IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJA.)

CRIMINAL APPEAL NO. 43 OF 2017

BETWEEN

SIMON MULUNDA WAMALILI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Bungoma ***(Msaga Mbogohli, J.)*** *dated 30th July, 2009*

in

HCCRC NO. 38 OF 2004

****

JUDGMENT OF THE COURT

[1] This is a first appeal in which **Simon Mulunda Wamalili** the appellant seeks to have the judgment of the High Court convicting him for the offence of murder contrary to **section 203** as read with **section 204** set aside. The appellant was charged jointly with one **Stephen Waluku Wamalili** (Co-accused) with the murder of **William Khisa Namasaka** (hereinafter referred to as the deceased).

[2] During the trial, seven witnesses testified for the prosecution while the appellant gave sworn evidence denying the offence and also called his mother **Violet Nafula Daraja (Violet),** who testified in support of his defence.

[3] David Namasaka Wafula (Wafula), who is father to the deceased was the main witness for the prosecution. He testified that he was on his way to his home when as he was passing the house of the appellant, he heard the deceased asking the appellant to give him his things so that he could leave. Wafula decided to enter into the home of the appellant. On arrival, he saw the appellant, the co-accused and the deceased. He then saw the appellant who was armed with a rake, hit the deceased on the head while the co-accused was standing by. The appellant's wife screamed and another son of Wafula, known as **Wafula Namasaka (Namasaka)** who had also heard the commotion arrived at the appellant's home.

[4] Wafula sent Namasaka to get a bicycle from his home and he then carried the deceased who had an injury on his head with blood oozing to Webuye District Hospital, but unfortunately the deceased succumbed to his injuries and died. In the meantime, the appellant and his co-accused ran away. The matter was reported to a village elder one **Dorcas Nasimiyu Francis (Dorcas)** and later to **CPL Silvanus Nyangora (CPL Silvanus),** an officer then attached to Webuye Police Station.

[5] A postmortem examination was later done by **Dr. Silas Ayunga** who found that externally the deceased had a cut wound on the head, and that internally he had a fracture on the top of the skull with injury to the brain and bleeding. He formed the opinion that the cause of death was cardiac arrest due to increased intracranial pressure due to fracture of the skull. The appellant and his co-accused were later arrested and charged with the offence.

[6] In his defence, the appellant testified that he was walking along the road when he met the deceased who engaged him in a quarrel. He left

and went to report to his village elder one Peter Wasioma, the elder told him to go home and have the issue resolved the next day. Later at about 8.00p.m., Wafula, the deceased and Namasaka came to his home. They knocked the door and he opened for them, they beat the deceased and in the process one of them fell down. Later Wafula returned and realized that the deceased was the one who had fallen down. The deceased was then taken to the hospital and later died. The appellant maintained that his wife was not present on the material day and that the only other person who was present was his mother. She reported the matter to Dorcas and later the police came and arrested him. He maintained that the deceased was the one who called him and that it is Wafula and his sons who had gone to his house to attack him.

[7] The appellant's mother testified that the appellant left home at about 7.00p.m. to go to the canteen, that at about 8.00p.m Wafula and his three sons including the deceased arrived at her homestead. She asked Wafula what was happening and the deceased replied that either he or the appellant must die. The deceased then started fighting with the appellant, shortly thereafter there was then a bang and Wafula said that "they had finished" and they should leave. Wafula and his sons who were all armed were all beating the appellant as the appellant and the deceased held each other with the deceased struggling. The witness heard someone fall and when she later brought a lamp, she realized that it was the deceased. Wafula then came back and took his son to hospital.

[8] Although the hearing of the prosecution case proceeded before Wanjiru Karanja J (as she then was), she left before finalizing the case and the hearing thereafter proceeded before Mbogholi Msagha J. In his judgment, the learned judge found the evidence of Wafula that the appellant beat the deceased on the head credible and consistent with the evidence of Namasaka, who saw an injury on the deceased's head and **Dr. Silas Ayunga** who carried out a post mortem examination and confirmed that the deceased suffered an injury on the head. The learned judge therefore, rejected the defence of the appellant, and found him guilty of the offence as charged. The co-accused was acquitted of the charge.

[9] The appellant has raised nine grounds of appeal. He contends that the charges against him were defective and that the proceedings before the trial court were defective in substance and therefore a nullity. In addition, the appellant contends that the learned judged erred: in convicting and sentencing the appellant relying on inconsistent, contradictory and legally inadmissible evidence; in failing to take into account matters that he ought to have taken into account and as a result arrived at a wrong decision; in failing to consider the accused person's defence before passing judgment; in passing a harsh and disproportionate sentence against the appellant; in failing to consider all the facts and the law while convicting the appellant; in taking into account matters that he ought not to have taken into account and as a result arrived at a wrong decision.

[10] During the hearing, the appellant was represented by **Mr. B. Korir**, while **Ms R. N. Karanja,** Prosecuting Counsel appeared for the State.

[11] Learned Counsel, Mr. Korir who made oral submissions in support of the appeal, submitted that the conviction of the appellant was not safe as the prosecution did not establish the two elements of murder, that is, *actus reus* and *mens rea;* that the court relied on the evidence of Wafula and Namasaka only in regard to *actus reus*; that the evidence of Namasaka reveals that he did not actually witness the fight but relied on what he was told; that the offence is alleged to have happened at 8.00p.m when it was dark; that the evidence was not clear on who caused the fatal blow to the deceased; that the evidence of identification was that of a single witness; that the incident having occurred at the house of the appellant, it is evident that the deceased was the aggressor and that there was no evidence of *mens rea.*

[12] In addition, the charge sheet did not contain sufficient particulars to enable the appellant to mount a defence; that there being two accused persons during the trial, it was not clear which accused the witnesses were referring to and that the court should therefore allow the appeal and set aside the conviction.

[13] Ms Karanja who appeared for the State, submitted that the prosecution had proved all the elements of defence; that it was the head injury that caused the death of the deceased; that the injury being one of a grievous nature *mens rea* can be inferred under **section 206** of the **Penal Code;** that the evidence of Wafula and Namasaka was clear that the single blow resulted in the serious injury to the deceased; that the appellant was identified through recognition by neighbours who knew him well; that both the appellant and his witness gave sworn evidence placing themselves at the scene of the crime; that there was adequate corroboration in the evidence of the village elder who was an independent witness and who testified that the appellant admitted hitting the deceased; and finally that the sentence imposed upon the appellant was lawful.

[14] In response to the submissions made by Ms Karanja, Mr. Korir stated that section 206 is more concerned with the state of mind of the offender rather than the activity; that the state of mind of the appellant was not established; that it was not possible to see who caused the fatal blow as there were several people at the scene; that the evidence of the village elder was hearsay evidence with no probative value; that there was no evidence that the person referred to as Mulunda was actually the appellant.

[15] This being a first appeal, we are obligated to subject the evidence that was adduced in the trial court to afresh re-examination and analysis with a view to reaching our own findings. In doing so, we must be alive to the fact that we have not had the benefit of seeing the witnesses and assessing their demenours.

[16] The appellant having been charged with the offence of murder, the critical particulars that needed to be established at the trial are that the deceased person died, that his death was caused by an act or omission on the part of the appellant, and that the appellant committed the act or omission with malice aforethought.

[17] In this case, the fact of the deceased's death was clearly established by the evidence of Wafula, Dorcas, and Dr. Silas Ayunga who performed the post mortem examination. The cause of the deceased's death was the head injuries that resulted in the fracture of the skull and increased intracranial pressure. The question is how did the deceased sustain these injuries? and was the appellant in any way connected?

[18] The evidence of Wafula, was clear that the injuries were caused by the deceased who hit the appellant on the head with something which looked like a rake. It is evident that the evidence of Wafula regarding how the injuries were caused stands alone as his son Namasaka who was a witness testified that he found the deceased already lying on the ground. So it is only Wafula who saw the appellant assault the

deceased. It is also apparent that the incident took place at the home of the appellant.

[19] The appellant did not deny that there was a confrontation in his home. However, he claimed that it was Wafula and his sons, including the deceased, who went to the home of the appellant and attacked the appellant. This version of events is not credible. There was no evidence that the appellant suffered any injuries, a very unlikely result if he was indeed attacked by Wafula and his three sons.

[20] Secondly, the appellant appears to imply in his defence, that it was Wafula and his sons who hit the deceased during the fracas, probably by mistake because it was dark. We have considered this possibility but reject this line of defence as we are satisfied that Wafula spoke the truth that he went to the appellant's home when he heard a commotion and the voice of his son. The fracas was therefore between the appellant and the deceased, Wafula only happened to appear just before the deceased was hit. His other son appeared after the deceased had been hit. It is not therefore true that the deceased was hit by Wafula or any of Wafula's other sons. We find that there was sufficient evidence that the deceased was hit by the appellant. The next question is whether the appellant had malice aforethought. It is conceded by the appellant that there was some disagreement with the deceased regarding a debt that the deceased claimed the appellant owed him. On the other hand the appellant maintained that it was the deceased who owed him. This is hardly sufficient to prove any malice aforethought on the part of the appellant.

[21] However, under **section 206** of the **Penal Code,** malice aforethought may be deemed to be established by evidence proving any one or more of the following circumstances:

> ***"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the same person actually killed or not;***
>
> ***(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, or by a wish that it may not be caused;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) …"***

[22] In this case, the appellant hit the deceased on the head. We have no doubt that he had knowledge that his action w ould cause death or grievous harm to the deceased. Under **section 206(b)** of the **Penal Code**, the appellant's action of hitting the deceased in the manner he did was sufficient to infer malice aforethought.

[23] On our own evaluation of the evidence, we come to the conclusion that all the ingredients of the offence of murder were established and that there was sufficient evidence to establish the charge against the appellant to the required standard and consequently, the appellant was properly convicted.

[24] As regards the sentence, the appellant was sentenced to death, the learned judge noting that it was the only sentence provided by law. The Supreme Court has now in the decision of **Francis Karioko Muruatetu & another vs Republic [2017] eKLR,** declared that the mandatory nature of the death sentence as provided for under **section 204** of the **Penal Code** is unconstitutional and that while the sentence of death is the maximum sentence that may be imposed for the offence of murder, the trial court still retains its discretion to impose any other sentence that may be appropriate depending on the circumstances of the case.

[25] We believe that in the circumstances of this case, had the learned judge had the benefit of the Supreme Court decision, he would not have imposed the death penalty. Accordingly, we find it appropriate to apply the Supreme Court decision and set aside the death penalty imposed on the appellant and substitute thereto a term of imprisonment of fifteen years considering that the appellant killed the deceased in the course of a fight over a debt.

[26] The upshot of the above, is that we dismiss the appellant's appeal against conviction but allow the appeal against sentence to the extent of setting aside the death penalty and substituting thereto a sentence of fifteen years imprisonment effective from 30th July, 2009.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 4th day of April, 2019

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.