THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CRIMINAL APPEAL NO. 6 OF 2006

BETWEEN

CONSOLATA ODERO ODONGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction of the High Court of Kenya at Migori (Majanja, J.,) dated 22nd October, 2015 and sentence meted on 16th November, *2015* in H.C. CR.C. NO. 32 OF 2009)

****

JUDGMENT OF THE COURT

[1] ***Consolata Odero Odongo*** (appellant) was married to ***Francis Odongo Osawa*** (deceased) in 1962. They were blessed with seven (7) children and five (5) grandchildren. The couple used to live at Aora-Jope village, in Alego West sub-location, South Sakwa Location of Migori County. It is indicated in the record that as at the time the deceased met his death, he was aged 73 years while the appellant was aged about 64 years. By a cloak and dagger twist, on the morning of 20th June, 2011, the lifeless body of the deceased was found behind his kitchen and as the villagers milled around, struck by the bizarre death, the appellant just sat quietly in the house unmoved by the commotion outside. At the time the deceased met his death, he used to reside in the same house with the appellant and their grandson, one ***David Ochieng Otieno*** **(PW3).**

[2] The background surrounding the death of the deceased unfolded on 20th June, 2011 at about 6 a.m., when ***Japheth Abonyo Owour*** **(PW2)**, a clan elder at Aoro Jope village aroused the barking of his dogs, went outside to check through his fence, he saw the appellant who was from the same village peeping through the fence. She reported to him that the deceased had come home the previous night with some strangers who wanted to take away their cows but she started fighting them. The appellant said she did not raise an alarm but the strangers stayed until 6 a.m. when they ran away and so she went to report the matter to the village elder. **PW2** asked the appellant whether she raised an alarm when she was fighting off the strangers to which she responded in the negative. At about 11 a.m., **PW2** received a distress call from the deceased's daughter informing him that her father's lifeless body was lying at the homestead.

[3] **PW2** reported the matter to ***Morris Ong'injo Asindi*** **(PW6)** the Assistant Chief of the area who visited the scene in the company of Administration Police Officers **(APs).** When they arrived at the scene, the members of the public were gathered outside the homestead, as they said they were afraid of the appellant who was found sitting quietly on a chair in the house unfazed by the commotion outside. The body of the deceased was lying behind the kitchen and a *rod* was beside it. The chief called the police, and Inspector ***Richard Mutiso*** **(PW7)** in addition to responding, also took up the investigations. PW7 with other officers visited the scene and upon making the initial inquiries, they took the body of the deceased to Rapcom Mortuary for the post-mortem examination which was carried out by ***Dr Emmanuel Oyier***. However, the report was adduced in evidence by ***Dr Vitalis Owuor Ogutu*** **(PW5)** on behalf of his colleague who had left Migori Hospital by the time the matter was being heard. According to the report, the body of the deceased had four deep cuts on the parietal frontal region 2cm deep, a fracture on the right tibia and fibula. The doctor concluded the cause of death was as a result of severe head injury due to depressed skull fracture sustained from assault with a blunt object.

[4] The police arrested the appellant and also picked up **PW3** to assist with the investigations being the two persons who used to reside with the deceased in the same house. According to **PW7,** he interviewed the two but found the appellant culpable as she admitted that she fought the deceased together with the strangers in self-defence. Accordingly, the appellant was charged with the offence of murder of the deceased contrary to the provisions of ***Section 203*** as read with ***Section 204*** of the Penal Code. The particulars of the offence stated that on the night of 19th and 20th June, 2011 at Aora-Jope village, in Alego West sub-location, South Sakwa Location of Migori County, the appellant murdered the deceased.

[5] As a consequence, the appellant was arraigned before the High Court in Migori. She denied the offence, and after trial that consisted of evidence given by some seven (7) prosecution witnesses the appellant was found to have a case to answer. On being placed on her defence, she gave a sworn statement stating that on the fateful night the deceased who was an habitual drunkard had come home with strangers who were demanding that she opens the door. The appellant was armed with a rod which she used to defend herself by hitting the intruders but because it was at night, she did not know who she hit. She locked herself in the house until morning when she saw the deceased lying outside and she went to report the matter to the village elder. Upon weighing the evidence, the learned Judge dismissed the defence by the appellant and found the prosecution had proved that the appellant was the one who inflicted the fatal injuries on the deceased. She was convicted as charged and sentenced to death.

[6] Being aggrieved by the said conviction and sentence, the appellant challenges the said judgment on the grounds that the learned trial Judge misdirected himself by failing to consider the defence that elicited the circumstances leading to the death of the deceased; by transferring the onus of proof to the appellant whilst the state failed to prove the case against the appellant; by relying on hearsay evidence and for imposing a death penalty without considering the mitigation on record.

[7] During the hearing of this appeal, ***Mr. Emukule*** learned counsel for the appellant relied on his written submissions and made some oral highlights. He submitted that the entire evidence by the prosecution witnesses was that only PW7 implicated the appellant with the murder of the deceased while relying on the statement of the appellant and **PW3**. However, he pointed out that **PW3** maintained that he had dinner with the appellant on the material night, went to sleep and the following day went to school and upon returning home he found people in the compound and that is when he saw the body of his grandfather. For this reason counsel faulted the trial Judge for shifting the burden of proof to the appellant when he concluded in a pertinent paragraph of the judgment that the appellant failed to raise an alarm; and by stating that if the altercation between the appellant and the deceased went on until 6 a.m., it should have woken up the neighbours despite the fact that there was no evidence showing that the deceased and the strangers made loud noises to attract the neighbours.

[8] On the death sentence, counsel cited the decision by the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic - Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** ***(Muruatetu's case)***. Where the Apex Court pointed out that the mandatory nature of the death sentence was unconstitutional as it deprived the trial court the judicial discretion to determine proportionality, appropriateness and other considerations relevant in arriving at a sentence to met out as informed by various circumstances that obtain in each case. Counsel therefore urged us in the alternative, should the conviction be sustained, that the appellant gave a mitigation, that she is now 70 years old and a sole breadwinner of her grandchild whom she used to live with, besides being a a first offender and commute the sentence to the period served.

[9] This appeal was opposed by ***Mr Muia*** learned prosecution counsel for the State. He relied on his written submissions and made some oral highlights. He argued that the evidence of **PW7** was not hearsay as he testified in regard to what he saw and heard at the scene of murder and what he gathered from the witnesses. According to counsel, the statement made by **PW3** was not hearsay and was admissible because it was made immediately after the body of the deceased was found in circumstances that excluded the possibility of concoction or distortion to the advantage of **PW3** or the disadvantage of the appellant being the only two people who were residing in the same house with the deceased. It was never denied that **PW3** made a statement to **PW7** and that it was relevant to the issue and was consistent to the circumstances surrounding the death of the deceased. On the appellant's defence that she was threatened by the deceased and the strangers who had accompanied him, counsel urged us to find this was a concocted story that failed to convince the trial Judge taken with the strong prosecution case. On sentence, counsel admitted that the mandatory nature of the death sentence is unconstitutional although certain cases still deserved it such as the instant appeal where the deceased was subjected to a gruesome and heinous attack. Coupled with the fact that the appellant did not appear remorseful, counsel urged us to maintain the death sentence.

[10] We have recited the brief factual background pursuant to the requirement that in a first appeal it is imperative for this Court to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. See ***Sir Kenneth OÇonnor, P*** in the case of ***Peters vs. Sunday Post*****, [1958] E.A. 424: -**

> **"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."**

[11] The evidence that linked the appellant to the death of her husband is basically circumstantial which was gathered from the surrounding circumstances that the appellant and **PW3** lived with the deceased and in the morning of 20th June, 2011 the appellant reported to **PW2** that her husband had come home with strangers who were attempting to forcefully open the door and she fought them with a *rungu*. Soon thereafter the body of the deceased was found lying in the homestead with serious injuries and besides the body was a *rungu* which the police produced in evidence as the murder weapon. The whole incident did not attract the attention of the neighbours including ***Martin Ben Olulo*** **(PW1)** who was the deceased's son and lived in the same homestead but in a separate house. He said that when he woke up, he went to his shamba but his attention was later drawn to his home by people who came there and when he went to check he was met by the body of the deceased lying outside the house near the cow pen. By that time the appellant was seated in the house maintaining a studious silence until when she was interrogated by **PW7** and gave her defence that she was fighting off the strangers and the deceased who had come together and were forcing and insisting that she opens the door.

[12] The learned trial Judge discredited the defence by the appellant in which she stated;-

> **"... My husband did not come into the house. He had three people with him. I did not know them. It was at night so I could not see them. They were strangers. They began pushing the door. They were talking in Swahili. My husband first knocked the door. I heard his voice once. I saw the three people through the widow. When my husband called, I did not**

open the door. I was afraid of people my husband was with. The area I live is volatile as there are robbers in the area. When I refused to open, they pushed the door open. They were saying "fungua, fungua". My husband did not say anything. I heard him only once. The men came into the house. I was close to the door. They did not sit down, they did not speak to me. I had a stick with which I hit one of them on the hand and they left. There was no light in the house. There was just moonlight outside. I did not know the person I hit with the rod. I hit a person as I thought they were bad people. They all went out. I did not go out at night to find out who they were. I was still afraid. … I heard people outside the house. I heard like they were fighting. I closed the door. I stayed in the house. I went out at 6.am and when I looked outside I found my husband lying outside. I decided to go to the village elder…"

[13] The trial Judge found this evidence fanciful due to the fact that the body of the deceased had four (4) deep cuts on the head and a fracture of the leg which was as a result of a violent attack inflicted with force and not the way the appellant put it. The Judge however agreed with the evidence of **PW7** who carried out the investigations and testified that what he gathered from the witnesses was that the deceased was a habitual drunkard who used to come home late and become quarrelsome. This is how the Judge put it in his own words: -

"On the other hand, there is evidence, that the deceased was a drunkard. PW3 testified that the deceased had a habit of coming late at night. PW4 their daughter also testified the deceased was a drunkard and that he would quarrel with the accused though they never fought. According to the (sic) PW7 there was evidence that the accused and the deceased had a quarrel where the accused took a rungu and hit the deceased.

Having rejected the accused's defence that she was attacked by strangers, I find the accused is the only person who could have inflicted the injury on the deceased when he came home late that night. The injuries inflicted were of such a vicious nature and could only have been intended to cause grievous harm or in fact death…"

[14] To us, as aforesaid, the determination of the question of who caused the appellant's death turns on circumstantial evidence. This is because the learned Judge ruled out in our view, rightly so, the defence that the appellant was attacked by the strangers whom he had come with. The reasons given by the trial Judge being that if indeed the deceased was attacked by these strangers, the appellant would have screamed or attracted the attention of **PW1**, **PW3** or even the neighbors. On our own re- evaluation of the evidence we find no co-existing factors in the entire evidence that would weaken or even destroy that inference that the appellant was with the deceased on the fateful night and that she was the one who inflicted on him the fatal injuries. - See **Kipkering Arap Koske & Another vs. R (1949) 16 EACA 135**. We, like the trial court, conclude on the first requirement for proof of murder that the appellant caused the death of the deceased as indeed there is clear evidence that she was the only one who had the opportunity and nobody else to inflict the fatal injuries on the deceased. A defence that the deceased was killed by strangers was rejected by the learned Judge as indeed it defeats common sense how the appellant was attacked by strangers and did not even mention it to **PW1 and PW3** who were in the same homestead. We find no reasons to disagree with this finding.

[15] However, we have to address the issue of whether death of the deceased was caused with malice aforethought? Under ***Section 206*** of the Penal Code death is caused with malice aforethought if the accused person is proved to have, *inter alia*, intended to cause the death of or to do grievous harm to the victim. The defence raised by the appellant as reproduced elsewhere in this judgment was that she did not know who she hit with the rod and that she was shocked to find the lifeless body of her husband in the morning and decided to report the matter to the village elder. Nonetheless she did not alert her children or next door neighbours but travelled some distance to inform the village elder. The learned Judge also accepted the evidence by **PW7** and **PW4** who testified that the deceased was quarrelsome, he had sold a piece of his samba and on the fateful night, he had come home in the wee hours drunk. Also there is clear evidence that as the villagers milled around her homestead upon discovering the body of the deceased, the appellant did not utter a word which lends credence to her defence that she was in shock. To us self defence on provocation by the deceased who was quarrelsome, a drunkard and had come home in the wee hours is not farfetched. In this case we are persuaded the evidence pointed more to an offence of manslaughter than murder and it is where we part company with the trial Judge.

[16] In the circumstances, the appeal partially succeeds, we substitute the conviction of the appellant for the offence of murder with that of manslaughter. We therefore set aside the death sentence imposed by the trial Judge. We have considered the mitigation offered; the appellant is an elderly lady of about 70 years and she is a first offender. Accordingly, we sentence the appellant to ten (10) years imprisonment from the date of conviction being 22nd October, 2015.

Dated and delivered at Kisumu this 24th day of October, 2019.

P. N. WAKI

……..

JUDGE OF APPEAL

R. N. NAMBUYE

……..

JUDGE OF APPEAL

M. K. KOOME

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR