IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL No. 237 OF 2018

DANIEL MWOMOLE ADEDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Eldoret, (Kimondo, J.) delivered on 25th April 2017

in

HCCC No. 60 of 2010)

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JUDGMENT OF THE COURT

1. The appellant was charged with the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya**. The particulars of the offence were that on the 6th of October 2010, at Makutano village, Matakusi sub-location, Lugari location in Lugari District within Western Province, the appellant jointly with others not before court murdered Janet Olesia Singer (the deceased). The deceased was attacked on 12th April 2010 and died six months later on 6th October 2010.

2. The prosecution case was founded and grounded *inter alia* on the testimony of PW1 Ainea Vutziriri, PW2 Simon Mudasia Ombuya, PW3 Dr Wambasi Mutolo a medical superintendent at Webuye District Hospital and PW4, Peter Ngunje, a Police Constable.

3. PW1 Ainea Vutziriri testified as follows:

> *On 12th April 2010 I was at the home of the deceased JANET. We were having tea at 7.30 p.m and her workers James and Julius who are Turkana and Simon Mudasia. We heard noises saying "Leo ni leo tunataka kichwa ya Charity tusimame nayo mbele ya crown". They were saying "come out". James and Julius came out and asked what the matter was. He was hit by Daniel Adebe (accused). I saw him hit Julius. The other attackers were Felix Alati and Roken Rubia.*
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> *We came out with Janet. They chased Janet. She ran to the neighbour's house Adisa. Adisa closed her door before Janet could get inside. The accused, Roken Rubia, Felix Alati, Isua and Henrita attacked her with rungus and an axe. The sun was setting, there was still light. I was near where the attack was occurring. Adisa's house was 30 meters away from Janet's house. Janet was screaming. I ran away to Milimani Police Station. I also called the O.C.S Turbo. The police met me on the way. I accompanied them back to the scene. I found Janet had been removed from Adisa's door and she had been put in her kitchen. She was bleeding. We took her to Webuye hospital. She had been cut four times on the head and on the hands (elbows). She finally died at Webuye Hospital where she had been re-transferred from Moi Hospital.*

4. PW2 Simon Mudasia Ombuya, corroborated the testimony of PW1 in the following manner:

> *In 2010 I was living in Makutano, Lugari. I was working for Janet as a grounds man. On 12.4.2010 at about 7.30pm. I was with other workers with Ainea (PW1) and the two Turkanas. Janet was inside. Ainea moved into the house. The accused entered through the gate with Rubia. Rubia was saying "wapewe". The accused is a step-brother to deceased. Janet came out and saw it was accused. The brother to accused Felix and their mother Henrieta came. They were restrained by the Turkanas. The assailants overcame them. The Turkana's took off. Ainea came back with the Administration Police (Aps) and found Daniel and Felix were beating the deceased. Charles came with an axe and cut her on head and back. When the APs came, they went away and said it was*

family dispute. They removed deceased from Adisa's house and dragged her to Janet's kitchen. They then went away and left her there.

When we examined Janet, her heart was beating. She was bleeding. She had cuts on head and neck. Ainea had called Turbo station. The police found her alive. The assailants had previously said they would kill the deceased. Daniel and Felix were the ones who used to say that. In March 2010 Janet said that this land will take me to the grave. She said her brothers thought she was taking away their land. I saw the accused attack the deceased. Their mother was shining a torch. The accused held the deceased on the neck and inserted sticks in her private parts. He had a knife. I was not there when police and Ainea took deceased to hospital.

5. On cross examination, PW2 painted a vivid picture of the offence that was committed as follows:

Accused had a knife, a kitchen knife, a long one. He used some arrows that the Turkanas had. They used those sticks or arrows to injure her on the private parts. Accused was the one inserting the metal- a metal bar. It was three (3) feet. Rubia had a knife which he gave to accused. Rubia did not attack deceased. Ainea went to call the APs. The APs did not intervene. The attack was going on. Four people attacked the deceased. Some buyers of that land were the ones saying "ua ua". They did not attack the deceased. Deceased had injuries on the head on the forehead and the hair of the deceased removed and on the back near the neck. Charles Ambani cut the deceased on the neck. I saw the accused insert the sticks into deceased private parts. Rubia is the one who was saying "wapewe".

6. PW3, Dr Wambasi Mutolo, a medical superintendent at Webuye District Hospital produced a post mortem report on the deceased. The post mortem was conducted by Dr. Alex Munyendo. The report was produced in evidence pursuant to **Sections 33 and 77 of the Evidence Act** with no objection from the appellant. PW3 testified that the cause of death was pulmonary failure due to pulmonary embolus resulting from prolonged immobilization which was in turn caused by severe head injury inflicted by a blunt object with sharp edges.

7. PW4, PC Peter Ngunje testified as follows:

On 12.4.2010 I was accompanied by Inspector Nyachiro and P.C Fridah to Makutano village. We received a report from the AP officers at the village that the deceased was attacked by her step brothers. We found the deceased in her kitchen floor. Blood was oozing from deep cuts on the head and back. She was still alive. We took her to Lumakanda Hospital where we were referred to Webuye District Hospital.

8. The prosecution closed its case and the learned judge gave a ruling where he put the appellant on his defence. The appellant gave a sworn statement and essentially denied committing the offence. It was his defence that he was in jail at the time pursuant to an assault case which was later dismissed.

9. Upon hearing and evaluating the evidence tendered, the judge convicted the appellant and sentenced him to death. The learned judge in sentencing the appellant expressed:

I have considered the mitigation. Like I have stated in the judgment, this was a murder most foul. I have taken into account that the accused is a first offender and remorseful. He must take responsibility for his actions. Punishment must reflect his moral blameworthiness for killing his step sister over a land dispute. Murder is a felony. Section 204 of the Penal Code provides for only one sentence. I sentence the accused to suffer death.

10. Aggrieved by the conviction and death sentence meted upon him by the trial court, the appellant lodged the instant appeal. The grounds of appeal are that the learned judge erred in convicting and sentencing him on a case that did not meet the evidentiary threshold as required by law; that he was tried and convicted on a charge whose particulars were not sufficiently proved and that due to the fact that he was a first offender, the death sentence meted upon him was harsh and excessive. It was further contended that the judge erred in failing to warn itself that the appellant's conviction was based on the testimony of a single identifying witness whose evidence was not corroborated in material particulars.

11. At the hearing of this appeal, learned Counsel **Mr. Nelson Ogeto** appeared for the appellant. The hearing date was taken by consent of the parties during case management. Both parties filed written submissions and cited authorities in this appeal.

APPELLANT'S SUBMISSIONS

12. The learned counsel for the appellant relied on his written submissions and made oral highlights. He submitted that the conviction and sentence did not meet the evidentiary threshold to prove the offence. That the particulars of the offence were not proved as no evidence was led to indicate that it is the appellant who committed the grievous harm to the deceased since there were five (5) people who were charged with the offence.

13. According to the post mortem report, the case of death was as a result of blunt trauma. However, the prosecution failed to prove which weapon was used to kill the deceased as there were five (5) people who had five (5) different weapons. That it is doubtful whether it was the appellant who committed the unlawful act of murder with malice aforethought. That the testimony of PW1 and PW2 point towards Charles and Felix as the possible individuals who fatally beat the deceased. That from the testimony of PW3, it was possible the deceased could have died as a result of falling on a blunt object with sharp edges.

14. The appellant further submitted that the trial judge found that the motive in the death of the deceased was a dispute over ancestral land. That the judge erred in finding that this was the motive without indicating the corroborative circumstances that led to the finding. That in the absence of any corroborative circumstances on motive, the conviction of the appellant was unsafe. That the judge did not determine who was the owner of the disputed land; were there any buyers involved; and was the land subject to Succession Proceedings.

15. On the issue of the sentence, counsel urged this Court to apply the **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015** case, quash the death sentence and substitute it with a term sentence. He told the Court that the appellant has been in custody since 2010 and has spent his youthful years in prison.

RESPONDENT'S SUBMISSIONS

16. The respondent filed written submissions opposing the instant appeal. It was urged that the prosecution proved beyond a reasonable doubt that the appellant committed the offence as charged. That the evidence tendered in court points to the guilt of the appellant. That malice aforethought was proved by the appellant's conduct of carrying weapons to the deceased's home while baying for her blood. Also, the injuries inflicted on the deceased that led to her death were pointers towards the malice aforethought on the part of the appellant.

17. The respondent cited the case of **Daniel Muthee – v- Republic (2007) eKLR** where this Court in finding there was malice aforethought expressed:

> *"…in cutting the deceased with a panga severally, the appellant must have known that act would cause death or grievous harm to the victims."*

18. The respondent submitted that the appellant was positively identified through recognition as both PW1 and PW2 knew him to be a step brother of the deceased. That both PW1 and PW2 stated they were able to identify the appellant and his co-assailants since they were very well known to them and there was still light and even the appellant's mother was holding a torch while cheering the assailants to attack the deceased. The State concluded its submissions by urging us to find that the trial judge came to the correct conclusion in finding the appellant guilty of the offence as charged.

ANALYSIS and DETERMINATION

19. We have considered the record of appeal as well as submissions made by the appellant and the respondent. This is a first appeal against conviction and sentence. In **Reuben Ombura Muma & another - v - Republic [2018] eKLR** it was stated:

> *"This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."*

20. The appellant herein was charged with the offence of murder contrary to **Section 203** of the **Penal Code** which provides that the one who causes the death of another by malice aforethought by an unlawful act or omission is guilty of murder. The appellant contended that the evidence tendered before the trial court did not meet the threshold of proof beyond reasonable doubt. That malice aforethought on the part of the appellant was not proved. **Section 206** of the **Penal Code** establishes what constitutes as malice aforethought as;

> *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.*

21. The evidence on record shows that the deceased was attacked by the appellant and other assailants. The testimonies of PW1 and PW2 vividly narrates the events of the day. From the testimony of PW1 and PW2, it is manifest that the appellant and his co-assailants came to the deceased's house shouting and uttering the words "*Leo ni leo tunataka kichwa ya Janet"* and "*ua ua."* (Today is today, we want Janet's Head. Kill, kill."

22. The evidence further shows the appellant was armed with a somali sword with a club, that he hit Julius, one of the guards who was hired by the deceased. Not only did the appellant and his co-assailants scare and chase away the Turkana guards, they also ran after the deceased as she tried to flee to her neighbor's house for safety. According to PW2, the appellant used the sticks or arrows retrieved from the guards who had ran off and inserted them into the private parts of the deceased.

23. It was specifically stated by PW1 that the appellant hit the deceased with a metal rod on the head three times. He also used a *panga*, which was on his trouser belt and removed a big part of the deceased skin and hair piece. The chronological account of the evidence was that once they were done with their vicious attack, they dragged the deceased back to her house, placed her in the kitchen and left her for dead. This was corroborated by the evidence of the Police Constable, PW4 who found that deceased bleeding profusely in the same kitchen.

24. From the evidence adduced it is clear that the appellant and others who are not before the Court had malice aforethought, they attacked the deceased with an intent to kill. The words they were uttering, the weapons they carried and the vicious attack meted on the deceased all point towards a premediated murder. This Court pronounced itself in **Daniel Muthee v Republic [2007] eKLR** as follows;

> *"We are in entire agreement with the learned Judge that this was a case in which the appellant armed himself with a panga with a clear intention of either causing grievous harm or killing the deceased Catherine, and her son Allan…When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code." (See also Thomas Okoth Odede v Republic [2006] eKLR).*

25. In this appeal, the appellant submitted that the deceased was attacked by five different people with five different weapons. That there remains doubt if the appellant was the one who fatally beat the deceased. The appellant (amongst other persons) having been placed at the scene of crime, the legal principle enshrined in the persuasive case of **Uganda - v - Sebaganda s/o Miruho [1977] HCB 7,** is applicable. In **Uganda - v - Sebaganda s/o Miruho [1977] HCB 7,** it was held:

> *"that where there is common intention, it is immaterial who inflicts the fatal injury to the deceased as long as when the injury is inflicted the parties are carrying out a common purpose and in such a case one is responsible for the acts of the other."*

26. We are satisfied that the prosecution proved beyond a reasonable doubt the malice aforethought of the appellant and his co-assailants. The appellant and his co-assailants demonstrated their intention to kill the deceased. We are satisfied that not only did the prosecution prove malice aforethought on the part of the appellant, he was also positively identified by both PW1 and PW2. He was known to them and identified him as such. The identification of the appellant was by recognition and taking into account the caution given by this Court in **Wamunga vs Republic [1989] KLR 426** and in **R vs Turnbull [1976] ALL E.R. 549**, we are satisfied that the identification was free from error. In the same breath, we are persuaded by the finding in **Shalen Shakimba Ole Betui & another v Republic [2009] eKLR**;

> *"The present case was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified and recognized by PW1 and PW2. There could be no possibility of a mistaken identity. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, see Anjononi and Another v. R. [1980] KLR 54 at p. 60."*

27. We now consider the mandatory death sentence meted out on the appellant, we note that the same is provided for in **Section 204** of the **Penal Code** and therefore the learned judge did not err is sentencing him as such. However, the appellant claimed that the same was harsh since he was a first offender. His counsel further urged the Court in his submissions to apply the **Francis Karioko Muruatetu & another – v- Republic, (supra)** and reduce the sentence meted out on the appellant. In the aforementioned decision, the Supreme Court held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. Following that decision, this Court is at liberty to determine the appropriate sentence based on the facts of each case. As a result, many such decisions have been made by this in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** based on the circumstances surrounding each case.

28. In the instant matter, the circumstances under which the offence was committed was heinous and malicious. The appellant deliberately and with impunity pursued and viciously attacked the deceased with a clear intent to kill her even as she tried to flee to seek refuge. The injuries inflicted on the deceased were not only aimed to kill but were also meant to take away her dignity in the process.

29. The appellant's conduct of inserting sticks into the private parts of the deceased depicts the gruesome nature of the pain inflicted on the deceased. The appellant's act of chasing the deceased as she was fleeing is atrocious. This Court cannot overlook such a monstrous conduct which are aggravating circumstances. The appellant's conduct of going to the deceased homestead armed with weapons paints a picture of premeditated murder. We have considered all these as aggravating factors. The appellant's mitigation is on record. We have taken the same into account together with the aggravating circumstances stated above. The appellant has urged that the trial court erred in meting a harsh death sentence. We are aware of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic, (supra) Petition Nos. 15 & 16 of 2015.** Nevertheless, due to the aggravating circumstances surrounding the death of the deceased, we decline to vary or interfere with the death sentence meted upon the appellant.

30. This appeal has no merit. We uphold and affirm the conviction and the death sentence meted on the appellant. This appeal be and is hereby dismissed in its entirely.

Dated and delivered at Eldoret this 17th day ofOctober, 2019

R. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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