



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 113 OF 2014

BETWEEN

ERNEST OPALU OKUNJA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Busia,*

*(Muchemi, J.) dated 2<sup>nd</sup> December, 2010*

In

HCCRC NO. 7 OF 2007)

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JUDGMENT OF THE COURT

1. This is an appeal against the judgment of the High Court (Muchemi, J.) in which the High Court convicted **Ernest Opalu Okunja** (the appellant) for the offence of murder, and sentenced him to death.
2. The circumstances leading to the appellant's conviction were that on the morning of 27<sup>th</sup> February, 2005 **Ellen Mahoka Baraza** (also referred to as Hellen Makoha Baraza) (Ellen) was in her house together with her one-year old son **EO** (herein deceased). Also, in the house was Ellen's daughter **EAB** (E) and Ellen's co-wife Margaret Wangatia Baraza (Margaret). Hell broke loose when several people armed with pangas, somali swords and rungus entered the home shouting. The men entered Ellen's house then walked out. Ellen who was holding the child followed them outside and two of the men attacked her, slashed her on her head and back, and also cut the deceased (whom Ellen was holding), across the face with a panga. Both Ellen and E identified the appellant as having been one of the persons who slashed Ellen and the deceased with a panga. By this time **MN** (M) who is also Ellen's daughter was on her way to her mother's house. As she approached the home she heard screams then saw the appellant standing with a panga. She started screaming but he warned her to keep quiet. The appellant and his accomplices then ran away.
3. M and E saw the deceased lying down on the ground. He was already dead. Ellen who was still breathing had cuts on her head, right arm and back. Apart from Ellen, E and M, SB a son to Ellen also saw and identified the appellant during the fracas and confirmed that he was armed. However, Margaret who was also at the scene claimed that it was someone called **Joseph Okwelo** who cut Ellen and the deceased, and that the appellant was not at the scene.
4. The matter was reported at Nambale police station and the police took Ellen to the hospital and the body of the deceased to the mortuary. Photographs of the scene of crime were also taken and produced in evidence during the trial. Investigations were conducted by **IP Moses Waliaula** (IP Waliaula) and the appellant was later arrested on 16<sup>th</sup> June, 2005.
5. A post mortem was performed on the body of the deceased on 4<sup>th</sup> March, 2005 by **Dr. Maingi** who prepared a report that was produced in evidence by **Dr. Zakaria Njau (Dr Njau)**. The findings of **Dr. Maingi** were that the body of the deceased had a deep cut wound on the right cheek and right mandible, was pale and sprinkled with blood, had internally a deep cut wound on the right cheek, right mandible and upper jaw. There was also loss of blood due to deep cut wounds. **Dr. Maingi** formed the opinion that the cause of death was cardiac pulmonary arrest due to shock following assault.

6. The appellant gave a sworn statement in his defence in which he denied having murdered the deceased or being at the scene at the time of the murder. He testified that the prosecution witnesses had a grudge against him and gave false evidence against him. The appellant denied that there was any land dispute between him and the husband to Ellen (Samuel Baraza). The appellant called **Francis Kwena(Chief)**, the Chief of Marachi East sub location as a defence witness. The Chief testified that the deceased was murdered by one **Josphat Mauko Okwero** and not the appellant.
7. In convicting the appellant the learned Judge made findings that the appellant went to the home of Ellen in the company of others; that he was armed with a panga and used the panga to cut the deceased; that for the appellant to arm himself and go to the scene and without any provocation attack the deceased so severely was sufficient proof of malice aforethought; that the severity of the injury inflicted on the deceased was meant to kill the deceased; and that the appellant caused the death of the deceased.
8. Aggrieved by the decision of the High court, the appellant filed the present appeal in which he raised four grounds of appeal, namely, that the learned Judge erred in law and in fact: in convicting the appellant of the offence of murder when the evidence tendered by prosecution witnesses was unreliable and laden with such massive and grave inconsistencies; that the prosecution did not prove its case beyond reasonable doubt; that the appellant's defence was disregarded; and that the trial court shifted the burden of proof to the appellant contrary to the established legal principle.
9. During the hearing of the appeal, learned counsel **Mr. Okoyo** was present for the appellant while **Mr. Sirtuy**, the Principal Prosecution Counsel was present for the State. **Mr. Okoyo**, relied on the appellant's memorandum of appeal and written submissions which he highlighted. In summary, the appellants submissions were that that the events were precipitated by a land dispute; that the evidence of the prosecution witnesses was actuated by malice; that the prosecution evidence was not sufficient to prove the case against the appellant; that Ellen, E and M did not witness the appellant commit the offence; that Margaret who was at the scene of the crime testified that the appellant was not at the scene of the crime and that it was Okwelo who cut the child; that the evidence of prosecution witnesses was full of inconsistencies, for instance Ellen's evidence was contradictory, so was the evidence of her son SB; and that the appellants defence was improperly rejected. In regard to the sentence, the court was urged that the appellant who was sentenced to suffer death was (68 years) old, and that on the authority of the Supreme Court's decision in **Muruatetu's** case, the Court should consider reducing his sentence to the time already served.
10. **Mr. Sirtuy** who opposed the appeal relied on his written submissions which he highlighted. He argued that **E** clearly saw the appellant who was armed with a machete inflict a cut on the deceased's head, and that the injury was fatal. Counsel submitted that **E** placed the appellant at the scene of the crime and urged that the prosecution witnesses were credible and gave truthful evidence. Counsel urged the court to find that the appeal lacks merit and dismiss the same. He left the issue regarding the evidence of **Margaret** and the issue of sentencing for the court's determination.
11. In reply, **Mr. Okoyo** pointed out that **E** did not see the appellant inflict injury on the deceased; that by the time she came outside, the deceased had already been injured.
12. We have perused the record, the written and oral submissions by counsel, the authorities cited and the law. This being a first appeal we are expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses. Our mandate as set out in rule 29(1) of this Court's Rules is to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant.
13. In the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005**, this court held that:
- "In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same."***
14. Further, in the well-known case of ***Okeno v Republic (1972) EA 32*** the predecessor of the Court of Appeal stated that:
- "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)"***
15. We are alive to the fact that the trial court had the advantage of observing the demeanour of the witnesses and assessing their credibility, and this court in considering this appeal is obligated to give allowance for that. We are also alive to the fact that for the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by an act or omission on the part of the appellant and that the appellant had malice aforethought.
16. There are five key witnesses who were at the scene at the time the assailants struck. These were **E, Ellen, M, Margaret, and SB**. **E** identified the assailants as persons known to her and gave the names of four (4) people including the appellant. **E** explained that **Ellen** followed the assailants outside the house as she remained inside the house. She went outside the house when she heard the deceased crying, and found **Ellen** and the deceased lying on the ground and both had been cut. In cross examination **E** insisted that she actually saw the assailants cutting the child and that the appellant was the one who cut the child.
17. **Ellen** also identified the appellant and three (3)w others, who were all persons not only known to her but also related to her, as having been among the assailants who invaded her home. She maintained that it was the appellant who cut her with a panga. As a result of her

injury, she could not see clearly who cut the child. M evidence was that when she arrived, she found the appellant standing armed with a knife and the deceased was lying on the ground. The appellant warned her not to scream. Immediately the other three (3) men came from the main house and the assailants all left. S also testified that both Okwero and the appellant cut his mother and the deceased.

18. Margaret's evidence was similar to the evidence of the other witnesses, except that she only identified three of the assailants and maintained that the appellant was not among the assailants. She identified the person who cut Ellen and the deceased as one Joseph Okwero.

19. We find it clear from the evidence of Ellen that it was indeed the appellant who cut her with the panga. Since Ellen was carrying the deceased child, and the evidence of both E who heard the deceased crying and went out of the house immediately, and that of M who found the appellant outside armed with the panga with the deceased lying on the ground is consistent with the evidence of Ellen that it was the deceased who cut both Ellen and the deceased child with a panga.

20. We have considered the evidence of Margaret and that of the Chief who maintained that the appellant was not at the scene, and that the deceased was killed by someone else. The evidence of the Chief was based on hearsay as he conceded that he only heard some women say that it was Okwero and not the appellant who had killed the deceased. We find that Margaret was not truthful in maintaining that the appellant was not at the scene. The trial judge who saw her testify, did not believe her evidence.

21. Moreover, it is evident that the assailants were at least four persons. Section 21 of the Penal Code, defines common intention as follows:

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

22. As this Court stated in Eunice Musenya Ndui v Republic [2011] eKLR the ingredients of common intention are that:

***(i) There must be two or more persons;***

***(ii) The persons must form a common intention;***

***(iii) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;***

***(iv) An offence must be committed in the process;***

***(v) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.***

23. In Wanjiru d/o Wamerio v Republic 22 EACA 521 the predecessor of the Court of Appeal stated as follows:-

***“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”***

24. The appellant and the other persons having armed themselves with pangas and swords and having invaded the home of Ellen, whose husband had previously been murdered, it is evident that the assailants had a common intention of executing an unlawful purpose, and that the cutting of Ellen and the deceased with a panga was part of the probable consequences of the unlawful purpose. It is therefore immaterial who among the four persons struck the fatal blow as all had a common intention and each is deemed to have committed the offence.

25. Malice aforethought is defined under section 206 of the Penal Code as follows:-

**(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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.**

**(c) An intention to commit a felony.**

**(d) An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony.**

26. From the post mortem examination it was evident that the deceased died as a result of the injuries that the appellant inflicted upon him. As already stated the appellant and his colleagues had a common intention of executing an unlawful purpose. In the course of execution of that purpose they caused the deceased injuries which they knew or ought to have known would cause death or serious injuries. Moreover, the fact that the appellant and his colleagues were all armed is a clear indication that they stormed Ellen's home with the intent to kill. The evidence was therefore sufficient to establish malice aforethought.

27. From the foregoing, we are satisfied that the offence of murder was proved beyond reasonable doubt against the appellant and that the trial court properly directed itself in convicting the appellant. In the premises, the appeal against conviction fails.

28. As regards the sentence, the trial court sentenced the appellant to death which is the sentence provided for the offence of murder under Section 204 of the Penal Code. However, The Supreme Court in ***Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015***, (Muruatetu’s case), held at para 69;

***“Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”***

***“...It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners...”***

29. In ***William Okungu Kittiny v Republic [2018] eKLR*** Criminal Appeal No. 56 of 2013, this court held that the decision of the Supreme Court in ***Muruatetu’s case*** (supra) had an immediate and binding effect on all other courts. As this appeal had not been finalized, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the High court could have lawfully passed. We find it expedient to finalize the matter rather than order a sentence rehearing in the High Court. We have considered the circumstances of this case and are of the view that although the Supreme Court did not outlaw the death sentence, the death sentence was not appropriate herein, and that a term of imprisonment would serve the interest of justice.

30. For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed to the extent of setting aside the sentence of death and substituting thereto a sentenced of 20 years imprisonment to take effect from 2<sup>nd</sup> December, 2009 when the appellant was sentenced.

Orders accordingly.

**Dated and delivered at Kisumu this 31<sup>st</sup> day of July, 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.**