



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 93 OF 2016

BETWEEN

MRAMBA MASHA TSORA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (C.W. Meoli, J.) delivered on 17th February, 2012

in

CR.C. No. 9 of 2012)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court delivered at Malindi on 17th February, 2012. It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld – **Okeno v Republic [1972] E.A. 32.**

In the information presented before the trial court the appellant, **Mramba Masha Tsora**, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

Particulars of the offence were that on the 16th December, 2006 at Madeteni in the then Kilifi District he murdered **Charo Tsofa Mwarago**.

The prosecution called 9 witnesses in support of its case. The substance of the evidence was that on the said 16th December, 2006 **Charo Tsofa Mwarago** (hereinafter “**the deceased**”) was in his house when at about 8 p.m. he was viciously attacked with a panga and sustained injuries that led to his death.

Maitha Charo Tsofa (Maitha) (PW2) testified that he knew the appellant very well as he was his relative and neighbour who he had known since childhood. The deceased was the father to the witness. He (Maitha) arrived home on the said day at the said time and found the deceased holding consultations with **Kenga Mramba (Kenga) (PW5)** and **Sifa Kahindi Kaingu (Sifa) (PW7)** about sale of a parcel of land. The two visitors, namely PW5 and PW7, left and the deceased and Maitha sat conversing about the meeting that had just taken place between the deceased and the said two visitors. The deceased informed the witness (Maitha) that there were allegations about witchcraft where Kenga's mother had been bewitched. The deceased had informed Sifa's mother about those allegations which had upset her very much. As the deceased was briefing Maitha, the appellant suddenly emerged from the kitchen holding something which turned out to be a panga. The appellant came to where the deceased was and started cutting him on the head with the panga. Maitha confronted the appellant which made the appellant take off but in the process the deceased had fallen off the chair. Maitha ran after the appellant but when he got outside the house he got injured on the side of the head by a person he did not see as it was dark outside. Upon being injured he ran back to the house and the whole commotion had attracted neighbours and they all proceeded to take the deceased to hospital where he was pronounced dead on arrival.

According to Maitha, his two children Kitsao Maitha (Kitsao)(PW3) and Karisa Maitha (Karisa) (PW4) were present when the attack took place.

In cross-examination it was Maitha's testimony that although it was dark outside the house there was light where the deceased sat and he properly identified the appellant who although had wrapped a cloth on his head to disguise his identity had not covered his face. On the light

available in the house it was the witness evidence that the lamp in the room was a tin lamp, a kind used by fishermen and that it illuminated the room very well. According to the witness the appellant had a long standing grudge with the deceased and each time he passed by their home when drunk the appellant would shout that the deceased was a witch which matter had been reported to the area chief.

Kitsao Maitha (PW3) a grandson of the deceased and a son of Maitha was in the room when the appellant suddenly appeared and attacked the deceased. According to him there was a lamp in the room and he could see the appellant, a person he knew before, very well. After the attack he witnessed his father Maitha run after the appellant and come back with an injury on the head. He was involved in alerting neighbours who came to take the deceased to hospital. According to this witness although the appellant had covered his head with a cloth he had not covered or concealed his face.

Karisa Maitha (PW4) also a grandson of the deceased was in the room when he observed the appellant emerge suddenly and attack the deceased.

Kenga Mramba Masha (Kenga) (PW5) had visited the deceased on that day and they held discussions about the possibility of buying land. A few minutes after he left the home of the deceased he heard screams and when he rushed back he found the deceased lying on the floor of the house with cut wounds on the head. He was told by Maitha that it was the appellant who had attacked the deceased. He helped in taking the deceased to hospital.

According to **Dama Charo Tsofa (Dama) (PW6)**, stepmother of the appellant, the appellant used to come home and insult the deceased calling him a witch. As this went on several times the witness implored her husband to report the matter to authorities. According to this witness the appellant and the deceased were not on talking terms by the time her husband was killed and that at one time when a person died in the village the appellant came home and told the deceased **“I want to kill you one day”**. This witness ended her testimony by stating that according to the customs of the Giriama people calling a person a witch would be tantamount to issuing a death sentence as the Giriama were known to kill witches.

Sifa Kahindi Kaingu (Kaindi PW7), an uncle of the appellant, on hearing screams on the fateful day rushed to the home of the deceased and found the deceased injured. Maitha informed him that it was the appellant who had attacked the deceased. He had overhead allegations made against the deceased on issues of witchcraft but when he tried to discuss the matter with the deceased the deceased declined to have the discussion saying he required witnesses to be present.

Dr. Charles Mwangombe (PW8) a psychiatrist testified that he had examined the appellant and found that he was fit to take a plea and participate in the trial.

No. 71135 PC Abaire Yusuf (PW9) of Sotik Police Station had previously worked at Kilifi Police Station where on 23rd December, 2006 the appellant was brought to the police station under arrest. He re-arrested him and after placing him in the cells he commenced investigations. This revealed that the deceased had been viciously attacked and had died. He drew a sketch plan of the deceased's home and surroundings and recorded statements from witnesses. He charged the appellant with the offence of murder.

Dr. Faiza Nasir (PW1), a Medical Officer at Kilifi District Hospital performed postmortem on the body of the deceased on 21st December, 2006 at the said hospital. He found multiple cut wounds on the head and deep cut wounds on the occipital temporal region which had led to the brain tissue being exposed. There was a fracture of the scalp also exposing the brain. He concluded that the cause of death was cardiac respiratory arrest due to intra-cerebral bleeding. He produced postmortem report into the evidence.

That was the case made out by the prosecution and upon the trial court complying with the provisions of **section 306** of the **Criminal Procedure Code** the appellant chose to give an unsworn statement where he stated amongst other things that he was a stone mason and also a palm wine tapper. He denied the charges. According to him on 16th December, 2005 he left home as usual and went to curve stones at the quarry. He sold stones upto about 2 p.m. when he went to a wine den called “Mangwe” and proceeded to enjoy his drinks and later his brother Charo joined them. He left for home at about 7.30 p.m. and on reaching home he found his brother Charo and his in law the deceased. But because he was drunk he decided to go to bed. His wife woke him up at about midnight and they had a discussion about money and she also informed him about the attack on the deceased. He was shocked but because he was tired and drunk he slept on till morning. In the morning he learned that the deceased had been attacked and he assisted in funeral arrangements. He was later summoned by police and arrested. He denied killing the deceased.

The trial court evaluated the prosecution evidence and considered the defence offered by the appellant, but finding that the defence had been displaced by strong prosecution evidence convicted and sentenced the appellant to death. Those are the findings that provoked this appeal which is premised on a supplementary memorandum of appeal drawn by the appellant's lawyer **Okoth Duncan Odera** and filed in court on 23rd May, 2019 where 6 grounds of appeal are set out. The learned trial judge is faulted for convicting the appellant when she did not think that there was opportunity or sufficient light for PW2 and PW3 to positively identify the appellant. It is also said that the judge erred in convicting the appellant on the basis of motive and suspicion which cannot be the basis of a conviction. It is also said that the prosecution did not call some witnesses like police officers who arrested the appellant or tender evidence on how and why the appellant was arrested, and that the judge erred in failing to find that had the said witnesses been called to testify their evidence would have been adverse to the prosecution case. It is also stated that the judge erred in not finding that the alibi offered by the appellant had displaced the prosecution case on identification. In the penultimate ground the judge is said to have erred by shifting the burden of proof and finally that the judge wrongly exercised her discretion in sentencing the appellant to suffer death on the basis that the sentence was mandatory.

The appeal came up for hearing before us on 28th May, 2019 when learned counsel **Mr. Okoth Duncan Odera** appeared for the appellant and learned prosecution counsel **Mr. J. Isaboke** appeared for the Republic. According to Mr. Odera the circumstances for positive identification were lacking; nature of light for purposes of identification had not been properly stated; the size of the lamp and the intensity of illumination had not been stated; and according to counsel the light in the room was not bright enough to illuminate the room for purposes of

positive identification. In further submissions it was counsel's view that there was contradiction on what the appellant was said to have been

wearing on the head. He cited the case of **Maitanyi v Republic [1986] eKLR** which case discussed the issue of positive identification before a conviction could be entered. On the sentence imposed counsel cited the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and submitted that it was wrong for the trial court to impose the death sentence as a mandatory sentence. Counsel submitted finally that the appellant's unsworn defence statement had not been considered which the trial court was enjoined to consider.

In opposing the appeal Mr. Isaboke agreed with counsel for the appellant that identification was the main issue in the appeal. According to counsel for the Republic various witnesses particularly PW2, PW3 and PW4 had witnessed the attack as it took place. The witnesses had testified that they observed the appellant, a person known and related to them, attack the deceased. According to counsel the room where the attack took place was sufficiently illuminated by a lamp which was next to the deceased and the said witnesses were next to the deceased. Counsel submitted further that there was evidence that although the appellant had covered his head he had not covered or concealed his face. On the issue of sentence Mr. Isaboke submitted that a life was lost of a relative, the appellant had planned the attack, he had quarreled with the deceased many times and in line with the **Francis Karioko Muruatetu (supra)** case counsel urged us to substitute the death sentence with a sentence of 40 years imprisonment.

In a brief reply Mr. Odera urged us, should we dismiss the appeal on conviction, to consider a sentence for the period already served, which he stated to be 12 years.

We have considered the record of appeal and the submissions made and this is our view and disposition of this appeal.

We agree with both counsel that the main issue is in regard to identification.

It has been held many times by this Court that visual identification of an accused in criminal cases can bring about miscarriage of justice and there is a need for the trial court to warn itself of the special need for caution before convicting an accused based on evidence of visual identification. The court must examine closely the circumstances in which identification by each witness took place before coming to a conclusion and convicting an accused person. There is a long line of cases on this issue. In the case of **Wamunga v R [1989] KLR 424** this Court while dealing with the complexities of an identification of an assailant had this to say:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

The following passage appears in the case of **Boniface Okeyo v Republic [2001] eKLR**:

“As we stated earlier evidence on identification must be considered with circumspection. All conditions of identification must be subjected to careful analysis in order to assess whether identification is free from possibility of error ...”

We have in this appeal gone through the evidence presented by the prosecution. Maitha (PW2), his son Kitsao (PW3) and his other son Karisa (PW4) were in the room when the attack took place. They all testified that there was a lamp which was burning in the room and it was next to the deceased and that it was bright enough to illuminate the room. Maitha was sitting next to the deceased and was being briefed on a visit that had just taken place. All these witnesses were related to the appellant and they saw him enter the room and attack the deceased unprovoked. Although the appellant had covered part of his head with a cloth he had not concealed his face and was easily recognized by the said witnesses. Maitha told the other prosecution witnesses who came in answer to the screams by the deceased that it was the appellant who had attacked the deceased. Maitha chased after the appellant trying to apprehend him but he was himself attacked outside their house by a person unknown to him and could not continue with the chase. The trial court on the issue of identification found:

“I think it would be unreasonable to say that a koloboi lamp, even a small one cannot throw light at a distance of 1-2 metres in a room. To suggest so would mean that such a lamp had actually no value. Yet that is the same light in which PW5 and PW7 were able to later view the body of the deceased and converse with PW2 when they returned to the home after the attack.

It is not possible that the assailant struck the deceased from a distance of 6 or 10 metres, which was suggested in cross examination of PW5 and PW7. He had to come close, and in so doing got close enough to the witnesses range of view.”

The trial judge found that circumstances obtaining at the time of the attack created an opportunity and sufficient light for PW2 and PW3 to see the assailant and identify him positively.

We too are of the same view.

There was sufficient evidence that the lamp illuminated the room properly and PW2, PW3 and PW4 were able to see and identify the appellant when he entered the room and attacked the deceased. We are also in agreement with the trial judge on the evidence tendered by the witnesses that the appellant had often insulted the deceased calling him a witch which was a serious allegation among the Giriama people who, the court was told, killed people suspected of being witches. The appellant had even been heard by the deceased's wife PW6 threaten the appellant that he would kill him one day. Identification of the appellant was positive and there is no merit in the ground of appeal in respect of identification.

The appellant says that the learned trial judge erred in failing to consider his defence. We have summarized the defence which was to the effect that the appellant had on the material day gone about his usual chores at the end of which he went drinking and finally retired to bed.

The prosecution evidence particularly through PW2, PW3 and PW4 was forthright and direct. They all witnessed the appellant enter their house and attack the deceased. The trial judge found that identification evidence adduced by the prosecution was of such weight that it had displaced the alibi offered by the appellant. We agree. The appellant was well known to the deceased and the evidence they gave left no room for error on the way the appellant attacked the deceased.

The side issue raised by the appellant that some witnesses were not called can be dealt with easily. It is true that the prosecution is required to call witnesses to support its case to the required standard. This has been the position taken by this Court and counterpart courts for many years. For example in the case of **Bukenya & Others v Uganda [1972] E.A. 549** the following holding was made on the issue of the number of witnesses required to be called to prove a charge:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

Before the trial court the prosecution availed witnesses who were present at the scene of crime either at the time the crime took place or those who attended the scene after the deceased had been attacked. The prosecution also called the investigations officer **PC Abaire Yusuf** who re-arrested the appellant and carried out investigations. Doctors were called to confirm the state of mind of the appellant and the cause of death of the deceased. We cannot on the record see that any necessary witness was not called by the prosecution. There is no merit in that complaint which is dismissed.

Counsel for the appellant urged us, should we not find merit in the appeal on conviction, to interfere with the findings of the learned judge on the issue of sentence. Mr. Isaboke, for the respondent, called for a deterrent sentence considering the circumstances of the case before the trial court. The record shows that when it came to sentencing, the State Counsel informed the trial judge that the appellant was a first offender. Counsel for the appellant did not offer any mitigation and the judge issued the following sentence:

“The accused to suffer death in manner authorized by law ...”

That was on 26th March, 2012.

The Penal Code by **Section 203** as read with **Section 204** provides in mandatory terms that a person convicted of murder shall be sentenced to death.

The Supreme Court of Kenya was asked in the **Francis Muruatetu** (*supra*) case to pronounce itself on the constitutionality of the said provision that required a trial court, upon convicting of murder, to impose the death sentence as a mandatory requirement. The Court found that to be unconstitutional laying the correct position in law to be:

“(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50(1) and (2) (q) of the Constitution.”

In the end the mandatory nature of the death sentence as provided by **Section 204** of the **Penal Code** was declared unconstitutional. The courts have therefore been freed, upon convicting on a charge of murder, to consider the mitigation offered by an accused person and award an appropriate sentence.

In this appeal counsel for the appellant submits that the appellant be sentenced to the period already served, 12 years. Counsel for the respondent however reminds us that a life of a relative was lost at the hands of the appellant; that the attack was planned; that the appellant had called the deceased a witch many times. Counsel submits that a sentence of 40 years imprisonment would be an appropriate sentence. The circumstances of the attack appear to have been unprovoked. The appellant invaded the privacy of the deceased home armed with a dangerous weapon which he used to attack the deceased inflicting such serious injuries that killed the deceased even before he reached hospital. The attack was planned and that is why the appellant was armed. He attacked the deceased who sat in his house defenceless. We agree with Mr. Isaboke that a deterrent sentence is called for. Considering the circumstances we think that a sentence of 30 years imprisonment is called for in the circumstances of this case.

Our overall finding is that the appeal on conviction is devoid of merit and we dismiss it. The death sentence imposed on the appellant by the trial court is hereby set aside and substituted with a custodial sentence of 30 years imprisonment from the date of conviction.

Dated and delivered at Mombasa this 26th Day of September, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR