IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO (P), KOOME & SICHALE JJ.A)

CRIMINAL APPEAL NO. 27 OF 2015

BETWEEN

BENARD OLIECH OOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Homa Bay

(D.S. Majanja, J.) dated 18th December, 2014

in

H.C.CR.C 34 of 2012)

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JUDGMENT OF THE COURT

While it is common factor that there was a dispute over family land between the deceased and his brother, who is the father of the appellant, and while there was medical evidence of the cause of death of the deceased, the critical question in the trial as indeed it is before us is who inflicted the injuries from which the deceased died.

But from their investigations, the police identified the appellant as the suspect and charged him with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code: that on the 11th of November, 2012 at Onyando village within Homabay County, he murdered his paternal uncle, Patrick Lumumba Ooko (the deceased).

The deceased and the appellant lived in the same village and their homes were approximately 1km apart. It was the prosecution's case that on 7th November, 2012 the appellant's father (PW4) who is a brother to the deceased had reported to the area chief (PW2) that the deceased had destroyed trees at their family home. The chief summoned the deceased to his office to look for a solution to their differences but he failed to attend the meeting. As a result of that failure, the chief advised PW4 to report the matter to the police. There is evidence that he did so.

However, the next morning, there was news that the deceased had been beaten and sustained serious injuries to the head and arm. He was rushed to Homa Bay District Hospital where he succumbed to his injuries. Though there was no eye witness evidence as to how the injuries were caused, the prosecution insisted that it was the appellant who was responsible; that the deceased had cut trees and removed iron sheets from the roof of the kitchen in their family home which fact angered PW4 and led him to report the matter to both the chief and the police; and that in retaliation, the appellant and his brother (PW7) assaulted the deceased and inflicted fatal injuries upon him.

The appellant in his defence denied the charge and maintained that there was no bad blood between the families and that they lived peacefully. To the contrary, he explained that after learning of the deceased's sickness he went to his home and, using his father's motorbike, he, together with his father, ferried the deceased to hospital; and that he was the one who took care of the deceased while he was undergoing treatment in hospital. Having taken care of the deceased all this time, it came to him as a surprise when he was arrested and charged with causing the death of the deceased.

This evidence was placed before the trial court (Majanja, J.) who, upon its consideration, came to the conclusion that it was the external injuries inflicted upon the deceased by a person using blunt force that had caused his death; and that, from the circumstantial evidence the person in question was the appellant.

The Judge identified the circumstantial evidence presented in the prosecution evidence to include, an existing family dispute; that the deceased, in his death bed told PW3 that he was assaulted by the sons of PW4, a dying declaration under **section 33(a)** of the Evidence; that medical evidence on the nature of injuries supported the dying declaration; that the testimonies of PW4, PW6 and PW7 were not credible as they amounted to a complete denial of the injuries on the deceased, intended to protect and cover up for the appellant; that by taking the deceased to hospital PW4 and the appellant was part of a scheme to cover up their tracks; and that it was incredible for PW4, PW7 and the appellant to pretend to be concerned about the sickness of the deceased but fail to notice the obvious injuries on his head and arm.

Guided by the principles on circumstantial evidence enunciated by this Court in such cases as **Ndurya V. R** [2008] KLR 135; **Sawe V. Republic** [2003] KLR 364 and **R V. Kipkering arap Koske and Another** 16 EACA 135, the learned Judge was satisfied that the evidence presented before him irresistibly pointed to the appellant as the person who committed the murder and that because the injuries pointed to malice aforethought given their concentration on the head and right upper limb. Having satisfied himself on both elements for the proof of the offence of murder, the learned Judge convicted the appellant, and upon considering a detailed mitigation on behalf of the appellant, he observed, as the courts did then, that the law only provided for the death penalty under **section 204** and accordingly proceeded to sentence the appellant to suffer death.

The conviction and sentence aggrieved the appellant who has proffered this appeal on six grounds. According to him the learned Judge erred by: convicting him on the basis of a dying declaration under **section 33 (a)** of the Evidence Act without caution; convicting him on unclear evidence as to the immediate cause of death; disregarding the *alibi* evidence of the appellant and; imposing an unconstitutional sentence of death.

During the hearing of the appeal, parties relied on their written submissions and opted not to orally highlight them. For the appellant it was submitted that it was an error for the learned Judge to convict him solely on the deceased's dying declaration; that Susan and Margaret Agola in whose presence PW 3 alleged the declaration was made were not summoned to corroborate the evidence of PW 3; that the dying declaration was a fabrication of PW3. The case of **Bukenya & Others V Uganda** (1972) EALR 549 at 551 was relied on.

On the *alibi*, it was posited that a dying declaration should be considered alongside the evidence of *alibi*, as stated in the case of **Adongo Hadoline V. Uganda** (2014) UGCA 56; that the appellant's *alibi* that he was at work when the deceased was attacked was not considered, which failure constituted a miscarriage of justice. It was further argued that it was the duty of the prosecution to investigate the *alibi* by establishing from the appellant's place of work whether or not he was at work on the day and at the time

in question.

Lastly, on the sentence, it was submitted that the sentence to death of the appellant under **section 204** was bad in law since it went against the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Anor V. Republic** (2017) eKLR. The appellant, though alive to the fact that his case was determined before the decision in the **Francis Karioko Muruatetu** case, asked us, in the alternative to consider, either remitting the file to the trial court or ourselves passing an appropriate sentence.

The respondent opposed the appeal maintaining that the ingredients of the offence of murder were established; that malice aforethought was established by the extent of injuries proven by the medical evidence; that though nobody saw the appellant assault the deceased, there was proof of a family dispute. In addition, there was evidence that the deceased named his attackers in his dying declaration to PW3; that the provisions of **section 33 (a)** of the Evidence Act were fulfilled; and that there is no provision of the law compelling the learned Judge to warn himself before convicting on a dying declaration.

On the appellant's defence of *alibi,* it was submitted that the same was unsustainable as he did not call his friend Okoth to establish the *alibi* and that the assault happened on 8th November, 2012 before the appellant left his home for work.

On the sentence, it was conceded that at the time the appellant was convicted, the only punishment for the offence of murder was the death penalty. However, based on the case of **Muruatetu,** (supra), the respondent urged us to revisit the sentence and impose an appropriate one, not being less than 20 years in order to meet the ends of justice.

In our estimation, based on the foregoing submissions, there are only two substantive issues for determination: whether the appellant caused the death of the deceased, which is in effect a question of identification, based on circumstantial evidence and a dying declaration by deceased and if the question is in the affirmative, what sentence would be appropriate.

In considering the two issues, it has to be remembered that as a first appellate Court, our role in this appeal is to re-evaluate the evidence on record as a whole in order to arrive at our own independent conclusion. This was explained in the case of **Okeno V. Republic** [1972] EA.32 as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal 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 finding 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."**

It is not in contention that the evidence against the appellant was purely circumstantial. It is also a fact that the deceased did not die on the day of his assault. He died a few days later as he was undergoing treatment at Homa Bay District hospital. The law on circumstantial evidence is firmly settled; that it must form a chain so complete as to lead to the incompatible inference of guilt of the accused person; and there are no co-existing factors that might weaken that inference. See **Rex V Kipkering Arap Koske & Anor** (1949) 16 EACA 135 and **Simoni Musoke V. R** (1958) EA 715 and **R V. Taylor Weaver & Donovan** (1928) 21 Criminal App. R 20. In the latter it was stated that:

> **"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

From the post mortem report the cause of death was identified as head injuries and intestinal obstruction. The learned Judge in this regard looked at the extent of the injuries and thus expressed his opinion;

> **"27. Finally, it is clear that the multiple bruises concentrated on the head and right upper limb demonstrate malice aforethought. These injuries inflicted by a blunt object which resulted in a fracture and bleeding on the head could only have been intended to cause the death of or do grievous harm to the deceased within the meaning of section 206(a) of the Penal Code. It does not matter there that (sic) the deceased could have died from intestinal knotting as opined by PW 8. In my view, it is sufficient that one of the causes of death was proved to have been caused by the accused and I** (sic) **have outline above, the accused is the inflicted (sic) the blow that caused death.**
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> **28. I also find that that given the position of the fracture on the mid-shaft of the right arm is evidence that it is likely that the deceased was trying to block a blow to his head which led to his arm being fractured. Ultimately the blow landed on his head causing him to die."**

There is no misdirection in this passage. Indeed, we, like the trial Judge, are satisfied that there was evidence of cause of death, being the injuries to the head; and that intestinal knotting was not the proximate cause. Again, from the graveness of the injuries, that targeted upper part of the body, we entertain no doubt that malice aforethought was equally proved.

As far as the identity of the person who inflicted the injuries is concerned, again, like the learned Judge we rely on the dying declaration that the deceased made to PW3. The circumstances leading to the dying declaration were that, following a complaint made to the chief PW2 by PW4 about the deceased, PW3 was sent by the chief to investigate the assault reported to him. He proceeded to the deceased's house on 8th November, 2012 and found the deceased in the house. He observed that he had head injuries and his hand was broken. PW3 testified that the deceased told him that he had been assaulted by the sons of PW4, being the appellant and PW7. PW 3 therefore advised PW4 to take the deceased to hospital.

The learned Judge, in relying on this declaration was cognizant of the guidelines for the admissibility of a dying declaration and was well guided by the decision of this Court in the cases of **Choge V. R** [1985] KLR 1 and **Pius Jasanga s/o Akumu V. R** [1954] 21 EACA 331. The learned Judge was of the considered view that PW3 was not only an independent but also a credible witness since he did not have any relationship with the deceased and the family; and that given his status as the area assistant chief, he was the kind of person to whom the deceased would give a dying declaration. The learned Judge stated on this issue that:

> **"The testimonies of PW4, PW 6 and PW 7 are a complete denial of the injuries inflicted on and sustained by the deceased. The testimony of PW3 as regards the injuries is however corroborated and confirmed by the medical evidence given to PW8. I would hasten to add that the kind of injuries sustained by the deceased on the head and the broken right arm as so obvious that the testimony of PW 4 and PW 7 on this issue cannot be believed. There was no reason for PW 3 to lie to the court or implicate the accused and his brother as he was an independent witness without any relationship with the deceased and his family apart from the fact that he was the chief of the area. He is the kind of person whom the deceased would tell what happened to him. I therefore find and hold that the statement made by the deceased implicating the accused is credible.**
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> **As a result of my finding above, I also reject the accused's testimony that he did not assault the deceased. PW 2 and PW 3 confirmed that there was a dispute in the family which was reported by PW 4. I hold that the intention of PW 4, PW 6 and PW 7 was to protect and cover-up for the accused who committed the felonious act."**

With respect, the learned Judge properly directed himself on the issue of dying declaration. For our part we note that PW7 was, as a matter of fact declared a hostile witness for having recanted his statement to the police that it was his brother, the appellant, who fought with the deceased. It was on the basis of this

statement that PW7 was spared the trial for murder.

Failure to call two witnesses, Susan and Margaret Agola who were said to have been present when the deceased mentioned the appellant and the PW7 was not fatal as there is no requirement that, in order to support a conviction based on evidence of a dying declaration there must be corroboration. See: **R V. Eligu s/o Odel and another** (1943) 10 EACA 90, where it was held:

> **"That whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and that would be incorrect…."**

See also**: Re Guruswami Tevar & Others** (1940) Mad 158.

That notwithstanding we find ourselves that, apart from PW3 being a credible witness, medical evidence tendered by PW8 supported PW3's testimony. Further, in view of the family dispute that existed, though not essential for proof of crime, the motive of the appellant to kill the deceased completes the last link in the chain of circumstantial evidence. This Court in the case of **Libambula V. Republic** [2003] KLR 683, stated thus:

> **"Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."** (Our Emphasis)

The *alibi* evidence of the appellant was also considered and found to have been displaced by the overwhelming prosecution evidence. We find no material from which we can interfere with the conviction of the appellant. His appeal on conviction is accordingly dismissed.

We turn to consider what would be appropriate sentence having found that both elements of the offence of murder proven. Until the aforesaid Supreme Court decision in **Francis Karioko Muruatetu & Anor** (supra) the courts considered that death sentence in murder and indeed other capital offences was the only punishment prescribed by law.

This Court is now bound by **Francis Karioko Muruatetu & Anor** (supra); that death sentence is not mandatory in a charge under **section 204** of the Penal Code. On record is a detailed mitigation both by the appellant and his family members. We also take into consideration the fact that the appellant was a first offender, for which reasons we are inclined to interfere with the death sentence imposed by the trial court and substitute it with a sentence of 20 years.

This appeal therefore partially succeeds and is accordingly allowed to the extent that the death sentence is set aside and in its place we sentence the appellant to twenty (20) years imprisonment.

This sentence shall take into account the period the appellant has been in custody pursuant to **section 333 (2)** of the Criminal Procedure Code.

Dated and delivered at Kisumu this 21st day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR