IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 202 OF 2014

BETWEEN

PETER OKOTH ORIANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from judgment on conviction of the High Court of Kenya

at Kisii (R.N. Sitati, J.) dated 29th October, 2014

in

HC. CR.A. No. 4 of 2006)

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JUDGMENT OF THE COURT

A group of friends who either came from or worked in Awendo decided to party the night of 9th - 10th November, 2005. They were **Moses Okonyo Ooro** (PW1 - Okonyo), **Chrispin Wanjira Orondo**, (**PW2 - Orondo**), **Romanus Odino Nyadura (PW3 - Odino), Moses Ogonya Ooro (PW4 - Ogonya), Maurice Nyanjwa Muga (PW5 - Muga), Onango Nyamisi ("the deceased")** and 3 ladies who were not called as witnesses but who included one called Kwamboka. Their partying ended tragically when the deceased was stabbed to death. They had, before that tragedy, visited at least two bars in the hours between 7 p.m. and about 2 a.m. and had consumed alcohol in both places. Those are the events that led to the charge of murder that faced the appellant, **Peter Okoth Oriango** who was charged at the High Court of Kenya at Kisii with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** particulars being that on the 10th of November 2005 at Awendo market within the then Migori District he murdered the deceased.

As noted by the trial Judge who concluded the case, the trial did not proceed smoothly as judges kept being transferred. Six prosecution witnesses were called and heard by one Judge with the aid of assessors and by the time the appellant was put on his defence there were no assessors which led to that trial being declared a mistrial.

Although the plea was taken in February 2006, the trial itself started before Muriithi, J. who took the opening statement and the evidence of one witness. Sitati, J. then took over the trial and took the evidence of the other witnesses after it was agreed by both sides that the trial proceed from where it had reached.

It was the evidence of the 5 friends Okonyo, Orondo, Odino, Ogonya and Muga that after having telephone discussions during the day on the 9th of November, 2005 they congegrated at about 7 p.m. at Aramba Bar at Awendo where they started taking alcohol. They were joined by 3 ladies including one called Kwamboka. In the course of the evening the appellant entered the bar and asked Okonyo to buy him a beer. When Okonyo refused to do so the appellant persisted and Okonyo, to get rid of him gave him, Shs.50 so that he could stop pestering him. The appellant went to the bar counter and bought himself alcohol called "Furaha". The other friends witnessed this happening. The appellant exited the bar and when the bar closed at about 11 p.m. the friends together with the ladies decided that they had not had enough so they went to a night club called Jogamu where a band was playing. They took more alcohol at the night club as some revellers were also dancing to the rhythm of music from the band. They left the night club at about 2 a.m.

On the issue of lighting it was Okonyo's evidence and also that of the other witnesses that the bars were well lit with electric light, there were also street lights and there were lights from adjoining buildings.

While still at the night club, the appellant had re-appeared, then left, which led the friends to decide to leave. When they left the night club they walked towards a taxi bay and were surprised to see the appellant approach them after emerging from a public telephone booth. Ogonya was then walking with Kwamboka while the rest of the men walked with the other ladies. The appellant confronted Ogonyo asking him why he was walking with his wife. Ogonyo told the appellant to take Kwamboka away if she was his wife. A confrontation then began and there was general melee where stones were thrown by the witnesses at the appellant who was accompanied by two others. According to the evidence there was tension in the area as this was the period of the 2005 national referendum where two opposing sides represented on the one hand by an orange while on the other by a banana were in a political competition. The appellant accused the witnesses and the deceased of belonging to the banana side which apparently was unpopular in the area. During this confrontation the deceased who was, according to the witnesses, drunk, attempted to run away accompanied by Kwamboka. The appellant confronted the deceased and produced a dagger from an inside pocket. In attempting to kick the appellant the deceased slipped and fell. The appellant descended on him with the dagger stabbing him repeatedly in the chest and the neck. This narration of facts was confirmed by the various witnesses including Odino (PW3) who told the trial judge:

> ***"Then the deceased fell down. The man who had emerged from the telephone booth stabbed the deceased while the deceased was on the ground. He stabbed him several times. Then everybody ran for their lives."***

According to Orondo (PW2) when they were approaching the taxi bay the appellant who was still dressed in the same clothes which he was wearing when the witnesses saw him in the two bars came back but he was very wild. Orondo stated:

> ***"On returning, I found the deceased Olango Nyamisi standing by the taxi. Olango Nyamisi was one of the colleagues with me that night. He was in the company of the lady, who was his fiance. Then the accused came carrying a dagger in his right hand. Mr. Nyamisi tried to kick the accused as he was not sure why the accused was coming to us. On the process of kicking, Mr. Nyamisi fell down. While Mr. Nyamisi was on the ground the accused reached for him and stabbed him on the chest, neck, throat. At the time Mr. Nyamisi was lying on his back."***

According to this witness there were security and street lights and he saw the appellant very well.

Those facts as recorded by the trial judge were confirmed by all the 5 witnesses.

All the 5 witnesses reported the incident in the early morning of 10th November, 2005 at Awendo Police Station where they recorded statements. According to the witnesses the appellant was arrested and brought to that police station while they were still there.

P.C. Douglas Ongicho formerly of C.I.D. Office Migori Police Station was the investigations officer in the case. On the night in question he was woken up from sleep and summoned to the office. A report had been received of the death of the deceased who had died at the scene of crime. He, together with a **Chief Inspector Kiarie** and an **Inspector Lubanga** visited the scene and collected the body which was taken to the mortuary. He interviewed the witnesses and recorded their statements. The appellant was arrested by Inspector Lubanga that morning and the dagger was recovered from his pocket which had dry blood stains. The appellant was later taken to hospital because he had some injuries sustained from the stone throwing incident that had taken place that night.

The police officer produced into evidence a post mortem report prepared by a **Doctor Idagiza** who was however not called as a witness. The doctor had concluded in the report that the deceased died from cardiovascular collapse due to penetrating injury to the left atrium. This police witness had also collected blood samples from the deceased and the appellant and he produced reports from the Government Chemist relating to analysis of the said blood samples. No expert from the office of the Government Chemist was called.

That was the evidence put before the trial court by the prosecution which found that the appellant had a case to answer. In an unsworn statement the appellant stated that on the 7th of September, 2005 upon waking up and finding his youngest child to be sick he went to the shops to buy medicine for the child. While enroute to the shop the vehicle in which he was travelling was stopped at a police road block and because he was one of the three excess passengers he was arrested and put in the cells at the police station. He was assaulted by a police officer he knew as Ongicho. He was later taken to Migori Police Station where he was detained for 120 days thereafter taken to court on the 25th of January, 2006. He asked the trial court to establish whether being held for such a long period was constitutional and stated that he knew nothing about the charge preferred against him.

The trial judge took submissions from both sides and in a judgment delivered on 23rd October, 2014, the judge convicted the appellant for the offence of murder and having taken his mitigation she found the circumstances aggravating and the appellant was sentenced to death "as by law provided".

Those are the findings that provoked this appeal which is premised on the memorandum of appeal drawn by the appellant's advocates **S.O. Odingo and Company Advocates** where four grounds of appeal are set out. It is said that the trial court erred in law by relying on the evidence of PW1 and PW4 which it is said was not corroborated. It is said that the court failed to note that the evidence of PW4 was hearsay evidence and that a police officer who received the report was not called; and that the trial court failed to appreciate the strong and supported alibi of the appellant which was enough to secure an acquittal.

When the appeal came up for hearing before us on 29th July, 2019 **Mr. Taremwa** learned counsel appeared for the appellant while **Miss Varoline Lubanga** appeared for the respondent. Mr. Taremwa relied on what he called submissions drawn by the appellant in person which we have perused. In a highlight of the same, counsel submitted that evidence of PW4 did not corrobrate that of PW1. According to counsel some of the witnesses did not witness the deceased being stabbed and counsel wondered whether the witnesses who had been drinking alcohol for many hours could be sure of what they had seen. Counsel also thought that there were contradictions in the prosecution case. In an alternative submission Mr. Taremwa urged us to consider that the appellant had been in custody for 120 days before he was charged in court. He cited the Supreme Court case of **Francis Kariako Muruatetu v Republic [2017] eKLR** urging us to interfere with the death

sentence awarded to the appellant.

Miss Lubanga relied entirely on written submissions which had been filed by the respondent on 15th July, 2019. In those submissions we are reminded of the duty of the 1st appellate court and counsel cites the case of **Kamau v Mungai 2006 1 KLR 150** and asked us to evaluate the evidence, assess it ourselves and reach our own conclusions remembering that we have neither seen nor heard the witnesses and hence making allowance for that. We note that the cited case involved a civil matter but the same is relevant as the principle on the duty of a first appellate court are the same whether the appeal be of a civil or criminal nature.

On the evidence, counsel for the respondent submits that the prosecution case was watertight and that it was properly proved. Counsel cites **Section 206** of the **Penal Code** on the definition of malice aforethought and submits the same was proved as required in law. Counsel visits the post mortem report to show the cause of death although we note that the trial judge held that without the post mortem being properly produced by an expert it did not assist the prosecution case.

We have considered the record and the submissions made.

By **Section 203** of the **Penal Code** any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. **Section 204** of the same **Code** provides the sentence for murder.

By **Section 206** of the **Code**:

> ***"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 on not, or by a wish that it may not be caused;***
>
> ***c) an intent to commit a felony;***
>
> ***d) ...."***

The learned trial judge set out two issues calling for her determination. Firstly, whether the fact that the appellant was arrested on 9th November, 2005 and arraigned in court on 25th January, 2006 would lead to the trial being declared a nullity and, secondly, whether the charge of murder had been proved. The trial judge analysed various case law and came to the conclusion that although the appellant had been held in custody for a period not allowed by the retired Constitution the trial was not a nullity. That issue is not before us.

On whether the offence of murder had been proved to the required standard, the judge again analysed various cases and came to the conclusion that the post mortem report and the documents from the Government Chemist which had not been produced by either the makers or experts in the respective fields were worthless and could not be relied on in the case. A conviction was therefore entered based on the other evidence produced before the trial judge.

The judge analysed testimony given by the 5 prosecution witnesses on how they had been enjoying their drinks and how the appellant approached them asking to be bought a drink and how he later alleged that the witnesses were going away with his girlfriend or wife and how he later produced a dagger and stabbed the deceased. The judge found that that evidence was sufficient to found a conviction in the case.

As we have stated in this judgment, the 5 prosecution witnesses who were enjoying drinks in bars in Awendo were confronted by the appellant who asked to be bought a drink. He was offered some money but he followed them from the first bar to the night club and later confronted them outside the night club. The bars and the surrounding areas were well lit with electricity lights. The appellant attempted to stab Okonyo (PW1) but Okonyo dodged avoiding the intended stabbing and ran away and when he was about 200 to 300 metres he heard people crying saying that a person had been killed.

Orondo (PW2) testified that he saw the accused stab the deceased who had fallen to the ground. He stated that there were security lights and he was able to see the appellant well. He testified how the appellant stabbed the deceased who was lying on the ground and he described the various stab wounds that were inflicted on the deceased by the appellant.

Odino (PW3) also witnessed the appellant stabbing the deceased while the deceased was on the ground where he had fallen.

Ooro (PW4) almost became a victim of the stabbing when the appellant confronted him at the said place but he managed to duck and run. A moment later he heard people crying saying that the deceased had been killed.

The totality of the evidence of these witnesses and that of Muga (PW5) is that there was no doubt at all on the facts before the trial court that the deceased was stabbed to death by the appellant. There was sufficient light at the first bar and at the night club and also at the taxi bay for the witnesses to properly identify the appellant who stabbed the deceased to death. They had seen him in both bars as he had come to them demanding to be bought alcohol. He persisted in his demands and only stopped disturbing the witnesses after he was given some cash. The witnesses had a good opportunity to see the appellant in both bars and later when he emerged from a telephone booth confronting them saying that they were taking his wife away. All the places were well lit with electric light and this accorded the witnesses a good opportunity

to recognize the appellant.

So on the facts of the case there was an attack. The attacker was armed with a dangerous weapon namely a dagger and the appellant attacked the deceased inflicting severe wounds on his chest and neck which led to his death. The doctor who performed post mortem was not called and therefore there was no medical evidence produced before the judge on the cause of death of the deceased. The evidence that was produced was that of the eye witnesses who saw the appellant confront the deceased and stab him several times leading to his death. The issue of whether medical evidence must be produced by the prosecution to found a conviction was one of the issues considered in a case of this Court **Ndungu v Republic [1985] KLR 487** where at Page 492 the following passage appears:

> ***"Of course there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post mortem report would not necessarily be fatal."***

In a more recent decision of this Court sitting at Eldoret **Dorcas Jebet Ketter & Another v Republic [2013] eKLR** no medical evidence had been produced before the trial judge. The trial judge notwithstanding the absence of the medical evidence as to the cause of death of the deceased as no post mortem report was produced to prove cause of death nonetheless considered the other evidence that was before her and found that it had been established beyond reasonable doubt that the deceased died from the acts of the appellant. The trial judge found that it was safe to convict. The conviction was upheld by this Court and it was found in the appeal that each case must be decided on its own merits but where evidence is overwhelming that the deceased has died on the hands of a suspect then even in the absence of a post mortem report the court can still convict. It was observed:

> ***"We are certain such cases are very few and far between."***

We find as did the learned judge who tried the case that the appellant attacked the deceased who had fallen to the ground and inflicted fatal injuries on him using a dagger. Although a post mortem report was found to be worthless because it was not produced either by the maker or an expert evidence of the witnesses who witnessed the attack was direct and there was no doubt that it was the appellant who inflicted the fatal injuries on the deceased.

On the grounds of appeal taken by the appellant we have not found any contradiction in the evidence of the prosecution witnesses. The evidence is consistent and corroborative. There was no hearsay evidence at all and the ground of appeal in that respect has no basis. On the complaint that a police officer who had received a telephone call about the murder incident had not been called as a witness the law is that there is no need to call any number of witnesses to prove a fact. The prosecution called eye witnesses who testified how the appellant attacked the deceased, an attack that led to death of the deceased. The alleged alibi was displaced by the strong and consistent case made by the prosecution.

The conviction for murder was sound and we uphold it. The appeal on conviction is dismissed.

Counsel for the appellant in submissions before us asked us to interfere with the sentence.

We note from the record that after conviction the appellant through his advocate in mitigation stated that the appellant was 29 years old at that time; that he was married with 3 young children who depended on him; that he was remorseful; he was a first offender and he had been in custody for 8 years. He asked for leniency.

The appellant was convicted and sentenced in October 2014. The learned trial judge rightly observed that the law provided for a sentence of death for the offence that the appellant had been convicted thus the sentence for death was imposed. Jurisprudence on the issue of the mandatory death sentence for the offence of murder under **sections 203** and **204** of the **Penal Code** was the subject of the Supreme Court decision in **Francis Kariako Muruatetu** (supra) where that court was invited to answer the question whether the provision of law requiring a sentence of death to be imposed as a mandatory sentence was constitutional. The Supreme Court found that the said requirement was unconstitutional. Courts have thus been freed from imposing the death sentence as a mandatory sentence but consider circumstances of the case before the court.

We therefore accept the invitation by counsel for the appellant to revisit the sentence imposed by the trial judge.

Apart from the mitigating circumstances that we have set out it was in evidence that there was heightened political activity and tension in Awendo and other places because of the referendum question that was framed regarding a new Constitution in Kenya. It is in evidence on record that the appellant and his colleagues shouted at the witnesses who gave evidence for the prosecution that they belonged to the banana side of the political debate which was an unpopular side of the debate in that region. This may explain why the whole melee took place. Further, circumstances are that the witnesses who gave evidence for the prosecution admitted that they had been drinking alcohol for many hours and in the process they were joined by some ladies. The appellant claimed one of the ladies to be his wife or his girlfriend. In such circumstances such melees are not uncommon in certain areas especially where revelers are inebriated.

Having said all that the attack by the appellant on the deceased was vicious. It is on record that the deceased who was drunk was a much older person and could not run like the other witnesses did. His vain attempt to kick the appellant instead led him to fall to the ground and when he was on the ground the appellant attacked him with the dagger killing him. This attack is not excusable. Considering all the things we have said we think that a sentence of 20 years imprisonment is an appropriate sentence in this case and would serve the intention of the criminal law in punishing and reforming those who go against the law. We set aside the sentence of death imposed by the trial court and substitute thereof a sentence of 20 years imprisonment from the date of conviction.

Those are our orders.

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

E.M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR