



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 164 OF 2017

BETWEEN

EKIRU IKUL alias ENGURANGOR.....1ST APPELLANT

EKURE NAPETET.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Lodwar (Riechi, J.) dated 25th November, 2016

in

HC. CR. Case No. 2 of 2015)

JUDGMENT OF THE COURT

[1] Ekiru Ikul alias Engurangor (1st appellant) and Ekure Napetet (2nd appellant) were jointly tried together with Lomoru Napetet (Lomoru) and Emuria Ekipor (Emuria) before the High Court at Lodwar, with 4 counts of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The 1st appellant was convicted of the offence of murder in regard to the 1st, 2nd and 3rd counts while the 2nd appellant was convicted in regard to the 4th count. Lomoru and Emuria were both acquitted of the charges.

[2] The two appellants are dissatisfied with the judgment of the High Court and are now before us in this first appeal. Each of the appellants filed their appeal in person but they were jointly represented at the hearing of the appeal by learned counsel Mr. Kaira Nabasenge, while the respondent was represented by Ms. R.M. Karanja a Prosecuting Counsel in the DPP's office.

[3] The events leading to the appellant's arrest and arraignment in court were sparked of by an allegation that the 1st appellant had raped the wife of **Philip Ekakorone Eris** (Philip) (deceased in count 4). Both Philip and the appellants are from the Turkana community, and a meeting was fixed in accordance with Turkana customary law to discuss the customary compensation that the 1st appellant was to pay Philip for the rape violation.

[4] Evidence was adduced before the trial court that the meeting was attended by members of Philip's family who included his uncle Lore Chara, Epil Lore, Nakomwa Elvis, Asinye Lore, Nakam Eris, Lotera Eris, and the deceased persons **Epeot Miramoe** (deceased in count 1), **Lokol Loree** (deceased in count 2), **Ludukwae Loree** (deceased in count 3) and Philip. Before the meeting commenced, the 1st appellant came armed with a rifle, and without any provocation shot the deceased in count 2, deceased in count 1, and deceased in count 3, while the 2nd appellant shot Phillip. This was testified to by Loree Chara, Phillip's uncle, Epul Loree, Phillip's brothers Nakomwa Elvis and Asinyen Loree, Nakam Elis wife to the deceased in count 3, and Lotela Eris sister to Phillip. The matter was reported to the police who arrested the two appellants and the two co-accused. Subsequently one of the co-accused led the officers to a house where an AK 47 rifle was recovered.

[5] In their defences each appellant denied having committed the offence. The 1st appellant claimed that he was going home with his cattle when he heard gun shots after which he was shot in the thigh. He crawled into a bush and hid there until morning when he received help and was taken to Lodwar where he was admitted at Lodwar District Hospital. Later he went to the police to report the matter. He was taken to Lokichogio Police Station where he was arrested and charged. The 2nd appellant also denied the charge and explained how the 1st appellant

who is his brother came home with injuries and he took him to hospital. Two days later he went and sold a cow and then went to a hotel in the village to eat when officers from the Kenya Police Reserve came, arrested him and took him to Lokichogio where he was charged.

[6] In his judgment the learned judge of the High Court found that there was sufficient evidence including the evidence of eye witnesses that confirmed that the 1st appellant shot and killed the deceased persons named in counts 1, 2 and 3 and the 2nd appellant shot the deceased in count 4. He therefore convicted them of the offences.

[7] In his memorandum of appeal the 1st appellant faulted the judgment of the trial judge for relying on circumstantial evidence and hearsay evidence; and failing to consider his defence.

[8] During the hearing of the appeal **Mr. Nabasenge** counsel for the appellant fully relied on the written submissions that were duly filed and served. The main ground upon which the submissions were anchored was: that the prosecution case was not proved beyond reasonable doubt as required by law; and that the evidence was full of inconsistencies and contradictions. For instance, Lore Chara whose evidence was relied upon by the prosecution contradicted himself saying he was not sure of the person who shot the 1st, 2nd and 3rd deceased at one point saying it was the 1st appellant while at another asserting that it was the 2nd appellant.

[9] In addition, it was submitted that the learned judge was not consistent in his analysis, finding in part that **Asinyen Lore** (PW4) shot Phillip and then proceeding to find the 2nd appellant guilty in regard to count 4. It was submitted that in view of the inconsistencies and contradictions the trial judge ought to have given the appellants the benefits of doubt and acquitted them of the charges. In regard to the sentence the court was urged to follow the Supreme Court decision in **Francis Karioko Muruatetu & Anor vs. Republic [2017]eKLR**, set aside the death sentence, and order that the appellants be subjected to a re-sentencing hearing so that their mitigation can be considered.

[10] For the respondent it was submitted that five prosecution witnesses who testified were all at the scene where the incident took place; that Lore Chara saw the 2nd appellant shoot Phillip, while Epul, Nakwoma and Asinyen all testified that the 1st appellant was armed with a rifle, and that they saw him shoot the deceased in the 1st, 2nd and 3rd counts. The court was urged to find this evidence credible and reliable. It was submitted that the cause of death in regard to all the deceased persons was confirmed by as excessive bleeding due to gunshot wounds. The court was therefore urged to find that the case against the appellant was proved to the required standard.

[11] We have considered this appeal and the submissions made before us. The appeal being a first appeal we are alive to our duty as stated in the case of **Okeno v Republic [1972] EA 32** as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424).”

[12] The offences of which the appellants were charged being murder it was incumbent upon the prosecution to establish that each of the deceased persons died as a result of an act or omission on the part of the appellant and that the appellants had malice aforethought. In this case it was evident from the evidence of the eye witnesses that the four deceased persons were shot, and from the evidence of **Collins Thunguti** the clinical officer, each died as a result of the gunshot wounds. The question is who was responsible for shooting each of the deceased and whether the person had malice aforethought. The evidence of Lore Chara was as follows:

“The accused 1 was armed with a rifle. He started shooting Lokore Lore (deceased in count 2), then Edukai Lore (deceased in count 3). I did not see where Lokore Lore was shot. Educare Lore (deceased in count 2) was shot on the leg and abdomen. The 3rd to be shot are Epeot Miramoe (deceased in count 1). I did not see where. Philip was the last to be shot (deceased in count 4). Philip was shot by Ekuru Napetet (accused 4) accused 1 is the one who shot Epeot, Maramor, Lokore and Lodukae. Accused 4 is the one who shot Epeot, Maramor, Lokore and Lodukae. Accused 4 is the one who shot Philip. Accused 2 did not shoot anybody. Accused 3 did not shoot anybody but he was present.”

[13] There appears to be a little mix up in the account, however, Lore Chara is emphatic that 1st appellant shot the deceased in the 1st count, deceased in the 2nd count, and deceased in the 3rd count while the 2nd appellant shot Philip. Epul Lore who is another witness stated as follows:

“PW1 did not speak to us. We did not speak to him. He then rapidly shot the deceased person. I saw him shoot Lokal Lore. (deceased in count 2) on the head near the left ear; Lodakae Lore (deceased in count 3) who was shot in the left abdomen and Epeot (deceased in count 1) on the abdomen. I was standing there. Where he killed them I ran away. I was not shot because I was behind them. Accused 4 is the one who shot Philip. I saw accused 4 shoot Philip. Accused 2 did not shoot anybody. Accused 3 killed Lodukae Lore (deceased in count 3).”

[14] It is evident that this witness was clear that the 1st appellant shot the 1st and 2nd deceased person while the 2nd appellant shot Philip. We note that there is some contradictions regarding who shot the 3rd deceased as the witness mentioned both the 1st appellant and the 3rd accused.

[15] Another witness Nakomwa Elvis stated as follows:

“The accused came to the water point (calabash) and my brothers were there. I then saw accused 1 shoot my brothers. The 1st to

be shot was Lokol Lore (deceased in count 2), then Epeot Lore (deceased in count 1) and Lodukae Lore (deceased in count 3), and then accused 4 shot Philip (deceased in count 4). My brothers did not have a gun. When I heard gunshots I took cover in the water.”

[16] Similarly, Asinyen Lore, Nakam Eris and Lotera Eris all testified that the 1st appellant shot the deceased in count 2, deceased in count 1, and deceased in count 3, while the 2nd appellant shot Philip. In our view although there were some minor contradictions in the witness evidence, all the witnesses were clear that the 1st appellant was armed and that he shot the deceased in the 1st, 2nd and 3rd counts whilst the 2nd appellant shot Philip.

[17] In regard to the contradictions we reiterate what this Court stated in Joseph Maina Mwangi v Republic [2000] eKLR that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

[18] The discrepancies herein were not material. The witnesses were agreed that they were gathered at the water point to discuss the customary compensation in regard to the rape of Philip’s wife; and that the 1st appellant and the 2nd appellant shot the deceased persons who were waiting for the meeting to start. The appellants’ defences were rightly rejected as it was clear that the appellants were not only at the crime scene but also actively participated in the shooting. We come to the conclusion that there was sufficient proof that all the deceased persons died as a result of the actions of the 1st and 2nd appellant. From the circumstances of this case, malice can be inferred from the fact that the two appellants shot the deceased persons being fully aware that their action was likely to result in the death of the deceased.

[19] Accordingly, we are satisfied that the charge in regard to count 1, 2 and 3 were proved against the 1st appellant and count 4 was proved against the 2nd appellant to the required standards. As regards the sentence, the appellants’ advocates made submissions in mitigation of the sentence, and the learned judge properly exercised his discretion in sentencing taking into account the circumstances before him. Four lives were lost needlessly, and in our view, the sentence of death imposed upon each appellant was merited. There is therefore no justification for our intervention.

[20] The upshot of the above is that we find no merit in this appeal. It is accordingly dismissed in its entirety. Those shall be the orders of this court.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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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