IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 52 OF 2017

BETWEEN

ALI SALIM BAHATI.....1ST APPELLANT

FRANCIS CHARO BAYA.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 29th June, 2016

in

***H.C.CR.C No. 26 of 2014.*)**

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JUDGMENT OF THE COURT

1. The appellants herein are challenging their conviction for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. They were found culpable of killing Kahindi Charo Katana *alias* Kadindo (deceased) who died in the most gruesome manner during the course of mob justice.

2. The circumstances that led to the said mob justice, at least as per the prosecution, was that at all material times the 2nd appellant carried out the business of transporting people and goods vide a motorcycle which business is popularly known as *'boda boda'*. It seems that the 2nd appellant was robbed of his motorcycle on the evening of 26th November, 2014. The following day, on 27th November, 2014, when *'boda boda'* operators from the area paid him a visit in his house the appellant implicated the deceased as one of the culprits who robbed him. Apparently, the deceased came from within the same locality and was well known.

3. On that very day at around 9:00 a.m. one of the *'boda boda'* operators went to the deceased's house to confront him over the issue. The deceased's wife, Kadzo Kaingu (PW2) who was present at the time was not sure of what the two were talking about but she noticed that there was tension between them. The said *'boda boda'* operator who Kadzo identified as Benge left only to return a few hours later at around 11:00 a.m. with a multitude of *'boda boda'* operators.

4. They called the deceased to come out of the house and he complied; they then started interrogating him over a stolen motorcycle belonging to the 2nd appellant. Kadzo heard the deceased deny any involvement in the alleged robbery but the crowd would not take his word. The crowd decided to take the deceased to the 2nd appellant's house where they believed the truth would be revealed. The deceased was bundled onto one of the motorcycles and taken to 2nd appellant's house.

5. It seems that news of the confrontation had spread like wild fire as Eunice Katana (PW3), the deceased's aunt, and Charo

Katana Kaingu (PW4) heard of the same through the grapevine. Eunice who was close by decided to head over to the 2nd appellant's house and while she was still on her way a swarm of *'boda boda'* operators going in the same direction passed her.

6. Upon arriving at the 2nd appellant's house, Eunice saw a crowd gathered around the deceased and the 2nd appellant. She heard the 2nd appellant accuse the deceased of stealing his motorcycle which allegation the deceased denied and maintained that he did not even know how to operate a motorcycle. His response infuriated the 2nd appellant who started hitting him with a stick. This move by the 2nd appellant, as per Eunice, roused other members of the crowd to assault the deceased.

7. At this point, Kaingu and Changawa Charo Chanzera (PW6) who were also present witnessed the senseless attack on the deceased. Kaingu tried to intervene but the 1st appellant held him by his shirt and stopped him. The situation went from bad to worse as the deceased was doused with petrol and set ablaze as his aunt watched helplessly. The trauma was too much for her to handle and she fainted.

8. Unfortunately, by the time the police arrived at the scene the deceased had already died. Eunice, Kaingu and Changawa identified the appellants as having participated in the assault and ultimate demise of the deceased. As such, the appellants together with three other co-accused persons were arrested, arraigned and charged with the offence of murder at the High Court. Based on the foregoing evidence, they were all put on their defence.

9. In his unsworn statement, the 1st appellant distanced himself from the offence and contended that he was arrested on the material day at 9:00 a.m. even before the incident occurred.

10. Refuting the charge against him the 2nd appellant testified that on 26th November, 2014 at around 8:00 p.m. while he was at Gede, the deceased, who was well known to him, engaged his services to go to his work place. After agreeing on the charges he went into a shop to buy soap before they proceeded. When he came out of the shop he found the deceased in the company of man he did not know and the deceased told him to take them both to the agreed destination.

11. They all got onto the motorcycle and began the journey. Moments later, the deceased held him by his neck causing him to lose control of the motorcycle and they all fell down. Immediately, the deceased got up and held his neck once more as his counterpart held his legs. He tried to put up a fight but he was overpowered by the deceased who removed his belt and tied it around his neck. The deceased strangled him until he passed out.

12. When he came around neither the deceased or his accomplice nor the motorcycle was in sight. Surprisingly, the deceased's aunt was at the place where the robbery took place and she asked him if he had identified any of the perpetrators. He decided not to tell her anything. Fortunately, he was able to get assistance from a fellow *'boda boda'* operator who took him home. He reported the incident to the police but did not mention that the deceased was one of the robbers.

13. Nonetheless, the following day he disclosed to some *'boda boda'* operators that the deceased was involved in the incident. The *'boda boda'* operators left his house and returned a few hours later with the deceased. He confronted the deceased about the whereabouts of the motorcycle but the deceased got annoyed. The appellant stated that he was directed to go into the house which he did. Thereafter, the crowd turned on the deceased and killed him.

14. It is on the totality of the foregoing evidence that the trial court (**Chitembwe, J**.) in a judgment dated 29th June, 2016 convicted the appellants and acquitted their co-accused for lack of evidence. Having considered the mitigation by both appellants, the learned Judge deemed that imprisonment for a term of 15 years was an appropriate punishment and meted out the same to each appellant. This is the decision that has provoked this first appeal wherein the appellants complain that the learned Judge erred by convicting them based on unreliable and contradictory evidence; and invoking the doctrine of common intention.

15. At the plenary hearing, Mr. Nabwana, learned counsel for the appellants, relied on the written submissions on record and made oral highlights as well. Questioning the veracity of the eye witnesses' account, counsel took issue with the fact that out of all the people who were present on the material day only the deceased's relatives and close friends were availed as prosecution witnesses. He alluded to the possibility that the evidence of these witnesses may have been crafted to fit a narrative that implicated the appellants. In his view, their evidence was incredible and the learned Judge should have taken notice of the same.

16. He argued that the prosecution's evidence was marred with contradictions hence unreliable and incapable of sustaining the appellants' conviction. Giving instances of the alleged inconsistencies, he asserted that Charo, the deceased's father had initially testified that he was called by one Dunlop who informed him about what had happened only to admit thereafter that he did not own a mobile phone. He went on to state that Kadzo claimed that the complainant of the alleged stolen motorcycle came to her house twice and was amongst the people who picked the deceased from the house. She even confirmed that the said complainant was not amongst the appellants clearly raising doubt as to why the other prosecution witnesses gave evidence that the motorcycle in question belonged to the 2nd appellant. Further, Kaingu in one breath, stated that when he tried to come to the deceased's aid the 1st appellant held him by his shirt and in another, that the 1st appellant bit him on his shoulder.

17. We were asked to take Eunice's testimony with a pinch of salt because to counsel her evidence raised more questions than answers. The basis of that perception as counsel put it arises from the fact that, as per the 2nd appellant, when he regained consciousness after the robbery he saw Eunice at the scene and he suspected she could have been an accomplice. Other than that, Eunice never gave evidence with respect to the distance between where she allegedly observed the incident and where the deceased was being assaulted and/or whether she had a clear view of all that went on.

18. Besides, she stated that at some point she lost consciousness which indicates that the prevailing circumstances were difficult negating the possibility of a positive identification. Counsel also took issue with the identification parade evidence which he believed was devoid of any probative value. This because Eunice did admit that she never gave any description of the perpetrators yet she participated in the identification parade and picked out the 1st appellant.

To bolster his position, counsel cited the case of ***Mbui John Mwavita vs. R [2010] eKLR***.

19. Mr. Nabwana intimated that the post-mortem report did not disclose the cause of death which is essential for a conviction for the offence of murder to stand. What was more, Dr. Abdulaziz Dhulqarnanin (PW5) testified that the deceased's body was not opened raising doubt as to whether a post mortem had been conducted. In that regard, reference was made to this Court's decision in ***Ngala Chirongo Mwamee vs. R [2018] eKLR***.

20. According to him, this was a case of mob justice and it was unfair to attribute blame for the deceased's death to only the appellants. He faulted the learned Judge for invoking the doctrine of common intention to convict the appellants yet there was no basis for doing so. Similarly, there was no evidence to support the learned Judge's finding that *malice aforethought* had been established against the appellants. All in all, the appellants' conviction was based on speculation.

21. M/s Ogweno, Principal Prosecution Counsel, opposed the appeal claiming that there was overwhelming evidence against the appellants. The appellants were placed at the scene of crime by eye witnesses. She argued that the prosecution's evidence established the doctrine of common intention to harm/kill the deceased from the time the 2nd appellant informed the motorcycle operators that it was the deceased who robbed him up to the time he was killed. In addition, the kind of brutal force used against the deceased left no doubt that the appellants acted with *malice aforethought.* M/s Ogweno also asked us to enhance the appellants' sentence which she believed was not commensurate with the ruthless attack on the deceased.

22. We have considered the record, submissions by counsel and the law. This is a first appeal and as such, we are bound to re-appraise the evidence on record and make our own conclusions whilst bearing in mind that we did not have the opportunity to see the witnesses as they testified. See ***Rule 29(1)(a)*** of the ***Court of Appeal Rules***.

23. It is not in dispute that the deceased died as a result of mob justice. The main evidence which the trial court believed linked the appellants to the offence herein was that of identification which placed them at the scene of crime. It is worth reiterating that before a court convicts an accused person based on identification evidence it should be cautious of the fact that although a witness is honest he/she might be mistaken when it comes to identification. Therefore, a court should be satisfied that such evidence is positive and free from error. Otherwise, a miscarriage of justice may arise on the part of the accused. See this Court's decision in ***Joseph Onyikwa Nyariki vs. R [2019] eKLR***.

24. Our reading of the record reveals that in as much as Eunice took part in an identification parade to identify some of the perpetrators the same was not conducted in respect of the appellants. It seems counsel's misconception on this issue may have arisen from the fact that through the parade Eunice had identified a co-accused namely, Salim Ali alias Chapati Boy, whose name was more or less similar to the 1st appellant. Consequently, any arguments touching on the issue of the parade have no bearing on the appellants conviction thus we see no point in delving into the same.

25. Be that as it may, it is common ground that all the witnesses who placed the appellants at the scene gave evidence that the appellants were known to them prior to the incident. This means that the identification of the appellants was not based on identification of a stranger rather it was a case of recognition. Even so, the aforementioned caution is still required to be taken in case of recognition. See ***Hamisi Swaleh Kibuyu vs. R [2015] eKLR***.

26. Did the trial court take the said caution? We believe it did because the learned Judge took into account whether the prevailing circumstances were conducive for a positive recognition and the credibility of the identifying witnesses. See ***Benson Mugo Mwangi vs. R [2010] eKLR.***

27. The learned Judge rightly noted that the incident occurred during day light and the identification evidence was that of eye witnesses who were in close proximity hence the possibility of mistaken identity was highly unlikely. Eunice, Kaingu and Changawa testified that they saw the appellants on the material day physically assaulting the deceased. In point of fact, it was their uncontroverted evidence that it was the 2nd appellant who began assaulting the deceased when he denied any involvement in the said robbery. It was 2nd appellant's initial attack on the deceased that provoked the rest of the crowd to beat the deceased.

28. What is more, the learned Judge who observed these witnesses as they testified found them to be credible and we see no reason to interfere with such finding. It did not matter that one of the eye witnesses, Eunice was related to the deceased, of relevance was whether her

evidence was credible. Besides, Kaingu and Changawa's evidence corroborated Eunice's recognition of the appellants. Our position is fortified by the case of ***Victor Nthiga Kiruthu & Another vs. R [2017] eKLR***.

29. In the end, we find that the recognition evidence placed the appellants at the scene of crime. For that reason, the 1st appellant's contention that he had been arrested early that morning does not hold any weight. In any event, there is no evidence of the alleged arrest.

30. In our view, the fact that there were some discrepancies in the prosecution's case as alluded to by the appellants in the preceeding paragraphs did not negate the positive recognition of the appellants. We say so because the said discrepancies did not go to the root of the appellants' case nor prejudiced them. Whether Charo, the deceased father, had a mobile phone and how he was informed about the incident did not go to the appellants' conviction because Charo was simply giving an account of how he learnt of his son's death.

31. Likewise, the fact that Kadzo referred to Benge as the complainant of the stolen motorcycle did not cause any confusion as to who the motorcycle belonged to. The 2nd appellant was clear in that respect that the motorcycle belonged to him. Whether or not the 1st appellant stopped Kaingu from coming to the aid of the deceased by holding him by his shirt and/or by biting him on the shoulder did not go to the root of his conviction. It therefore, follows that the said discrepancies are curable under ***Section 382*** of the ***Criminal Procedure Code***. See also ***Joseph Maina Mwangi vs. R-Criminal Appeal No. 73 of 1993(unreported)***.

32. It was not enough for the prosecution to just establish that the appellants were at the scene of crime at the material time. The prosecution was also required to prove the key ingredients which constitute the offence of murder. These ingredients were set out by this Court in ***Nyambura & Others vs. R*** **[2001] KLR 355** as: a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased; (c) and that the accused had harboured *malice aforethought*. See also ***Section 203*** of the ***Penal Code***.

33. It is not in dispute that the deceased died on the material day. As to the cause of his death, the same is usually established by medical evidence obtained through a post mortem. In this respect, the post mortem report on record indicates that the cause of the deceased's death was severe head injury and burns. Mr. Nabwana took issue with that because he posited that the doctor did not indicate how the injuries he set out in the report caused the deceased's death. Further, Dr. Abdulaziz who produced the post mortem report which was prepared by his colleague, Dr. Salmin Omar, testified that the deceased's body was not opened during the procedure. According to Mr. Nabwana, the cause of the deceased's death was not proved to the required standard.

34. Our considered view on the foregoing ground is that in as much as neither this Court nor Mr. Nabwana are medical experts, we agree that the said postmortem report left a lot to be desired. Be that as it may, we draw guidance from the case of ***Dorcas Jebet Ketter & Another vs. R [2013] eKLR*** wherein this Court observed:

> ***"We think, every case must be decided on its own merit but where evidence is overwhelming that the deceased has died at the hands of a suspect, then even in the absence of a postmortem report, the court can still convict. We are certain such cases are very few and far between."***

Taking into account the events that took place on the material day we are clear in our minds that the deceased died as a result of mob justice.

35. Could the deceased's death be attributed to the appellants' actions? We must say that it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim's death. It is in such circumstances that the provisions of ***Section 21*** of the ***Penal Code*** come into play. The section stipulates:

> ***"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."***

See ***Eunice Musenya Ndui vs. R [2011] eKLR***.

36. The moment that the 2nd appellant implicated the deceased as one of the perpetrators who robbed him to his fellow '*boda boda'* operators as opposed to the police it was discernable that he did not intend to let the law take its course. Thereafter, the conduct of the said '*boda boda'* operators who included the 1st appellant, of jointly going for the deceased in his home and taking him to the 2nd appellant's house was evident of their concerted intention with the 2nd appellant of taking matters in their own hands. To that extent, the case of ***Mabel Kavati &Another vs. R [2014] eKLR*** wherein this Court quoted with approval the following excerpt of ***Rex vs. Tabula Yenka S/o Kirya & 3 others[1943] 10EACA 51*** applies in this case:

> ***"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****."[Emphasis added].*

Additionally, their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased. See ***Stephen Ariga & Another vs. R [2018] eKLR***. Equally, it established *malice aforethought* on the part of the appellants. See ***Section 206*** of the ***Penal Code***. Accordingly, we cannot fault the learned Judge from invoking the doctrine of common intention and finding the appellants guilty of the deceased murder.

37. Last but not least, although the obligation on an appellate court to forewarn or caution an appellant before enhancing a sentence imposed against him/her by a trial court is not anchored on any legal provision it has gained notoriety in practice. See ***Gushashi Lelesit vs. R [2016] eKLR***. Generally, the notice or warning may take the form of a notice of enhancement filed by the state.

In this case no such notice or cross appeal on the appellants sentences were made by the respondent. Equally, we did not warn the appellants of the possibility of enhancing their sentences. M/s Ogweno only raised the issue in her address to us and therefore we decline to accede to counsel's request bearing in mind that the sentence issued by the trial court is not illegal.

38. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR