IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 120 OF 2015

BETWEEN

BRUCE OCHIENG SHABAN........................APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Homa Bay, (D. Majanja, J)

***dated 14th August, 2014* in HCCRC NO. 24 OF 2013 formerly Kisii HCCRC NO. 105 OF 2012)**

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JUDGMENT OF THE COURT

The appellant, **Bruce Ochieng Shaban** was charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code***.** The particulars in the information were that on 1st August, 2012 at Konyango Location, Rachuonyo North District within Homa Bay County in the Republic of Kenya he murdered Victor Ogweno Otieno (the deceased). He pleaded not guilty to the information and soon thereafter his case proceeded to trial. The prosecution called a total six witnesses in a bid to prove its case against the appellant. Briefly stated the prosecution case as seen through the eyes of these witnesses was as follows;

According to **Erick Ouma Omollo** (**PW1)** the appellant came from his village and he knew him well. It was around 6:00 pm on 1st August, 2012 while he was at the village playgrounds playing football with other boys when the appellant came around to watch the game. The deceased who was on his way home also stopped by to watch the game. An argument soon ensued between the deceased and the appellant and they started fighting. He and the other players went and separated them. The appellant then went home while the deceased sat down on the periphery of the field as the game continued. After a while the appellant came back and started fighting with the deceased again. When they went to separate them, he saw the deceased rise and then fall. He was also bleeding from his chest. The appellant ran away holding a kitchen knife as he and other boys approached the deceased who was still alive. He remained with the deceased while other people pursued the appellant. Thereafter the area Chief was contacted and in turn he called the police who came to the scene. PW1 maintained that there was adequate light to identify the appellant.

Hilden Omondi Otieno (PW2) was the deceased's brother. He stated that on the material day at about 6:00 pm he was among a group of boys playing football at the village grounds when a quarrel and fight ensued between the appellant and the deceased. He confirmed that the appellant stabbed the deceased on the chest. **Walter Odhiambo Nyamisi (PW3)** was the uncle of the deceased. His testimony was that on his way home from Kendu Bay on the fateful date at around 6:20 pm, he saw the deceased lying down surrounded by some boys who had been playing football. The events of what had transpired between the appellant and the deceased were narrated to him by PW2. He observed that the deceased had blood on the left side of the chest. He called the deceased's father and the area assistant chief. The police came and took the body of the deceased to Simbiri Hospital Mortuary. He later attended the post-mortem on 8th August, 2012 where he identified the body of the deceased to **Dr. Peter Ogolla (PW5)** for purposes of postmortem

PW5, a medical officer of health at Rachuonyo South conducted the post mortem on the body of the deceased. His observations were that the deceased had a single penetrating wound on the front of the left chest between the 5th and 6th ribs. On opening the chest cavity he observed that the left lung had been perforated and there was blood in the left chest cavity. The left part of the heart had also been perforated. He concluded that the cause of death was severe bleeding resulting from perforation of the lung and heart caused probably by a sharp object.

He also examined the appellant and filled a P3 form in which he noted that the appellant had a swelling on the lower lip approximately 6

days old which was probably caused by a blunt object. He assessed the injury as harm. He approximated the age of the appellant as 15 years old.

Cpl. Joseph Keter (PW6), a Criminal Investigations Department Officer was at the time stationed at Rachuonyo. On 2nd August, 2012 he was instructed to investigate a case of murder committed at Kendu Bay on 1st August, 2012. He recorded statements from the witnesses. Based on the statements, he preferred the murder charge against the appellant.

Put on his defence, the appellant opted for sworn testimony. He stated that on 1st August, 2012 he got home at about 5.00 pm after bathing in the lake at Kotieno beach. He passed by the football field where he saw children playing football then proceeded home to do his homework. He later heard his brothers and sister crying. Upon enquiry he was informed that the deceased and PW2 were fighting in the field. He went to the field where he saw PW2 running away towards town. He asked the deceased what happened but the deceased could not talk. He concluded by stating that he could not have killed the deceased as he was his friend.

The learned Judge **(Majanja, J.)** in his considered judgment observed that the death of the deceased was confirmed by the evidence of PW3 and PW5. The latter tendered in evidence the post mortem report.

On who caused the death, the learned Judge acknowledged that PW1 and PW2 were the key prosecution witnesses whose direct evidence implicated the appellant. The appellant was also well known to the two. The incident occurred between 6.30 pm and 7.00 pm before it was dark as confirmed by the fact that the boys were still playing football at the time. Those circumstances negated any chances of mistaken identity. Even though the knife being the murder weapon was not found, the learned Judge took the view that the evidence fingered the appellant as he was seen stabbing the deceased and the injuries were consistent with the stabbing. The said evidence was confirmed by the testimony of PW5 who concluded that the injuries were probably caused by a sharp object. The Judge then concluded that on the basis of the foregoing, the possibility that any other person other than the appellant would have stabbed the deceased was eliminated.

With regard to the appellant's defence, the learned Judge observed that the appellant implied that he arrived at the scene after the deceased had been stabbed and that he saw PW2 running away. However, this testimony was countered by that of PW3 who stated emphatically that he did not find the appellant at the scene when he arrived. PW3 found PW2 among the people who were with the deceased and could not have probably run away from the scene. The learned Judge further observed that the appellant's defence was further weakened by the fact that whereas four of the prosecution witnesses saw blood on the deceased, on his part the appellant claimed not to have seen any injury or blood on the deceased's chest. His defence was therefore rejected by the court on the basis of the foregoing.

The learned Judge took the view that the fact that after the quarrel the appellant went home to get a knife which he subsequently used to stab the deceased clearly established the intention to cause the deceased grievous harm. There was no evidence of provocation or that the appellant acted in self-defence. The fact that the appellant also ran away from the scene with the knife after the incident was also indicative of his guilt. The learned Judge was thus satisfied that the prosecution had proved its case beyond the reasonable doubt. The appellant was accordingly convicted of murder and sentenced to be *detained at the pleasure of the President as he was a minor.*

Aggrieved by the conviction and sentence, the appellant filed the present appeal in which he raised seven grounds to wit that the learned Judge erred in law and fact when he: failed to notice the gross violation of his constitutional rights to a fair trial which violations were prejudicial to the appellant; convicted the appellant on a plea of guilty that was equivocal and/or not properly taken; failed to notice that this was a clear case of self defence; failed to evaluate and analyze the evidence on record and dismissing the appellant's alibi defence; failed to observe that there was no nexus between the evidence adduced by the prosecution and the crime alleged to have been committed by the appellant; and sentenced the appellant to a sentence which under the circumstances was excessive, harsh, uncertain and thus unlawful.

At the plenary hearing of the appeal, **Ms. Olonyi,** learned counsel appeared for the appellant while **Mr. Sirtuy,** learned principal prosecution counsel appeared for the respondent. The appellant relied on his written submissions and opted not to highlight while the respondent submitted orally.

The appellant submitted that he was not informed of the reason for his arrest, the right to remain silent or the consequences thereof (?) and even though he raised the issue with the trial court, it was ignored. He went on to submit that he was not presented before Court within the constitutional timelines enshrined in Article 49 (1) (f) of the Constitution and no reasons were given for his extended detention in police custody which amounted to gross violation of his constitutional rights. With regard to the plea, the appellant submitted that when charges were read to him and a plea of not guilty entered, the particulars of the information were however not read to him so that he could confirm whether they were true or not. His plea was in the circumstances equivocal. He also submitted that the trial court should have subjected him to psychiatric evaluation to determine whether he was fit to stand trial or not.

On whether the prosecution had proved its case beyond reasonable doubt, the appellant submitted that the murder weapon (knife) could not have just disappeared into thin air. The appellant went back to his house yet no search was conducted in the said house to recover the knife. He maintained that PW2 did not see the deceased being stabbed and only realized that he had been stabbed afterwards and therefore anyone else could have done it. It was submitted further that the evidence tendered was purely circumstantial and did not meet the threshold required to sustain a conviction as it did not conclusively tie the appellant to the case to the exclusion of others people. He submitted further that on arrival at the field he was provoked by the deceased and he merely defended himself and the fact that he had a swelling on the lower lip proved that he was defending himself. He further submitted that the fact that the appellant was watching the match before being joined by the deceased went to show that he was provoked and only reacted due to the provocation.

As regards the sentence, the appellant submitted that being detained at the pleasure of the President was unconstitutional and violated the principle of separation of powers, and that the sentence was in any event excessive since it was uncertain.

Opposing the appeal Mr. Sirtuy submitted that the evidence of PW1 and PW2 was to the effect that they saw the appellant stab the deceased. There was sufficient light and hence this was a case of recognition. The evidence led showed that the cause of death was a stab on the chest.

The conduct of the appellant running away after the crime confirmed or rather demonstrated the necessary mens rea. He concluded by submitting that being held at the pleasure of the President was not unconstitutional as it was provided for under the law.

This is a first appeal. Rule 29 (1) of the Court of Appeal Rules require us to subject the entire evidence adduced before the trial court to a fresh evaluation and re-appraisal so as to reach our own conclusion. In the case of ***Okeno v Republic** (1972) EA 32* the predecessor of this Court stated:

> ***"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, submissions by counsel and the law. The issues for determination are; whether the plea was properly taken; the appellant was provoked and therefore acted in self-defense; the prosecution case was proved beyond reasonable doubt; and whether the sentence meted out on the appellant was excessive in the circumstances.

It is unclear to us what the appellant means when he submits that he was convicted on an equivocal plea of guilt without the particulars of the information being read to him. From the record, after the information was read over to the appellant and every element thereof explained in dholuo to him he replied; "I killed the deceased but I never planned to kill him". A plea of not guilty was then entered and the appellant subsequently went through a full trial. Having entered a plea of not guilty, the issue of whether the plea was equivocal or unequivocal does not rise therefor. Further, the appellant cannot seriously claim that the facts of the information were never read to him so that he could confirm whether they were true or false. This would have been necessary where the plea of guilty had been entered. As already stated, this was not the case.

The appellant has also complained that he was not informed of the reasons of his arrest and the right to remain silent. We have carefully perused the record and note that the issue was never raised before the trial court. Further, the appellant in his defence did not raise the issue either. We are also not oblivious to the fact that the appellant was throughout the trial represented by counsel who too never raised the issue through examination of witnesses availed by the prosecution or in his submissions.

In any event, was any prejudice if at all, occasioned to the appellant on the basis of the aforesaid alleged omissions? We do not think so as the appellant thereafter went through a full trial; where he extensively cross-examined witnesses and testified in his own defence. All in all we find no merit in these ground of appeal.

As regards provocation and self-defense, it is common ground that a quarrel ensued between the appellant and the deceased resulting a fight. However, the fact that the appellant left the scene after the fight, went home then came back sometime later with a knife and picked up the fight again meant that the element of provocation had dissipated. The appellant cannot therefore claim to have acted in self defence. The appellant had time to cool down. Section 208 (1) of the Penal Code which deals with provocation has been the subject of interpretation in our courts in several cases. In the case of **Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR** the Court stated:

> ***"For provocation to exist the following two conditions must be established:***
>
> ***(1) The subjective condition that the accused was actually provoked so as to lose his self-control and***
>
> ***(2) The objective condition that a reasonable man would have been so provoked."***

Similarly in the case of **Elphas Fwambatok v Republic [2009] eKLR** it was held that:-

> ***"In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case severe injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims......."***

Mokwa v Republic [1976-80] 1KLR 1337 this Court held that:

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

In the present appeal, the appellant did not state the basis of provocation. What is it that the deceased said that enraged and provoked him so much that he had to act in self defence? Throughout the cross-examination of the witnesses availed by the prosecution, counsel for the appellant made no attempt at all to lay a basis for such defence. Finally, in his submissions counsel for the appellant never raised the issue. We also note that the appellant had the opportunity to retreat from the danger which he did only to come back later armed with a knife which turned out to be the murder weapon. Clearly therefore, this ground of appeal is an afterthought.

With regard to the submission by the appellant that the investigations conducted were not conclusive since the murder weapon was not recovered nor a search mounted in his house to try and retrieve the same, we do not think that the failure was fatal to the prosecution case. The death of the deceased was not contested nor was the cause of death in doubt. In any event, by his own submissions before us, he conceded to have been at the scene of crime and fought with the deceased. He was even seen running away from the scene with a knife in

the hand. Medical evidence showed that the deceased died as a result of severe bleeding that resulted from perforation of the lung and heart caused by a stab probably from a sharp object. How then can he claim that he was not at the scene by raising the defence of alibi? In a nutshell, we are satisfied just like the trial court that the prosecution proved its case beyond reasonable doubt.

As regards violation of the appellant's rights, it is his submission that his rights were violated when he was held in police custody from 1st August, 2012 to 7th August, 2013 without any reason being given for the delay in arraigning him in court. However, as this Court has constantly stated, such violations do not have any bearing on the innocence or guilt of the accused. Unless it is demonstrated that the alleged violation has impinged on a fair trial, such violations are best dealt with by an action in damages. See **Julius Kamau Mbugua v. Republic [2008] eKLR.**

Turning to the sentence, the appellant was 15 years old at the time the offence was committed and therefore a child offender. He was sentenced to be held at the pleasure of the President. We do not think that the said sentence was in his best interest as child in terms of section 4 (2) of the Children's Act which provides thus:

> **"In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."** Emphasis ours.

It is trite law that Courts have dealt with Section 25(2) of the Penal Code before and set aside the sentence of being detained at the President's pleasure. In the case of **A. W. M v Republic (2009) eKLR**, the appellant was 17 years old when she was convicted of murder and was sentenced to detention under the President's pleasure. This Court while setting aside the sentence held as follows:

> ***" In view of the foregoing, we are satisfied that the appellant was wrongly convicted before the superior court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Accordingly, the conviction is set aside and substituted with one of a finding of guilty of infacticide*** *(sic)* ***contrary to Section 210 of the Penal Code. We also set aside the order of detention under President's pleasure apparently imposed pursuant to Section 25(2) of the Penal Code and it its place we substitute a discharge under Section 191(1) (a) of the Children Act taking into account the long period the appellant has been in custody. The appellant is to be set free forthwith unless otherwise lawfully held".***

In the persuasive High Court decision in **H.M. v. Republic and another [2017] eKLR**, the Court observed and correctly so in our view that:-

> ***"…The lengthy incarceration of such convicts erodes their human dignity as provided for under Article 28 of the Constitution. …The sentence is indefinite and all what the appellant has to do is to entertain the faint hope that the Presidential pleasure will be exercised before the expiry of 10 years. One serving such sentence cannot be held to be serving a proper sentence. The sentence is indefinite … That situation erodes the appellant's dignity. … I do find that his detention at the President's pleasure from an unknown period is an*** **excessive sentence…"**

Persuaded by these authorities, we are satisfied that the sentence meted out on the appellant was manifestly harsh and excessive since he cannot tell with certainty when it will be deemed to have been served.

In the result, the appeal on conviction is dismissed. On sentence, we set aside the sentence imposed and substitute it with a sentence of ten (10) years' imprisonment effective from the date of conviction and sentence.

Dated and delivered at Kisumu this 24th 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.