



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 44 OF 2017

BETWEEN

MOSES BIWOTT CHIRCHIR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret, (Ngenye, J.) dated 30th July, 2014

in

HCCRC NO. 1 OF 2009)

JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court (Ngenye, J.) convicting the appellant for the offence of murder of Reuben Kipyego (deceased) contrary to **section 203** as read with **section 204** of the **Penal Code** and sentencing the appellant to death.

[2] The particulars of the offence were that on 21st December, 2008 at Kapkutum village, Simit sub location, Muskut location, Soy division in Keiyo District within Rift Valley province, the appellant murdered Reuben Kipyego.

[3] At the trial, the prosecution called eight witnesses. **Janet Cherotich** (Janet), the Assistant Chief; **John Kipkemoi Kiplagat** (John), the deceased's brother; **Mike Kibiego** (Mike), the deceased's sister; **Sheila Cheruiyot** (Sheila), key witness; **Teriki Cheruiyot** (Teriki); **Dr. Benson Macharia** (Dr. Macharia), pathologist; Corporal Police Administration **CPA Kiplagat Kiptumo** (CPA Kiplagat) and **PC Gregory Muya** (PC Muya), the investigating officer.

[4] The evidence adduced against the appellant in the trial court was as follows: On 21st December, 2008, Sheila was at her house when the deceased who was her employer, woke her up to pay her wages. At that moment, the appellant who was Sheila's former lover arrived at Sheila's house carrying a knife, demanding that the door be opened for him, and when Sheila failed to open the door, the appellant broke into the house and the appellant and the deceased started arguing. Sheila left the two in the house as the argument developed into a struggle which extended outside the house.

[5] Later the appellant emerged, went to Sheila and asked Sheila to accompany him to the police station. The two proceeded to Muskut AP camp where the appellant reported to Administration Police Corporal Kiplagat Kiptumo (Cpl Kiptumo) that he had killed the deceased with a panga through a cut to his head, because he found the deceased with his lover. The appellant then handed over the panga to Corporal Kiplagat. In the meantime, Teriki a resident of Simati village was from his home when he came across the body of the deceased on a footpath. He raised an alarm and the police were called.

[6] Cpl Kiptumo escorted the appellant to Kiplagat police station, then accompanied other police officers to the scene where they found the body of the deceased whose neck was cut and eyes covered with a piece of mattress. The floor where the body was, was covered in blood. The body of the deceased was taken to the mortuary where Dr. Macharia, a pathologist based at Moi Teaching & Referral Hospital carried out a post mortem examination on 29th December, 2008. Dr Macharia produced the report of the post mortem examination in evidence. His findings were that the body had a large gaping wound on the left side of the neck, insect bite wounds on the left forearm and dead ants were also found in the body. Dr Macharia formed the opinion that the cause of death was cervical cord transection with extensive bleeding due to sharp force trauma to the neck.

[7] In his sworn statement of defence the appellant denied the murder charge. He testified that on the material date he attended a circumcision ceremony then proceeded to Sheila's place, where there was 'busaa' (a local brew). He took two cups of the brew then bought some more of the 'busaa' which he put aside to drink later. He then went to the circumcision ceremony where he stayed until 11.00pm. Later after leaving the ceremony, he went back to Sheila's house where he found two other people with Sheila. These were the deceased and one Kiptoo Boit (Kiptoo). The deceased and Kiptoo left and after finishing his drink, he started walking home when he saw someone lying on the ground. He identified the person as the deceased and went and informed Sheila who accompanied him to the scene, and they both agreed to report the death at the Muskut chief's camp. They arrived at the chief's camp at around 2.00a.m. and after reporting the matter they were taken to Kaptagat Police station. The appellant denied having confessed to murdering the deceased.

[8] The learned Judge found that it was only the evidence of Sheila that directly implicated the appellant; that he went to her house armed with a panga and that the appellant was angered at finding the deceased at his girlfriend's house. The learned Judge found the act of the appellant of proceeding to Sheila's house armed with a panga showed that he had malice afterthought, and that he caused the death of the deceased. She therefore found the appellant guilty and convicted the appellant of the offence of murder.

[9] Aggrieved by the decision of the High court, the appellant filed the present appeal in which he raised four grounds of appeal in his supplementary memorandum of appeal, namely, that the trial court erred in: reaching conclusions which were not supported by the evidence adduced; convicting the appellant based on weak circumstantial evidence; refusing, failing, or ignoring to deal with or resolve the contradictions and discrepancies; failing to resolve the contradictions and discrepancies in favour of the appellant; and failing to adequately consider the appellant's defence.

[10] When the matter came up for hearing, Mr. Mathai holding brief for Mr. Marube was present for the appellant whereas Mr. Oyiembo, Senior Assistant Director of Public Prosecutions was present for the respondent. Counsel relied on their written submissions.

[11] For the appellant it was submitted that there was no evidence adduced by the prosecution which proves that the appellant possessed malice aforethought; that there was no evidence that the appellant had the intention to harm the deceased; or that the deceased had knowledge that the act would cause death or that he intended to commit a felony; that the learned Judge misdirected herself in concluding that the appellant had prepared himself to harm the deceased with no provocation at all; that this was a crime of passion and there was no sequence of events; that Sheila was lying, being economical with the truth and gave evidence on other extraneous issues; that her integrity was doubtful and that this Court should disregard her testimony and place no probative or little value on it; and that the conviction and sentence were not safe.

[12] In opposing the appeal, Mr Oyiembo submitted that there was overwhelming evidence in support of the conviction and sentence; that the appellant viciously attacked the deceased; that the offence of murder was proven beyond reasonable doubt; and that there was no reason to disturb the High court decision.

[13] We have perused the record, the written and oral submissions the authorities and the law. This being a first appeal we are alive to the fact that 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 and have to give due allowance for this. This duty was well captured by the predecessor of this Court in *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)”

[14] In addition **Rule 29(1)** of this Court's Rules requires us to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant. The appellant is therefore entitled to have our own consideration and view of the evidence as a whole and our own decisions thereon. The issues for determination in this appeal is whether the evidence adduced against the appellant at the trial was sufficient to prove the charge of murder against the appellant to the required standard such as to sustain his conviction.

[15] It is evident that the conviction of the appellant was grounded on the evidence of Sheila, who, we note, did not witness the murder. At cross examination, she stated:

“ ...The deceased and the accused left together and went outside the house. I followed them. I did not witness he (sic) scuffle involving the deceased and the accused. I did not hear them shouting at one another or screaming. It was late. I did not see the accused assault and kill the deceased:

[16] Sheila maintained that she did not see the appellant kill the deceased; nevertheless her evidence implicated the appellant and pointed towards him as the person who killed the deceased. This was because Sheila stated that the appellant arrived at her house armed; that Sheila and the appellant were lovers; that the appellant was enraged by the fact that the deceased was in Sheila's house; that the appellant immediately picked up a quarrel with the deceased who was in Sheila's house; that the quarrel developed into a scuffle that took the two men out of the house; and that the appellant later came back and informed Sheila that he had killed the deceased.

[17] We have considered whether the evidence of Sheila was truthful and reliable. We note that Sheila contradicted herself as to whether the weapon the appellant had was a knife or a panga. This was because she initially stated that the appellant had a knife, but later she identified the panga that was produced in court as the weapon which the appellant had. We think that the contradiction was not very material. The information before us is not sufficient to show what kind of panga was produced in court, but it is not uncommon for some type of pangas to look like a knife or what is sometimes referred to as a masai sword. Moreover, Cpl Kiptumo's evidence corroborated Sheila's evidence that the appellant had a panga. It is therefore clear that the appellant was armed with a panga.

[18] Sheila's evidence that the appellant found the deceased in her house was admitted by the appellant in his defence, as was the evidence that the appellant and Sheila went and reported the death of the deceased at the AP Chief's Camp. Further, Sheila's evidence that the appellant came back and told her that he had murdered the deceased is consistent with the evidence of Corporal Kiplagat who testified that the appellant and Sheila went to the Camp and that the appellant reported having killed the deceased and handed over the panga that he had allegedly used. The evidence of Sheila was also consistent with the evidence of Dr Macharia who confirmed that the deceased died as a result of a cervical cord transection with extensive bleeding due to a sharp force trauma to the neck. We therefore have no reason to believe that Sheila was not a truthful witness, as what she stated was substantially corroborated. We find that her evidence was truthful and reliable.

[19] In the absence of any eye witness the evidence implicating the appellant was circumstantial. In *Judith Achieng' Ochieng' v Republic* [2009] eKLR; this court stated as follows regarding circumstantial evidence:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

[20] Similarly, in *Omar Chimera v Republic Cr. A. No. 56 of 1998* the Court held that:

"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – *TEPER V THE QUEEN* [1952] AC 480 at page 489].

"Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge."

[21] We have considered whether the inculpatory facts as above stated point irresistibly to the appellant and no other person having cut the deceased with a panga and thereby caused his death. We are satisfied that the appellant was present at the scene; that he had an altercation with the deceased; and that he thereafter reported having killed the deceased and handed over the weapon used to the police. These facts point irresistibly to the appellant having caused the death of the deceased.

[22] It was incumbent upon the prosecution to prove that the appellant caused the death of the deceased with malice aforethought. 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.

[23] As the learned Judge of the High Court noted the appellant was armed and combative when he arrived at Sheila's house. Sheila was his girlfriend and he was therefore angered by the presence of the deceased in the house. There was no evidence of any provocative conduct on the part of the deceased, nor was there any thing that would justify the conclusion that the appellant's crime was a crime of passion. We find that the appellant deliberately went to Sheila's house armed with a panga and ready to harm, and that he knew or ought to have known that his action would cause death or grievous harm, but did not care. Malice aforethought can therefore be inferred under section 206 (a) & (b) of the Penal Code.

[24] We therefore come to the conclusion that the offence of murder was proved against the appellant beyond reasonable doubt and that the appellant's conviction was proper.

[25] With regard to the sentence, in *Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015*, (Muruatetu's case), the Supreme Court 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...”

[26] Similarly in the case of ***William Okungu Kittiny v Republic 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 and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts. Therefore, this court has jurisdiction in appropriate cases to order a sentence re-hearing or pass any appropriate sentence that the High court could have lawfully passed.

[27] We are alive to the fact that the Supreme Court did not outlaw death sentence but only rendered invalid the mandatory aspect of the sentence. In sentencing the appellant to death, the trial judge did not exercise her judicial discretion as she considered her hands tied by the mandatory death sentence provided under section 204 of the Penal Code. That position is no longer obtaining. In the circumstances of this case, although the appellant was responsible for the death of the deceased, the death sentence was not warranted. We do not deem it necessary to order a sentence re-hearing as the appellant has already been in custody for 10 years. In our view a reasonable term of imprisonment would serve the interest of justice.

[28] For the foregoing reasons, we dismiss the appeal against conviction but allow the appeal against sentence. We hereby set aside the sentence of death and substitute thereto a sentence of 20 years imprisonment effective from 30th July 2014, which is the date the appellant was sentenced by the trial court.

Those shall be the Orders of the Court.

Dated and delivered at Eldoret this 25th 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.