IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 60 OF 2017

BETWEEN

STEPHEN KIPKEMOI ROTICH.....APPELLANT

AND

REPUBLIC.....RESPONDET

(An appeal against the decision of the High Court of Kenya at Eldoret

*(**N. Macharia, J.**) dated **18th November, 2014***

in

H.C.C.R.A. No. 60 of 2009)

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JUDGMENT OF THE COURT

1. This is an appeal against judgment of the High Court at Eldoret, (**Ngenya-Macharia, J.)** in which **Stephen Kipkemoi** (the appellant) was convicted for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code The appellant had been charged that on the 1st day of November 2009 at a village within Nandi North District of the Rift Valley Province he murdered **Mary Chelimo Rotich**.

2. In his memorandum of appeal dated 2nd December 2014, the appellant has raised five grounds of appeal that we reproduce herein verbatim as follows:

> ***"(i) That the trial judge erred in law by convicting me without observing that I was angered with the relationship between Pw2 and the deceased and that the elements of malice aforethought and intention was not proved beyond reasonable doubt.***
>
> ***(ii) That the trial judge erred in law by directing herself that I had malice to cause death or grievous harm without considering that we picked a quarrel with PW2, while the deceased wanted to separate us and coincidentally was hit with the alleged axe without any knowledge.***
>
> ***(iii) That the trial judge erred in law by convicting me without observing that holding that the accused had engaged in fracas with Pw2 before the arrival of the deceased the accused was angered by the actions of the deceased giving maize to somebody who had picked a quarrel with PW2.***
>
> ***(iv) That the trial judge erred in law by convicting(sic) me to suffer death without observing that the person who was stricken by the alleged axe was innocent, who was not in a position to know why we quarreled with PW2.***
>
> ***(v) That the trial judge erred in law by dismissing my defence without giving any convincing reason and without considering that I discharged truth as provided in Section 111 of the Evidence Act."***

3. At the hearing of the appeal, ***Miss Kipyego***, learned counsel who appeared for the appellant, submitted that the appellant had no malice aforethought to kill the deceased. She stated that an argument had ensued between the appellant and ***Peter Nando Kisenge* (*Peter*).** This

argument was aggravated by several factors. First, was a bag of maize which the deceased wanted to give **Peter** as payment for work done but which the appellant had intended to give to his second wife, ***Pauline Chepkemboi Rotich***. Secondly, the appellant was enraged to find ***Peter*** wearing his clothes and justifying his action by stating that the clothes were old. Thirdly, the appellant believed that his deceased wife and ***Peter*** were in a romantic relationship, and lastly, the appellant was drunk. Counsel submitted that it was in light of the above circumstances that an argument ensued and Peter attacked the appellant with an axe, and that it was during the struggle that the appellant tried to snatch the axe from Peter, and it hit the deceased on the neck killing her instantly. Counsel argued that the attack was not premeditated and urged the Court to find the appellant guilty of manslaughter and not murder, and allow the appeal to that extent.

4. ***Mrs. Karanja***, Public Prosecuting Counsel who appeared for the State opposed the appeal. She submitted that the appellant had committed a heinous crime against a defenseless woman; that his action was unprovoked as the argument was between the appellant and the deceased; that the evidence adduced in court showed that the appellant had a history of violence against the deceased; and that the appellant had deliberately aimed the axe at the deceased and hit her neck. She urged the court to dismiss the case and to find that that the Appellant had the necessary *mens rea* as he knew or ought to have known that the axe he aimed at the deceased would deliver a fatal blow.

5. We have carefully considered this appeal, the submissions and authorities cited. Under **section 203** of the Penal code for a charge of murder to be sustained, it is imperative to prove that the deceased died and that his death was caused by an act or omission on the part of the appellant; and that the act or omission was undertaken by the appellant with malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean that the death of the deceased during the scuffle was not intentional.

6. It is not disputed that the deceased was the appellant's wife, and that the appellant struck the fatal blow that led to the death of the deceased. The issue is whether the appellant had the necessary *mens rea* or guilty mind to kill the deceased at the time he struck the blow, and whether the appellant was guilty of murder or manslaughter. This being a first appeal, the Court has a duty to reconsider, re-evaluate the evidence and arrive at its own independent conclusion. (Okeno vs Republic [1972]EA 32.

7. During the trial, ten (10) witnesses testified. The eye witnesses to the offence were ***Diana Chemutai Massie (Diana), Nancy Cherop Maasai (Nancy)*** (both daughters to the appellant and the deceased), and ***Peter.*** Their evidence was to the effect that the deceased collected a bag of maize with the intention of paying **Peter** in kind for the work he had done for her for the day. A fight arose between the deceased and the appellant because the appellant wanted to give that same maize to his second wife. The appellant then picked up the axe that Peter had been using during the day, aimed it at the deceased, and cut her on the neck.

8. ***Dr. Macharia Benson*** (***Dr. Macharia***) confirmed that the deceased suffered a deep sharp cut, measuring 17cm on the left side of the neck, extending to the left ear-lobe; that the wound penetrated deep into the spine of the neck; and that the cause of death was excessive bleeding due to sharp force trauma to the neck.

9. The appellant who gave a sworn statement in his defence confirmed that he had an argument with the deceased over a bag of maize which he intended to give his second wife but which the deceased wanted to give **Peter** as payment for work done. He further stated that he was incensed because **Peter** was wearing his clothes and had started an affair with the deceased, and this led him to accost Peter. As he was struggling to snatch the axe which Peter had put up, he managed to pull the axe from Peter's hand but the axe cut the deceased who was just behind the appellant trying to intervene in the quarrel.

10. **Section 206 of the Penal Code** defines malice aforethought as follows:

> ***"Malice aforethought shall 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 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, 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;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

11. As already stated the fact that the deceased died as a result of the appellant's action is not disputed. The evidence of Diana**,** ***Peter*** and ***Dr Macharia*** regarding what transpired was credible. This evidence negated the appellant's defence that he was provoked as he alleged. There is no evidence that ***Peter*** was wearing the appellant's clothes, and the allegation that the deceased and ***Peter*** had a romantic relationship is negated by the appellant's own evidence that his relationship with his deceased wife was smooth and that they *"lived happily except for general quarrels"*. We also find it more plausible that the appellant's quarrel was with the deceased who was giving away maize, as opposed to Peter who in the appellant's testimony was courteous enough to warn him that his wife did not want him to carry the maize.

12. In his defence, the appellant raised the defence of intoxication, provocation and self-defence. The issue of self defence cannot hold given our earlier finding on the implausibility of the appellant's version of the events. Neither the deceased nor Peter attacked the appellant to justify his retaliation in self defence.

13. On the issue of intoxication, the appellant explicitly admitted that before he went home on the fateful day, he passed by the home of Joseph Kiprotich a neighbour and took *busaa* and *chang'aa* both alcoholic drinks. In his evidence in chief and cross examination the appellant stated that he did not take a lot of the alcohol. Even though he thought his anger was raised by the alcohol.

14. **Section 13** of the **Penal Code** provides as follows:

> ***"(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***
>
> ***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –***
>
> ***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***
>
> ***(b) the person charge was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***
>
> ***(3) …***
>
> ***(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence."***

15. In light of **Section 13** of the **Penal Code**, for the defence of intoxication to apply, the court must be satisfied that the appellant was at the time of the act or omission so intoxicated to the extent that he did not know that such act or omission was wrong, or that he did not know what he was doing, or that he was by reason of intoxication, temporarily insane at the time of such act or omission.

16. From the evidence, the actions of the appellant at the material time, reflects a person who had total control of his faculties. Despite his intake of alcohol, he remembered the specific type and amount of alcohol he consumed; which of his children were home; the words exchanged between himself and Peter; that his daughter Diana told him not to quarrel her mother; and the sequence of events that led to the disagreement between himself and the deceased. The appellant was therefore not drunk to an extent that he was incapable of knowing what he was doing. Nor was he so drunk as to be incapable of forming any specific intention. The defence of intoxication cannot therefore apply.

17. Turning to the issue of provocation. The Penal Code makes provision for provocation under **Sections 207 & 208** as follows:

> ***"207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.***
>
> ***208 (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***
>
> ***(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault."***

18. In **Peter King'ori Mwangi & 2 others versus Republic [2014] eKLR**, this Court addressing the defence of provocation stated as follows:

> ***"We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy (1949) I ALL ER 932; provocation was defined as*** *'some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind …'*
>
> ***Inherent in this definition at common law, is the requirement of two conditions to be satisfied for the defence to be made out, namely:-***
>
> ***The "subjective" condition that the accused was actually provoked so as to lose his self-control; and the "objective" condition that a reasonable man would have done so."***

19. In addition, not every act of provocation will reduce the act of murder to manslaughter. In the case of **Tei s/o Kabaya v. R. [1961]EA**, the Court of Appeal for East Africa, outlined the circumstances which a court should consider in deciding whether certain provocation is sufficient for purposes of Section 207 of the Penal Code, to reduce a charge of murder to manslaughter. The Court stated:

> ***"In considering whether provocation was sufficient to reduce the offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used."***

20. The question that arises is whether the circumstances in which the appellant committed the offence, and the relationship between the appellant and the deceased, were such as to justify the appellant being incensed to the point of losing his self-control, so as to bring in the

defence of provocation as defined in **sections 207 and 208** of the Penal Code,

21. The argument between the appellant and the deceased was over a bag of maize. The deceased intended to use the bag of maize to pay Peter for work done while the appellant wanted to give the bag of maize to his second wife. In his testimony, the appellant stated that:

> ***"Pauline (second wife) then sent me to the home of Mary (deceased first wife). She told me because there was draught in her place, I bring her my maize from Mary". He further states "she told me I would not carry the maize. I told her I was taking the maize to my children. Pauline has 4 children while the deceased had 8. Deceased told me she was to use maize to pay Peter"***

22. The evidence of ***Diana, Nancy*** and ***Peter*** clearly indicate that in the course of the argument, the appellant went to where the axe lay, took it and hurled it at the deceased. Was the deceased's act of giving maize to a stranger instead of giving it to the appellant to feed his second family who were allegedly facing drought so enraging and insulting so as to cause the appellant to lose self-control?

23. The record shows that according to the testimonies of ***Diana, Abraham Kipkemboi (Abraham)*** and ***Emmanuel Kirwa Rotich(Emmanuel)*** the relationship between the appellant and the deceased was not good and was marred with arguments, insults and beatings from the appellant. In fact, on several occasions the deceased had to run away from the matrimonial home. ***Musa,*** who knew the appellant from birth describes him as a violent man especially when he drank *chang'aa*.

24. Given the appellant's history of violence towards the deceased, the deceased's actions were sufficient to make the appellant lose his temper and in the heat of passion attack the deceased with the axe. However, the standard to be met is that the wrongful act or insult triggering the aggression must be of such a nature as would be likely to deprive an ordinary person of the class to which the appellant belonged, the power of self-control. This standard should not be adapted to accommodate a particular person's innate lack of self-control or a person whose temperament is more susceptible to anger, hypersensitivity or aggression. The provoking act must therefore be one that would cause an ordinary man of ordinary sense to lose his self-control. While the refusal by the deceased to allow the appellant to take the maize to his second family may have been infuriating to the appellant, it was not of such gravity as would cause a reasonable man to lose his self-control.

25. Moreover, as stated in the **Tei S/O Kibaya** (supra), the degree of retaliation was material. The use of an axe and the force used by the appellant against his wife was not warranted. The type of weapon used and the part of the body struck reveals an element of malice aforethought to the extent that the appellant knew that his action will probably cause death or grievous harm to the deceased.

26. We agree entirely with the learned judge's finding that;

> ***"when the accused picked up the axe and so strongly struck the deceased, he was seized with knowledge that an axe would either cause death or grievous harm. Besides, he aimed at the deceased's neck, a vital part of the body against which any serious injuries would cause death."***

27. We therefore find that the defence of provocation is not available to the appellant and come to the conclusion that the appellant killed the deceased with malice aforethought. His conviction for the offence of murder was therefore proper.

28. With regards to the appeal against the sentence imposed by the trial court, we note that in sentencing the appellant to death, the trial court did not exercise any discretion given that the death sentence was the only legal sentence prescribed by law at the time. However, The Supreme Court's decision in **Francis Karioko Muruatetu & others vs Republic & others, [2017] eKLR,** declared the mandatory nature of the death sentence as provided for under **section 204** of the **Penal Code** unconstitutional. This means that a court has the discretion to impose the death penalty or any other sentence that may be appropriate given the circumstances before it.

29. The appellant was given an opportunity to mitigate but did not say anything and his Advocate had no mitigation to make on his behalf. In sentencing the appellant, the learned judge addressed her mind to the fact that the only sentence for the offence of murder as provided under Section 204 of the Penal Code was death. This means that the learned judge did not exercise her judicial discretion in sentencing. Given the circumstances of this case, we believe that had the learned judge properly exercised her discretion, she would have considered a sentence other than the death penalty. In the circumstances of this case, we find that a sentence of **fifteen (15)** years would have been appropriate.

30. The upshot of the above is that we dismiss the appellant's appeal against his conviction, but allow the appeal against sentence. We therefore set aside the sentence of death imposed by the trial court, and substitute it with a sentence of **fifteen (15)** years imprisonment to take effect from the date of sentencing.

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

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR