IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, M'INOTI & OTIENO-ODEK. JJ.A)

CRIMINAL APPEAL NO. 73 OF 2015

BETWEEN

CARILUS OMONDI MBOGA .....1ST APPELLANT

ROSEMARY APONDI OMONDI .....2ND APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu,

(E. N. Maina, J) dated 28th May, 2015

in

HCCRC NO. 6 OF 2009)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Kisumu (**E. N. Maina, J.**). On 16th January, 2009 the said court was informed that the appellants, **Carilus Omondi Mboga** and **Rosemary Apondi Omondi** had contrary to section 203 as read with section 204 of the Penal Code on 3rd January, 2009 at Bar Agulu sub-location in Siaya District within Nyanza province murdered **Charles Ouma Onyango, *"the deceased"***. On 28th November, 2009 the appellant pleaded not guilty to the information and soon thereafter their trial ensued. The prosecution called a total of five witnesses in a bid to prove its case against the appellants. The brief facts of the prosecution case were as follows:

Alex Omondi Ouma, (**PW1)** was at home on 3rd January, 2009 at about 12:30pm with his father, the deceased, having lunch. The deceased then excused himself to go and get a bicycle to take him to Asembo. Whilst still in the house, he suddenly heard the deceased shouting that he was being beaten. He rushed out and found the appellants who were husband and wife, and neighbours at that, assaulting the deceased using a panga and a stick. He rushed to call his brother, **Michael Okuku Ouma, (PW2)** and when they came back they found the deceased lying on the ground badly wounded. One eye had been gouged out, one leg broken and the deceased had a cut on the head. He was bleeding profusely.

PW2 on his part stated that on getting to the scene, the deceased told him that *"these people have fractured my leg"*. He called a friend and together they carried the deceased into the house. He then went to fetch his mother, **Anna Akinyi Ouma, (PW3)** who was attending a church function at a nearby school. She came and found the deceased lying on the floor. He could communicate albeit with difficulty. The deceased told her that Asir and his wife had killed him. She identified Asir and his wife as the appellants. She saw a stab injury on the forehead above the eyebrow and his legs were broken. She then took the deceased to Siaya District hospital where he succumbed to the injuries at about 9:00pm while undergoing treatment.

William Ringa Nyaruoth, (**PW4)** identified the body of the deceased for purposes of postmortem. During the postmortem, **Dr. Kachanga Simon, (PW5)** noted that the deceased had severe eye injury, bruises and swelling on the left hand, severely fractured tibia close to the knee and a 3cm long cut on the leg. He concluded that the cause of death was severe bleeding due to cuts on the lower limbs with bilateral fractures.

Put to their defence, the 1st appellant in his unsworn statement denied the offence and stated that on the material day he was at work and only came back late in the evening, ate and went to bed. He had no knowledge of the death of the deceased. The 2nd appellant also in her unsworn statement had a similar story save that on the material day she woke up early and went to Usenge market to buy omena fish for sale. She remained at the local market selling the fish until 7:00pm when she returned home, cooked and went to sleep.

The learned Judge, in her considered judgment noted that PW1 saw the appellants assault the deceased with a panga and stick and was able to recognize them since they were neighbours which fact was confirmed by PW2 and PW3. That evidence regarding the fatal assault of the deceased by the appellants was corroborated further by that of PW5 who concluded during the post mortem that the cause of death was severe bleeding due to cuts on the lower limbs.

Though PW1 was a single identifying witness, it was the learned Judge's view that he positively identified the appellants as the incident occurred in broad daylight. The learned Judge further found PW1 to be truthful as he remained steadfast in his testimony notwithstanding intense cross-examination. It was her further finding that the deceased's dying declaration and PW1's testimony proved beyond reasonable doubt that the appellants were responsible for the death of the deceased. With regard to the appellant's defences, the learned Judge observed that they both purported to raise an alibi but the same could not pass for an alibi as *"they were mentioned in passing and were not raised at the earliest possible opportunity so that they could be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."* Those defences were therefore found to be false. Finally, the learned Judge observed that by slashing the deceased repeatedly with a panga and hitting him with a stick, the appellants clearly had the intent to cause him grievous harm and the nature and severity of the injuries show that their intention was to kill him. The appellants were thus found guilty of the offence of murder, convicted and sentenced to death

Aggrieved by the conviction and sentence, the appellants filed the present appeal in which they raised three grounds to wit; that the learned Judge erred in fact and in law in; convicting and sentencing them when the prosecution evidence did not support the offence charged; finding the appellants guilty and convicting them even though the prosecution evidence was marred with numerous inconsistencies; and condemning them to a sentence which under the circumstances was manifestly harsh, unconstitutional and unlawful.

When the appeal came up for hearing, **Ms. Olonyi,** learned counsel appeared for the appellants while **Ms. Lubanga,** learned Prosecution Counsel holding brief for **Mr. Mule,** senior assistant director of public prosecutions appeared for the respondent. Counsel relied on their written submissions that they had filed and opted not to highlight.

The appellants submitted that there was no dispute that the deceased died. However, they contended that only PW1 saw the deceased being assaulted and therefore the possibility of mistaken identity could not be ruled out completely. They reasoned that no tangible evidence had been placed before the trial court to prove that they were responsible for the murder. They further submitted that the prosecution had not availed the murder weapon(s) and further that the investigating officer did not testify.

With regard to malice aforethought, the appellants submitted that the type of weapon used in the murder was not tendered in evidence and that the prosecution witnesses contradicted themselves in their testimonies as to which part of the body of the deceased was injured. It was further submitted that the prosecution evidence fell short of the threshold to prove intention to kill. The prosecution evidence being purely circumstantial, they submitted, did not tie them as the sole perpetrators of the crime to the exclusion of others. As regards sentence, the appellants submitted that the sentence meted out on them was illegal, excessive and unconstitutional since their mitigation was not considered thereby violating their right to freedom from cruel, inhuman and degrading treatment, the right to dignity and the right to life. Given the foregoing, the appellants' urged us to allow the appeal.

Opposing the appeal, the respondent submitted that the direct evidence by PW1 was corroborated by PW2. The prosecution evidence was consistent in material aspects. The cause of death was severe bleeding due to cuts on the lower limbs. Malice aforethought was established by the extent of injuries sustained, the identity of the appellants was not in doubt as it was by recognition and the cause of death was confirmed by PW5 to be severe bleeding due to cuts on the lower limbs. The appelants' defences did not displace the prosecution case in any respect and therefore the prosecution case was proved beyond reasonable doubt. Finally, it was submitted that no evidence was adduced as to why prosecution witnesses would seek to implicate the appellants for an offence they did not commit. We were thus urged to dismiss the appeal.

This being a first appeal this Court is as a matter of law enjoined to analyze and re-evaluate afresh all the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses and therefore give due allowance. In **David Njuguna Wairimu v Republic [2010] eKLR** this Court rendered itself on the issue thus:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

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 interfere with the sentence imposed on the appellants.

With regard to the standard of proof, in **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR,** the High Court in discussing proof beyond reasonable doubt cited the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** where it was stated:-

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect (defeat?) the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is***

proved beyond reasonable doubt, but nothing short of that will suffice."

It is trite law that there is no obligation on the part of the accused person to prove his innocence. The burden of proof rests solely with the prosecution throughout the trial save where there are admissions by the accused person. Therefore, it was up to the respondent to prove death of the deceased and the cause thereof, that he died as a result of the unlawful acts of the appellants; and in so doing, they were actuated by either express or implied malice aforethought. See **Republic v Andrew Omwenga [2009] eKLR**.

The death of the deceased is not in contest as correctly observed by the trial court. The evidence of PW1, PW2, PW3 PW4 and PW5 all attest to the death of the deceased. They all saw the body of the deceased. Indeed even the appellants themselves concede to this fact. To crown it all there was the postmortem report tendered in evidence by PW5.

PW1 testified that he saw the appellants assault the deceased. Apart from PW1, none of the other witnesses testified to witnessing the incident. Thus, the evidence of PW1 is that of a single identifying witness. In the case of **Abdala bin Wendo and Another v R [1953] 20 EACA 166** citied with approval in **Roria v Republic [1967] EA 583,** the Court of Appeal had this to say on the evidence of such a witness:-

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."**

Applying this test to the evidence of Alex (PW1) we are satisfied that he positively identified the appellants as the deceased's attackers. To begin with the incident occurred at 12.30pm hence in broad day light. PW1 knew the appellants as they were neighbours, a fact confirmed by his brother (PW2) and mother (PW3). Their homes were hardly 30 metres apart. Secondly when he heard the deceased's screams he immediately ran to the scene and saw the appellants assaulting the deceased. Whereas the 1st appellant was armed with a panga the 2nd appellant had a stick. The trial court was impressed by the testimony of this witness. It formed the opinion that he was a very truthful witness as he remained steadfast in his testimony notwithstanding intense cross-examination by defence counsel. This Court has the obligation to respect the findings of the trial court on the demeanoour of witnesses. In the case of **Mwangi v Wambugu [1984] KLR 543**, this Court observed:-

> **"….A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of witnesses is inconsistent with the evidence in the case generally".**

We discern no such misdirection in the circumstances of this case.

Then there was the evidence of PW3 to whom the deceased confirmed that he had been killed by Asir and his wife. She identified Asir and his wife as the 1st and 2nd appellants respectively. This evidence is in the nature of a dying declaration and is admissible under section 33(a) of the Evidence Act. Indeed this Court in **Choge v R [1985] KLR 1,** stated**:-**

> **"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.**
>
> **There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person"**

We agree with the learned Judge that this declaration coupled with the evidence of PW1 proved beyond reasonable doubt that it was the unlawful act of the appellants that resulted into the death of the deceased and the same evidence placed the appellants at the scene of crime.

In their defenses the appellants alleged to have been at places other than at the scene when the offence was committed. Essentially they all raised alibi defences. It is trite law that when an accused raises an alibi defence, the burden is on the prosecution to debunk it. But as correctly observed by the learned Judge, it was not raised at the earliest possible time so that it could be investigated to establish whether it was true or false. Thus the prosecution was not accorded sufficient time within which to investigate and probably counter the same. In which case the court had to consider the said defence alongside the other evidence tendered by the prosecution. See **Karanja v Republic [1983] KLR 501.** Given the evidence of PW1 and the dying declaration which all placed the appellants at the scene of the crime at the time the offence was committed, their alibi defences could be nothing but false as correctly held by the trial court.

In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered:

> ***"The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."*** *See*

also: ***George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic [1991] KLR 622.***

Further, section 206 of the Penal Code defines malice aforethought as comprising of:-

(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 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) An intent to commit a felony;

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

The prosecution's case was that the deceased died as a result of haemorrhage due to cuts and fracture in the limbs. PW1 witnessed the deceased being assaulted. PW2 and PW3 testified that he had cuts on his forehead and legs and that his left leg was fractured. These injuries were confirmed during the postmortem and PW5's opinion was that the cause of death was severe bleeding due to cuts on the lower limbs. There is no doubt at all that by inflicting these injuries the appellants intended either to kill or cause grievous harm to the deceased. Accordingly, malice aforethought was proved and or can be inferred. Accordingly, we cannot fault the learned Judge for holding that malice aforethought was established by cogent evidence.

As regards sentence, the Supreme Court in **Francis Karioko Muruatetu & another v Republic (2016) eKLR,** held that:

"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." Emphasis ours.

Additionally, the Supreme Court stated at para 111 of the said judgment that:

"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. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …" Emphasis provided.

Even though the Supreme Court did not outlaw the death sentence, it held that it was not mandatory. We are of the view that in the circumstances of this case, the death sentence was not warranted. The appellants offered their mitigation but the learned Judge considered the law applicable at the time to have tied her hands. It is not therefore necessary to order a sentence re-hearing. The appellants have been in prison for 10 years. They are a couple with eight young children. Indeed at the time of the hearing of the case, the 2nd appellant had one of the children with her in remand as he was too young to be left on his own. It is also on record that due to bad living conditions some of the children had been infested with jiggers. Given the foregoing we are inclined to hold that a sentence of imprisonment would serve the interests of justice. In the premises, 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 30 years imprisonment each with effect from 30th June, 2015 when they were first sentenced.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.