IN THE COURT OF APPEAL

AT NAIROBI

(CORAM): MAKHANDIA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 7 OF 2017

BETWEEN

AHMED GOLICHA GALMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi, (Ojwang, J.) dated 1st October 2009,

in

H.C.CR.A No. 25 of 2006)

****

JUDGMENT OF THE COURT

The appellant, Ahmed Golicha Galma, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The information stated that, on the 11th November 2002 at Kiamaiko village within Nairobi area, he murdered ***Galgalo Abduba***, ***the deceased***. He was subsequently tried, convicted and sentenced to death by the High Court.

The appellant was dissatisfied with the High Court's judgment and has brought this appeal on grounds that, the proceedings were flawed and a nullity because the learned judge failed to indicate the language of the court; that the learned judge erred in convicting the appellant on the basis of contradictory and conflicting evidence and also failed to evaluate the entire evidence; that the learned judge did not appreciate that the P3 form specified that there was a struggle between the appellant and the deceased which caused the appellant to suffer injuries; that the court convicted the appellant on the evidence of ***Huka Duba Kosi (PW2 or Huka)*** and ***Abdullahi Diba (PW4 or Abdullahi)*** both of whom lacked credibility, which rendered it insufficient to prove the offence beyond reasonable doubt; that the learned judge failed to find that the appellant's rights were violated when he was not arraigned in court within the stipulated 14 day period as specified by the repealed constitution; that the proceedings were a nullity as the coram of 22nd September 2008 was omitted; that the learned judge failed to find that crucial witnesses were not called to testify and also failed to find that the appellant was 70 years of age and therefore was incapable of committing the offence.

Learned counsel for the appellant, ***Ms. C. Odembo*** submitted that, the appellant was arraigned in court one month after he was arrested which was a violation of his rights; that the proceedings omitted essential elements, for instance, the language of the court was not indicated; the record did not show that an interpreter was made available to him when the plea was taken on 16th March 2006, and on 22nd September 2008 the coram was not recorded, which omissions rendered the proceedings a nullity.

It was further submitted that essential witnesses, including, one Baba Karanja and persons from the slaughterhouse were not called to testify. With regard to the evidence that the deceased was stabbed twice, counsel asserted that this was inconsistent with the pathologist's report which indicated that only one stab wound was evident; that the learned judge did not appreciate that the appellant's injuries were the result of a fight between the appellant and the deceased.

Counsel complained that the trial court did not take into account ***Stephen Matinde Joel Weibe, (PW7)*** the Government Analyst's report, that showed there were no blood stains on the appellant's shirt and therefore he could not have been responsible for stabbing the deceased; that Stephen Weibe and Dr. Janet Wasike Simiyu's (P.W.8) evidence were contradictory on the colour of the appellant's shirt.

Counsel concluded by urging us to substitute the appellant's sentence with one of imprisonment as prescribed by Supreme Court in the in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**.

Ms. Wanjelo, learned counsel for the state opposed the appeal. Counsel submitted that the contradictions referred to were not material; that the conviction was based on direct evidence; that PW2 and PW4 were both present when the offence was committed, and they saw the appellant pull out a Somali sword and stab the deceased, and thereafter handed himself over to the police, together with the murder weapon; that PW2 followed him to the police station, and did not at any time loose sight of him. As to whether he was stabbed once or twice, counsel submitted that this was not material, as the evidence was clear that a stab wound killed the deceased.

Turning to the contention that critical witnesses were not called, counsel asserted that the only persons who witnessed the incident were called to testify; that one, Baba Karanja merely informed the deceased's mother of the occurrence, but did not witness the murder. Further, the incident occurred in a market place and not the slaughterhouse, and therefore persons from the slaughter house were not necessary witnesses. With regard to testing of the sword for fingerprints, counsel stated that since several persons had subsequently handled it, testing for fingerprints would have been an exercise in futility. With respect to the pre trial violation of his rights, counsel stated that this was not fatal to the prosecution's case.

This is a first appeal, and on the authority of the case of ***Okeno vs Republic [1972] EA. 32*** among other authorities on the issue, this Court is under an obligation to reconsider the evidence, re-evaluate it and come to its own independent conclusions having regard to the conclusions and findings reached by the trial court. In doing so, this Court must bear in mind that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify. See also ***James Ngugi Njoka vs Republic Court of Appeal Criminal Appeal No. 315 of 2006.***

We have considered the evidence and the parties' submissions and in our view, the issues for determination are:

i) whether the appellant's rights were violated when he was not arraigned in court within the stipulated 14 days as per the repealed constitution;

ii) whether the trial judge's failure to record the language and coram of the court rendered the proceedings a nullity;

iii) whether the learned judge failed to find that essential witnesses were not called to testify;

iv) whether the appellant was convicted on the basis of contradictory and conflicting evidence;

v) whether the learned judge failed to appreciate that the P3 form specified that there was a struggle between the appellant and the deceased, and also failed to find that the appellant was 70 years of age and was therefore incapable of committing the offence;

vi) whether PW2 and PW4's evidence lacked credibility, thereby rendering it insufficient to prove beyond reasonable doubt that the appellant was responsible for the deceased's death; and

vii) whether the trial court failed to evaluate the entire evidence.

We begin with whether the appellant's rights were violated when he was not arraigned in court within the stipulated 14 days.

In addressing this issue the trial judge was satisfied with the prosecution's explanation that certain vital procedures required to be completed before the appellant was arraigned in court.

Section 72 (3) (b) of the repealed Constitution stipulates:

(3) A person who is arrested or detained-

(b) "Upon reasonable suspicion of his having committed or being about to commit, a criminal offence;

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he not brought to before court within twenty four hours of his arrest or from the commencement of his detention; or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable of suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging the provisions of this subsection have been complied with."

Clearly from the above, the provision only made it a requirement for the prosecution to explain and to discharge the burden of proving that the accused ***"…has been brought before a court as soon as is reasonably practicable…"*** where there has been a delay in presenting him or her in court.

According to the record, the prosecution conceded that there was a two-week delay. It was explained that the delay was occasioned by ***Corporal Kizito Lisutsa's (PW 9)*** inability to locate the witnesses as they were afraid to testify; that for instance, the incident had scared Fatuma to the extent that she had immediately after the incident relocated to a relative's place in Ruiru. In addition, Dr. Kamau had scheduled the appellant's medical examination for 9th December 2002, and following its completion, the appellant was arraigned in Court on 10th December 2002; it was explained that it would have been inexpedient for the appellant to have been arraigned in Court without the P3 form, which only the Police Surgeon could prepare.

From the above, the prosecution provided an explanation for the delay as was required by ***section 72(3) (b)*** of the retired constitution, which explanation the trial court accepted. We too find the reasons provided to be satisfactory having regard to the circumstances of the case.

But this notwithstanding, we would point out that this Court has stated variously that a delay in bringing an accused person to court does not give rise to an automatic acquittal, but a claim for damages. See the case of ***Julius Kamau Mbugua vs Republic Criminal Appeal No. 50 of 2008***. As such, this ground fails.

As to whether the trial judge's failure to record the language of the court interpreter rendered the proceedings a nullity, we have considered the record and find that, though the record does not show whether an interpreter was present when the plea was taken on 16th March 2006, the record clearly shows that Muga Apondi, J. who took the plea stated that;

> ***"Information read out and every element explained to the accused who pleads.***
>
> ***"NOT GUILTY" ."***

The plea having been explained to the appellant and his having pleaded in the way that he did, signified that he understood the nature of the charge that he was facing, and therefore the failure of the record to show that there was an interpreter in court when plea was taken did not render the proceedings a nullity. We discern no prejudice or injustice was occasioned. The story would perhaps have been different had he pleaded guilty.

In addition to the above, for the most part, the record shows that the language of the court was "Kiswahili", and save for the evidence of Fatuma, where the language was not specified, it is recorded that the other witnesses either testified in Kiswahili or there was English/Kiswahili interpretation. Since it is observed, that the appellant was represented by counsel, who did not object to the manner of conduct of the proceedings, it can be concluded that Fatuma's evidence was in a language that the appellant understood.

On the allegation that the coram on 22nd September was not recorded, the record shows that on that day the coram comprised of Ojwang, J. who was presiding, Mr. Huka was the court clerk, Mr. Keengwe appeared for the appellant and Ms. Mwanza appeared for the State. Given our findings, this ground fails too.

As to whether the trial court failed to call crucial witnesses, the appellant's case is that one Baba Karanja and a person or persons from the slaughter house ought to have been called to testify. ***Ms. Wanjelo's*** response to this is that, only those persons who witnessed the incident needed to testify. We would agree. Since, there is no evidence to show that Baba Karanja or any person from the slaughterhouse saw the appellant stab the deceased, we find that these persons were not crucial witnesses and would not have provided any additional evidence in support of the prosecution's case. In any event, it was the prosecution's prerogative to call such witnesses as were deemed necessary to prove its case. Accordingly this ground lacks merit.

Turning to the issue that the prosecution witnesses' evidence was riddled with contradictions and conflicting evidence, in that, PW2's and PW4's evidence specified that the deceased was stabbed twice, which was inconsistent with the pathologist's report which indicated that there was one stab wound. The evidence is clear that the deceased was stabbed twice in the same place; hence the appearance of one stab wound which Dr. Simiyu concluded was the cause of death. Based on this, we find no discrepancy in the evidence. Regarding the question on whether or not there were blood stains on the appellant's shirt, and the differing evidence of its colours, our view is that the discrepancies are minor, and nothing turns on them. This ground is therefore rejected.

Concerning the complaint that the learned judge failed to find that the appellant was 70 years of age and was therefore incapable of committing the offence, we have reviewed the evidence, and find nothing to support this presumption. In any event, we are not aware of the injunction that people of 70 years cannot commit an offence. In sum, these complaints also fail.

Next we turn to the issue of whether the evidence of Huka and Adullahi lacked credibility, and whether their evidence proved beyond reasonable doubt that the appellant murdered the deceased. In this regard, the learned judge had this to say;

> ***"The Court did not perceive anything in the demeanor of the prosecution witnesses showing them to be untruthful witnesses."***

A re-evaluation of the evidence does not disclose any material that undermines the credibility of PW2's and PW4's evidence. And since the learned judge who saw and heard the witnesses and found them to be candid and truthful, we, who did not hear their testimony, are enjoined to rely on the learned judge's conclusions in this respect, to reach a finding that they were credible witnesses. (see ***Mwangi vs Republic [2004] 2 KLR 28).***

Having so found, the next question for determination is whether the evidence proved beyond reasonable doubt that the appellant killed the deceased. To arrive at a finding on this, a re-evaluation of the evidence would be essential.

Fatuma Sora PW1 (Fatuma) was selling miraa at her shop in the plot called— Takwa at Kiamaiko when at about 3 p.m on the 11th November the deceased who was passing by stopped to greet her. A few minutes later she heard shouts and screams that, "*Golicha ameuwa Galgalo"*, (Golicha has killed Galgalo). She was shocked because she had spoken to Galgalo just a few minutes earlier, and suddenly he was dead. On cross examination she testified that she had not seen Golicha killing Galgalo.

Huka**,** a goat trader had brought some goats to sell at the Kiamaiko market, and whilst sitting in front of the Mwangaza slaughter house, he saw Galgalo stop to greet Fatuma. At that moment, the appellant whom he knew passed by him without speaking. He went directly to Galgalo, pulled out a Somali sword from his belt, and holding it in his right hand, *"…sank it into the rib of Galgalo"*. Galgalo tried to run but

collapsed near the Mwangaza slaughterhouse after which, the appellant turned away and went to the police station still holding the bloody knife. Huka went over to Galgalo to see if he was still alive, and finding that he was dead, ran together with other members of the public, to report the incident at the nearby Police post. When cross examined, he said that the appellant had stabbed Galgalo twice; that he stabbed him, pulled out the knife and stabbed him again.

Abdullahi a meat supplier was going to a butchery at Kiamaiko market at about 3.45 p.m. He too saw Galgalo talking to Fatuma. He saw the appellant go up to the deceased and stab him in the right chest. The deceased tried to run away, but the appellant followed him and stabbed him again, this time close to the first stab wound. Thereafter, Abdullahi saw the appellant turn and walk away towards the Police Station. On cross examination, he repeated that the appellant had stabbed the deceased with a Somali sword twice in his lower chest; that the sword was in a polished red sheath that was held by the appellant's belt on his right waist, and was hidden away under the appellant's clothes.

Dr. Zephania Mwangi Kamau (PW5), the Police Surgeon assessed the appellant's mental status and injuries on 9th December 2002. The examination revealed tenderness in the left abdomen, and a broken right thumb nail which the appellant informed him had resulted from a struggle he had with the deceased; that the injuries seemed to have been caused by sharp and blunt objects had not been treated. Dr. Kamau categorized the injuries as "harm". He nevertheless found the appellant's mental status to be sound.

On 11th November, 2002 at 3.30 p.m ***Police Constable Henry Luvusi, (PW6***), who was on crime duties at Ruaraka Police Post was instructed by the OCPD, to proceed to Kiamaiko from where a report had been received that a person had been stabbed to death. He was instructed to preserve the *locus in quo*, and to protect the deceased's body until the scenes of crime officers arrived to take photographs. PC Luvusi was informed that the suspect involved in the stabbing incident had gone to the police post, and was already in custody. He later took the deceased's body which had a stab wound on the right side of the ribs for preservation at the City mortuary.

Stephen Matinde Joel Weibe, of the Government Chemist produced a report prepared by Government Analyst, Jeremiah Kavita Munguti. The report was in respect of tests on: (i) The blood sample taken from the deceased, (ii) the blood sample taken from the appellant; (iii) the appellant's long-sleeved shirt, grey with white stripes; and (iv) the Somali sword produced in Court, and it's findings were that; (a) the two samples of blood were of Group "O"; (b) the knife was stained with blood Group "O" blood, of a human being; (c) no blood was found on the shirt.

Dr. Simiyu, a pathologist from the National Public Health Laboratories conducted the post-mortem examination on the deceased's body on 14th November, 2002. The external examination revealed a body of a 22 year old African male, of good nutritional status, and 162 cm in length, showed a bloodstain on a white-flowered jacket, and on an orange and-cream striped T-shirt both of which had a tear on the right side. The body had a penetrating wound in the right lateral anterior chest-wall, in the 3rd intercostal space, measuring four centimetres in length. Since, the deceased was a Muslim, and Islamic practice did not allow the body to be cut so that the internal organs can be examined, Dr. Simiyu, concluded on the basis of her external examination that the cause of death was a penetrating chest injury caused by a sharp object.

Corporal Kizito Lisutsa, (PW9) was an officer on crime duty at Ruaraka Police Post. On 12th November, 2002, he investigated the circumstances leading to the death of the deceased. He testified that the appellant was in custody, and that the knife surrendered at the police station was handed over to him. He prepared the exhibits form comprising the blood stained knife which he dispatched to the Government Chemist. He testified that he had not taken the knife for finger printing because the handle was oily and rough, and fingerprints are only lifted from smooth, and not oily surfaces.

In his unsworn defence, the appellant stated that at about 2. 00 p.m. he left Jamia Mosque and arrived at Kiamaiko at about 3.20 p.m. As he was walking towards the market, he saw three people whom he did not know standing in front of him. As he attempted to pass between them, they held him and took his jacket. He immediately went to the Police station to report the incident. He denied killing the deceased or having any reason for doing so. He also denied carrying a Somali sword.

So did the prosecution prove beyond reasonable doubt that the appellant murdered the deceased? In the instant case, it should be pointed out that though the trial court found that the prosecution had made out a 'cast- iron case", and observed that, the stabbing, the appellant's attitude and, the intensity of the stabbing, resulted in the death of the deceased, it did not determine whether the requisite ingredients of murder were present so that it could be safely concluded that the prosecution's case was proved beyond reasonable doubt. We must therefore reevaluate the facts and arrive at our own independent conclusion that the offence was proved to the required standard.

Section 203 of the ***Penal Code*** sets out the necessary ingredients for proof of the offence of murder. It provides;

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".***

In other words for the court to reach a finding of murder the prosecution must prove beyond reasonable doubt—the fact of death, as well as the cause of death of the deceased; that the deceased's death was due to an unlawful act or omission on the accused's part, in other words, the presence of both the act of murder: *actus reus*; and commission of the unlawful act or omission with malice aforethought, the intent or *mens rea* of the offence must be present. (See ***Nyambura & Others vs Republic [2001] KLR 355***).

Section 206 of the ***Penal Code*** defines malice aforethought thus;

> ***"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. ....."

It is not disputed that, both PW2 and PW4 were first hand eyewitnesses to the murder of the deceased. They saw the appellant stab the deceased twice in his right side with a Somali sword. Their evidence was corroborated by the postmortem report which identified a penetrating chest injury on the deceased's right side as the cause of death. The report concluded that a sharp object, which, in the circumstances of the case, would have been the Somali sword, was the cause of the fatal injury, thus satisfying the requirement of actual death having occurred.

The appellant's intention to kill the deceased was discernable from the deliberate manner in which he walked up to the deceased, and according to PW2 "…*stabbed, pulled out the knife, and stabbed again";* and when the deceased tried to run away, according to PW4, the appellant followed him and stabbed him again. No doubt, it was this vicious stabbing that led to the deceased's death, which coupled with the appellant's unconcealed intent to kill him satisfied the intent to kill. With the fulfillment of the two requirements, it is unassailable that the offence of murder was proved beyond reasonable doubt and more particularly, that it was the appellant who murdered the deceased.

But that said, the appellant has argued that the learned judge disregarded the evidence in the P3 form that the appellant had sustained injuries occasioned by an earlier struggle with the deceased. Addressing this issue, the learned judge had this to say:

"While in his defence the accused said that he had nothing belonging to the deceased, and he had no reason to kill the deceased, what he (accused) told Dr. Zephania Mwangi Kamau (PW5) was different; that he had been in a physical struggle with the deceased – and PW5 found a tenderness in the accused's abdomen, and a broken right – thumb nail which he (the doctor) classified as "harm."

It is not therefore true that there was no grudge between the accused and the deceased; and the accused had a motive to avenge the harm occasioned to him on another occasion, by the deceased."

Clearly, the evidence concerning a struggle was not overlooked, and after considering it, the learned judge formed the opinion that it could have been the genesis of a grudge that led to the appellant to stab the deceased on the material day; which lent further credence to an innate intention to kill the deceased. In the circumstances, we are satisfied that the learned judge rightly found that the prosecution had proved its case to the required standard and therefore this ground fails.

The final issue is concerned with whether the trial court evaluated the evidence. It is apparent from an analysis of the judgment that the learned judge succinctly evaluated the evidence thus;

"… from the evidence, it is about that time, 3.20 p.m, that the stabbing of the deceased took place; PW2 said the accused passed him and bent to pull out a sword from his clothing, and "sank it into the rib of *Galgalo* ***[the deceased]"; by PW2's evidence, the accused "ran away with the bloodied knife [and] went directly to the Police station"; PW2 was one of the witnesses who gave chase up to the Police station; PW 2 was clear, that the suspect went up to the Police station all by himself; PW 2 identified the double-aged sword which he had seen being used by the accused at the*** *locus in quo*, ***PW2 described the manner in which the deceased had been stabbed; "He stabbed, pulled out the knife, and stabbed again";*** *Abdullahi Diba* ***(PW4) saw the accused stab the deceased on the*** *right* ***part of the chest, at the material time; the deceased attempted to escape after the first stab, but the accused followed closely and stabbed him again "close to the spot he had first stabbed"; PW 4 said the accused went towards the Police Post, following the stabbing;*** *Corporal Kizito Lisutsa* ***(PW9) testified that the sword recovered from the accused at the Police Post was*** *blood stained, Stephen Matinde Joel Weibe* ***(PW 7) of Government Chemist, testified that the said Somali sword was found stained with blood Group "O"***

– which was the common blood group of both accused and deceased." The trial court added;

"There is agreement among the key witnesses (especially PW 2 and PW 4) as to the part of the deceased's body that was penetrated by the Somali sword; and this is further corroborated by Dr. Jane Wasike Simiyu (PW 8) who examined the deceased's white flowered jacket, and orange and cream T-shirt, each with a tear on the *right* ***side. She found that the deceased's body had a penetrating wound in the*** *right* ***lateral anterior chest-wall."***

And as is required of us, we too have subjected the evidence to a reevaluation and reached the same conclusion. As such, this ground is without merit and also fails.

In sum, and having regard to our conclusions above, it is manifest that the appeal on conviction is unmerited, and is hereby dismissed.

This leaves the issue of the death sentence imposed by the trial court, which counsel for the appellant has urged us to review for the purposes of resentencing the appellant in accordance with the principles set out by the Supreme Court in the ***Muruatetu case*** ***(supra)*** which found the mandatory nature of the death penalty to be unconstitutional.

In view of the decision in the ***Muruatetu case*** ***(supra)***, we would set aside the death sentence imposed and substitute it therefore with a term of imprisonment. Since the record does not disclose that the appellant was provided with an opportunity to mitigate, we remit the case to the High Court for mitigation and determination of the appropriate sentence. To that limited extent, the appeal on sentence succeeds.

It is so ordered.

Dated and delivered at Nairobi this 6th day of August, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR