IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI. JJ.A)

CRIMINAL APPEAL NO. 123 OF 2016

BETWEEN

ERIC OPIYO AGUNDA.....1ST APPELLANT

JOHN ODHIAMBO OPIYO.....2ND APPELLANT

WILLIAM ODIENGE OTETE.....3RD APPELLANT

ANDREW ODHIAMBO MILAR.....4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Homa Bay, (D. Majanja, J) dated 7th July, 2016

in

HCCRC NO. 47 OF 2013)

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JUDGMENT OF THE COURT

On 8th **July, 2013, the High Court at Homa Bay was informed that Eric Opiyo Agunda, John Odhaimbo Opiyo, William Odienge Otete and Andrew Odhiambo Milar (*"the appellants"*) with others not before court had murdered Michael Odhiambo Akuku alias Apeza contrary to section 203 as** read with **section 204** of the ***Penal Code.*** The particulars of the information were that on 4th June, 2013 at Mirogi Trading Centre, Ndhiwa District within Homa Bay County with others not before court jointly murdered **MICHAEL ODHIAMBO AKUKU alias APESA (**hereinafter, *"the deceased").* The appellants pleaded not guilty to the charge and soon thereafter the hearing of their case ensued.

The prosecution's case was that the deceased was beaten and set ablaze by a mob which included the appellants on suspicion that he had stolen some items namely a motor cycle and a generator. In a bid to prove this narrative, the prosecution called a total of nine witnesses. Through the eyes of these witnesses, the prosecution case unfolded as follows; on the material day, that is 4th June, 2013 **Joseph Matunga Akuku, (PW1)** was in Kisii town when he received a call from his brother, **Vincent Obange Akuku**, (**PW8)** at about 8.30pm informing him that the deceased who was his step brother was being beaten by the boda boda riders at Mirogi trading centre (*"Mirogi").* He called the officer in charge, Mirogi Administration Police Camp and requested him to intervene. He also called Bernard Otieno Gor, (**PW2)** whom he asked to go to the scene and ascertain what was happening. He went to Mirogi the following morning where he met a group of boda boda riders headed for the home of the deceased's brother, Patrick and witnessed them set Patrick's house on fire. He was able to identify the appellants among the group of people at the scene.

PW2 acting on the request made to him by PW1 proceeded to Mirogi bus station at around 9:00pm on the fateful day. He found the deceased being assaulted by several people among them boda boda riders. He was able to identify the 1st and 2nd appellants among them courtesy of street lights. He was at the scene for 10 minutes before the crowd confronted and chased him away. He thereafter stood at a

distance of about 500 metres and witnessed as the deceased was set ablaze. Not done yet the boda boda riders proceeded the following day to burn houses belonging to the deceased's relatives.

Iska Akeyo Odhaimbo, (PW3) was selling fruits at Mirogi on the material day at around 8.00pm when she saw boda boda riders gathering at a boda boda repair shade. One of them came to her and told her to tell her son not to hide the deceased who was her brother-in-law. She was ordered to remove her merchandize and her motorbike as they would be burned. She went to a nearby hotel where her son and the deceased were. The hotel was surrounded by the boda boda riders when she got there. She informed her son as ordered and soon left the hotel with him leaving behind the deceased. On her way she heard screams and went back to Mirogi where she found boda boda riders assaulting the deceased. She was able to identify the appellants among those assaulting the deceased with the help of street lights. The group accused the deceased of being a thief having stolen a motor cycle, generator and television. The 3rd appellant then took a tyre while the 4th appellant poured petrol from a motorcycle which they used to set the deceased ablaze. The 4th appellant lit the matchbox. When she came back the following morning, she found the deceased's body having been mauled by dogs.

Goretti Anyango Nicholas, (PW4), the deceased's sister in-law operates shops at Mirogi and Sori centres. On 5th June, 2013 at about 7.30 her co-wife Anne Ogwela came to her house crying and informed her that the deceased had been killed at Mirogi. She immediately left for Mirogi where she confirmed the death on seeing the body. The body was burned from the legs to the hips. The hips had in fact been mauled by dogs. Police officers came and took away the body. On returning home she found the deceased's house burning and the boda boda riders celebrating.

Benta Atieno Agumba, (PW5), also a shopkeeper at Mirogi at about 5.00pm on the material day was told by one of her neighbours that the deceased had been apprehended by boda boda riders. She went with the neighbour to inform the police to come and rescue the deceased but the officer she found at the police station told her that he could not leave the station since he was alone. When she came back, she found that the deceased had been beaten senseless. At about 10.00pm while she was in her shop she saw the crowd drag the deceased past her shop and the 3rd appellant brought a tyre and set him ablaze.

Rosemary Anyango Ouma, (PW6) was at the fateful day staying at Mirogi.

She heard screams and went outside and saw a crowd of people. The scene was near the roundabout. She heard the deceased who was her in-law lamenting *"why are you killing me"*. She feared going to the scene then. The following morning she went to the scene and found a generator next to the body of the deceased. Part of the body had been mauled by dogs. The body was soon thereafter collected by the police.

Vincent Obange Akuku, (PW8) on the other hand had been with the deceased who was his brother on the material day at around 4:00pm at Mirogi before he left for Kodera Forest. At about 8.00pm, he was called by his sister in-law who told him that the deceased was being assaulted by boda boda riders. When he called the 4th appellant whom he knew to be the chairman of the boda boda riders' association of the area, the 4th appellant informed him that the deceased was suspected of stealing and there was nothing he could do to stop the mob. When he returned the following morning he found the deceased's body by the roadside partially burnt and mauled by dogs. The boda boda riders who included the 1st, 2nd and 3rd appellants threatened to attack him as they celebrated the death of the deceased.

The cause of death was established by Dr Ayoma Ojwang' whose post mortem report was produced by **Dr Nicodemus Odundo**, (**PW7**). **Dr. Ojwan**g had passed on two months earlier. The Doctor noted that the deceased's lower limbs were burnt and flesh eaten by animals. There was a massive haematoma on the left front side of the chest and scalp haemorrhage on the right region. The base of the skull had a fracture. He concluded that the cause of death was head injury.

The investigating officer, **PC Rose Cheptoo, (PW9)** recorded witness statements and established that the deceased was killed by members of the public and boda boda operators from Mirogi after being accused of allegedly stealing a motorbike, generator and television. She was able to arrest the appellants while other suspects were still at large at the time of the hearing of the case.

When put on their defence the 1st appellant in his sworn statement denied any involvement in the deceased's death. Instead he testified that he was at home on the material day when he heard noises. He went to the scene and found a mob assaulting the deceased but did not get involved. The 2nd appellant also in his sworn statement stated that he was walking home from work on that day at around 8.00pm when he was approached by two people and forced to go to the scene under threats of death if he did not oblige. He was dragged, beaten and forced to the ground. He stated that at the scene he saw the 3rd and 4th appellants assault the deceased but denied any involvement. The 3rd appellant also in a sworn statement denied involvement in the deceased's death. His role was limited to participating in the arrest of the deceased on suspicion of theft of a motor cycle and that it was the other members of the public that beat him and not boda boda operators. The 4 th appellant also denied involvement in the deceased's death. Instead he stated that he was called by PW8 who asked him to assist in stopping the mob from killing the deceased. However, he was afraid to do so as he came from the Akuku family, same as the deceased and the angry mob did not want to see any member of the Akuku family. He denied being at the scene.

The learned Judge, **(Majanja, J.)** in his judgment observed that the deceased was severely assaulted by a mob before he was set ablaze. The appellants admitted to being at the scene. They were also identified by different people as they assaulted the deceased. That the 2 nd appellant's testimony was that of an accomplice as he implicated the 3rd and 4th appellants. That the appellants engaged in unlawful acts which ultimately led to the death of the deceased even if such death may not have been intended or anticipated by the appellants. Though there was no evidence of an initial pre-meditated agreement or joint enterprise to kill the deceased, the same was inferred from the mob action of lynching the deceased which the appellants participated. Therefore, death or grievous bodily harm was a probable consequence of the mob's actions in terms of **section 206(a)** of the *Penal Code.* Subsequently, he convicted the appellants and sentenced them to death.

Aggrieved by the conviction and sentence, the appellants filed the present appeal in which they raised two grounds; to wit that the learned Judge erred in law in finding that the case against the appellants was proved beyond reasonable doubt; and secondly, on sentence, the

appellants were seeking refuge in the provisions of Articles 165 (3) (a) (b), 159 (2) (a) (b) and 22 (4) of the Constitution bearing in mind the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (2017) eKLR.**

At the plenary hearing of the appeal, **Mr. Ariho,** learned counsel represented the appellants while **Ms. Lubanga,** learned Prosecution Counsel appeared for the respondent. Both counsel relied on their written submissions and opted not to highlight.

The appellants submitted that *mens rea* was not proved beyond reasonable doubt hence the appellants ought to have been convicted, if anything for the lesser offence of manslaughter and not murder. That the circumstances surrounding the death of the deceased were spontaneous actions with no intention or malice aforethought. There was no pre-meditated intention to kill the deceased and only *actus reus* was proved. They urged us to set aside the conviction and in its place order a conviction for the offence of manslaughter. They further urged us to set aside the death sentence and substitute the same with sentence of 5 years imprisonment.

Opposing the appeal, the respondent submitted that there was sufficient direct evidence linking the appellants to the murder of the deceased. On malice aforethought, it was further submitted that the extent of injuries confirmed by the post mortem report were such that malice aforethought could not be ruled out. It was submitted that the prosecution case was proved beyond reasonable doubt in terms of the standard of proof envisaged under section 107 of the Evidence Act and that common intention under section 21 of the Penal Code aptly applied to the circumstances of the case.

This is a first appeal. The appellants have a legitimate expectation that we shall subject the entire evidence adduced before the trial court to a fresh and exhaustive re-evaluation and analysis and reach our own independent conclusions while bearing in mind that we neither saw nor heard any of the witnesses and give due allowance for the same. This mandate is also encapsulated in rule 29(1) of this Court's Rules which obligates this Court to re-appraise the evidence and draw its own conclusions on the guilt or otherwise of the appellants. **In the case** of **Issac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005** this Court on the issue observed thus:

> ***"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."***

We have considered the record of appeal, the submissions made by counsel and the law. The issues for our determination are whether the prosecution case was proved beyond reasonable doubt; and whether this Court should exercise its discretion and review the sentence imposed on the appellants.

Section 203 of the Penal Code provides *inter alia* that:

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

A closer scrutiny at the section reveals four crucial ingredients of the offence of murder all of which the prosecution must prove beyond a reasonable doubt in order to sustain a conviction. These are; ***the fact of the death of the deceased; the cause of such death; proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; and proof that unlawful act or omission was committed with malice aforethought.***

It is common ground that the deceased was killed. The cause of his death was a head injury he sustained from the beating he received from the mob as well as being burnt. The said death was as a result of the unlawful act of mob justice or is it injustice visited upon him by the appellants and others. The appellants were positively recognized by PW2, PW3, PW5 and even the 4th appellant in his defence. This was because Mirogi where the incident happened was well lit with street lights. This evidence of recognition by these witnesses was unchallenged, nor was it controverted. It has constantly been reiterated by this Court since the case of **Anjononi and others v Republic [1976 – 1980] KLR 1566**; that when it comes to identification; recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or another. Further, all the appellants admitted at being at the scene but denied involvement in the assault and burning of the deceased. The question of mistaken identification therefore does not arise. The fact that all the appellants were at the scene and were identified and or recognized thereat creates no doubt at all that they participated in this macabre incident in one way or another. Of all the crowd present, why were the said witnesses only able to pick on the appellants? Nothing on record suggests that there was any existing grudge between these witnesses and the appellants or any of them that would have precipitated them or anyone of them to testify falsely against them. Indeed, the said witnesses described the role played by each of the appellants in the incident.

As for malice aforethought, the appellants assaulted the deceased, put a tyre around him, doused him with petrol and set him ablaze. These actions alone are sufficient to prove malice aforethought. The appellants intended to cause the deceased grievous harm or death within the meaning of Section 206 of the Penal code which defines malice aforethought as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;***
>
> ***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;***
>
> ***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…"***

In the case of **Nzuki v Republic [1993] KLR 171** this Court held that before an act can be deemed murder it must be aimed at someone and

in addition it must be an act committed with intention, the test of which is always subjective to the actual accused. The Court stated that:

> ***"Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse, it doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."***

From the conduct of the appellants, the fact that they beat up the deceased senseless in the words of PW5, and not satisfied, went further and set him ablaze using a tyre and petrol, it cannot be denied that their intention was to kill the deceased.

We note with approval the learned Judge's finding that though not planned, a common intention was inferred from the conduct of the appellants when they collectively beat the deceased and burnt him alive.

Section 21 of the Penal Code defines common intention in the following terms:-

> **"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 purpose 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."**

This Court in the case of **Dickson Mwangi Munene & another v. Republic [2014] eKLR** stated:-

> "[56] Common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In **Dracaku s/o Afia Vs R [1963] E.A.363** where *"there was no evidence of any agreement formed by the appellants prior to the attack made by each"* it was held that *"that is not necessary if an intention to act in concert can be inferred from their actions"* like *"where a number of persons took part in beating a thief."*

From the evidence on record, the mob which included the appellants were bent on dealing with the deceased. They initially gathered at a motor cycle repair shade, from where they went looking for the deceased whom they suspected to be a thief. When they caught up with him, they went on a rampage assaulting him as they questioned him regarding the theft of a motor cycle, a generator and television. Even though he admitted to the whereabouts of the generator which was soon thereafter recovered and availed to the owner, the appellants and others still went on assaulting the deceased, eventually placing a tyre around him and burning with petrol alive. There can be no doubt that common intention was proved by credible evidence.

As regards sentence, section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death**." The Supreme Court in **Francis Karioko Muruatetu & Another v Republic (2017) eKLR** however stated:

> ***"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…"***

Similarly, in the case of **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013**, this Court took the view that the decision of the Supreme Court in **Muruatetu's case** (supra) had an immediate and binding effect on all other courts though it did not prohibit courts below from ordering sentence re-hearing in any matter pending before those courts. Accordingly, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial court could have lawfully imposed. The appellant's mitigation are on record. Accordingly, it is not necessary to remit the matter to the High Court for re-hearing on sentence. According to the mitigation on record, the appellants were first offenders with families that depended on them. They were said to have children who would suffer were they to be sentenced to custodial sentence. That they so acted due to mob psychology and had not planned to kill the deceased. Considering all the foregoing, we do think that the death sentence imposed was unwarranted though stipulated by law. In the circumstances, a sentence of imprisonment would serve the interests of justice.

For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereof the appellants will serve 25 years imprisonment with effect from 19th July, 2016 when they were initially sentenced.

Dated and delivered at Kisumu this 31st day of October, 2019.

R. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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.