IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 53 OF 2016

BETWEEN

NGUMBAO KAHINDI KADSOMBA.....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 11th December, 2014 in

HCCRA No. 24 of 2011)

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JUDGMENT OF THE COURT

This appeal involves the murder of ***Ngumbao Kahindi Kadzomba, the deceased*** by ***Ngumbao Kahindi Kadsomba***, ***the appellant,*** contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars as set out in the information before the High Court at Malindi were that on 3rd May 2011 at Baricho Sub location of Marafa Division, Kilifi County, the appellant together with Mkutano Kahindi Ngumbao, the 2nd accused, murdered the deceased. Both had denied the charges.

In his opening statement of the proceedings, Mr. Naulikha for the State informed the court that the appellant and the 2nd accused had waylaid the deceased as he was returning from his farm at Bunyale location; that the prosecution would demonstrate that prior to the attack, the appellant and the 2nd accused held a secret meeting where a decision was reached to eliminate the deceased, who they suspected of practicing witchcraft, which had led to the death of the appellant's infant child. ***Mburuga Charo Marongo, PW2, (Mburuga)*** testified that on 3rd May 2011 at about 7.30 a.m. her husband, the deceased, and herself went to their farm. At about noon, her husband left her on the farm to return home. Later that day, at about 4.00 p.m as she was on her way home together with her co-wife, Kaikwahi, and her daughter Simanya Ngumbao, she saw the body of her husband lying on the road. The skull had been crushed and there was clotted blood all over the body. The deceased was holding a panga, and a little bag in his hands. A big stick and a stone lay beside the body. ***Pisi Kenga Kitu, PW3, (Pisi***) stated that on the material day at about 4 p.m. after he left his farm to go home, he had stopped in a bush by the roadside to relieve himself. While there, he heard voices that he recognized as belonging to the deceased and the appellant. As he was crouched and hidden in the bush, he saw the appellant hit his companion with a big stick, and then pick up a stone and again hit the man. Thereafter, Pisi went over to the man who was bleeding profusely from an injury on his head. The stick and a stone lay beside him. As he was too frightened to do anything he ran to his home. Later he looked for the appellant's older brother, ***Mudzomba Dickson Mwayele, PW5,*** and one Charo Kahindi Kadzomba to report what had transpired, both of whom told him to remain silent.

A dispute later arose over land between Pisi and Charo, and a complaint was lodged with ***Thomas Wanje Mulala, PW4,*** the Assistant Chief, Baricho sub-location. It was then that Pisi disclosed to the Assistant Chief that Charo's older brother had killed someone. He narrated how the appellant had used the stick and the stone to hit the deceased on the head. On cross examination, Pisi once again relayed the same facts.

While on his farm on ***3rd May 2011,*** the Assistant Chief received information that a body had been found in a forested area. When he went to the *locus in quo*, he found the body of the deceased lying face down and covered in blood. A stick and stone lay beside the body. He thereafter notified the area police. A few months later, he received information from Pisi that it was the appellant who had murdered the deceased. He came to learn of the incident in the course of resolving a dispute over land between Pisi and the deceased's brothers.

Mudzomba Dickson Mwayele, PW5, (Dickson) worked as an attendant at Baricho Hospital. Whilst at work, he was informed that his cousin, the deceased, had been attacked and killed. He rushed to the scene where he confirmed the death of his cousin. He spent the night there. The next day, the police collected the body. The deceased was covered in blood and a stick and stone lay beside the body. A wound was visible

on the right side of the head. Being his relative and living in the same village, Dickson stated that the deceased was well known to him, and that Pisi was also well known to him. ***Dr. Allan Makokha, PW1,*** who was a medical officer at the Malindi Hospital conducted the post mortem on 6th May 2011. He stated that the deceased who was dressed in a green pair of trousers was a black African male, 70 years and of good nutrition and physique. The post mortem revealed rigor mortis and livo mortis (blood percolating in lower part of the body) and therno mortis had set in on the body. The body was bloated with air forming under skin, and it had started to decompose. There were maggots on nostrils and eyes as well as cyanosis, and a wound on the right side that was fragmented. Dry blood stains were around the ear and nostrils, and a small bruise behind the neck was apparent. The doctor concluded that the death was due to the head injury secondary to crush by a heavy object on the right occipital region leading to cardio-respiratory arrest.

On cross examination, the doctor stated that the body was 3 days old since death, judging from the bloating and the maggots, and the head injury must have been caused by a heavy object. Such an injury would only be possible falling from a high building.

APC Briford Onchweri, PW6, who was attached to Baricho Location Administration Police Camp stated that on 5th September 2011 at about 5 p.m, he was called by CPL Mohamed to accompany him in search of a suspect, Mkutano, the 1st accused. They went to the 2nd accused's farm together with the Assistant Chief, where they located the 2nd accused who called the appellant. They thereafter escorted both accused persons to the Malindi Police Station.

On 21st October 2014, the learned judge (Meoli, J.) ruled that the appellant had a case to answer, and in so finding, placed the appellant on his defence. With respect to the 2nd accused, the learned judge was not satisfied that there was evidence that connected him to the murder, and consequently, the judge acquitted him of the offence.

In his defence, the appellant stated that he was a resident of Mambo Sasa Baya, and a wine tapper. He stated that he had returned from his farm on the material day and went home where he had remained until 5 p.m. That was when some children informed him that their father had been murdered. The children, Simanya and Sidi, accompanied him to the scene. The body remained at the scene until the next day.

The appellant then stated that a few months later, Pisi, a neighbour, disagreed with Charo's family over cutting down trees from the deceased's land. The Chief ordered him to pay for the trees, but he refused, that he was soon thereafter summoned to the Chief 's office to record a statement regarding the deceased's death. He denied murdering him.

After hearing the evidence, the learned judge concluded that the prosecution had proved its case beyond reasonable doubt that the appellant was responsible for the murder of the deceased and Chitembwe, J. before whom he mitigated, sentenced him to 25 years imprisonment.

The appellant was aggrieved by the High Court's decision and has brought this appeal on grounds that the learned judge failed to analyse the evidence and also did not appreciate that PW3's evidence was not free from error; that his conduct showed that he was not a credible or honest witness; that the learned judge failed to consider the appellant's defence and alibi, and wrongly relied on conjectures and surmises to arrive at the conclusion that the appellant killed the deceased; that the learned judge failed to ascertain the manner of recovery of the evidence as a consequence of which the cause of death remained unknown.

Submitting before us, learned counsel for the appellant, ***Mr. Obaga,*** asserted that the learned judge did not properly analyse the evidence and instead relied on conjecture and surmisation; that further, the learned judge wrongly relied on the prosecution's opening address to infer that malice aforethought was established; that further the learned judge applied ethnic profiling to arrive at the conclusion that the community's strong traditional beliefs in witchcraft had led to the suspicion that the deceased may have been responsible for the infant's death; that the learned judge ought to have based her findings on evidence and not on witchcraft.

Counsel further submitted that after Pisi allegedly reported the incident to Dickson, there is no evidence showing that Dickson was informed of the deceased's death by Pisi or that he told him to keep quiet.

On the question of the exhibits, counsel pointed out that since the Investigating Officer did not testify, there was no evidence to show how the deceased's body and the exhibits were handled, or how they came to be in court; that on this account the chain of events was broken, and there was no evidence upon which to convict the appellant.

Mr. Igonga, learned counsel for the State, opposed the appeal and submitted that witchcraft was not the cause of the death; that the evidence showed that Pisi saw the appellant hit the deceased over the head with a big stick; and that Dr. Makokha had confirmed that the cause of death was an injury to the head. Counsel further asserted that the learned judge considered Pisi's evidence in relation to the entire prosecution evidence produced in its totality and rightly concluded that the appellant murdered the deceased.

Regarding the sentence, counsel was of the view that since the Supreme Court had rendered the mandatory death sentence unconstitutional, the Court should take into account the decision of ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*** and maintain the custodial sentence of 25 years.

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 as they testified. See also ***James Ngugi Njoka vs Republic, Court of Appeal Criminal Appeal No. 315 of 2006.***

In our view the issues to be addressed by this Court are whether;

i) the trial court properly analysed the evidence and whether or not malice aforethought was established;

ii) the trial court failed to interrogate PW3's conduct and conclude that he was not a credible or honest witness, and his evidence was not free from error;

iii) the trial court failed to consider the appellant's defence and alibi; and

iv) the exhibits were connected to the prosecution's case particularly as the investigating officer did not testify.

On the first issue of whether the trial court properly analysed the evidence, given that this was a case involving murder, we will again evaluate the evidence in taking the ingredients of murder as set out in ***section 203*** as read with ***section 204*** of the ***Penal Code*** into account. To do so, we will consider whether the learned judge rightly found that the appellant had murdered the deceased, and in so doing, whether it was with malice aforethought.

With regard to the deceased's death, the evidence is clear that the deceased died on 3rd May 2011. His two wives, Mburuga and her co-wife Kaikwahi, discovered his lifeless body as they returned home from their farm.

Both Dickson and the Assistant Chief testified that they received information that the deceased had been killed and on reaching the scene, they found his body lying face down on the roadside. Dr. Makokha who carried out the postmortem on the deceased, confirmed that he had died from head injury secondary to crush by a heavy object on the right occipital region leading to cardio respiratory arrest. As such it is not in doubt that the deceased died from a fatal injury on his head.

As to who caused the death of the deceased was the next issue. Pisi who was the sole witness of how the deceased met his death, testified that on the material day he was on his way home from his farm at about 4 p.m., when he stopped to relieve himself in a bush. While there he heard voices of persons whom he recognized, the appellant and the deceased; that he saw the appellant use a big stick, or *gongo* to hit the deceased on the head. When the deceased fell down, the appellant picked up a large stone and again hit the deceased on his head.

Since no other person witnessed the incident, Pisi was a single identifying witness. And as it took place at about 4 p.m when it was daylight, Pisi was able to identify the appellant. The appellant and the deceased were people who were known to him. They lived in the same village and he was therefore able to identify him through recognition. Like the learned judge, we are satisfied that Pisi was able to recognize both the deceased and the appellant; that Pisi saw the appellant hit the deceased with the large stick and a stone and that it was the violent blow to the head that was the cause of death.

The appellant has argued that the learned judge ought to have discounted Pisi's evidence since he had failed to report the murder soon after it occurred; that for this reason his evidence could not have been considered credible or reliable. In considering his testimony, the learned judge stated that the delay *"…was borne out of the need for self preservation but watching the witness testify and handle questions during cross examination, he did not strike me as a dishonest man. He answered questions with ease,"* and, *"If indeed there was any need to make false allegations against any member of the accused's family, that should have been against Charo with whom the witness had a dispute, not the accused herein."*

After witnessing the incident, Pisi went to Dickson the deceased's brother and to Charo to report that the appellant had killed the deceased. According to Pisi, both Dickson and Charo told him to be silent. It was not until five months later that he told the Assistant Chief how the deceased had died. Both Pisi and the Assistant Chief confirmed that the report was made when the latter was hearing a land dispute between Pisi and Charo.

Though there is no evidence to show that Pisi reported the incident to Dickson or Charo, there is evidence that he reported it to the Assistant Chief. In our view, the delayed reporting of the incident did not discredit his evidence. The learned judge considered Pisi's evidence and found it to be credible and believable, and since nothing pointed to his having been dishonest or established a motive for falsely accusing the appellant, we are satisfied that nothing barred the learned judge from relying on his evidence.

We turn next to consider whether malice aforethought on the appellant's part was established. The appellant has faulted the learned judge for surmising that the deceased's death was linked to the traditional beliefs in witchcraft and the suspicion in the family that the deceased had something to do with the infant's death.

In this regard the learned judge had this to say;

> ***"…the circumstances of this case point to a motive rooted in traditional beliefs, there being no evidence at all that the deceased and the accused had any prior disagreements."***

We begin by stating that in a case of murder, motive does not have to be established. But a finding should be made on whether malice aforethought, which is an intention to cause death or grievous harm, was established. Even though the learned judge ruled out any motive on the appellant's part, what the judge then did not do was to reach a finding on whether malice aforethought was present when the appellant killed the deceased. In view of this error, we will re-analyse the evidence in order to determine whether or not malice aforethought was present.

Under ***section 206*** of the ***Penal Code,*** the circumstances that constitute malice aforethought are stipulated as;

> ***"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) …;

d) ….”

In the case of ***R vs Tubere S/O Ochen (1945) 12 EACA 63*** the Court set out the prerequisites for establishing malice aforethought thus;

> ***“In arriving at a conclusion as to whether malice aforethought has been established, the Court must consider the weapon used, the manner in which it is used, and the part of the body injured”.***

To establish malice aforethought, in the case of ***Nzuki vs Republic [1993] KLR 171*** this Court stated thus;

> ***“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions; the test of which is always subjective to the actual accused; -***
>
> ***“a) Intention to cause death;***
>
> ***b) Intention to cause grievous bodily harm;***
>
> ***c) Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It doesn’t matter in such circumstances whether the accused desires those to ensue or not… The mere fact that the accused’s 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.”***

In this case, Mburuga, the Assistant Chief, and Dickson all consistently testified as to the presence of a large stick and stone that lay on the ground beside the deceased’s lifeless body. The witnesses also attested to the presence of the big stick in court. Pisi’s evidence was that he saw the appellant hit the deceased on the head with a big stick and a stone. In corroboration of this evidence, the post mortem report concluded that the deceased died from a head injury caused by a heavy object. From the evidence there is no doubt that the appellant hit the deceased on his head with the large stick and a stone. In so doing, the appellant must have known that he would cause him grievous harm or even kill him. A blow to the head with a stick or a stone in the manner described by Pisi would have led to the death of the deceased. As such, we are indeed satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the appellant, conclusively illustrate that malice afore thought was present.

Regarding counsel for the appellant’s contestation that the Investigating Officer did not testify, and therefore there was nothing to link the exhibits in this case, the stick to the offence, we are of the view that the failure of the Investigating Officer did not in any way diminish the prosecution’s case that the appellant had hit the deceased with a big stick and a stone which was how he met his death.

Finally, we disagree that the learned judge failed to consider the appellant’s defence and alibi. This is because despite the appellant testifying that he was at home at the time of the incident, the weight of the evidence pointed to his having been at the *locus in quo* at the time, and therefore the learned judge rightly dismissed his defence and alibi upon finding it to be implausible.

Like the High Court, we have come to the conclusion that the prosecution proved its case against the appellant beyond reasonable doubt and to the required standard, and upon evaluation of the evidence, the learned judge correctly concluded that the appellant murdered the deceased.

On the sentence, the High Court imposed a custodial sentence instead of the death penalty as by law prescribed. Owing to the case of ***Francis Karioko Muruatetu & Another vs. Republic, (supra)*** where the Supreme Court has found that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** to be unconstitutional, we find no reason to interfere with the custodial sentence imposed.

In view of the aforegoing, the appeal is without merit and is accordingly dismissed.

It is so ordered.

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

D.K. MUSINGA

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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