IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 107 OF 2015

BETWEEN

PAUL OTIENO NDONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay, (D.S. Majanja, J) dated 18th November, 2014

in

HCCRC NO. 49 OF 2013)

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JUDGMENT OF THE COURT

On 9thJuly, 2013 the High Court at Homa Bay was informed thatthe appellant, **Paul Otieno Ndonga** had murdered**Doris Kusa Diang'a,** "deceased" on 7thJuly, 2013 at Kasewe 'B' Sub-location in Rachuonyo South District, contrary toSection 203as read with Section204of thePenal Code. The appellant when called to plead to the information denied the same and soon thereafter his trial ensued.

The prosecution's case in brief was that on 7th July, 2013 at about 12.30pm the appellant, the deceased and their child were pillion passengers on a motor cycle being driven by Samson Onyango Ouma when a quarrel broke out between the appellant and deceased. As they quarreled they all fell off the motorcycle. However, this did not stop the two from quarreling. In the process the appellant removed a knife and fatally stabbed the deceased, who died on the spot.

In a bid to sustain this narrative, the prosecution lined up a total of seven witnesses. In brief they testified as follows; on 7th July, 2013 **Samson Onyango Ouma**, (**PW1)** was riding motor cycle ferrying the appellant, deceased and their child to Ringa along Karota-Musanga road. The deceased sat immediately behind PW1 while the child sat in front of him and the appellant sat behind the deceased. While on the way, the appellant and the deceased started quarrelling. The appellant apparently asked the deceased where his properties were to which she responded negatively. The quarrel went on for about 30 minutes when suddenly PW1 heard the appellant and the deceased fall off the motor cycle. In the process, he lost control of the motor cycle and he together with the child also fell off the motorcycle. The quarrel

continued and whilst still on the ground he saw the appellant remove a knife and stab the deceased on the head and left hand. PW1 screamed and when the appellant saw members of the public approach he fled the scene. Members of the public pursued him and managed to arrest him at the Awach River and brought him back to the scene.

Herman Nyakuti Matira (PW2) was informed of the deceased's death on 18thJuly, 2013. He was a cousin to the deceased and identified her body at Rachuonyo Level 5 Hospital to Dr. Peter Ogolla (PW6) who carried out the post mortem.**Josephat Nyaguti Dianga,** (**PW3)** a step brother to the deceased also identified the deceased's body for post mortem purposes at the same hospital.

PC Charles Karimi, (PW4) a police officer based at Oyugis police station was on his normal patrol duties on 7thJuly, 2013 when he received a call from **Hesbon Otieno Asero, (PW7)** a local Assistant Chief informing him that someone had killed his wife at Kochia Onditi Village on the way to Oyugis. He proceeded to the scene and upon arrival found the appellant surrounded by members of the public who were baying for his blood while the body of the deceased lay besides the road.He saw several fresh stab wounds on the chest and the right hand of the deceased which seemed to have been inflicted by a sharp object. He interrogated the appellant and several other people at the scene and thereafter arrested the appellant. He took him to Oyugis police station while the body of the deceased was removed to Rachuonyo District Hospital mortuary. The appellant's clothes were wet as he had been apprehended in the river. He also had injuries on the fingers of his right hand when he arrested him.

Sgt. Damaris Ombina, (PW5) an officer based at Rachuonyo Criminal Investigations Department, was detailed by the Officer Commanding Rachuonyo Police Station, (OCS) to investigate the case on 7thJuly, 2013 at about 4:00pm. She took the appellant who had sustained injuries after being beaten by members of the public to Rachuonyo District Hospital where he was admitted until 9thJuly, 2013 when he was discharged. She then recorded witness statements and arranged for the post-mortem of the deceased by PW6. After gathering the necessary evidence, she laid the information against the appellant before the High Court at Homa Bay.

Dr. Peter Ogola, (PW6) performed the postmortem on the body of the deceased on 18thJuly, 2013. He observed multiple lacerations on the scalp, right side of the head, neck, trunk and at the back of the body. He noted that the lacerations were consistent with stab wounds some of which went so deep as to reach the bone. Internally, he found that the right lung had been perforated and there was a collection of blood in the right chest cavity. On the right side of the neck, he noted that the vessels taking blood to the head had been severed. In his opinion the cause of death was collapse of the lungs and the heart which resulted in reduced intake of oxygen due to bleeding that resulted from the perforated lung and severed blood vessel due to penetrating injuries.

He also examined the appellant on 8thJuly, 2013 and noted superficial bruises and chest pains. He conclued that the injuries were minor. Besides, he also mentally examined the appellant and concluded that he was fit to stand trial.

Hesbon Otieno Asero, (PW7) the Assistant Chief of Kasewe B Sub-location on 7thJuly, 2013 at about 12.30 pm was informed by a clan elder that the appellant, had stabbed the deceased with a knife. He immediately called the OCS Oyugis Police Station and proceeded to the scene. At the scene he found two people lying on the ground by the roadside, the deceased and the appellant. He was then informed that the appellant had been beaten by members of the public as he tried to escape from the scene.

Put on his defence, the appellant elected to give sworn testimony. He recalled that on 7thJuly, 2013 at about 1:00pm he asked PW1, a motorcycle operator to take him to Ongera where his aunt lived. On the way PW1 was speeding and in the process lost control of the motorcycle after hitting a stone and they all fell down. Following the accident, the deceased passed on, whereas, he was rendered unconscious. He blamed the death of the deceased on reckless riding of the motor cycle by PW1 and denied ever stabbing the deceased with a knife. He also denied having been beaten by members of the public or having fled to the river from the scene.

Upon evaluation of the evidence placed before the trial court as well as submissions by counsel and the law, the learned Judge, **(Majanja J)** was convinced that the appellant had committed the offence. Accordingly he convicted the appellant and sentenced him to death.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on grounds that; the trial Judge erred in law by convicting him on a defective information; solely based on the evidence of PW1 that was inconsistent, uncorroborated and hence unreliable; that the medical evidence adduced by the prosecution was exaggerated and did not meet the required threshold; the investigation into case were shoddy; and finally, that he was not accorded a fair trial.

At the plenary hearing of the appeal, the appellant was represented by **Mr. Anyull,** learned counsel whereas **Mr. Muia,** learned Prosecution Counsel appeared for the State. Counsel relied on their written submissions and opted not to highlight.

Mr. Anyull submitted that the trial court had made up its mind in advance to convict the appellant and did not at all consider the appellant's defence. That PW1 had all the reasons to lie as he was riding an overloaded motorcycle and without a licence. Counsel submitted that there were two versions of how the appellant and the deceased fell off the motorcycle; PW1's version was that they fell off while in motion and PW4's was that they fell off while alighting. Counsel wondered why the motorcycle was removed from the scene and not handed over to the police. Counsel took the view that there were grave discrepancies in the prosecution case that could not simply be wished away especially with regard to the stab wounds. Counsel submitted further that the trial Judge believed the evidence of PW6 and assumed that there was no room for error by this witness. The evidence of PW6 was mere opinion evidence that was not binding on the court. For this proposition, counsel relied on the case of **Rajabu v Republic [1979] E.A 395**.

It was further submitted that the learned Judge tried to piece and fill gaps in the prosecution case so as to make out a case for them as opposed to basing the conviction on the weight of the evidence adduced. Counsel faulted the trial Judge for expecting the appellant to displace the prosecution evidence yet the appellant had no obligation to do so. He submitted further that the prosecution conveniently and deliberately failed to call vital witnesses for the obvious reason; that such witnesses would have given evidence that was adverse to the prosecution case. In support of this submission counsel relied on the case of **Lugendo v Republic [2013] E.A 174**. Finally, counsel submitted that the death sentence was no longer mandatory and urged us to exercise our discretion in his favour bearing in mind the six (6) years that the appellant has been in custody and the fact that he needs to take care of his partially orphaned child.

Opposing the appeal, Mr. Muia pointed out that malice aforethought under **subsections (a), (b)** and **(c)** of **section 206** of the **Penal Code** was proved going by the injuries inflicted on the deceased and confirmed by PW6 in the post mortem report. That from the evidence there was no doubt that the appellant stabbed the deceased and tried to run away from the scene but luckily he was apprehended by members of the public. The act of running away was not conduct of an innocent person. With regard to the inconsistencies in the prosecution case, counsel maintained that there were no such inconsistencies and that the evidence of prosecution witnesses taken in totality proved all the essentials of the offence of murder were proved. Counsel took the view that although the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court, the appellant who committed the offence in a gruesome manner and who did not appear remorseful should suffer the ultimate sentence, death. He thus urged us to dismiss the appeal in its entirety.

This is a first appeal. By dint of Rule 29(1) of the Court of Appeal rules we are expected to subject the entire evidence tendered in the trial court to a fresh and exhaustive examination. However, in as much as we are free to draw our own conclusions, thereafter, we must not overlook the conclusions reached by the trial court which had the singular advantage of seeing and observing the demeanor of witnesses as they testified. In the case of ***Okeno v. R[1972] EA 32*** *the Court stated thus:*

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R.[1957] E.A. 336) and to the appellate court's***

own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, seePeters v. Sunday Post, [1958] E.A. 424."

We have perused the record of appeal, submissions by counsel and the law. The issues for determination are whether the prosecution case against the appellant was proved beyond reasonable doubt and whether this Court should exercise its discretion and interfere with the death sentence imposed on the appellant.

For a conviction on the charge of murder to hold, three essential ingredients must be proved. These ingredients were set out in the case of ***Anthony Ndegwa Ngari v Republic [2014] eKLR*** as follows:

"…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."

In the present appeal, the record shows that the appellant stabbed the deceased with a knife as testified to by PW1 who witnessed the incident. The deceased died on the spot going by the testimony of PW1, PW4 and PW7 who went to the scene and saw the body. The appellant too in his defence, confirmed that the deceased died on the spot. Finally, the postmortem tendered in evidence by PW6 confirmed the death of the deceased. The trial court observed, and correctly so, in our view, that the death of the deceased was proved beyond reasonable doubt.

Who was responsible for the death? The appellant denied responsibility. Indeed, he poked holes in the prosecution case starting with the fact that he was convicted on the evidence of a single identifying witness, PW1. *This Court has consistently held that a conviction can be sustained on the basis of the evidence of a single witness although such evidence must be assessed with appropriate caution, and circumspection. Whether the court will rely on single witness testimony as proof of a material fact depends on various factors that have to be assessed in the circumstances of each case. So, essentially a case can be proved by evidence of one witness. One does not need a particular or specific number of witnesses, contrary to the submissions of the appellant. In* ***Abdullah Bin Wendor v R [1953] 20 EACA 166****, the predecessor to this Court confirmed that a fact may be proved by the testimony of a single witness. Again in* ***Roria v Republic [1967] EA 583****, this Court held:*

"While legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence in the circumstances of this case it was not safe to do so."

In this case there is uncontroverted evidence by PW1 that he saw the appellant stab the deceased on the head and hand. The incident happened in broad daylight. The witness was subjected to intense cross-examination and stood his ground that he saw the appellant stab the deceased. This evidence was in fact corroborated by the evidence of PW6 who conducted the post mortem. Furthermore, the testimony of PW1 was consistent with the injuries that were observed by other witnesses. Though the appellant contended that there was no corroboration of the evidence of PW1, it is abundantly clear that there was such corroboration going by what PW6 stated above. Then there is the evidence of the appellant running away from the scene towards the river. He was chased by members of public and apprehended. If he was innocent, why was he running away from the scene? He was oblivious as to whether his own child who was a passenger on the motorcycle was injured or not during the same accident. Though the appellant denied running away from the scene, there was the evidence of PW7 that when he came to the scene, he found the appellant in wet clothes. There was no reason for PW7 to make up that story. This was because he had been apprehended by members of the public in the river as he ran away. PW3 had already testified to that fact that the appellant ran into the river as he attempted to escape from the scene. This act of the appellant cannot be the conduct of an innocent person, more so if the victim was his spouse.

Further there was also the evidence of PW6 as to the nature of injuries sustained by the deceased and the cause. They were stab wounds caused by a sharp object, probably a knife. This was consistent with the testimony of PW1 who saw the appellant stab the deceased. The possibility of such injuries being caused by the accident was ruled by the trial court and rightly so in our view. The appellant and PW1 were involved in the same accident and none of them suffered sharp penetrating wounds as the deceased. They suffered minor superficial bruises according to PW6. This alone rules out the appellant's submission that the deceased's death was caused by the road traffic accident involving PW1's motorcycle. As the incident occurred during broad daylight, the identity of the appellant cannot be in doubt. We are therefore satisfied just like the trial court that the appellant and no one else was responsible for the death of the deceased. Though the evidence of PW1 did not require corroboration, nonetheless there was corroboration as pointed out hereinabove.

The appellant contented that his defence was not considered by the trial court and that the trial court had already made up its mind to convict him without factoring in his defence. It is trite law that the burden of proof in criminal cases rests on the prosecution and never shifts. The appellant had no burden to prove his innocence as he is presumed innocent until proved guilty any way. The appellant's defence was that the deceased died as a result of the accident. The trial court in its judgment considered the cause of death as presented by PW6 in the post mortem report as well as the conduct of the appellant in running away from the scene and reached the conclusion rightly so in our view that the cause of death was not as a result of a road traffic accident. By reaching that conclusion, the trial court cannot be accused of manufacturing evidence to suit its already made up mind to convict the appellant nor was it shifting the burden of proof to the appellant. The trial court simply looked at the evidence of the prosecution and the defence and considered whether the appellant's claim that the deceased's death was occasioned by the accident was sustainable. It concluded that it was not plausible. On the material placed before it, the trial court was perfectly entitled to reach that conclusion and cannot therefore be accused of manufacturing evidence to advance its determination to convict the appellant and or of shifting the burden of proof to the appellant.

On failure to call some witnesses, we can only revert to section 143 of the Evidence Act which provides that no particular number of witnesses shall be required to prove any fact in the absence of any provision of law to the contrary. The appellant claimed that the owner of the motorcycle and those who gave chase and arrested him in the river ought to have been called to testify. However, we are unable to see what weight their evidence would have added to the prosecution case. They all came to the scene after the incident. Consequently, failure to call these witnesses was not prejudicial nor fatal to the prosecution case against the appellant. The evidence on record by the prosecution even in the absence of the evidence from these witnesses was sufficient to nail the appellant. In the case of ***Mwangi v Republic*** ***[1984] KLR 595*** this Court stated:

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

As regards inconsistencies in the prosecution case, the appellant argued that the discrepancies especially on the injuries sustained by the deceased could not be wished away. It is true that there were discrepancies in the evidence of PW1 on one hand and that of PW4 and PW6 on the other as to where the deceased was stabbed. However, the contradictions were not so material as to prejudice the appellant or weaken the prosecution case. The fact of the matter was that the deceased died as a result of stab wound the appellant was seen stabbing the deceased. This Court in**Joseph Maina Mwangi v Republic CA No. 73 of 1992** held that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

To our mind, and as correctly held by the trial court, these were minor and inconsequential discrepancies that did not go to the root of the prosecution case and the trial court was right in treating them as such. In

the end, we are in agreement with the trial court that the appellant was responsible for the death of the deceased.

Did the appellant cause the death of the deceased with malice aforethought? **Section 206** of the **Penal Code** provides, *inter alia:-*

> ***"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) 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."***

In the case of**John Mutuma Gatobu v Republic [2015] eKLR**this Court observed:

> ***"Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal…….***
>
> ***There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."***

Further in the case of ***Republic v Lawrence Mukaria & Another [2014] eKLR***,this Court made the following observations:

> ***"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."***

From the foregoing, the appellant through his reckless actions of stabbing the deceased with a knife multiple times caused her death and that, in our view just like the learned judge held, constituted malice aforethought. The appellant was in a position to know that by stabbing the deceased repeatedly would either cause the deceased grievous harm or death.

We now turn to the question of sentence. We were urged by the appellant to exercise our discretion and reduce his sentence in light of the Supreme Court decision in in **Francis Karioko Muruatetu & another v Republic (2016) eKLR** which 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 ours.

We note that the Supreme Court did not outlaw the death sentence. However, we are of the view that in the circumstances of this case, the death sentence imposed on the appellant may not have been warranted. We note that though the appellant offered mitigating circumstances, the learned Judge considered the law applicable at the time to have tied his hands. The appellant has been in custody for six (6) years and is remorseful. In the circumstances, we deem that a sentence of imprisonment would serve the interest of justice.

For the foregoing reasons, we have no basis to interfere with the trial court's conviction of the appellant. Accordingly the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution therefor the appellant is sentenced to 20 years imprisonment with effect from 16th February, 2015 when he was convicted.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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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.