IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 44 OF 2015

BETWEEN

DUNCAN MUGESI MASERA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori (Majanja, J.) delivered on 23rd March, 2015

in

HC.CR.C. No. 9 of 2014)

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JUDGMENT OF THE COURT

1. Duncan Mugesi Masera, the appellant, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 2nd September 2010 at Bohorera village in Masaba Location, Kuria West District, within the then Nyanza Province, the appellant murdered Alfred Manyinyi (the deceased). He was tried before the High Court at Kisii and convicted in a judgment delivered by ***Majanja, J.***, on 23rd March 2015. He was sentenced to death.

2. He has appealed against that judgment on the grounds that the ingredients of the offence of murder were not proved; that the trial court failed to consider that the death of the deceased was not caused by the act of the appellant but by intervening factors; that his defense was not considered; and that the sentence meted out is manifestly harsh.

3. The facts are that on 15th July 2010 at about 6.45 p.m., Thomas Nyamohanga, (PW1) Philip Marwa Mwita (PW2) and the deceased were walking home from Masaba Market. They were near their homes at Bohorera and about to part company when a motor cyclist, a boda boda rider, came from behind and fell off the boda boda. PW1, PW2 and the deceased rushed to assist the rider. They helped him lift the motorcycle. As they did so, the deceased rhetorically asked the rider, *'why young people, these days, do not ride their motorcycles carefully*.' In the words of PW1, the deceased asked the rider, "*kwa nini nyinyi vijana wa siku hizi mbona hamuendeshi piki piki kwa upole*." The rider was apparently not amused. He removed a knife from the left side pocket of his jacket, stabbed the deceased and ran off, leaving his motorcycle where it was. PW1 and PW2 screamed for help and people gathered at the scene.

4. Among those who responded to the screams and came to the scene was Christina Nyanwsi Rioba, PW3, the mother of the deceased as well as the deceased's brother, John Mwita Rioba, PW4. According to the mother of the deceased, PW3, she was in her house on 15th July 2010 at about 8.00 p.m. when she heard screams. She ran to where the screams were coming from, about 20 meters from her house, and found her son, the deceased, lying on the ground. He had been stabbed on the left side of the stomach. She tied her son's stomach with her leso. According to PW2, she (PW3) "*wailed as she tied the deceased's intestines…"* The deceased was then taken to Dr. Machage Memorial Hospital where he was admitted for treatment.

5. On his part, the brother of the deceased, John Mwita Rioba, PW4, stated that he was at home on 15th July 2010 at about 6.45 p.m., when he saw his children dashing out. He also got out and heard screams and went where the screams were emanating from. He found his brother, the deceased, had been stabbed. As his brother was taken to hospital, he went to make a report of the incident at the Administration Police (AP) Post, Masaba.

6. Following that report, on 16th July 2010, Corporal Thomas Ongaga, PW5, of AP Post Masaba, accompanied by another officer,

Police Constable Robert Okindo, went to the hospital where the deceased was hospitalized. He saw the deceased had been stabbed *"in the ribs on the left side"* and after observing him left him under the care of the doctors.

7. As PW5 and Police Constable Robert Okindo were leaving the hospital, they met PW1 who informed them that he had seen the attacker within the hospital. On the same day, PW1 had accompanied the mother of the deceased and PW2 to the hospital on a visit to the deceased. At the hospital, PW1 saw the boda boda rider who had stabbed the deceased the previous day. According to PW1, he knew the attacker before the incident. He explained, "*I also knew the suspect before the day of the incident. He was a child to a neighbour. The home was next to the deceased's home. The suspect's home from my home is further than from my home to the deceased's*."

8. On receiving that information from PW1, PW5 went to the ward, treatment room, where the alleged attacker was and on being identified by PW1, escorted him to where the deceased was in the hospital and upon confirmation by the deceased that he was the person who had stabbed him the previous day, they arrested him and took him to Kehancha Police Station.

9. Police constable Dawas Dante, PW6, was at the time attached to Kehancha Police Station. He was the investigating officer. He initially charged the appellant with the offence of assault before the Magistrates' Court, at Kehancha. He subsequently withdrew that charge when he received information on 2nd September 2010 that the deceased had succumbed to death as a result of the injuries. He recorded fresh witness statements and after concluding his investigations charged the appellant with the offence of murder.

10. Dr. Aggrey Idagiza Akidiva, PW7, a medical doctor at Akidiva Memorial Hospital in Migori, performed a postmortem examination of the deceased on 10th September 2010. The deceased died on 2nd September 2010. Based on his examination, he observed that the injuries were on the left lumbar region. He concluded that the cause of death was due to hemorrhagic shock due to the stab wound on the kidney. He formed the opinion that the injuries may have been caused by a sharp object.

11. In his defence, the appellant stated that on 16th July 2010, he was at home in Rotwuni village, Masaba Division, in Kehancha within Migori County when, about 9.30 a.m., he was visited by police officers who arrested him and took him to Kehancha Police Station where he was detained; that PW1 and PW2 accused him of an offence he knew nothing about; that he was not at the scene of the alleged crime on 15th July 2014 and had never ridden a motor cycle; that PW1 whom he knew from his village had a grudge and had threatened him as he, PW1, had wanted to buy a plot of land from a neighbour who instead sold it to the appellant's father and that is the reason for the appellant's suffering.

12. On those facts, the trial Judge was satisfied that the prosecution had established its case against the appellant to the required standard, found him guilty of murder and convicted him. The Judge expressed:

> **"In light of the evidence I have outlined, I find that the accused is the person who assaulted the diseased with a knife. I dismiss his defence that he was not present at the scene or that the case against him is the result of a grudge."**

13. Thereafter the Judge sentenced the appellant to death as ***"the law which I have to apply only prescribes one penalty; that is death."*** As already stated, the appellant was aggrieved and lodged the present appeal.

14. Urging the appeal before us, ***Mr. P. Ochieng***, learned counsel for the appellant relied on his written submissions which he highlighted. He submitted that the prosecution did not establish that it was the act of the appellant that caused the death of the deceased; that while the stabbing incident was alleged to have taken place on 15th July 2010, the deceased died on 2nd September 2010, 47 days later, and there was no connection between the two events; that between 15th July 2010 and 2nd September 2010 the deceased moved hospitals and no evidence was led regarding his condition during hospitalization; that there is therefore reasonable doubt as to whether there were intervening circumstances that would have caused the death. The case of ***Gichunge vs. Republic [1972] E. A. 546*** was cited.

15. Counsel submitted that prosecution evidence on the injury was contradictory; that while the witnesses stated that the deceased was stabbed in the stomach, the doctor, PW7, stated that the stabbing was in the lower lumbar region on the back lower side. According to counsel the trial Judge did not carefully evaluate the evidence on the cause of death.

16. On sentence, it was submitted that the death sentence should be substituted with a custodial sentence should the court reject the appeal on conviction.

17. Opposing the appeal, ***Mr. Kakoi***, learned Principal Prosecution Counsel also relied on written submissions which he highlighted. He submitted that all the ingredients of the offence were proved to the required standard; that PW1 and PW2 witnessed the appellant stab the deceased; that the incident occurred before sunset when there was sufficient day light; that the appellant was well known to both PW1 and PW2; that there is no doubt as to the cause of death as the deceased died of the stab wound inflicted by the appellant and there were no intervening circumstances.

18. We have considered the appeal. The main issue for consideration is whether the prosecution proved its case against the appellant to the required standard. In addressing that question, we have reconsidered and re-evaluated the evidence in order to draw our own conclusions. In doing so, we bear in mind that unlike the trial court, we have not had the advantage of seeing and hearing the witnesses testify.

19. As stated by the Court in ***Joseph Kariuki Ndungu & another vs. Republic, Criminal Appeal Nos. 183 & 188 of 2006, [2010] eKLR*** we have a duty as a first appellate court:

> **“■ ■ ■ To re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial *judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.”***

(See also ***Okeno vs. Republic [1972] EA***; ***Njoroge vs. Republic [1987] eKLR***; *and* ***Kiilu & Another vs. Republic [2005]1 KLR 174***.)

20. In order to sustain a charge for the offence of murder, the prosecution has to prove, firstly, the death of the deceased, and the cause of his death; secondly that the person accused committed the unlawful act which caused the death of the deceased; and thirdly that in committing that act, the accused acted with malice aforethought. See the decision of this Court in ***Abdi Kinyua Ngeera vs. Republic, Criminal Appeal No. 312 of 2012 [2014] eKLR***.

21. As regards the death of the deceased, and the cause of his death, the brother of the deceased, John Mwita Robia, PW4, identified the body at the mortuary for purposes of postmortem. Dr. Akidiva, PW7, who performed the post mortem examination stated in his evidence that he opened the body of the deceased, and that “*on physical examination, the deceased had a stab wound on the left lumbar region. This is on the back lower side. There was an incision wound on the left side of the abdomen*.”

22. The doctor testified further that the cardiovascular system had collapsed and “*there was a stab wound on the left kidney which had a hematoma formation*.” He concluded that the cause of death was due to hemorrhagic shock due to the stab wound on the kidney and expressed that the injuries, which were on the left lumbar region of the deceased, may have been caused by a sharp object.

23. In our view, the evidence of PW7 is consistent with that of PW1 and PW2 both of who were present when the deceased was stabbed. PW1stated that “*the deceased was stabbed on the left side of his stomach*.” PW2 was also clear that “*the deceased had been stabbed on the left-hand side of the stomach*.” The mother of the deceased, who used her *leso* to tie the deceased’s stomach before he was taken to hospital also confirmed that the deceased “*had been stabbed in the stomach on the left side of the stomach*”; that the deceased remained hospitalized “*at the hospital for about 1-2 months*” during which he “*used to urinate blood*” before he died.

24. Given that evidence, we find, as the trial Judge did, that the fact of death of the deceased as well as the cause of death were established to the required standard. The contention by the appellant that the deceased may have died of other intervening circumstances has no basis.

25. As to whether the appellant is the person who committed the unlawful act which caused the death of the deceased, the evidence is watertight. As already noted, the appellant is well known to PW1 and PW2. They engaged in conversation with him as they sought to assist him after he fell off his motor cycle. PW1 readily pointed him out to the police officer in the treatment room at the hospital on 16th July 2010 following which he was arrested. As the Judge correctly pointed out, this was a case of identification by recognition.

26. As regards the requirement of malice aforethought, Section 206 of the Penal Code provides that malice aforethought shall be deemed to be established by evidence proving, among other circumstances, an intention to cause death of or to do grievous harm to any person; knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person.

27. Expounding on Section 206 of the Penal Code, this Court in ***Paul Muigai Ndungi vs. Republic [2011] eKLR*** stated that:

> **“Malice aforethought is deemed established by the evidence proving an intention to cause death of or grievous harm to any person.”**

In ***Dickson Mwangi Munene and another vs. Republic [2014] eKLR*** the Court said that:

> **“The definition of malice aforethought in Section 206 of the Penal Code comprises of not only intentional but also reckless acts causing grievous harm committed with indifference to their consequences.”**

28. By stabbing the deceased in the stomach, the appellant knew or was indifferent that such act would result in the death or cause the deceased grievous harm. We conclude therefore that malice aforethought was established.

29. The result of the foregoing is that we uphold the conviction. There is no basis for us to interfere with it.

30. As for the sentence, the appellant stated in mitigation before the trial court that he was remorseful and sought leniency but was sentenced to death as the Judge considered that his hands were tied to mete out the death sentence. However, considering the circumstances leading to the death of the deceased; that he died while on a mission to assist the appellant; that the appellant was not at all provoked; we think a deterrent sentence is called for. We set aside the death sentence and substitute therefor a custodial sentence of 40 years from 21st September 2010 when he was arraigned before the High Court.

31. The appeal otherwise fails and is accordingly dismissed.

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

D.K. MUSINGA

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.JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR