



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, MURGOR & ODEK. J.J.A)

CRIMINAL APPEAL NO. 111 OF 2015

BETWEEN

SAMUEL ROBI WANGWI1ST APPELLANT

JUMA MORAGA WANGWI WANGWI2ND APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii, (R. N. Sitati, J) dated 14th May, 2013 in HCCRC NO. 32 OF 2009)

JUDGMENT OF THE COURT

The appellants in this appeal, **Samwel Robi Wangwi** and **Juma Moraga Wangwi** are brothers. The High Court at Kisii was on 5th June, 2009 informed that the appellants had committed the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars in the information were that the duo murdered **Daniel Monanka** on the 2nd day of February, 2009 at Mturio village, Kehancha in Kuria District of Nyanza Province. The deceased was also a brother to the appellants. When the appellants appeared to take the plea on 11th June, 2009, before the High Court in Kisii, they both denied the information and soon thereafter their trial commenced.

In the opening address made to the court before **Musinga, J. (as he then was)**, **Mr. Gitonga**, learned State Counsel informed the court that on the material day the deceased was going to the field to untether his two cows when he was accosted by the appellants who were his younger brothers. They were armed with pangas and arrows. The appellants who had been laying in wait descended upon the deceased and fatally assaulted him. Thereafter they ran away. The deceased subsequently succumbed to the said injuries. To support the above narrative, the prosecution lined up a total of seven witnesses, who testified in brief as follows:-

PW1, Lucy Robi Monanka the deceased's wife on 2nd February, 2009 at about 4.00pm, was in the house with the deceased when he left to untether his cows which were, according to her, some fifty metres away from the house. Soon thereafter she heard the deceased screaming and when she rushed to the scene, she found him lying on the ground being assaulted by the appellants. She asked the appellants to stop assaulting him but they could hear none of it.

PW1 then called for help. Among those who came to her assistance were **Samuel Sipora Gesira, PW3** and **Lukas Rioba Kerario, PW4**. Both these witnesses confirmed that they indeed rushed to the scene in response to PW1's plea for help. They all found the deceased lying on the ground and was still alive with the appellants seated nearby. PW4 with the assistance of a third person carried the deceased to the house. Meanwhile PW3 went to look for a vehicle to take the deceased to hospital but before he could get one, he was informed that the deceased had passed on.

CPL, James Wahome, PW2 was instructed by the OCS to visit the scene of crime which he did in the company of **CPL Warina, (PW6)**. They removed the body of the deceased to Kuria District hospital for post mortem. The post mortem was conducted by **Dr. Okunga** on 3rd February, 2009 in the presence of **Thomas Moroga Wangwi, PW5** and PW1 who identified the body. According to the post mortem report that was presented to court by **Dr. Ruwa Mwatela, (PW7)** as Dr. Okunga had left public service, the deceased's body had multiple cut wounds on the head, upper limbs and back. The cuts on the head were so severe that they exposed the brain. There was also collection of blood within the skull leading to massive intracranial haematoma. He formed the opinion that the cause of death was severe trauma to the head.

In his testimony, PW5, a brother to both the deceased and the appellants referred to the simmering land dispute between the deceased and the 2nd appellant, as the reason behind the murder of the deceased. He explained that the deceased had bought a plot from the 2nd appellant which he had developed and occupied. With time, a dispute arose over the unpaid balance of the purchase price. Instead of asking for the balance to be paid, the 2nd appellant wanted the deceased to vacate the plot. For some reason, the 1st appellant entered the fray. He testified that his efforts to resolve the dispute bore no fruit. He was convinced that the land dispute was the reason behind the death of the deceased.

PW6, the investigating officer visited the scene of crime at about 6.30pm on 2nd February, 2009 in the company of Constable **Njeru Mwakio** and **Cheboi**. He was informed by PW1 that the deceased was killed by the appellants over a land dispute. After conducting thorough investigations, he was convinced that the appellants had a hand in the death of the deceased. It was then that he preferred the information against them.

Put on their defence, the 1st appellant gave unsworn statement and testified that on 2nd February, 2009, he woke up early in the morning and went to Sirare for his *boda boda* business and returned home at about 7.00pm. Before he got home, he heard some screams whereupon he learnt of the deceased's death. The deceased had already been taken to Kehancha but because it was late, he did not go there until the following day. On 28th February, 2009 he was arrested and informed that he was suspected of stealing cattle. However, on getting to Kehancha police station, he was told that he was a suspect in the murder of the deceased.

The 2nd appellant also gave unsworn evidence. He stated that in the morning of 2nd February, 2009, he went to plough his shamba and thereafter went on duty at Mastermind Tobacco. He remained on duty weighing tobacco leaves until about 6.00pm when he went home. On the way home he found many people gathered at the deceased's home. The police arrived at the deceased's home simultaneously with him and removed the body. The following morning, he went to Kehancha police station and brought the body of the deceased home for burial. After the burial, he remained at home until 28th May, 2009 when he heard that the 1st appellant had been arrested and taken to Kehancha police station. On 1st June, 2009, he visited the 1st appellant at Kehancha police station and it was then that he too was arrested on suspicion that he and the 1st appellant had murdered the deceased.

Having carefully considered all the evidence that had been adduced by the prosecution, the defence, the law and the submissions by counsel, the learned Judge, **(R.N. Sitati, J.)** was persuaded that the prosecution had proved its case against the appellants beyond any reasonable doubt. She accordingly convicted them and sentenced them to death.

Aggrieved by the conviction and sentence, the appellants filed the present appeal in which they raised 10 grounds but chose to focus on the four in the supplementary memorandum of appeal to wit that; the learned Judge erred in law and in fact in finding them guilty when the plea entered against them was unequivocal and or not properly taken; convicting them despite the fact that the charge sheet was defective, finding them guilty even though the prosecution evidence was marred with inconsistencies and condemning them to a sentence which under the circumstances was excessive, harsh, unconstitutional and unlawful.

At the plenary hearing of the appeal, **Ms. Olonyi**, learned counsel appeared for the appellant whereas **Mr. Muia**, learned prosecution counsel represented the respondent. Counsel relied on their written submissions and opted not to highlight.

The appellants submitted that the information was defective and violated mandatory provisions of the law. Further that they did not understand the plea they were taking as the language used was not in their preferred language and the particulars of the offence were not read out to them so that they could confirm or deny the same. On whether the prosecution case was proved beyond reasonable doubt, the appellants took the view that it was not. They contended that no one placed them at the scene of crime, there were inconsistencies in the testimonies by prosecution witnesses and their conduct of not running away from the scene was unusual for people who had just committed a heinous crime. It was submitted further that the period between the commission of the crime and the arrest of the appellants was long and not explained. They submitted further that malice aforethought was not established. The evidence tendered was circumstantial and did not tie the appellants to the crime to the exclusion of any other person(s). The appellants finally submitted that the sentence handed down on them was excessive, illegal and unconstitutional.

In opposing the appeal, **Mr. Muia** submitted that the evidence on record was consistent and the ingredients of the offence of murder were met. The appellants should have known that their action of assaulting the deceased would lead to death and thus this was a case which deserved the death penalty. Further, PW1's evidence was corroborated by the testimonies of PW3, 4 and 5 and the motive being a land dispute was clearly brought out by PW5 and 6. The appellants were further properly identified and this was a case of recognition as opposed to identification of a stranger. It was further submitted that the appellants' alibi defences were displaced by the prosecution witnesses' evidence. That their conduct of disappearing from the village after the offence had been committed was an inference of their guilt and therefore the said defence was an afterthought. With regard to sentence, the respondent contended that the offence was committed in a gruesome and heinous manner and the appellant did not appear to be remorseful and should therefore suffer the ultimate sentence of death.

This is a first appeal. We are commanded to subject the entire evidence adduced before the trial court to a fresh evaluation, analysis and to draw our own inference while bearing in mind that we neither saw nor heard any of the witnesses and give due allowance. This is what rule 29(1) of this Court's rules is all about. In the well-known 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.”

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

For the conviction of murder to hold, it is imperative that the prosecution prove the death of the deceased, that the death was unlawful, was caused by the appellants and was committed with malice aforethought. In the circumstances of this case, there is no doubt that the deceased was killed. There was ample evidence to that effect. Indeed all the prosecution witnesses confirmed the death of the deceased. Even the appellants in their own defences confirmed the death of the deceased. To cap it all there is the post mortem report on record. Accordingly, the death of the deceased is not in dispute as was properly held by the trial court.

Who then was responsible for the said death? According to the testimony of PW1, the appellants were responsible. She found them in the act when she responded to the screams of the deceased as he was being assaulted and rushed to the scene. According to her, she saw the appellants from a distance of 50 metres throw a metal bar at the deceased and later found them cutting the deceased with pangas. The offence was committed in broad daylight. In fact it was 4.00pm. There can be therefore no question of mistaken identity. This witness was in fact a sister in-law to the appellants. Indeed upon getting to the scene, she pleaded with the appellants to stop assaulting the deceased but they were oblivious to her plea. Further, when PW1 went to report to the local chief, she fingered the appellants as being responsible for the crime.

Besides the evidence of PW1, there was also the evidence of PW4. He confirmed that he heard PW1 tell the local chief that it was the appellants who had killed the deceased. He rushed to the scene and found the appellants who were just seated and least bothered with what was going on. The evidence of these witnesses places the appellants at the scene of crime contrary to their alibi defences. It beats logic that the appellants would not be curious to find out what was happening to their brother. As already stated this was a case of recognition as opposed to a mere identification of a stranger.

In the case of **Anjononi & others v Republic [1976 – 1980] KLR 1566** it was stated that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or another. Contrary to the submissions of the appellants, this was not a case of circumstantial evidence. Rather, it was a case of direct evidence linking the appellants to the crime if the evidence of PW1 and 4 is anything to go by. It has not been suggested that PW4 would have any reason to falsely testify against the appellant.

It is also in evidence that soon after the incident the appellants disappeared from their homesteads and it was not until about 4 months later that they were arrested. This cannot be conduct of innocent persons. Otherwise why would they run away if they did not have a hand in the death of the deceased more so when the deceased was their biological brother? Given the foregoing, we are satisfied, just like the trial court that the appellants were responsible for the death of the deceased. The motive of the murder was clearly given by PW5 and PW6. It was all about land.

Section 206 of the Penal Code enumerates the circumstances under which the intention to kill commonly referred to as the *mens rea* can be established.

The section stipulates:-

“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 this case, malice aforethought was established under subsections (a) and (c) aforesaid from the following circumstances, by assaulting the deceased as they did, they knew that they would cause death or grievous harm to the deceased. They also knew they were committing a felony. No wonder post mortem report concluded that the cause of death was bleeding within the skull.

The appellants have submitted that the information charging them with murder was defective in that it did not contain sufficient and detailed particulars to enable them to mount appropriate defences. We disagree. Section 134 of the Criminal Procedure Code sets out what should be contained in an information. It should contain a statement of the specific offence charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In this case the information was in these terms:-

“STATEMENT OF OFFENCE

...MURDER Contrary to section 203 as read with section 204 of the Penal Code.

PARTICULARS OF OFFENCE

1. SAMUEL ROBI WANGWI 2. JUMA MORAGA WANGWI: On the 2nd day of February, 2009 at Mturio village in Kehancha of Kuria District within Nyanza Province jointly murdered DANIEL MONANKA”

The particulars clearly indicate the offence committed, where and when it was committed and by whom. To our mind these particulars were sufficient to enable the appellants know the case they were to meet. In any event section 137 of the Criminal Procedure Code has a proviso that an information shall not be open to objection of its form or contents if it is framed in accordance with the Code. Finally, we note that no objection to the information was taken up before the trial court though the appellants were represented by counsel throughout the proceedings.

Another complaint is whether the plea entered was unequivocal. We have difficulties understanding this ground of appeal. The appellants were not convicted and sentenced on their own plea of guilty. They pleaded not guilty and their case proceeded to hearing in the normal manner. Had they pleaded guilty then whether the plea was equivocal, unequivocal or the language used would have invited our interrogation. Once more and be that as it may, this complaint was never raised with the trial court. Clearly, it is an afterthought.

As regards the sentence, Section 204 of the Penal Code provides that **“Any person convicted for murder shall be sentenced to death.”** The Supreme Court in **Francis Karioko Muruatetu & Another v Republic, (2016) eKLR** however stated:

“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.”

“...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...”

Given that the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted though stipulated in law. It is also not necessary to order a sentence re-hearing as the appellants mitigation are already on record. Taking into account that the appellants have been in custody for 10 years, they are relatives of the deceased and their mitigation, we are of the view that a sentence of imprisonment would serve the interest of justice.

For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The death sentence is set aside and in substitution thereof the appellants will serve 20 years imprisonment each to take effect from 14th May, 2013 when they were first sentenced.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.