



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, MURGOR & OTIENO-ODEK. J.J.A)

CRIMINAL APPEAL NO. 61 OF 2015

BETWEEN

MOSES OCHIENG OKEYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Homa

Bay, (D.S. Majanja, J) dated 24th April, 2015 in HCCRC NO. 39 OF 2012)

JUDGMENT OF THE COURT

On 28th July, 2010, the High Court at Kisii was informed that **Moses Ochieng Okeyo “the appellant”** had murdered his father, **Alex Okeyo Obar**, on 17th July, 2010 at Nyamanga village, Kasgunga sub-location, Gembe West location, Mbita district, contrary to section 203 as read with section 204 of the Penal Code. When arraigned in court he pleaded not guilty to the information and soon thereafter his trial ensued.

The prosecution called a total of 7 witnesses to prove its case against the appellant. In brief the prosecution case was that on the morning of 17th July, 2010, the deceased went to bath in Lake Victoria and was accompanied by two children **DO (PW4)** and **KOO (PW7)**. The latter was the deceased’s grandson. As they returned from bathing, the two saw the appellant emerge from the bushes armed with an iron rod. He asked the deceased to tell him what he had done to him and before the deceased could answer, he hit him with the iron rod and the deceased fell down and died instantly. The appellant then ran into the woods. PW4 and PW2 ran home and informed the mother to PW7 and his uncle and neighbours among them **Kennedy Onyango Odhiambo (PW1)**.

According to PW1 he was herding his goats when he heard screams from the deceased’s house. He instinctively rushed there and upon arrival was informed that the appellant had killed his father by the lake. On his way to the lake he met PW4, PW7 and one Keziah who were screaming that the appellant had killed their father. He went past them and ran to the scene where he found the deceased lying down while bleeding from the neck. He saw the appellant running away towards the woods.

On the other hand, **Daniel Odero Owiti (PW2)**, a fisherman at about 10:00am on the same day received information that the appellant had killed his father. He rushed to the scene and found the deceased lying along a footpath with a deep cut on top of his head. He remained at the scene until the police officers from Mbita Police Station came and collected the body of the deceased. He accompanied the police officers when they stormed the woods in search of the appellant. They pursued the appellant who was now running from the woods towards the lake. They managed to arrest the appellant, removed him from the lake and handed him over to the police officers. He knew the appellant very well as they grew up together.

Ernest Otonda Opanga (PW3), a fisherman too from the same village joined the search of the appellant after getting information that he had killed his father. Before that he had proceeded to the scene and viewed the body. They found the appellant in the woods nearby and on seeing them approach, made for the lake. He was however apprehended and handed over to the police.

Senior Sergeant **Sammy Ngeywa (PW5)** investigated the case. He received information on 17th July, 2010 that someone at Nyamanga village had killed his father. He went to the scene together with the commanding officer and other police officers and found the deceased’s body with two visible injuries on the head and the left hand at the elbow. He took the deceased’s body to Homa Bay District Hospital Mortuary for a post mortem. The appellant was arrested by members of the public while attempting to run into the lake and handed over to him. He

rearrested the appellant and took him to Mbita police station. On 19th July, 2010 the appellant voluntarily took them back to the scene and showed them where he had hidden the murder weapon (*iron rod*) on the shores of Lake Victoria. The iron rod was then recovered. He also took the appellant to Sindo District Hospital for mental assessment before he charged him with the offence of murder.

Dr. Ayoma Ojwang (PW6) conducted the post mortem on the body of the deceased and prepared a post mortem report dated 22nd July, 2010. He observed a deep cut wound on the deceased's head at the right temporal region. On internal examination, there was no skull fracture but there was a lot of bleeding within the brain. He concluded and certified the cause of death as head injury and in his opinion the weapon used was a sharp object.

Put to his defence, the appellant gave sworn testimony. He stated that he had gone fishing overnight at Nyachebe beach on 16th July, 2010 and returned on the material day at around 10:00am. On the way, he met his step mother, Grace Agolla and police officers who were looking for him. He accompanied them to Mbita police station where he was asked about his father to which he answered that his father was at home. That at this point no one had informed him that the deceased was dead and he only became aware on 18th July, 2010. He denied hiding in bushes or trying to escape into the lake. He also denied seeing PW1 on the material day or having ever seen the iron rod before or that he took the police to where it was recovered.

The learned Judge, (**Majanja, J.**) in his judgment determined that the evidence of PW6 was consistent with that of PW2, 3 and 5 hence the deceased died as a result of a head injury inflicted by a sharp weapon. That a proper look at the iron bar showed that it was capable of inflicting a sharp injury when used. That PW1, 4 and 7 gave direct evidence which implicated the appellant. That though the evidence of PW4 and 7 was unsworn, it was corroborated by that of PW1 who had seen the appellant run away from the scene. The court observed further that the incident happened in broad daylight during mid-morning and therefore the evidence of PW4 and 7 on identification of the appellant was truthful as they had no reason to lie about the incident. It was also held that there was no reason for Grace Agolla to testify since the evidence of PW4 and 7 was sufficiently corroborated by PW1. She would not have stated anything different from what she had been told by the two witnesses, the court concluded.

With regard to the appellant's defence, the court was of the view that the testimonies of PW2, 3, 4 and 5 all pointed to the fact that he was arrested while hiding in the woods and attempting to run into the lake. The appellant's defence that he was going home when he was arrested was therefore disapproved on that score. The fact that PW1 did not see the appellant run away with the murder weapon and the fact that the PW4 and 7 were not present when it was recovered did not weaken the prosecution case. The contradictions adverted to by the appellant according to court were immaterial as the key witnesses were consistent about what they saw. The trial court then concluded that the appellant's defence was a sham in light of the prosecution witnesses' testimonies. It was of the firm view that the prosecution had proved beyond any reasonable doubt that the deceased's death arose from a single blow on his head inflicted by the appellant. The blow was intended to cause grievous harm hence the act was committed with malice aforethought. The appellant was then convicted of murder, and sentenced to death.

Dissatisfied by the conviction and sentence, the appellant filed the instant appeal in which he has raised two main grounds to wit; that the learned trial Judge erred in finding that the case against the appellant was proved beyond reasonable doubt; and secondly, that he would seek refuge in the provisions of Articles 165 (3) (a) (b), 159 (2) (a) (b) and 22 (4) of the Constitution bearing in mind the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic (2017) eKLR.

During the hearing of the appeal, **Mr. Omondi**, learned counsel appeared for the appellant while **Mr. Muia**, learned Prosecution Counsel represented the respondent. Counsel relied on their written submissions and opted not to highlight.

The appellant faulted the trial court's finding that the evidence by PW4 & 7 was corroborated by other material evidence when in fact there was no evidence in corroboration at all. That PW1 was the first person to arrive at the scene and not much later as was held by the trial court. That PW7 never went back to the scene until the police arrived. The trial court was further faulted for embarking on a fishing expedition because PW1 was neither at the scene of the incident nor did he see the appellant as the appellant immediately ran into the woods after hitting the deceased. Having established that the testimony of PW1 was full of fundamental discrepancies, only the evidence of Grace Agolla, mother of PW7 and deceased's younger wife would have shed more light on what transpired on the material day. However, she never testified. In the absence of her testimony without any justifiable reason; it could only be presumed according to the appellant that her evidence would have been adverse to the prosecution case. The appellant then urged us to substitute the death sentence imposed on him with a lesser one, should we find that the appellant was properly convicted.

Opposing the appeal, the respondent submitted that malice aforethought had been proved in terms of section 206 (a) (b) & (c) of the Penal Code having regard to the extent of injuries pointed out by PW6 and the cause of death being a head injury. As regards the identity of the appellant, the respondent submitted that the appellant was well known to PW1, 4 & 7. He maintained that the prosecution case was proved beyond reasonable doubt as neither the cross examination of prosecution witnesses nor the evidence tendered by the appellant in his defence poked holes in the prosecution case on any aspect. The prosecution relied on direct evidence of PW4 & 7 who saw the appellant commit the offence. PW4 & 7 were consistent and placed the appellant at the scene of the crime despite giving unsworn testimonies. That the said evidence was tested in terms of its veracity through cross-examination by the appellant's counsel. That the murder weapon was linked to the appellant owing to the fact that he was seen hitting the deceased with it and he also led the police officers to where he had hidden it and was recovered. On sentence the respondent submitted that the offence was committed in a gruesome and heinous manner, the appellant did not seem to be remorseful and had not made any effort towards rehabilitation while in prison custody. Therefore, the appellant, according to counsel, should face the full force of the law, and the death penalty imposed on him therefore should not be interfered with.

This is a first appeal. The appellant has a legitimate expectation that we will subject the entire evidence adduced before the trial court to a fresh and exhaustive evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses thus due allowance should be given for the same. This mandate is reiterated in rule 29(1) of the Court of Appeal Rules. That rules obligates us to re-appraise the evidence and draw our own conclusion on the guilt or otherwise of the appellant. Further **in the case of Issac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005**, this Court observed that:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.”

We have considered the record of appeal, the submissions made by counsel and the law. The issues for our determination are whether the prosecution case was proved beyond reasonable doubt; and whether we should exercise our discretion and review the sentence imposed on the appellant.

The essential ingredients to be proved in the offence of murder so as to sustain a conviction can be summarized thus; death; cause of death; identification of the perpetrator and malice aforethought. The appellant has contested the evidence of PW4 & 7 as having not been corroborated. The trial court relied on the said evidence in convicting the appellant as they were key eye witnesses. They gave unsworn evidence pursuant to the directions of the court. They testified to having seen the appellant emerge from the woods and attack the deceased before disappearing again into the woods. To this extent, we agree with the appellant’s submission that their evidence required corroboration as provided for under section 124 of the Evidence Act as they were minors. The section provides *inter alia*:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:”

The only exemption is in relation to sexual offences. The learned Judge in his judgment arrived at the conclusion that the evidence by PW4 & 7 was corroborated by the evidence of PW1. We also note that though the evidence of PW4 and 7 was unsworn, these two witnesses were firm in their evidence that they saw the appellant suddenly emerge from the bush with an iron rod, had a brief exchange with the deceased before he hit him with the iron rod on the head and vanished into the nearby woods. Besides, the appellant’s counsel cross examined them and they remained firm in their evidence. The trial court even found them to be truthful. This is a finding on the demeanor of witnesses which this Court is duty bound to honour. In the case of Mwangi v Wambugu [1984] KLR 453, this Court observed:-

“... A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probability material to an estimate of the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally ...”

We discern no such misgiving.

PW1 testified that as he approached the scene he saw the appellant whom he knew very well run towards the woods. This was in broad daylight. In fact, it was at midday. He knew the appellant as they were neighbours and grew up together. We are therefore satisfied that the evidence of PW4 and 7 was corroborated in material particulars by the evidence of PW1. The fact of death and the cause thereof is not in dispute and we need not dwell on it.

As regards malice aforethought, section 206 of the Penal Code provides *inter alia*:-

“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.”

Medical evidence tendered showed that the deceased died due to a head injury inflicted by a sharp object. PW4 and 7 saw the appellant inflict those injuries with an iron rod. Before doing so he had menacingly confronted the deceased and demanded of him to tell him “*what he had done to him*”. By arming himself with an iron rod and laying in wait, the appellant had methodically planned the execution of the crime. There is also the evidence of the appellant running into the woods and thence to the lake after the incident. This is not an act of an innocent person. Then there is the evidence of the appellant leading PW5 to the recovery of the iron rod where he had hidden it on the shores of Lake Victoria. The learned Judge made a finding that the iron rod produced in evidence could pass for a sharp object, we are inclined to conclude just like the trial court that by attacking the deceased in the manner he did, the appellant had the intention to cause death of or to do grievous harm to the deceased. Thus malice aforethought was established.

All in all we are persuaded that the prosecution case against the appellant was proved beyond reasonable doubt contrary to the assertion by the appellant. The appellant accused the learned Judge of embarking on a fishing expedition with regard to the testimony of PW1. Having thoroughly read the record, we are unable to discern any such expedition. What the Judge was doing was to draw inferences on the evidence presented before him and which he was perfectly entitled to do. With regard to failure to call Grace Agolla as a witness, the trial court held that, had she been called, she would simply have rehashed what PW4 and 7 had told her. We entirely agree with this conclusion. She was thus not an essential witness in terms of section 143 of the Evidence Act nor was the holding in the case of Bukenya and others v. Uganda [1972] EA 549 applicable in the circumstances of this case.

Turning to sentence, the Supreme Court of Kenya held in Francis Karioko Muruatetu & Another v Republic (2017) eKLR that:

“Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”

“...It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners...”

Similarly, in the case of William Okungu Kittiny v Republic (2018) eKLR this Court was of the view that, the decision of the Supreme Court had an immediate and binding effect on all other courts and that the decision did not prohibit the courts below from ordering sentence re-hearing in any matter pending before those courts. This Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial court could have lawfully passed. We are also alive to the fact that the Supreme Court in its decision did not outlaw the death sentence. However, in the circumstances of this appeal, the mandatory death sentence imposed on the appellant having been found to be unconstitutional, a sentence of imprisonment would serve the interest of justice. The appellant was a young man and has been in custody for the last 9 years.

From the foregoing, the appeal against conviction fails. The appeal against sentence is allowed. The death sentence is set aside and in substitution the appellant shall serve 20 years imprisonment effective from 24th April, 2015.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.