IN THE COURT OF APPEAL AT KISUMU

CORAM: MAKHANDIA, M'INOTI & ODEK, JJ.A)

CRIMINAL APPEAL NO. 138 OF 2015

BETWEEN

EZEKIEL WAKHWA NANDWA…….……1ST APPELLANT

MORGAN ONGWANO NGALA.....2ND APPELLANT

VERSUS

REPUBLIC…..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 25th June 2015

in

H.C. CR. C. No. 37 of 2010)

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JUDGMENT OF THE COURT

The information pursuant to which ***Ezekiel Wakhu Nandwa (1st appellant)*** and ***Morgan Ongwano Ngala (2nd appellant)*** were charged and convicted of the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code*** stated that on 17th August 2010, at ***Mahola Village*** in ***Butere District*** in ***Western Province*** they jointly murdered ***Paulo Amayeye David***. ***Sitati, J***., the last of the three judges who heard the case, found the two appellants guilty as charged and sentenced them to death, which she found to be the mandatory sentence prescribed by law. The appellants were aggrieved and filed this first appeal, which by law is both on matters of law and fact.

In support of its case, the prosecution called six witnesses. ***Ruth Inyangala (PW1)*** testified that while she was cultivating her *shamba* at about 7.30 am on the material day, the deceased passed by from the river and greeted her. Shortly she heard voices directing him to sit down. She went to find out what was happening, and from a distance of about 10 meters, she saw the two appellants assaulting the deceased. The 1st appellant, a nephew to the deceased, was armed with a *jembe*, which he used to hit the deceased on the head. The 2nd appellant had a *panga* that he used to cut sticks with which he beat the deceased. PW1 testified that she knew both appellants and the deceased very well because they were her relatives. With another lady called ***Rhoda Wamboko (PW2),*** who also witnessed the attack, they raised an alarm and many neighbours responded. The deceased, who was bleeding profusely, was helped to his house from where he was taken to hospital on a motorcycle.

PW2's evidence corroborated that of PW1. She testified that on the material morning she was from the river when she met the two appellants, armed with a *jembe*, *panga* and sticks, beating the deceased, who was pleading with them to spare his life. She knew the appellants and the deceased well before the incident. With PW1, they raised the alarm, attracting the attention of many neighbours. Her evidence was similar to that of PW1 on how the deceased was helped to his house before being taken to hospital.

Manase Omussule (PW3), a brother to the deceased testified that he heard screams from the deceased's house, which was about 100 meters from his own, and on going to check, found the deceased bleeding profusely. The deceased informed him that the appellants had assaulted him. PW3 hired a motorcycle and took the deceased to the Chief's Office at ***Lunza*** and later to ***Butere Police Station***. From there PW3 took the deceased to ***Butere Hospital*** where he was admitted for four days and discharged. However his condition deteriorated and he died on 13th September 2010. ***Habel Omulubi Miude (PW4***), a niece of the deceased, corroborated the evidence of PW3 and added that after the condition of the deceased deteriorated, he took him back to Butere Hospital before he was transferred to ***Kakamega Provincial General Hospital*** where he died. PW4 added that the family of the deceased was advised to transfer him to ***Moi Referral Hospital*** in ***Eldoret***, but they were unable to do so due to lack of money. PW4 identified the body of the deceased for postmortem.

Cpl. Benjamin Kibet (PW5) recorded a statement from the deceased on 30th August 2010 in which the deceased stated that it was the appellants who assaulted him. The appellants' counsel informed the court that he was not objecting to the statement and the same was

produced as an exhibit. The witness testified that the appellants were initially charged with assault in ***Butere SPM Criminal Case No. 561 of 2010***, but after the death of the deceased, they were charged with murder.

Dr. Dickson Mchana Mwaludindi (PW6), a pathologist at Kakamega Provincial General Hospital produced the deceased's postmortem report, which was prepared by ***Dr. Nyikuli***, his former colleague who had since left Government employment. The witness testified that the deceased sustained a cut wound on the forehead and a fracture of the skull with a depression, leading to bleeding in the brain. The cause of death was established to be severe head injury secondary to blunt trauma to the head.

In his defence, the 1st appellant gave sworn evidence but did not call any witness. He stated that on the material day he went to Butere Police Station where he was needed. On getting back home, he got summons to attend court on 18th August 2010 in connection with an arson case against the deceased. After about 25 minutes the police arrested him. He confirmed that the deceased was his uncle, but denied any knowledge of the circumstances of his death. He claimed that the deceased was lynched by a mob on 6th November 2009 for burning a house belonging to a relative.

On his part, the 2nd appellant also gave sworn defence and called no witness. He stated that on the material day he had visited the 1st appellant who is his uncle and was at ***Sabatia Market*** at 10.00 am when the police arrested and locked him up at Butere Police Station. He denied having met the deceased on the material day or any knowledge of or involvement in his death.

After their conviction and sentence the appellants filed this appeal in which they contend that the trial court erred by holding that the prosecution proved its case beyond reasonable doubt; by relying on contradictory and

inconsistent evidence; by ignoring their defence; by relying on a statement that was not a dying declaration; and by imposing a sentence which was manifestly harsh and excessive without considering their mitigation statements.

Urging the appeal, the appellant's learned counsel, ***Mr. Wangoda,*** submitted rather boldly that the deceased's death was not caused by the actions of the appellants, but by his family's failure to transfer him to Moi Referral Hospital, Eldoret, as they were advised. Had they done so, it was contended, the deceased would not have died. Counsel added that because PW6 testified that the wound on the deceased's head was healing, his head injury could not have been the cause of death. In counsel's view, the prosecution evidence did not therefore connect the appellants to the death of the deceased, particularly because the murder weapon was neither recovered nor produced in evidence.

On inconsistencies in the prosecution evidence, counsel submitted that PW1 and PW2 did not tell with certainty the language that the appellants were speaking, with one saying they were using Luhya language, and another Luhya and Kiswahili. Counsel also urged that there was contradiction between the evidence of PW1, PW2 and PW4 on how the deceased got to his house after he was assaulted and that the two women referred to by the deceased in his statement bore different names from PW1 and PW2, thus raising doubt about the evidence of PW1 and PW2.

Next, counsel submitted that the prosecution did not prove malice aforethought on the part of the appellants because the alleged murder weapons were a *jembe* and sticks and not weapons like spears or knives. In support of the submission counsel cited ***Charles Njonjo Gituro v. Republic [2019] eKLR*** and ***Rex v. Tuper s/o Ocher [1945] 12 EACA 63*** and submitted that the weapons allegedly used by the appellants negatived an intention on their part to kill the deceased.

As regards admission of the statement by the deceased, counsel submitted that the statement amounted to hearsay and should not have been admitted, or should have been admitted with great caution. The judgment in ***Charles Njonjo Gituro v. Republic*** (supra) was cited to emphasize the point that a dying declaration should only be admitted with caution.

Lastly on sentence, the appellants submitted, on the authority of the judgment of the Supreme Court in ***Francis Karioko Muruatetu & Another v. Republic & 4 Others [2015] eKLR***, that the mandatory death sentence for the offence of murder is unconstitutional and illegal. They also submitted that the trial court failed to consider their mitigation statements before sentencing them. The appellants accordingly urged us to allow the appeal and set aside the sentence of death imposed by the trial court.

Mr. Sirtuy, learned counsel for the respondent opposed the appeal, submitting that the prosecution had proved its case beyond reasonable doubt. He contended that PW1 and PW2 were eye witnesses who saw the appellants assaulting the deceased and that their evidence was corroborated by that of the pathologist regarding the nature of the injuries from which the deceased died. Counsel added that malice aforethought could be properly inferred from the nature of the injuries that the appellants inflicted upon the deceased. As regards sentence, counsel merely stated that the prosecution was conceding, without any elaboration.

We have carefully considered the record, the grounds of appeal, the judgment and the authorities cited by the appellants. This is a first appeal in which we are obliged to reappraise and re-evaluate the evidence, so as to come to our own conclusions thereon (See ***Okeno v. Republic [1972] EA 32***.

Ordinarily we are obliged to make allowance for the fact that we did not see or hear the witnesses as they testified, but in this case we take note of the fact that the judge who wrote the judgment did not see or hear any of the witnesses.

The evidence adduced by the prosecution to link the appellants to the death of the deceased was primarily that of PW1 and PW2 who were eye- witnesses. They witnessed the appellants assaulting the deceased and hitting his head with a *jembe*. These witnesses were relatives of the appellants and knew them very well. The offence was committed at about 7.30 am in the morning, in broad daylight. These witnesses were not shaken in cross- examination. The pathologist confirmed the evidence of PW1 and PW2 when he found that the cause of the death of the deceased was severe head injury secondary to blunt trauma to the head. He noted that the deceased had sustained a cut wound on the forehead and a fracture of the skull with a depression, leading to bleeding in the brain, which is consistent with the deceased being hit on the head with a *jembe.*

The deceased died less than a month from the date the appellants assaulted him. In these circumstances, it does not avail the appellants to claim that had the deceased been taken to Moi Referral Hospital, he would not have died, or that because the wound on his head showed signs of hearing, he did not die from the head injury. In terms of causation, the injuries that the appellants inflicted on the deceased were the of cause his death; his family's inability to have him treated at a particular hospital was not the primary cause of his death. If what the appellants submit were the law, all murderers would be able to deflect liability and attention from their own unlawful acts by blaming subsequent medical intervention or lack thereof. In view of the clear evidence of PW1 and PW2 that it was the appellants who inflicted the injuries on the deceased's head, we do not think anything turns on the admission of the statement that was made by the deceased before his death.

We are equally not persuaded that there were any contradictions or inconsistences in the prosecution evidence that would justify a different conclusion from that reached by the trial court. Having re-evaluated the evidence, we do not see any material contradiction or inconsistencies in the evidence of PW1 and PW2 as alleged by the appellants. As this Court stated in***, John Nyaga Njuki & 4 Others v. Republic Cr. App. No. 160 of 2000:***

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."***

As regards the murder weapon, the record shows that the *jembe* that the appellants used to inflict injuries on the head of the deceased was not produced as an exhibit. That in itself is not fatal to the conviction, once the trial judge believed the evidence of PW1 and PW2 that the injuries that the deceased succumbed to were inflicted by a *jembe*. In ***Karani v. Republic [2010] 1 KLR 73***, this Court delivered itself as follows on the issue of production of a murder weapon as an exhibit:

> ***"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".***
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> (See also, ***Ekai v. Republic [1981] KLR 569)***

As regards malice aforethought, which is the *mens rea* for the offence of murder, whether or not it is proved depends on the peculiar circumstances of each case. By virtue of ***section 206*** of the Penal Code, malice aforethought is deemed established by evidence proving, among other things, an intention to cause death or grievous harm to any person or knowledge that the act or omission causing death will probably cause the death of or grievous harm to a person. In determining whether malice aforethought has been proved, the court is required take into account factors such as the part of the body that was injured, the type of weapon that was used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused. (See ***Bonaya Tutu Ipu & Another v. Republic [2015] eKLR***).

In this appeal the appellants hit the deceased on the head with a *jembe.* The force was such as to cause a depression and fracture of the skull, leading to bleeding in the brain. There is no doubt that that from the nature of the attack, the appellants intended to cause grievous harm to the deceased. In the circumstances, we cannot fault the learned judge for finding malice aforethought proved on the part of the appellants.

The last issue in this appeal is on sentence, which the respondent concedes. The learned judge sentenced the appellants to death, noting that the death sentence was the only prescribed sentence for the offence of murder. Since then, the Supreme Court has held in ***Francis Karioko Muruatetu & Another v. Republic & 4 Others*** (supra) that sentencing is a matter for the courts and that a uniform mandatory sentence imposed upon conviction for an offence irrespective of the peculiar circumstances of each case is unconstitutional. Although the appellants presented their mitigation statements, contrary to what their counsel submitted, the learned judge did not consider them because of what she understood to be the mandatory nature of the sentence. The record shows that the appellants were first offenders with no previous criminal record and that they were remorseful.

Taking into account all the circumstances of this case, we dismiss the appeal against conviction in its entirety. We, however, allow the appeal against sentence and set aside the sentence of death meted by the trial court. In lieu thereof, we substitute a sentence of 30 years imprisonment with effect from the date of the appellants' arrest. It is so ordered.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. O. ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR