IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 87 OF 2016

BETWEEN

MOSES WANJALA NGAIRA....APPELLANT

AND

REPULIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Eldoret, ***(Kimondo, J.)*** *dated 14th July, 2015*

in

HCCR NO. 9 OF 2011)

****

JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court (Kimondo J), wherein **Moses Wanjala Ngaira aka Musungu** (the appellant), was convicted and sentenced to death for the offence of murder contrary to **section 203** as read together with **section 204** of the **Penal Code.**

[2] The particulars of the charge against the appellant were that between the night of 23rd and 24th of February, 2011, at 12.00 midnight at Tairi Mbili village, Mbangara Sub-location, Mautuma Location in Lugari District within Western Province, he murdered **Stephen Toili Macho** (hereinafter referred to as "the deceased").

[3] During the trial, the appellant pleaded not guilty to the charge, and eight witnesses testified for the prosecution. These were: Rose Otieno Odongo (Rose), Isaac Wanjala Waswa (Waswa), Josphat Amayi Busuru (Josphat), David Natembea Makhoka (David), Roselyn Nekesa Makhokha (Roselyn), Beatrice Khakali (Beatrice), Dr. Hilary Shivachi (Dr. Shivachi) and Sgt. Albanus Kimongo (Sgt. Albanus).

[4] In brief, the prosecution case was that on the morning of 24th February, 2011, the appellant went to the home of Rose to perform manual labour. Whilst there, he reported to Rose who is a village elder, that he had assaulted the deceased because he was a thief. Soon after, Rose received a report that there was a young man who had been beaten within her village. She rushed to the scene and found the deceased lying on a footpath with injuries on his head, left hand, left leg and blood on his clothes. There was also a sign that a fire had been lit in the area as there were burnt maize stalks around the deceased.

[5] Rose examined the deceased, who was still alive and asked him who had assaulted him. The deceased responded that the person responsible was the appellant mentioning the appellant by name. Rose enquired from the deceased why the appellant had assaulted him, but the deceased did not give her any reason. A similar account was given by Waswa, Josphat, Roselyn and Beatrice who all testified to have made similar enquiries which enlisted a similar response from the deceased.

[6] Arrangements were made and the deceased was rushed to the Hospital where he was pronounced dead on arrival. The matter was reported to Turbo Police Station and Sgt. Albanus, assigned to investigate the case. He recorded statements from witnesses and concluded that the appellant was a prime suspect of the murder. At the time of the deceased's death, the deceased was involved in a relationship with a

woman called Beatrice Nafula (Nafula), who was the appellant's mother in law. Nafula's home was approximately 40 meters away from the place where the deceased was assaulted. According to Roselyn, and Beatrice who are sister and mother (respectively) to the deceased, on the morning the deceased was murdered, there was blood inside and outside the house of Nafula.

[7] Sgt. Albanus arrested the appellant and recovered an iron bar which the appellant had in his possession. Sgt. Albanus suspected the iron bar to be the murder weapon. Nafula was initially arrested but was later released with a view to being used as a prosecution witness. However, Nafula did not testify as she went underground before her evidence was taken. Although the iron bar and the deceased's clothes were taken to the Government Chemist for analysis, a report from the Government Chemist was never produced in court as evidence.

[8] The appellant's trial initially proceeded before Mshila J, who after hearing the 8 prosecution witnesses, was transferred from the station. On 7th July, 2014, the appellant's rights under **section 200** of the **Criminal Procedure Code**, having been explained to him, and him having elected to proceed with the hearing subject to Rose being recalled for cross examination, further hearing proceeded before Kimondo J and Rose was cross examined by the appellant. Thereafter, the prosecution closed its case.

[9] In his defense, the appellant gave a sworn statement in which he denied having committed the offence. He explained that on the night of 23rd February, 2011, he was working at Bims Academy School where he had been employed as a night watchman. The said school was 2 kilometers away from the place where the deceased was found. The appellant left the school at 6am on the morning of 24th February, 2011. He went to the home of Rose to do some manual work. He denied admitting to Rose that he had assaulted the deceased, but claimed that he was present when a neighbour called Masinde came to report to Rose about the assault on the deceased.

[10] The appellant pointed an accusing finger at Nafula, stating that she was the one who had a relationship with the deceased, and that blood was found at her home. The appellant alleged that the crime scene was actually within the compound of Nafula's home. He maintained that he did not know the deceased very well and therefore had no reason to assault him.

[11] Patrick Simiyu Wanjala (Wanjala), who was the administrator at Bims Academy School testified as a defence witness. He confirmed that at the material time the appellant used to work at the school as a night watchman, having been employed in January, 2011. He also confirmed that on 23rd February, 2011, from 6pm to 24th February, 2011, at 6am the appellant was on duty. In the morning when the appellant checked out, he returned his work tools which included a *rungu*, a coat, a torch and arrows back to the witness for purposes of storage. Wanjala qualified his evidence by adding that since the appellant used to remain on duty alone between the aforementioned hours, he could not vouch for his whereabouts.

[12] In his judgment, the trial judge found that there was strong circumstantial evidence that pointed to the appellant as having assaulted the deceased with the intention to cause his death or grievous bodily harm; and that the alibi of the appellant was discounted by the dying declaration made by the deceased to several witnesses. He therefore found the appellant guilty and convicted him of the charge.

[13] Being aggrieved by the judgment of the High Court, the appellant lodged this appeal. In his memorandum of appeal which was filed on 22nd July, 2015, the appellant raised five grounds in which he faults the trial judge: for convicting him based on evidence that was not properly investigated and insufficient to support a conviction; in failing to find that he was not properly identified or named as the culprit; in failing to find that the circumstantial evidence was not strong enough to sustain the appellant's conviction; and in rejecting the appellant's alibi defence without giving a compelling reason.

[14] During the hearing of the appeal, **Mr. Nabasenge** learned counsel, appeared for the appellant while **Mr. Chacha**, prosecuting counsel from the office of the Director of Public Prosecution, appeared for the respondent. Mr. Nabasenge submitted that the learned judge erred: in believing the testimony of Rose; in relying on what the appellant allegedly told Rose as a confession; and in relying on what the deceased allegedly told Rose without considering the truth of the statement.

[15] Citing **Simon Musoke v Republic [1958] EA 715**, counsel pointed out that the circumstantial evidence adduced against the appellant was weakened by facts which included: evidence of blood having been found in the house of Nafula; the doctor's evidence that the deceased suffered multiple injuries; the nature of the injuries being of such gravity, that the appellant could not have inflicted them alone; and Nafula having been mentioned adversely and failing to attend court to testify. In addition, Mr. Nabasenge submitted that the appellant denied beating the deceased; and that his alibi that he was at his place of work at the school, was not shaken by the prosecution evidence. Counsel therefore urged the Court that the circumstantial evidence against the appellant was neither water tight nor cogent to justify his conviction.

[16] On his part, Mr. Chacha, opposed the appeal and urged the Court to dismiss it, and uphold the appellant's conviction and sentence. He submitted that contrary to the assertions of the appellant's counsel, the identity of the appellant as the deceased's assailant, was corroborated by the evidence of four prosecution witnesses who gave similar accounts of how the deceased identified the appellant as his assailant. In addition, the evidence of Rose was clear that the deceased mentioned the appellant by both his full name and his alias. There was therefore no doubt as to who the deceased was referring to.

[17] Mr. Chacha maintained that there were no co-existing circumstances that weakened the prosecution's evidence as even the evidence adduced by Wanjala on behalf of the appellant, was clear that Wanjala could not vouch for the whereabouts of the appellant during the night. Counsel therefore urged the Court to dismiss the appellant's appeal against conviction. As regards the appeal against sentence, Mr. Chacha drew the Court's attention to the Supreme Court's decision in **Francis Karioko Muruatetu & another vs Republic & 5 others [2016] eKLR,** and left the matter to the Court.

[18] We have carefully perused the record of appeal, and considered the submissions made by the parties' counsel including the authorities cited. This being a first appeal, we have an obligation to re-analyse and re-evaluate the evidence that was before the trial court, and come to our own conclusion. This duty was reiterated by this Court in ***Joseph Kipkemoi Ngetich v Republic [2018] eKLR*,** as follows:

> ***"As a first appellate Court, our mandate is to re-evaluate and re-analyse the evidence and thereafter make our own independent findings. In so doing, we shall take into account that unlike the trial court, we did not have the benefit of hearing and/or seeing the witnesses."***

[19] From our examination of the evidence that was adduced in the trial court, it is clear that there was no eye witness to the murder of the deceased. The evidence implicating the appellant were an alleged confession, a dying declaration and circumstantial evidence. The issues that we must address are therefore whether the appellant made a confession, if so, whether it is admissible in evidence; whether the deceased made a dying declaration and if so whether he identified the appellant as the person who had assaulted him; and whether the circumstantial evidence adduced against the appellant pointed irresistibly to the guilt of the appellant to the exclusion of anyone else.

[20] In her evidence, Rose testified that the appellant had informed her that he had beaten up a young man known as Toili because he was a thief. Rose identified Toili as the deceased who was found injured on a foot path. In his defence, the appellant denied having made such a report. The question then is whether the appellant made the statement to Rose; if so, whether the statement was a confession that the appellant is the one who had assaulted the deceased; and whether the confession was admissible in evidence.

[21] Under **section 26** of the **Evidence Act**:

> ***"26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceedings if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."***

[22] Rose testified that the appellant informed her that he had beaten up the deceased. This was denied by the appellant. However, we see no reason why Rose should have lied. Rose appeared to be an honest and reliable witness. The trial judge who saw her testify (albeit under cross examination) believed that she spoke the truth. Indeed what the appellant allegedly told her was consistent with what the deceased allegedly told other witnesses. We therefore find that the appellant did admit to Rose that he had assaulted the deceased. Given the injuries that were suffered by the deceased as revealed in the post mortem examination, the assault by the appellant was a crucial factor in the death of the deceased. The statement was therefore a fact tending to the proof of guilt by the appellant. The question is whether as a village elder, Rose was a person in authority such as may be covered by **section 26** of the **Evidence Act**.

[23] In **Kanini Muli vs Republic [2014] eKLR,** the appellant retracted her alleged confession, contending that she was forced to make the confession as a result of pressure from clan elders to avert death in her family that was attributed to a Kamba Kithitu Oath. The court accepting that there may have been pressure or intimidation stated as follows:

> ***"A chief was regarded for purposes of statements made to him by an accused person, as a person in authority in Rex vs Eriya Kasule & others (1947-1949) EA 148; while in Gopa s/o Gidamebanya & others vs Regina (1952-1953) EA 318, a head man was treated as a person in authority. In an African contest like that in which the appellant found herself, we would be slow to say that clan elders are not 'persons in authority' in this case. On the evidence, the elders as a family of the appellant brought pressure to bear upon her to make the confession and to open negotiations with the family of the deceased so as to avoid evil of a temporal nature, namely; further deaths in the family believed to be caused by the Kithitu oath. To that extend, the appellants statement was one extorted from her by fear of prejudice to her family or hope of the advantage of preventing further deaths in the family. We would add even sheer terror of the oath."***

[24] In this case, although Rose was said to be a village elder, there is no evidence of any special authority that she had that would have intimidated the appellant. Nor has the appellant alleged any such intimidation, threats or promises. It would appear that the appellant volunteered the information on his own free will not under any obligation or expecting Rose to take any action. In our view, the statement is part of Rose's evidence on her interaction with the appellant when he went to her house to do manual work. The statement is therefore a spontaneous admission that is admissible in evidence as it is not fettered by section 25A or section 26 of the Evidence Act.

[25] Several witnesses testified that the deceased made a dying declaration in which he named the appellant as the person who had assaulted him. Under **section 33(a)** of the **Evidence Act**, a statement made by a deceased person relating to his cause of death is admissible in evidence:

> ***"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."***

[26] In **Philip Nzaka Watu vs Republic [2016] eKLR,** this Court stated the following on admission and reliance on a dying declaration:

> ***"Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. …….. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."***

[27] In this case, the appellant was found on a foot path with serious injuries shortly before he died. Five witnesses, that is, Rose, Waswa, Josphat, Roselyn and Beatrice all testified that they each talked to the deceased before he died, inquiring who had assaulted him, and that the deceased responded to each that it was a person whom he identified as "Musungu". All the witnesses maintained that "Musungu" was an alias name for the appellant. Both the appellant and the deceased were well known to all the witnesses. More specifically Rose appeared to have had a special relationship with the appellant, which was admitted by the appellant as the appellant had gone to her place to do manual work. According to Rose, she was from the same village with the appellant and they were also neighbours. Therefore, they were likely to be familiar with the appellant's alias name. Moreover, the deceased also identified his assailant to Rose by name using the appellant's full name Moses Wanjala Ngaira and also the alias "Musungu". Therefore, it was clear that the deceased was referring to the appellant as the person who had assaulted him. The dying declaration having been consistently repeated to several witnesses, and it being clear that the appellant was identified as the person who assaulted the deceased, and the appellant on his own free will having informed Rose that he had assaulted the deceased, the dying declaration was sufficiently corroborated and was safe to rely upon.

[28] As regards the appellant's alibi defence, the evidence of the defence witness Wanjala, did not confirm that the appellant was at all material time at his place of work at the school. This was because Wanjala conceded that he could not vouch for the appellant's presence at the school at all times during the fateful night. Moreover, the alibi defence was discounted by the dying declaration made by the deceased to the 5 witnesses who gave similar accounts of the said declaration. In the circumstances, the alibi defence was properly rejected.

[29] From the evidence of the doctor who performed the post mortem examination, the deceased suffered several injuries caused by a blunt object as well as a sharp object. The injuries included a cut wound on the frontal aspect of the head with an inner skull fracture, and a stab wound on dossal part of the right arm. **Section 206(b)** of the **Penal Code,** states as follows:

> ***"206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances –***
>
> ***(a) ……..***
>
> ***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."***

[30] In **Daniel Muthee vs Republic [2007] eKLR,** this Court addressing the issue of malice aforethought stated as follows:

> ***"When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code."***

[31] In the circumstances of the present case, it can also be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under section 206(b) of the Penal Code.

[32] We have considered whether there were any circumstances that could weaken the inference of guilt on the part of the appellant. The weak link included: the absence of Nafula, and the failure to produce the report from the Government Analyst. In our view, although such evidence would have added to the evidence against the appellant, the absence of the evidence does not in any way weaken the circumstantial evidence against the appellant. The evidence implicating the appellant which included the appellant having admitted beating up the deceased; the deceased having named the appellant as his assailant; the deceased having suffered serious injuries that resulted in his death; all point irresistibly to the death of the deceased having been caused by the appellant and no one else. For the above reasons, we find that the appellant's conviction for the murder of the deceased was proper.

[33] On the issue of sentence, the trial judge sentenced the appellant to suffer death stating as follows:

> ***"Murder is a serious felony. The homicide in this was most foul and unnecessary. The law in section 204 of the Penal Code provides for a mandatory sentence. I order that the accused shall suffer death. It is so ordered."***

[34] In the Supreme Court judgment in Petition No. 15 and 16 of 2015 (consolidated), the Supreme Court declared that the mandatory nature of the death sentence as provided for under section 204 of the Penal Code, as unconstitutional. What this means is that the Court is at liberty to exercise its discretion and consider any sentence including the death penalty depending on the circumstances before it. This Supreme Court judgment was delivered on 14th December, 2017, and therefore the learned judge who sentenced the appellant did not have the benefit of this judgment. In this case, there was nothing before the court that could ameliorate what the appellant had done. That notwithstanding, had the judge had the benefit of the Supreme Court judgment, he could probably have given a sentence other than the death penalty.

[35] The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence. We allow the appeal against sentence, set aside the sentence of the death penalty, and substitute thereto a sentence of twenty years imprisonment to take effect from 14th July, 2015, the date when the appellant was sentenced by the High Court.

Those shall be the orders of this Court.

DATED and delivered at Eldoret this 6th day of March, 2019.

E. M. GITHINJI

.....

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.