IN THE COURT OF APPEAL

AT KISUMU

CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ. A

CRIMINAL APPEAL NO. 131 OF 2017

BETWEEN

GABRIEL MAKHOHA...................APPELLANT

AND

REPUBLIC....................................RESPONDENT

(*Appeal against Judgment of the High Court of Kenya at Busia, (**Hon. M. Mbogholi, J**) dated 6th October 2006 in*

CRIMINAL CASE NO. 6 OF 2006)

****

JUDGMENT OF THE COURT

1. This is a first appeal by **Gabriel Makhoha** (the appellant) who was charged in the High Court at Busia (Mbogholi, J) with the offence of murder contrary to Section 203 as read with 204 of the Penal Code, for which he was sentenced to death.

2. The particulars of the offence were that on 9th January 2007 at Lwanya Village, Bujumba Sub-location in Busia District within Western Province, the appellant together with his wife, **Mildred Akello Makhoha (Mildred)** jointly murdered **Vincent Ouma** (the deceased).

3. The prosecution called five (5) witnesses. **Calisto Mukono Onyango (Calisto)** testified that the deceased was his brother while the appellant was a family member. It was Calisto's further testimony that at 10.00pm on 8th January, 2007 he attended the funeral meeting of one **Gaudencia Opondo, (Gaudencia)** his late brother's widow and that he and others were organizing to raise money for funeral expenses. The deceased, proposed that men contribute Kshs. 100/- while women contribute Kshs. 50/-. **Mildred** objected to this and moved towards **Vincent** and started fighting him. The appellant who was holding a *panga* (machete) got up and went to where the two were fighting. The appellant, stabbed the deceased in the stomach and the intestines came out. Calisto further testified that he ran to separate the appellant and the deceased and retrieved the *panga*. Two young men were thereafter sent to report the incident at Bumala Police Station, and they returned to report that the police had requested that the suspects be taken to the police station. The appellant and **Mildred** were taken to the police station and the deceased, who was then still alive, was taken to Busia District Hospital. The deceased succumbed to his injuries on 18th January 2007. In cross examination, **Calisto** testified that he was seven (7) meters away from the deceased and the appellant, and that there was a lantern in the room where the fight between the appellant and the deceased took place.

4. It was the evidence of **Chrispinus Odhiambo (Chrispinus**) that the deceased and **Calisto** were his cousins. **Chrispinus** testified that on the material night he was attending the funeral meeting of his in law, **Gaudencia** and that **Calisto**, the deceased, the appellant and **Mildred** were all present. Calisto was chairing the meeting to raise money for funeral expenses. The deceased proposed that men should contribute Kshs 100/- while women should contribute Kshs 50/- which proposal annoyed **Mildred** and she physically confronted the deceased whereupon the appellant stood up and held the deceased and stabbed him on his stomach. It was the further evidence of **Chrispinus** that on the material night there was a full moon and a lantern, and that the deceased's intestines were hanging out and that the *panga* was sharp on both sides. **Chrispinus** with the assistance of others present overpowered the appellant and retrieved the *panga* from him and two young men were sent to Bumala police station to report the matter. The appellant and Mildred were taken to the Police Station while the deceased who was breathing but could not talk was taken to Busia District Hospital. In cross examination, **Chrispinus** testified that **Mildred** beat the deceased about seven (7) meters from where he was seated and that there was one lamp and the moon was very bright.

5. **Patrick Opondo Okado (Patrick)** testified that on the material night he was attending the funeral meeting of **Gaudencia** in the presence of among others, **Calisto, Chrispinus, Mildred** and the appellant. The deceased proposed that men contribute Kshs 100/- and women contribute Kshs 50/-. **Mildred** protested this proposal and stood up and a confrontation ensued between her and the deceased and they both

fell down. The appellant who was a few meters away got up and went to where the two were fighting and stabbed the deceased with a *panga* in his stomach. Patrick and others present disarmed the appellant and went to Bumala Police Station to report the matter. Mildred and the appellant were taken to the Police Station while the deceased was taken to the hospital. In cross examination, Patrick testified that Calisto took away the *panga* from the appellant.

6. **Dr Clifford Asava Amaganga** (Dr Amaganga) who was formerly Medical Superintendent at Busia District Hospital testified that he conducted a post mortem examination on the deceased's body on 19th January 2007 to ascertain the cause of death. His findings were that the cause of death of the deceased was ***"cardiac pulmonary arrest following poisons spilled by bacteria from the abdominal cavity following a penetrating would (sic)".*** **Dr. Amaganga** produced the Post Mortem form and Medical Examination forms which confirmed that the appellant and **Mildred** were both physically and mentally fit to stand trial. In cross examination **Dr. Amaganga** confirmed that his findings on the cause of death of the deceased were conclusive.

7. **Cpl David Simbui** (Cpl Simbui) was based at Bumala Police Patrol Base. It was his testimony that the Investigating Officer, **PC Musyoki** was transferred from Bumula Police Base and handed over the case to **PC Kipserem** who was indisposed at the time of trial and had handed over to him one *panga* which was sharpened on both sides. **Cpl Simbui** produced the *panga* as an exhibit.

8. The appellant gave sworn evidence and did not call witnesses. In his defence, the appellant denied the offence. He admitted that he was at the funeral meeting of his late in-law, where he had called people to assist to raise funds for the funeral. At about 10pm, his wife, **Mildred** was called by their daughter, **Linda** and they went outside. He then heard screams and he and other people ran to the scene. At the scene, he found **Mildred** and the deceased fighting and the deceased was lying on the ground. The appellant denied being near the deceased when he was killed and testified that when he reached the scene, the deceased had already been stabbed. The appellant denied being at the scene of the crime. In cross examination, the appellant maintained that he was not armed with a knife and that **Calisto** and **Chrispinus** lied to the court when they stated that the appellant was armed with a knife and had killed the deceased. It was the appellant's further testimony that the deceased did not attend the funeral meeting. The appellant denied that he was the person who stabbed the deceased.

9. **Mildred** in her sworn statement admitted to being at the funeral meeting. She testified that at around 9.30pm, her daughter Alice came and informed her that a young child had been taken ill. Mildred testified that she informed the appellant, that she was leaving and she and **Alice** started walking to their home. They met with the deceased who held her hand, tripped her and she fell down. She testified that the deceased tried to rape her, but she fought him. The screams from her and her daughter attracted many people to the scene. **Mildred** further testified that she did not see any knife at the scene and that all the witnesses who testified against her and the appellant were telling lies.

10. The learned Judge (Mbogholi, J) considered the evidence and the submissions by learned counsel and found that there was no dispute that the appellant, **Mildred**, **Calisto, Chrispinus** and **Patrick** were at the funeral meeting, and that the evidence of the three (3) eye witnesses, namely, **Calisto, Chrispinus** and **Patrick** was consistent that there was moonlight and a lantern. The learned Judge found the evidence of Calisto that he saw the appellant stab the deceased to be so consistent that the defence advanced by the appellant and **Mildred** could not be true. The learned Judge found that the appellant's defence and that of **Mildred** was contradictory in that the appellant testified that the daughter who called **Mildred** is called Linda while **Mildred** testified that the daughter's name is **Alice**. The learned Judge stated as follows regarding that contradiction:

> ***"That contradiction, though minor, is important because it would appear the two accused persons tried to tailor evidence to reach a pre-drawn conclusion that they were not involved in the killing of the deceased person."***

11. The learned judge found **Mildred** not guilty of the charge and acquitted her of the offence. However, the learned Judge found that the appellant caused the death of the deceased with malice aforethought and found him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and sentenced him to death.

12. Aggrieved by that decision, the appellant appealed to this Court on the grounds that the case was not proved beyond reasonable doubt; that the prosecution evidence adduced was contradictory and inconsistent; that the learned trial court failed to critically analyze the appellant's defence; that the learned trial court convicted the appellant without proof of *mens rea;* that the identification of the appellant was unsafe and not in accordance with the law; and that the learned trial judge erred in convicting the appellant when his constitutional rights had been violated.

SUBMISSIONS BY COUNSEL

13. At the hearing of the appeal, the appellant was represented by **Mr Paul Amuga** holding brief for **Ms. Marcella Onyango** while the respondent was represented by **Mr. Ketoo**, a Prosecution Counsel. Counsel for both parties had filed written submissions which they adopted without any oral highlighting.

14. Counsel for the appellant called into question the veracity of the eye witnesses' evidence as they did not testify whether the deceased was stabbed while standing or lying on the ground or whether the deceased defended himself; that the evidence adduced by the witnesses who were present was contradictory. Counsel submitted that Calisto testified that **Mildred** fought with the deceased while **Chrispinus** testified that **Mildred** lifted the deceased and threw him onto the ground. On the other hand, **Patrick** testified that **Mildred** went to where the deceased was, pushed him and they both fell down. Counsel submitted that none of the witnesses stated that the appellant lifted his wife, **Mildred**, from the ground and stabbed the deceased or that any witness testified that the deceased defended himself by fighting back or that he stood up for the appellant to stab him. Counsel further submitted that all three prosecution witnesses stated that the appellant had a short *panga* which he used to stab the deceased but there was no evidence that the appellant was holding the *panga* or that it contained blood belonging to the deceased. Counsel also raised issue with the fact that while Calisto, **Chrispinus** and **Patrick** testified that they were sitting next to the appellant and saw him standing up to go to the scene of the fight between the deceased and **Mildred**, they did not question why he was going with a knife to separate the fight.

15. Regarding identification, counsel for the appellant submitted that while **Chrispinus** testified that there was one lamp but the moonlight was very strong, there was no evidence where the lamp had been positioned and the witness testified that he was about seven (7) meters away from the scene of the crime. Further, that the light used to identify the appellant as the one who stabbed the deceased was not sufficient for proper identification of the appellant as the person who stabbed the deceased.

16. Counsel for the appellant further submitted that no evidence was led to show that the panga belonged to the appellant or that it had blood stains which belonged to the deceased. Counsel submitted that for the offence of murder to be proved, the prosecution had to prove both *mens rea* and *actus reus* yet there was no evidence that the appellant had planned to kill the deceased. Counsel further submitted that the trial court failed to take into account the appellant's defence that **Mildred** was called from the funeral meeting by their daughter and while on their way home, met with the deceased who fought with his wife. On the trial court's dismissal of the appellant's testimony due to the inconsistency in the names used by the appellant and Mildred to refer to their daughter, counsel submitted that a person can have more than three names and the prosecution did not lead any evidence to show that the daughter referred to by the appellant and Mildred were indeed two different people.

17. Lastly, Counsel for the appellant submitted that despite being arrested on 9th January 2007, it was three (3) months before the appellant was arraigned in court, which was a violation of his constitutional rights. Counsel urged us to allow the appeal.

18. Learned counsel who appeared for the State submitted that the prosecution proved the essential ingredients of the offence of murder beyond reasonable doubt; that malice aforethought was established by the evidence establishing that the appellant stabbed the deceased using a panga which was sharp on both sides, and with such intensity thereby causing him grievous injuries resulting in the deceased's intestines hanging out of his stomach; and that **Dr. Amaganga** confirmed that the deceased died as a result of a penetrating wound in the left lumber section of the abdomen.

19. On the ground of contradictory and inconsistent prosecution evidence, counsel submitted that all three eye witnesses were consistent and candid on the events that took place on the material night, and that not a single inconsistency or contradiction can be deduced from the evidence.

20. On the alleged failure of the trial court to consider the appellant's defence, counsel urged this Court to find, as the High Court did. that the defence case was tailored and unreliable and should be rejected. Lastly, on the ground of violation of the respondent's constitutional rights, counsel submitted that no sufficient material had been presented by the appellant on this ground, and that it was an afterthought as the appellant did not raise this issue before the High Court. Counsel relied on the case of **Julius Kamau Mbugua vs Republic (2010) eKLR**.

DETERMINATION

21. We have considered the rival submissions by counsel, the authorities cited and the law. This is a first appeal. Our mandate as set out by the predecessor of the Court in **Okeno versus Republic [1972] EA 32,** at page 36 is as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination (Pandya versus Republic) [1957] EA 336) and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantatital M. Ruwala versus Republic (1957) EA 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 findings and conclusions; 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 had the advantage of hearing and seeing the witnesses. See Peters versus Sunday Post [1958] EA 426."***

22. Rule 29(1)(a) of the Court of Appeal Rules, 2010 provides that on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.

23. In **Republic vs Oyier [1985] KLR 353** this Court held that:

> ***"The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable Tribunal could make such findings or it was shown that the trial magistrate erred in his findings or that he acted on wrong principles."***

24. From the rival submissions made by both the appellant and the respondent, it is clear that the deceased was stabbed to death. In this appeal our responsibility is to reconsider and evaluate the evidence that was adduced in the trial court, bearing in mind the aforestated decisions, in order to come to our own conclusion on the following issues:

> **(i) Whether the deceased died as a result of an act or omission on the part of the appellant;**
>
> **(ii) If so, whether the act or omission was committed with malice aforethought; and**
>
> **(iii) Whether the appellant's sentence was proper.**

25. From the evidence that was adduced in the trial court, it is clear that the deceased was stabbed on the material night and that he died as a result of the stab wounds. What is in dispute is who stabbed the deceased leading to his death. **Calisto**, **Chrispinus** and **Patrick** who testified as eye witnesses were well acquainted with the appellant. Calisto and **Chrispinus** testified that they were members of the same family with the appellant. The appellant admitted that he was with **Calisto, Chrispinus** and **Patrick** at the funeral meeting. **Calisto, Chrispinus** and **Patrick** all testified that they saw the appellant stab the deceased following an altercation with **Mildred** in the course of a

meeting held to raise money for expenses towards the funeral of **Guedencia**.

26. **Calisto** testified that there was sufficient lighting on the material night which facilitated positive identification of the appellant; that there was a full moon and a lantern, and that he was seven (7) meters away from the scene of the stabbing. Chrispinus testified that **"there was one lamp and the moonlight was very bright."** It was his further testimony that he was sitting seven (7) meters away from the scene of the stabbing. On his part, **Patrick** testified that the fight took place within a funeral meeting and that **Mildred** pushed the deceased down and the appellant went to where the fight was taking place and stabbed the deceased on his stomach with a *panga.*

27. The appellant denied committing the offence and in his defence stated that he was at the funeral meeting of his relative accompanied by his wife, **Mildred**; that **Mildred** was called by their daughter, **Linda;** that **Mildred** and **Linda** went outside the house; that subsequently he heard screams and found **Mildred** and the deceased fighting; that the deceased was lying on the ground and that he did not see any injuries inflicted on the deceased as it was dark; and that he went to the scene after the deceased had been killed. The appellant denied being at the scene of the crime. In cross examination, the appellant stated as follows:

> ***"We took the body to the police station and hospital. The deceased was not at the gathering. I have not seen him for one month…I insist that the deceased was not there."***

28. The learned Judge in his judgment stated as follows regarding the appellant's defence:

> ***"It is also the evidence of PW1 (Calisto) that the 1st accused person (the appellant herein) was only two (2) metres away from him and that he saw him stab the deceased. The evidence is so consistent that the defence advanced by the two accused persons cannot be true."***

From the record, it was Calisto's evidence that the appellant was only seven (7) metres away from him. The trial court therefore misdirected itself in this regard.

29.It was the appellant's submission that the *panga* that was allegedly used to stab the deceased was not linked to the appellant or the deceased through any forensic investigation and that the failure to submit the knife to forensic investigation created sufficient doubt which ought to have been resolved in favour to the appellant. Three eye witnesses, namely, Calisto, **Chrispinus** and Patrick all testified that they saw the appellant stab the deceased using a panga and that Calisto took the *panga* from the appellant while Chrispinus held the appellant. We find that the evidence of Calisto, Chrispinus and Patrick was sufficient to establish a nexus between the *panga,* the appellant and the injuries that were suffered by the deceased. While the forensic evidence may have strengthened the prosecution's case, the absence of such forensic evidence was not fatal to the prosecution case as there was sufficient evidence implicating the appellant and leaving no doubt that the *panga* that was produced in court was the "knife" that the appellant used to stab the deceased.

30.**Calisto** and **Chrispinus** were related to the appellant while **Patrick** testified that he knew the appellant. Accordingly, they were able to identify the appellant through recognition. **Calisto** testified that there was a full moon and a lantern while **Chrispinus** testified that there was a lamp and the moonlight was very bright. The evidence was consistent that **Calisto**, **Chrispinus** and **Patrick** recognized the appellant and saw him stab the deceased. This Court, in the case of **Mohammed Ringi Ali vs Republic [2002] eKLR** upheld a conviction for robbery with violence, holding that even though the incident had occurred at night there was moonlight and the complainants were able to recognize the appellants who were well known to them prior to the attack. We come to the conclusion that there was ample evidence that proved beyond reasonable doubt that the appellant was positively identified by 3 eyewitnesses as the person who stabbed the deceased.

31.Turning to the question whether malice aforethought was established, Section 206 (a) & (b) of the Penal Code clearly sets out the elements of malice aforethought as follows:-

> **"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…"**

32. The learned Judge in his judgment stated as follows regarding malice aforethought:

> ***"The injury to the deceased was serious and the 1st accused should have known that by using a knife on a fellow human being, the consequence was going to be death. In my judgment, malice aforethought under Section 206 of the Penal Code has been established…"***

33. In **Joseph Kimani Njau vs Republic [2014] eKLR** the court followed the holding in **Nzuki vs Republic [1993] KLR 171** that malice aforethought is a term of art and emphasized that:

> ***"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, that the test of which is always subjective to the actual accused:***

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the 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 does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

34. From the evidence adduced by **Calisto** and **Chrispinus**, the appellant stabbed the deceased with a panga to the extent that the deceased's intestines were exposed. The evidence of Patrick was that the appellant stabbed the deceased on the stomach. The evidence of **Dr. Amaganga** was that upon conducting a post mortem on the body of the deceased, he observed that there was **"perforation of the small intestines and the whole upper part of the intestines was gangrenous (dead)…the cause of death was cardiac pulmonary arrest following poisons spilled by bacteria form the abdominal cavity following the penetrating wound(sic)."** The evidence of Cpl Simbui, who produced the panga in evidence was that the panga was sharpened on both sides.

35. The appellant having used the panga that was sharpened on both sides to stab the deceased knew that his action was likely to cause the deceased serious injury or death. While there was no evidence of the appellant having express malice towards the deceased, his action of stabbing the deceased with the panga on the stomach falls within the provisions of Section 206 (b) of the Penal Code and malice aforethought must therefore be inferred. We therefore find that the appellant was properly convicted as both *actus reus* and malice aforethought with regard to the offence of murder were proved to the required standard.

36. On the ground whether the delay in taking the appellant to court invalidated the charge, we reiterate what this Court stated in **Julius Kamau Mbugua v R [2010] eKLR 37:**

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72(6) of the former Constitution* ***. That is the appropriate remedy which the appellant should have sought in a different forum."***

The alleged breach could, therefore, logically give rise to a civil remedy which the appellant can seek in a different forum. Moreover, we are in agreement that the complaint not having been raised in the trial court, it is an afterthought and cannot be entertained at this stage.

37. As regards the sentence, in accordance with the Supreme Court decision in **Francis Karioko Muruatetu & others vs Republic & others – Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015 (Muruatetu's case)**, the mandatory nature of the death sentence was declared unconstitutional. In sentencing the appellant, the learned Judge did not exercise his discretion nor did he give the appellant the opportunity to mitigate as he was of the view that the death sentence was mandatory. In the circumstances we are constrained to intervene in the appellant's favour. Accordingly, taking into account the circumstances of the case, we are satisfied that a sentence of fifteen (15) years would be appropriate.

38. The upshot of the above is that we dismiss the appellant's appeal against his conviction, but allow the appeal against sentence, to the extent of setting aside the sentence of death that was imposed upon him by the trial court, and substituting thereto a sentence of fifteen (15) years imprisonment to take effect from the date of the judgment of the High Court.

Those shall be the orders of the Court.

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

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR