IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, HANNAH OKWENGU &

S. ole KANTAI JJ.A.)

CRIMINAL APPEAL NO. 49 OF 2015

BETWEEN

JOHN GITAU GACHIRI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Nairobi ***(Mwilu, J.)*** *dated 11th July, 2013*

in

HCCRC NO. 43 OF 2009)

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JUDGMENT OF THE COURT

[1] John Gitahu Gachiri, (hereinafter referred to as the appellant), was tried and convicted by the High Court at Nairobi for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** He was alleged to have murdered his mother **Tabitha Mumbi Gachiri** (herein deceased) on the 23rd April, 2009. His trial commenced before Ochieng, J. on the 8th of June, 2010. Ochieng J heard the evidence of six witnesses after which the trial was taken over by Mwilu, J. (as she then was), who took the evidence of three witnesses. Thereafter the appellant who was placed on his defence gave sworn evidence.

[2] In her judgment, the learned judge found that the appellant attacked and injured the deceased in the presence of the deceased's grandson, Cyrus Kamau (Cyrus), whose evidence was corroborated by Japheth Kioko Kilundu (Japheth), an administration police officer, Faith Wangare Mwaura (Faith), a neigbour, Teresia Mumbi Kuria (Teresia), also a neigbour and Francis Kamau Mungai (the Chief of the location). The learned judge rejected the defence of provocation that was put forward by the appellant on the grounds that the attack was vicious and unprovoked. She therefore convicted the appellant of the offence of murder and sentenced him to death.

[3] Being aggrieved, the appellant lodged this appeal in which he filed a memorandum of appeal raising seven grounds. The appellant also filed a supplementary memorandum of appeal, in which he raised six grounds. In the supplementary grounds, the appellant faulted the judgment of the High Court, contending that the learned judge erred: in relying on the evidence of a witness whose testimony on identification of the accused could not pass the test of veracity; in failing to find that there was no *mens rea;* in convicting the appellant on inconsistent evidence; in shifting the burden of proof to the appellant; in failing to consider the appellant's defence; and in the alternative in failing to find that if the offence was committed, then the appellant was provoked.

[4] Mr. Paul Mugwe Nyaga, learned counsel who appeared for the appellant, abandoned the original grounds of appeal and relied on the supplementary memorandum of appeal. Counsel filed written submissions which he orally highlighted during the hearing of the appeal. The first issue that Mr. Nyaga took up in the submissions was the alleged failure by the trial court to comply with section 200 of the Criminal Procedure Code. He submitted that although Ombija, J. made reference to section 200 of the Criminal Procedure Code, Mwilu, J. proceeded with the hearing without complying with that section. Counsel relied on **Bob Ayub vs Republic [2010] eKLR,** for the proposition that the trial was a nullity as the appellant's rights were not explained to him, and this prejudiced the appellant as he could have recalled the main witness who was a minor.

[5] On the issue of malice aforethought, Mr. Nyaga submitted that the learned judge did not properly consider the circumstances of the case; that Cyrus testified that there was an argument between the appellant and the deceased; that this showed that the appellant may have acted on the spur of the moment; and that the defence of provocation ought to have been considered. Counsel therefore urged the Court to find that the appellant's trial was a nullity and that malice aforethought was not established.

[6] In regard to sentence, Mr. Nyaga urged the Court to take into account the Supreme Court decision in **Francis Karioko Muruatetu & another vs Republic & 5 others [2016] eKLR,** and impose on the appellant a sentence other than death as the appellant was remorseful.

[7] Mr Solomon Naulika, learned counsel who appeared for the respondent urged the Court to uphold the appellant's conviction and dismiss this appeal. He argued that if there was violation of section 200 of the Criminal Procedure Code, it was not prejudicial to the appellant. He submitted that death sentence is not an illegal sentence; that the appellant having served barely five years for killing his mother, to release him would be a slap on the wrist; and that the appellant may not be accepted back in the society.

[8] We have considered this appeal, the submissions made and the authorities cited. The first issue that we wish to address, is the alleged failure by the trial court to comply with section 200 of the Criminal Procedure Code. The record shows that after hearing six witnesses, Ochieng, J. was transferred to another station. The matter was then mentioned before Ombija, J. who ordered that further hearing proceeds before Mwilu, J. in compliance with section 200 of the Criminal Procedure Code. This was in the presence of Mr. Mwaniki, who was the advocate for the appellant, and Mr. Macharia, who was appearing for the State. On 20th September, 2011, hearing proceeded before Mwilu, J. in the presence of both Mr. Mwaniki and Mr. Gichuru. It is evident that Mwilu, J. did not make any reference to the said section 200. In other words, the appellant was not informed nor formally requested whether he wanted to exercise the options available under section 200 of the Criminal Procedure Code. By virtue of section 201(2) of the Criminal Procedure Code, the provisions of section 200 of the Criminal Procedure Code, is applicable to trials in the High Court.

[9] The question is whether the failure to formally comply with section 200 rendered the appellant's trial a nullity. In **Abdi Aden Mohammed vs Republic [2017] eKLR,** this Court addressing section 200 of the said code stated as follows:

"Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or all together recommence the trial. In that case, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right…. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demenour and credibility of the particular witness or witnesses and to weigh their evidence accordingly."

[10] In **Ndegwa vs Republic [1985] KLR 535,** which was referred to in **Abdi Aden Mohammed vs Republic (supra),** it was held, *inter alia,* that:

> ***"1. The provisions of Section 200 of the criminal procedure code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only are likely but will defeat the end of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.***
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> ***2. The provisions of Section 200 should not be invoked where, the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual, or presumed to prejudice the prosecution."***

[11] In this trial, six witnesses had testified. These were basically the crucial witnesses whose evidence implicated the appellant. However, the appellant had the benefit of counsel, who had the opportunity to cross examine these witnesses. When Mwilu, J. took over the matter, notwithstanding the fact that Ombija, J. had already alerted the parties' on section 200 of the Criminal Procedure Code, there was no attempt by the counsel or the appellant to draw the trial judge's attention to this section or to have the witnesses recalled or trial start *de novo*. In other words both the appellant and his counsel were content to proceed with the trial from where it had reached. Under these circumstances, we are not persuaded that the appellant suffered any prejudice or injustice by the failure of Mwilu, J. to comply with section 200 of the Criminal Procedure Code. In any case, although this ground was taken up in the written submissions, it was not a ground pleaded either in the original memorandum of appeal or in the supplementary memorandum of appeal. We would accordingly reject this ground of appeal.

[12] In regard to the evidence, this being a first appeal, the Court is obliged to re-consider and re-evaluate the evidence with a view to arriving at its own conclusion. (**Okeno vs Republic [1972] EA 32)**. The appellant was charged with the offence of murder. Therefore, it was necessary for the prosecution to prove that the deceased died; that her death was caused by an unlawful act or omission on the part of the appellant; and that the appellant had malice aforethought or the necessary state of mind, to cause the deceased's death.

[13] The fact that the deceased died, is not disputed. A post mortem examination was performed on the body of the deceased and although the doctor who performed the post mortem examination was not called to testify, his report was produced in evidence by the investigations officer under **section 77** of the **Evidence Act**. The report shows, that the body had a cut on the dossal aspect of the forearm; a large deglovin cut in the mid face with severance of the nasal cartilage extending to the left orbit and a depressed skull fracture in the parietal-occipital area. According to the report, the doctor formed the opinion that the deceased died as a result of head injury and intracranial hematoma due to assault.

[14] The evidence implicating the appellant as the person who caused the injuries leading to the deceased's death, was that of Cyrus. He testified that he saw the appellant attack the deceased, first with a panga and then with a fork jembe (a hoe). This evidence was consistent with the evidence of Teresia, who responded to the commotion and found the deceased injured. Teresia stated that although the appellant was then not present, Cyrus reported to her that, he was the one who had cut the deceased. This evidence was also consistent with the evidence of Japheth and Mungai, the AP and the Chief who both testified that Cyrus reported the incident to them, and that upon rushing to the home of

the deceased, they found her critically injured. The witnesses also testified that they recovered a panga and a fork jembe which Cyrus said were used in the attack.

[15] We are alive to the fact that Cyrus was a minor who was subjected to a *voire dire* examination. The trial judge formed the opinion that though he could not understand the nature of an oath, he appreciated the importance of speaking the truth. His evidence was therefore, unsworn, and cannot be acted upon without corroboration. That corroboration was evident in the evidence of Teresia, Japheth and Mungai, as referred to above. These witnesses went to the home of the deceased, found her critically injured and recovered the panga and the fork jembe that Cyrus testified were the weapons used by the appellant in assaulting the deceased. The incident happened during the day and the appellant being an uncle to Cyrus, was well known to him. There was therefore no possibility of a mistaken identification. In his defence, the appellant denied having cut the deceased, but this denial was clearly negated by the evidence of Cyrus and the other witnesses.

[16] As regards *mens rea*, Mungai, the Chief, testified that on several occasions, he had been called upon to resolve disputes between the appellant and the deceased. Cyrus stated that before the attack, the appellant demanded money from the deceased, and that it was when the deceased insisted she had no money, that the appellant slashed her with the panga.

[17] In his defence, the appellant claimed that his mother had asked him to get workers to work on the shamba, but later refused to pay, and that he got annoyed and slapped her, and she fell down. This defence is not only negated by the evidence of Cyrus but also the injuries suffered by the deceased which included two large cuts, several fractures and a depressed skull. It is evident that the appellant attacked his mother with a panga and a fork jembe, and that he did not just slap her as he claimed nor did the deceased suffer the severe injuries from a fall.

[18] We agree with the trial judge that the attack on the deceased with a panga and a fork jembe was vicious and uncalled for. The refusal of the deceased to give the appellant money, was not provocation that could justify the vicious attack. In the circumstances, the defence of provocation was not available to the appellant. We uphold his conviction for the offence of murder.

[19] As regards sentence, the trial judge sentenced the appellant to death. Counsel for the appellant has urged the Court to re-consider this sentence in light of the Supreme Court decision in **Francis Karioko Mwaruatetu & another vs Republic & 5 others** (supra). In that decision the Supreme Court declared the mandatory aspect of the death sentence as provided under section 204 of the Penal Code, to be unconstitutional. What this means, is that a judge who finds an accused person guilty of murder, has the discretion to impose any sentence, death penalty being the severest sentence that can be imposed.

[20] As the appellant was sentenced on the 11th July, 2013, before the Supreme Court decision, the learned judge obviously did not have the benefit of that decision. Be that as it may, considering the circumstances in which this offence was committed, and the fact that the victim was the appellant's own mother, the sentence of death imposed by the trial judge was appropriate and there is no justification for this Court to interfere.

[21] The upshot of the above is that we find no merit in this appeal and do therefore, dismiss it in its entirety.

Those shall be the orders of the Court.

DATED and delivered at Nairobi this 8th day of March, 2019.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.