IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 62 OF 2015

BETWEEN

SAMSON OTIENO ODOYO.. APPELLANT

AND

REPUBLIC.. RESPONDENT

***(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay, (D.S. Majanja, J) dated 12th December, 2016* in HCCRC NO. 27 OF 2013)**

JUDGMENT OF THE COURT

The High Court at Kisii was on 3rd June, 2010 informed that the appellant, **Samson Otieno Odoyo** had murdered **Tom Mbuya Mayiecha,** hereinafter "the deceased" on 9th May, 2010 at South Kanyajuok Sub-location in Rongo District within Nyanza province. When called upon to plead to the information the appellant denied his involvement in the death of the deceased and accordingly stood trial. On 5th February, 2013 and before the commencement of the hearing of the case, it was transferred to the newly set up High Court at Homa Bay for hearing and determination. The prosecution called a total of seven (7) witnesses to prove its case against the appellant

The prosecution case in a nutshell was that on 9th October, 2010 at about 6.00p.m, the deceased, his wife **Margaret Akello Omollo (PW1)** and their son, **Felice Odhiambo Omollo**, **(PW2)** went to the house of the appellant whom they suspected to have stolen their 15½ litres of illicit brew, namely, changaa. The appellant was a nephew to the deceased and PW1, and a cousin to PW2. When they got to his house they demanded that he gives to them the changaa which they claimed he had stolen. PW2 was by then armed with a panga. The appellant then went back into the house and came out with a wooden stick which he tried to hit PW2 with but he raised his hand and was hit on the right thumb. The deceased was then hit on the chest with the wooden stick and he fell down. PW2 ran away from the scene into a nearby sugarcane plantation. When the appellant turned his fury on PW1, she equally ran away into a nearby maize plantation and went home. Soon thereafter, one of the deceased's sons, **Jack Roger** came home whilst supporting the deceased who was complaining of chest pains. The deceased continued to complain of chest pains whereupon PW1 took him to Hongo Dispensary where she was referred to Oruba Nursing Home in Migori. The deceased died on 11th May, 2010 at about 3.00a.m.whilst undergoing treatment thereat. She later reported the matter to the local assistant chief, David Olang Onyango, (PW3).

PW2, confirmed that he was one of those who together with PW1 and the deceased went to the appellant's house between 7:30pm and 8.00pm to demand from him the missing chang'aa. When they got to the house, the appellant was inside. It was dark but there was moonlight though not very bright. When asked about the chang'aa, the appellant went back to the house and came out with a wooden stick with which he hit the deceased on the chest. On seeing this, PW2 ran into the sugarcane plantation and thereafter went home where he found the deceased lying on the bed breathing heavily.

PW3, the area assistant chief knew both the deceased and the appellant as they were residents in his sub location. He had been informed by a clan elder, George Oloo that the deceased had been assaulted by the appellant at night and was in bad condition. He instructed the elder to take the deceased to hospital. On the same day the appellant came to see him and informed him that he had assaulted the deceased. He took the appellant to Kitembe AP post where he was placed in custody. On 11th May, 2010 PW1 informed him that the deceased had passed on. Together they proceeded to report the incident at Kamagambo police station. **PC Charles Gachoka Mwangi, (PW7)** received the report and thereafter accompanied them back to the scene of crime and recovered the wooden stick used in assaulting the deceased.

Peter Mogoi Ratemo, (PW4) a brother to the deceased identified the deceased's body to Dr. James Oduol Otieno (PW5) for purposes of postmortem and was present when post mortem was conducted on 19th May, 2010.

PW5, carried out the post mortem. He observed a bruise mark over the anterior part of the chest and on the legs. Internally, he noted bleeding

on both sides of the thorax. He concluded that the cause of death was cardio pulmonary arrest secondary to haemothrax and pericardial haemorrhage caused by blunt object.

PC David Nyongesa, (PW6) of Kamagambo Police Station was detailed to investigate the case. When on 11th May, 2010 the appellant was brought by PW1 and PW3 he re-arrested him. He recorded their statements and thereafter visited the scene and drew a sketch plan. He witnessed the post mortem and also escorted the appellant to Dr. Lillian who confirmed that he was fit to stand trial. In the cause of the investigations he established that when the deceased, PW1 and PW2, went to the appellant's house, PW2 was armed with a panga, there was an altercation between the deceased and the appellant, that the incident occurred at 9.00p.m and that the deceased grabbed the appellant's neck. He was nonetheless convinced that the appellant committed the offence of murder. It was on that basis that he prepared the information charging him with the offence.

Put to his defence, the appellant gave sworn testimony. He testified that whilst in his house on 9th May, 2010 at about 9.00p.m., sleeping he heard some people knock on his door. He opened the door and someone immediately pounced on him and held him by the collar and hit him on the nose. He screamed and rushed back into the house. Those people followed him inside and continued beating him. He took a wooden stick that was next to the door and hit one of them. The others ran away, leaving behind the deceased. At this point in time he did not know who they were. In the morning, he saw a cap, panga and pair of shoes in the house. He reported the incident to the clan elder who then referred him to the area chief. When he reported the matter to PW3, he took him to Kitembe police post and later to Rongo Police Station. From Rongo Police Station, he was on 25th May, 2010, taken to the High Court at Kisii and charged with an offence he did not commit. All that he had done was defend himself when he used the wooden stick to repulse the attackers, whom he later learned were the deceased, PW1 and PW2.

The trial court, **(Majanja, J.)** having carefully evaluated the evidence tendered by the prosecution as well as the defence, the respective submissions of the parties and the law, came to the conclusion that the appellant had committed the offence. Accordingly, he convicted him and sentenced him to death.

Aggrieved by the conviction and sentence, the appellant filed the present appeal on six (6) grounds, to wit, that the trial court erred in law by failing to find: that the case against the appellant was not proved beyond reasonable doubt; failed to take into consideration the glaring inconsistencies in the testimonies of prosecution witnesses; did not consider that he acted in self-defence; that the mandatory nature of the death sentence set out in Section 204 of the Penal Code was unconstitutional; and against the spirit of the Universal Declaration of Human Rights as it denied the appellant the right to life. Finally, the appellant bearing in mind that this Court was bound by the Supreme Court judgment in **Francis Karioko Murwatetu & Another v Republic [2017] eKLR**, urged us to revisit the death sentence imposed on him**.**

At the hearing of the appeal, the appellant was represented by **Mr. Anyull,** learned counsel holding brief for **Mr. Kouko,** learned counsel whereas **Mr. Muia,** prosecution counsel appeared for the state. Counsel relied on their written submissions and opted not to highlight.

Mr. Kouko in his submissions reiterated that the appellant was casually relaxing in his house when he was attacked and he had to defend himself from the attackers who were determined to put him down. The appellant therefore acted in self-defence. Counsel faulted the trial court for violating Section 169 (1) of the Criminal Procedure Code by having total disregard of the evidence adduced by the appellant that he acted in self-defence. While relying on the case of **Francis Karioko Muruatetu & Another v Republic (Supra)** counsel submitted that the death sentence imposed on the appellant by the trial court was unlawful and violated his constitutional rights.

Opposing the appeal, Mr. Muia in his submissions pointed out that the prosecution proved its case against the appellant beyond reasonable doubt. That from the evidence there was no doubt at all that the appellant hit the deceased with a wooden stick which resulted in his death. Counsel further submitted that the fact that the information read that the deceased was murdered on 9th May, 2010 when he in fact he died on 11th May, 2010 did not make the information defective as the same was in compliance with Sections 134 and 137 of the Criminal Procedure Code. For this proposition counsel relied on the case of ***Yongo v Republic (1983) KLR 319*****.** Counsel further argued that although the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court, the offence in this case was committed in a gruesome and heinous manner and the appellant who did not exhibit any remorse should suffer the full force of the law which is the death sentence. With regard the consistency of witness testimony, counsel submitted that the prosecution witnesses were consistent. Counsel concluded by submitting that the prosecution case was proved beyond reasonable doubt as neither the cross-examination of its witnesses nor the evidence tendered by the appellant displaced the prosecution case in any respect. He therefore urged us to dismiss the appeal.

This being a first appeal, it is our duty to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis so as to reach our own independent conclusions. In doing so, however, we must bear in mind that we neither saw nor heard any of the witnesses as they testified and as such we must give due allowance. That is the essence of rule 29(1) of this Court's Rules. In the case of ***Okeno v Republic*** ***(1972) EA 32*** the predecessor of this Court reiterated this position as follows:-

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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 (See Peters Vs. Sunday Post, (1958) EA 424)"***

We have perused the record of appeal, submissions by counsel and the law. The main issue for determination is whether the prosecution case was proved beyond reasonable doubt so as to sustain a conviction for murder.

The offence of murder is defined by section 203 of the penal Code as follows:

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

That definition gives rise to the following crucial ingredients of the offence of murder all of which the prosecution must prove beyond reasonable doubt in order to found a conviction. They are; the fact of the death and its cause, proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused and proof that the said unlawful act or omission was committed by the accused with malice aforethought. (See: ***Anthony Ndegwa Ngari v Republic** [2014] eKLR)*.

It is not in dispute that the deceased died and that he died as a result of a blow he received on his chest when he was hit by a wooden stick on the night of 9th May, 2010. All the prosecution witnesses who testified and saw the body of the deceased and all attested to his death. According to PW5, the cause of death was cardio pulmonary arrest secondary to haemothrax and pericardial haemorrhage due to blunt chest injury. Indeed even the appellant himself confirmed the death of the deceased in his defence save that he was not responsible and only acted in self-defence. Accordingly, the death of the deceased and the cause thereof was proved by the prosecution beyond any reasonable doubt. We cannot therefore fault the trial court for so holding.

Did the appellant cause the death of the deceased *'of malice aforethought'* as indicated in the information? The appellant does not deny hitting the deceased that resulted in his death but hastens to add that he did so in self-defence. Of course self-defence *is a complete defence and may lead to an acquittal if proved. In the case of **Mokuna vsRepublic** **[1976-80] 1 KLR 1337** this Court held thus;*

> ***"Self-defence is an absolute defence even on a charge of murder unless in circumstances of the case the accused applies excessive force."***

*The law regarding self-defence is found in **section 17** of the **Penal Code** which states as follows;*

> ***"Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law."***

*This Court has, had occasion to consider the law relating to self defence in the case of **Ahmed Mohammed Omar & 5 Others v Republic** **[2014]eKLR** where it stated as follow:-*

> *"The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **DPP v Morgan** **[1975] 2 ALL ER 347**, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such believe was based on reasonable grounds. But in **DPP v Morgan** (Supra) it was held that:*
>
> ***"…. if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."***
>
> *The Court continued;*
>
> ***"Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test. The learned Judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge's attention been drawn to the case of DPP v Morgan (Supra) his decision would have been different.""***

Clearly then in cases of self defence the test to be applied is subjective and not objective as had been the case earlier.

Recently, this Court laid down principles that should be applied whenever the defence of self-defence is raised. This was in the case of **Victor Nthiga Kiruthu & another v Republic (2017)eKLR** wherein it was stated:

> ***"The principles that have emerged from these and other authorities are as follows:-***
>
> ***(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.***
>
> ***(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.***
>
> ***(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.***
>
> ***(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.***

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."

In the instant appeal, the appellant was in his house where he was sleeping at about 9.00pm when he was suddenly confronted by the deceased, his wife and their son who accused him of stealing changaa. PW2 was armed with a panga according to the testimony of PW1 and PW6. The two forced themselves into the house. It was dark, if testimony of PW1 and PW2 is anything to go by. According to them only the moonlight provided the source of light and again according to them it was not so bright. Apparently the appellant had no time to put on any light. One of the trio following an altercation according to PW6 proceeded to hold the appellant by the neck and they pushed him into the house. How was the appellant expected to react given those circumstances? He was obviously under attack and had to fight back in self-defence. According to him he went for a wooden stick nearby to use as a means of repulsing the attackers. Who can blame him! He lashed out blindly in the dark. It cannot be claimed that the appellant aimed the wood stick at the deceased with intent to kill him. Further, he never aimed the wooden stick in the critical delicate organs of the deceased that would have resulted in his immediate death. No doubt the appellant apprehended real danger in the manner the trio confronted him. This was therefore a clear case of self-defence contrary to the finding of the learned judge. Was the force used by the appellant on the deceased excessive? We do not think so. The appellant struck the deceased only once with a wooden stick on the chest. He never assaulted the deceased repeatedly thereafter, even after PW1 and PW2 had run away leaving the deceased behind and at his mercy.

We are also not oblivious to the appellant's conduct after the incident. The morning after the incident, the appellant reported to the clan elder regarding the fracas, who in turn referred him to PW3. Thereafter he cooperated throughout with the police investigating officer in the case. He sought to know what he could do in the circumstances to advance the investigations. He did not opt to run away or to hide. To our minds, this was not conduct of a guilty person. He never intended to kill the deceased. His testimony was convincing and ought to have been believed contrary to the holding by the learned judge.

All in all we are satisfied that the appellant had no intention to kill the deceased. He only acted in self-defence following intrusion into his house by the deceased in the company of PW1 and PW2 whilst armed. The force he used to repulse them was not excessive.

We accordingly allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

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

ASIKE-MAKHANDIA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.