evidence presented to the trial court we are not persuaded that the appellant planned or intended to kill the deceased. Given the failure to prove *mens rea*, the appellant's contention that the ingredients for a case of murder were not proven to the required standard, holds true.

20. By extension, the ground that the appellant's defence was never considered is untrue as from the record, the trial court went to great lengths to dissect the veracity of the appellant's statement *vis a vis* the testimony of the prosecution witnesses. However, to this court, it is equally apparent that there was an exchange of words between the appellant and the deceased prior to the fight. The appellant argues that the trial court ought to have found that this constituted provocation. ***section 208*** of the Penal Code defines provocation as follows:

> ***208 (1) The term "provocation" means and includes…any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relationship of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***
>
> ***(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the later stands in such relation as aforesaid, the former is said to give to the latter provocation for an assault."***

The defence of provocation only arises where it is shown that in the circumstances of the case, the accused was deprived of self-control or was acting under diminished responsibility. The applicable test was set out by the House of Lords in ***Director of Public Prosecutions vs Camplin [1978] 2 All ER*** as follows:-

> ***"Whether the provocation was sufficient to make a reasonable man in like circumstances act as the defendant did. Not a reasonable boy or a reasonable lad; it was an objective test – a reasonable man"***

Save for the trading of insults, there is nothing in this case to suggest that the appellant's provocation warranted the killing of the deceased. The circumstances of the case do not fit the definition of provocation as envisioned under section 208 aforesaid.

21. However, in view of the foregoing, we are satisfied that the killing of the deceased was devoid of malice aforethought. In the circumstances, the case established by the prosecution was not one of murder, but the lesser cognate offence of manslaughter and the learned trial court erred in failing to find as much.

22. As a result, the conviction for murder is hereby quashed and we substitute therefor a conviction for the offence of manslaughter contrary to **section 202** as read with **205** of the Penal Code. After considering the circumstances surrounding the matter and the fact that the appellant was a first offender who has been incarcerated for over 10 years since his arrest, but while at the same time not overlooking the seriousness of the offence, we find it mete and just to sentence the appellant to serve 15 years imprisonment from the date of conviction.

DATED and delivered at Mombasa this 14th day of February, 2019.

ALNASHIR VISRAM

………………………………

JUDGE OF APPEAL

W. KARANJA

……………………………

JUDGE OF APPEAL

F. SICHALE

……………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR