IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 69 OF 2017

BETWEEN

PATRICK NYONGESA OMUSE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Bungoma ***(Ali-Aroni, J.)*** *dated 2nd October, 2015*

in

HCCRC NO. 42 OF 2010)

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JUDGMENT OF THE COURT

[1] Patrick Nyongesa Omuse, the appellant herein, was tried and convicted by the High Court for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** It was alleged that he had murdered Consolata Kwanye Omuse. His trial initially proceeded before Gikonyo J, who heard the evidence of three witnesses. Thereafter, the matter was taken over by Mabeya J who informed the appellant of his rights under **section 200** of the **Criminal Procedure Code,** and the appellant opted to proceed from where Gikonyo J had reached. Justice Mabeya took the evidence of four witnesses, after which the prosecution closed its case. On 20th November, 2014, a ruling prepared by Mabeya J in which the court ruled that the appellant had a case to answer was delivered by Omondi J.

[2] Thereafter the matter came before Aroni J on 17th March, 2015, and she fixed a hearing date for 20th May, 2015. When the matter came up for hearing, the appellant who was present, was represented by an advocate, Mr. Situma, who was holding brief for Mr. Juma. The appellant indicated that he was ready to proceed with his defence, and the court thereafter proceeded to hear the appellant who opted to give a sworn statement. On 2nd of October, 2015, Ali Aroni J delivered a judgment in which she found the appellant guilty. Upon hearing the appellant's mitigation, she sentenced him to death.

[3] The appellant is now before us in this first appeal in which he is represented by counsel, Mr. Miyienda. In arguing the appeal, counsel relied on a supplementary memorandum of appeal in which four grounds were raised. The first ground which faulted the learned judge for failing to pronounce sentence was abandoned after counsel established that the original file in fact contained the pronouncement of sentence, which was inadvertently omitted in the record of appeal that was prepared. The other supplementary grounds raised were: that the trial judge of the High Court failed to comply with the mandatory provisions of the Criminal Procedure Code as provided under section 200; that the trial judge erred in admitting written submissions in evidence contrary to the provisions of the Criminal Procedure Code, and the established law; and that the sentence meted out against the appellant was excessive given the Supreme Court decision in **Muruatetu & anothers vs Republic & 5 others [2016] eKLR.**

[4] This being a first appeal, the Court has the obligation to re-consider afresh the evidence that was adduced against the appellant, evaluate the same and arrive at its own conclusion. **(Okeno vs Republic [1972] EA 32).** Seven prosecution witnesses testified against the appellant. Their evidence was briefly, that on the material night, Rose Amondi (Rose) was at the house of her mother in-law Consolata Omusi (deceased). They were chatting when the appellant who is a step son to the deceased suddenly appeared. The appellant was armed with a panga, a stone and a whip and was swearing that somebody must die. He hit Rose on her right foot with the stone, then turned onto the deceased whom he hit on the neck with the whip and also kicked her in the stomach. The deceased fell down, and the appellant fled.

[5] In the meantime, Rose screamed calling for help. Vincent Onyango Omuse (Vincent), the husband to the deceased was in the house of his 2nd wife, (mother to appellant) when he heard the screams. As he went out of the house to respond to the screams, he met with the appellant who appeared agitated. The appellant was coming from the house of Rose. Vincent proceeded to the house of Rose where he found Rose who informed him, that the appellant had killed the deceased. Vincent proceeded to the house of the deceased where he found the deceased dead. Vincent went and reported the matter to James Wasike (Wasike), a village elder, who visited the scene and saw the body of the deceased.

[6] Wasike reported the matter to the AP camp and the body was later moved from the scene, and taken to the mortuary where a post mortem examination was performed by Dr. Muli Dennis (Dr. Muli), who prepared a report. The post mortem report revealed that the deceased had internal injuries and massive haematoma, caused by a raptured spleen. Dr. Muli concluded that the cause of death was cardio respiratory arrest due to shock arising from the massive haemorrage from the raptured spleen. Subsequently, the appellant was arrested at Busia and charged with the offence.

[7] In his defence, the appellant gave a sworn statement. He explained that he received a report from his wife, that his in-law Rose had harvested maize from his shamba. He went to complain to his father Vincent, but his father dismissed him saying that he did not deserve land. He then reported the matter to the village elder, who also dismissed him saying that the dispute was a family matter. He explained that as a result of his disagreement with his father over the issue of land, he had realized that his father did not want him. He explained that on the material day he was at home and did not know how the deceased met her death.

[8] In her judgment, the learned judge found that the evidence implicating the appellant was that of a single identifying witness. She relied on **Maitanyi vs Republic [1986] KLR 198; R vs Turnbull & others [1976] 3 All ER 549 & Anjononi vs Republic [1980] KLR 59** on identification by way of recognition. She found Rose to be a truthful witness and accepted her testimony which she found to be consistent with that of Vincent and Dr. Muli.

[9] Before we address the substantive appeal, we wish to address the procedural issues that were raised by the appellant in the supplementary memorandum of appeal. The first concerned the alleged failure by the court to comply with the provisions of section 200 of the Criminal Procedure Code.

[10] As already intimated, the appellant's trial was conducted by three different judges, that is, Gikonyo J, Mabeya J and Ali-Aroni J. The record reveals that when Mabeya J took over from Gokonyo J, the provisions of section 200 were complied with and the appellant's rights to recall witnesses explained to him. The appellant through his then advocate, Mr. Juma, informed the court that the hearing should proceed from where Gikonyo J had reached. Mabeya J heard four witnesses and the prosecution closed its case. Unfortunately, he also left.

[11] The record indicates that when the matter came before Aroni J, she fixed a hearing date and when the matter came on that hearing date, she noted that the matter was part heard and for defence hearing. The appellant then indicated that he was ready to proceed. We appreciate that the typed proceedings in the record of appeal, indicates the learned judge as referring to section 210. However, this must have been a typing error as the original record reflects Aroni J, making reference to section 200 of the Criminal Procedure Code and indicating that the accused had been informed of the section, and the accused responding that he is ready to proceed. But even assuming that section 200 was at this stage not explained, two things are evident.

[12] First, the appellant had the benefit of counsel. Secondly, the appellant had already had the experience of having proceedings being taken over by a different judge and his rights having been explained to him previously, he cannot claim not to have known that he had a right to recall witnesses or to have the hearing commence afresh. It is evident to us that when the appellant stated that he was ready to proceed, he was alive to the options that he had under section 200. We therefore find that section 200 was explained to the appellant and no prejudice would have been caused to him by the failure as he was already aware of his rights under section 200.

[13] Again, the record shows that the appellant through his advocates, Paul Juma & Company Advocates, filed written submissions which were responded to by the State Counsel, who also filed written submissions. In faulting this procedure, the appellant relied on **Akhuya vs Republic [2003] eKLR,** in which this Court faulted the Magistrate's Court for accepting written submissions on the grounds that the presiding officer of a court, is expected to orally hear such submissions as both sides in a criminal case wish to make, and to seek clarification where necessary, before delivering his opinion taking into account those submissions. We have considered this authority but find that the same must be distinguished.

[14] In the first place, the authority related to proceedings that were in a magistrate's court and where the accused person did not have the benefit of an advocate, and was therefore obviously at a disadvantage. In the present case, the proceedings were in the High Court and the appellant had the benefit of an advocate. If anything, the written submissions were an advantage as it allowed the parties' the luxury of filing properly considered submissions to the court, without suffering the constraint of pressure of time. Moreover, given the number of cases that judges and magistrate's now have to contend with, sixteen years after the authorities referred to, the filing of written submissions is now proving to be the preferred mode, particularly, where parties are represented. In practice, we have seen a positive emerging trend, where through the assistance of paralegals or prison officers, appellants who are in person, filing well considered written submissions supported by authorities. For this reason, we would also dismiss this ground of appeal.

[15] Coming back to the evidence, Rose was clear and consistent in her evidence that it was the appellant who entered the house and attacked the deceased. Her evidence was corroborated by the evidence of Vincent who met the appellant as he was coming from the house of the deceased, and who observed that the appellant looked agitated. The evidence of the Doctor who performed the post mortem examination, was also consistent with Rose's evidence to the extent that the deceased suffered a cardiac arrest, as a result of shock from the injuries that she had suffered on the stomach. We have no doubt that the evidence of Rose was reliable and credible.

[16] The evidence of Vincent and that of Wasike, the village elder, alleged that there was a family disagreement between the appellant and other members of the family. In his defence, the appellant confirmed this position. We are satisfied that the appellant's action was as a result of this family disagreement. The appellant deliberately attacked the deceased with the intention of causing harm to her. Therefore, malice

aforethought can be inferred under **section 206** of the **Penal Code**. We find that the appellant was properly identified as the person who assaulted the deceased and caused the injuries resulting in her death and that the appellant had malice aforethought to cause the death of the deceased. The appellant's guilt was therefore proved beyond reasonable doubt and his conviction cannot be faulted.

[17] As regards the sentence, it was submitted that the sentence imposed on the appellant was excessive. The original record shows that in imposing sentence, the learned judge stated as follows:

> ***"I have considered the mitigation by counsel, however, the laws of Kenya including the Constitution 2010, do not give any other penalty for the offence that the accused has been convicted of. I therefore sentence him to death as by law provided."***

[18] In **Francis Karioko Muruatetu vs Republic** (supra), the Supreme Court declared the mandatory aspect of the death penalty provided under section 204 of the Penal Code as unconstitutional. This means, that contrary to what the learned judge posited, the death penalty is not the only sentence that can be imposed. A trial judge has a discretion to consider any other sentence that may be appropriate. The appellant herein, killed his step mother an innocent old lady who did not deserve to die. We believe that a sentence of 25 years imprisonment, would have been appropriate in the circumstances.

[19] The upshot of the above, is that we uphold the appellant's conviction and dismiss the appeal in this regard. We allow the appeal against sentence to the extent of setting aside the sentence of death imposed upon the appellant by the High Court, and substitute thereto a sentence of 25 years imprisonment effective from the date of the judgment and sentence in the lower court.

Those shall be the orders of this Court.

DATED and delivered at Eldoret this 7th Day of March, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.