IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NUMBER 5 OF 2018

BETWEEN

MATHEW MUMINA MUTINDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Mombasa (Odero, J.) delivered on 29th October, 2012

in

H.C.CR.C. No. 15 of 2009)

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JUDGMENT OF THE COURT

1. In April 2009, the appellant, Mathew Mumina Mutinda, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 17th April 2009 about 3.00 p.m., at Ulawini Village of the then Taveta District of the former Coast Province he murdered Stephen Nthiwa. He was tried before the High Court at Mombasa and convicted in a judgement delivered on the 26th of October 2012. He was sentenced to imprisonment for a term of 40 years.

2. He has appealed against both of the conviction and the sentence. In his grounds of appeal, he contends that his wife, PW1, was called as a prosecution witness contrary to Section 127 of the Evidence Act; that the charge of murder was not proved; and that the Judge did not consider or properly consider the evidence of provocation.

3. The prosecution case, in brief, was that on 17th April 2009 at about 12.00 noon, the appellant encountered his wife, PW1, conversing with the deceased person along a foot path; that the appellant and his wife were both members of a choir where the deceased was the choir master; that the appellant and PW1 had, a few days prior to this encounter, become estranged and PW1 had moved out of their home and returned to her parents' home; that suspecting that his wife and the deceased person were in an illicit affair, the appellant drew a knife, attacked the deceased, a struggle ensued, and the appellant stabbed the deceased person on the chest.

4. According to the prosecution, the appellant thereafter left the scene and proceeded to Chumvini Patrol Base where he found Police Constable Samuel Irungu (PW4) to whom he surrendered himself alongside the blood-stained knife with which he had stabbed the deceased; that PW4 called Taveta Police Station; that Corporal David Charo (PW5) of Taveta Police Station joined PW4 at Chumvini Patrol Base where the appellant had surrendered himself; that the appellant then escorted PW4 and PW5 to the scene where the body of the deceased person lay; and that the police then retrieved the body and took it to Taveta District Hospital.

5. At the hospital, a post-mortem was performed on the body of the deceased by Dr. Henry Ng'eno. The body was identified by his wife, Beatrice Ndunda Nthiwa, PW3, as well as by the deceased's brother, Jones Kimulu Nthiwa, PW2. According to the post-mortem report, which was produced in court as an exhibit by Dr. Hesborn Dianga (PW6) on behalf of Dr. Ng'eno, the body had a wound on the right side of the chest around the 6th and 7th intercostal space midclavicular line; the lungs had collapsed and there was a pool of blood in the plural space. The doctor formed the opinion that the cause of death was haemothoracic secondary to penetrating wound on the chest which caused cardiopulmonary arrest.

6. In his defence, the appellant stated that he knew the deceased for a long time; that he was a choir master and a friend and they both attended the same church. He stated that on the material day he woke up and went to the farm where he worked until 2.00 p.m.; that he had in his possession a knife that he had been using to prune vegetables; that on his way home he passed through the home of PW2 after which he followed a shortcut through the bushes on his way home; that as he walked through the bushes he was surprised to see a couple engaging in sexual intercourse; thathe then heard his wife say, "*ni bwana yangu*"; that the deceased person then immediately zipped his trousers and got hold of the appellant, as the appellant's wife took to her heels and ran away; that the deceased knocked the appellant to the ground; that the appellant then removed his pruning knife over which they both struggled; that they both fell down into a hole and then he heard the deceased say, "*nimeumia*"; that he thereafter got up and went to Chumvini Police Station where he made a report, after which he was locked up and subsequently charged with the offence of murder.

7. Based on the evidence, the trial court was satisfied the prosecution had proved its case against the appellant to the required standard and proceeded to convict and sentence him as already stated.

8. Urging the appeal before us, ***Miss. Aoko Otieno***, learned counsel for the appellant, began by submitting that the charge sheet was defective as it referred to the victim of the crime, the deceased person, as Stephen Nthiwa whereas in the post-mortem report refers to Stephen Nthiana and that the discrepancies in the name were never resolved during the trial. It was submitted that authenticity of the post-mortem report is also in question as it does not have an official stamp or the official designation of the person who filled it out and neither was it produced by the author. For those reasons it was submitted that the cause of death was not conclusive.

9. It was submitted further, that Section 127(2)(ii) of the Evidence Act was violated because PW1, the wife of the appellant, was allowed to testify against him; that the appellant did not consent to the wife testifying; and that her testimony should therefore be expunged from the record.

10. In the absence of the testimony of PW1, and the post-mortem report having been discredited, nothing linked the appellant to the crime, counsel submitted.

11. Furthermore, according to counsel, the alleged confession was not taken before an officer of the required rank; that evidence of provocation was disregarded by the trial court in that a sporadic fight erupted when the appellant found the deceased person having sexual intercourse with his wife; and that this is therefore a case of manslaughter, and not murder.

12. Amongst other decisions, counsel referred to the case of ***Julius Mwita Range vs. Republic [2003] eKLR*** in which the Court found there was provocation, quashed the conviction for murder, substituted therefor a conviction for the offence of manslaughter, set aside the death sentence that had been given and substituted the same with a sentence of imprisonment to a term of 10 years.

13. It was submitted that the sentence meted out by trial court is harsh; that the appellant is remorseful; is of good character and has acquired useful skills; and his sentence should be reduced to the time already served.

14. Opposing the appeal, ***Mr. Mulamula***, learned Principal Prosecution Counsel, submitted that the discrepancy in the names of the deceased is an excusable typing error; that it is not denied that the deceased died from a stab wound and family members identified the body for purposes of the post mortem examination.

15. With regard to the complaint that the testimony of PW1 was taken in violation of Section 127 of the Evidence Act, it was submitted that she chose to testify and was not compelled to do so.

16. It was submitted that the offence of murder was proved to the required standard; that the appellant surrendered himself to the police; confessed to the police that he had stabbed the deceased; led the police to the scene where the body was recovered along a path in an open field; that it is unlikely the deceased and PW1 would have had the audacity to engage in sexual intercourse in such an open place. Counsel submitted that the appellant drew the knife, which was concealed, and that malice aforethought was established.

17. We have considered the appeal. This is a first appeal. We have, in accordance with our mandate, re-evaluated the evidence on record so as to draw our own conclusions, bearing in mind that the trial court was in the unique position of having heard and seen the witnesses. As stated by the Court in ***Joseph Kariuki Ndungu & another vs. Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006)*** 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 32***.

18. The overarching question in this appeal is whether the prosecution proved its case to the required standard. Within that there are the questions: whether the evidence of PW1, the wife of the appellant, is admissible in light of Section 127 of the Evidence Act; whether the charge sheet was defective; whether the appellant confessed to the crime and if so, whether such confession met the requirements stipulated by law and is admissible under Section 25A of the Evidence Act; whether provocation was established and if so, whether the charge ought to have been reduced to one of manslaughter; and what sentence would be appropriate.

19. We begin with the question whether the trial court erred in admitting the evidence of PW1, the wife of the appellant, in light of Section 127 of the Evidence Act. There is no doubt that PW1, Hannah Mutindi Mumina, is the wife of the appellant. She said so. In her words, "*I*

know the accused. He is my husband." The appellant in his defense confirmed in his testimony that PW1 is indeed his wife. The relevant statutory provision relating to the competence of a spouse as a witness in criminal proceedings is in Section 127(2)(ii) of the Evidence Act to which counsel for the appellant referred. It provides:

> ***"127(2) In Criminal Proceedings, every person charged with an offence and the wife or husband of the person charged shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person.***
>
> ***Provided that;***
>
> > ***(i) the person charged shall not be called as a witness except upon his own application;***
> >
> > ***(ii) save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;***
> >
> > ***(iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.***
>
> ***(3) In Criminal proceedings, the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person in any case where such person is charged-***
>
> > ***(a) With the offence of Bigamy.***
> >
> > ***(b) With offence under the Sexual Offences Act, or***
> >
> > ***(c) In respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them and not otherwise."***
>
> [Emphasis added]

20. The record shows that upon PW1 stating at the onset of her testimony that the appellant is her husband, the court enquired from her, " *if being the wife of the accused she is allowed to give evidence in this court*" whereupon she responded that, "*I am willing to testify even though accused is my husband*." The record does not reflect that the appellant consented to her testimony and neither was there objection to her testimony. Indeed, counsel for the appellant cross examined her at length. Nonetheless, it seems to us that the reception of her evidence offended the provisions of Section 127(2)(ii) of the Evidence Act. In ***Kinyatti vs. Republic, Criminal Appeal No. 60 of 1983 [1984] eKLR***, the Court said:

> ***"In this case the maker, Mumbi, is the appellant's wife, so though competent she could not be compelled to testify against her husband, the appellant. That was why the prosecution could not call her".***

21. The circumstances in the present case bear striking resemblance to those in ***Julius Mwita Range vs. Republic [2003] eKLR*** where this Court upheld a decision of the High Court to exclude evidence of a spouse in a criminal case. The Court expressed:

> ***"We are certain in our minds that the marriage between the appellant and Elizabeth Nyaitoto was a marriage covered under Section 127 (4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness. The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect".***

22. See also the decision of this Court in ***Joseph Munyoki Kimatu vs. Republic [2014] eKLR*** to the same effect. It does not matter that PW1 had a few days prior to the incident left the matrimonial home and returned to her parents' home. She remained the appellant's spouse. Her evidence is not admissible and the trial court should not have allowed it. There is merit, therefore, in the appellant's complaint that in light of the provisions of Section 127 of the Evidence Act, PW1 should not, in the circumstances, have been allowed to testify against her husband. We uphold that ground.

23. We do not think there is merit in the complaint that the charge sheet was defective merely because the deceased was referred to as Stephen Nthiana in the postmortem report as opposed to Stephen Nthiwa as appearing in the charge sheet. The body of the deceased was identified for the purpose of the postmortem by his wife, PW3, and his brother, PW2, as appears on the face of the postmortem report. There was never any doubt who the deceased person was. This is undoubtedly a typographical error in the postmortem report that is curable.

24. Absent the testimony of PW1, did the prosecution prove the offence to the required standard? In order to sustain a charge and conviction 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 [2014] eKLR (Criminal Appeal No. 312 of 2012)***. *See* also ***JMM vs. Republic [2013] eKLR*** and also ***Peter Kiambi Muriuki vs. Republic [2013] eKLR***).

25. With regard to the death of the deceased, there is the testimony of the brother of the deceased, Jones Kimulu Nthiwa, PW2, who told the court that on Friday 17th April 2009, he was at Chumvini market when he got information from a neighbour that his brother had been killed. He went to the scene and found the body of his brother, Stephen Nthiwa, lying on the farm. He was also present and identified the body of the deceased as that of his brother when the postmortem was performed.

26. The wife of the deceased, PW3, Beatrice Ndunda Nthiwa, was also at her hotel at Chumvini market when she received information that her husband had been stabbed and proceeded to the scene where she "*found* [her] *husband lying dead on the shamba*." The following day, on 18th April 2009, she, alongside PW2, identified the body of the deceased for purposes of the postmortem. Police Constable Samuel Irungu (PW4) and Corporal David Charo (PW5) also confirmed that on getting to the scene, to which they were directed by the appellant, they found the body of the deceased as it lay in the shamba. The fact of death was also confirmed by Dr. Ng'eno who performed the post mortem.

27. As regards the cause of death, those same witnesses observed a stab wound on the right side of the chest of the deceased. PW5 for instance was graphic that he "*saw one stab wound on the right side of the chest between the ribs*." The appellant in his testimony stated that he struggled with the deceased "*over the knife*" and that the deceased "*said he had been stabbed*." Dr. Ng'eno in his post mortem report noted a wound on the chest right side around the 6th and 7th … space and opined that the cause of death was "*secondary to penetrating wound on the chest*."

28. Based on that evidence, we are fully in agreement with the trial Judge that the fact of death of the deceased and the cause of death were established to the required standard. The complaint that the post mortem report is not authentic because it does not bear an official stamp and was not produced by the maker has no merit. The request to the pathologist to ascertain the cause of death on the first page of the post mortem form bears the stamp, though faint, of the officer in charge of the police station making the request. The report is duly signed by the maker on whose behalf it was produced before the court as an exhibit by PW6, with counsel then appearing for the appellant indicating that there was no objection to its production. The belated objection to the post mortem report is an afterthought and has no merit.

29. We turn now to the question whether it was established to the required standard that it was the appellant who committed the unlawful act which caused the death of the deceased. As already noted, Police Constable Irungu, PW4, stated that the appellant found him at Chumvini Patrol Base and reported to him that *"he had killed one Nthiwa"* and handed over to him the blood-stained knife which PW4 subsequently identified and produced before the trial court. With that information, PW4 contacted Taveta Police Station. Corporal David Charo, PW5, was dispatched to join PW4. The appellant then led them to the scene where they found the body of the deceased with a stab wound to the chest.

30. Counsel for the appellant complained that Section 25A of the Evidence Act was breached in that the "confession" by the appellant was not before a competent officer. This matter does not form part of the grounds of appeal in the appellant's memorandum of appeal. It was raised in passing during the hearing. Nonetheless, the Supreme Court of Kenya in its recent decision in ***Republic vs. Ahmad Abolfathi Mohammed & another [2019] eKLR*** drew a distinction between a confession and an admission and stated that if an explanation given by a suspect is an admission, the same is admissible in evidence although it would require corroboration to found a conviction. The Supreme Court expressed:

> ***" We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects' commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd of admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that*** *"information from an accused person leading to discovery of evidence is not admissible outside a confession…."* ***, the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession."***

31. In this case, the evidence by the appellant leading to discovery of where the body lay and how the deceased met his death was corroborated by the evidence of PW4 and PW5 as well as that of Dr. Hesborn Dianga Odpe, PW6, who produced the postmortem report indicating that the cause of death was secondary to penetrating wound to the chest. There is therefore no merit in the complaint that the *"confession"* was not taken in accordance with Section 25A of the Evidence Act.

32. Furthermore, the claim by the appellant that the deceased must have fallen on the knife when, according to him, both of them fell down into a hole as they struggled over the knife, appears inconsistent with his other assertion that he was provoked into the act having found his wife having sexual relations with the deceased.

33. On malice aforethought, Section 206 of the Penal Code provides that:

> ***"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."

34. In our view, stabbing the deceased on the chest manifested an intention to, at the very least, cause grievous harm to the deceased. In ***Paul Muigai Ndungi vs. Republic [2011] eKLR***, the Court expressed that malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person. And in the case of ***Dickson Mwangi Munene and another vs. Republic 2014] eKLR***, the Court also expounding on Section 206 of the Penal Code and stated that the definition of malice aforethought in that section comprises of not only intentional but also of reckless acts causing grievous harm committed with indifference of their consequences. We are therefore in agreement with the trial Judge that the circumstances of this incident fall squarely within the definition of malice aforethought as provided by Section 206(a) of the Penal Code.

35. What remains is to consider the appellant's complaint that the Judge failed to give sufficient consideration to the evidence that the appellant was provoked. The argument is that the appellant stabbed the deceased in the heat of the moment on finding his wife engaging in illicit sex with the deceased. The learned Judge considered the matter and concluded *"that the provocation defence advanced by the accused is a pure fabrication."* Section 207 of the Penal Code provides:

"207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only".

36. The definition of what constitutes provocation is in section 208. It provides as follows:

"208. (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

37. The Court summed up Section 208 in ***Stephen Kipkeror Cheboi vs. Republic [2002] eKLR*** in this way:

"In other words if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self-control an act of killing resulting from such striking could amount to manslaughter rather than murder."

38. In ***VMK vs. Republic [2015] eKLR*** this Court adapted the definition in the English case of **Duffy [1949] I ALL ER 932** where the court defined provocation as:-

"Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind …"

39. Citing **Peter King'ori Mwangi & 2 others vs. Republic [2014] eKLR**, the court went on to state that two conditions should be satisfied for the defence of provocation to be made out, namely:-a.

The "subjective" condition that the accused was actually provoked so as to lose his self-control; *and* b. ***The "objective" condition that a reasonable man would have been so provoked.***

40. In the present case, the appellant in his testimony had this to say regarding how the incident occurred:

"I decided to follow a short cut through the bushes on my way home. As I walked in the bushes I saw a couple making love (sexual intercourse). I was surprised to see this. I heard my wife say 'ni bwana yangu' i.e. its my husband. The deceased then immediately zipped his trouser and caught hold of me. My wife ran away. The deceased boxed me and I fell down. I had my pruning knife in my hand I removed it. We struggled over the knife and we both into a hole fell down then I heard the deceased say 'nimeumia' i.e. I am injured. He said he had been stabbed. He was still holding the knife. I got up and went to Chumvini police station where I made a report. I was locked up in cells."

41. Based on that narration, implausible as it might appear, if the same is to be believed, there is no suggestion at all that as a result of his finding his wife in a sexual relation with the deceased, he attacked or attempted to strike the deceased. According to him, it is the deceased who first caught hold of him, and boxed him to the ground before the appellant removed the knife over which a struggle ensued before they both fell into a hole. That narration is inconsistent with his claim that he was provoked on finding his wife having sexual intercourse with the deceased. He did not therefore raise the plea of provocation in his testimony. We are satisfied that the trial Judge duly considered the evidence and properly rejected the plea of provocation.

42. The result of the foregoing is that the appeal on conviction is devoid of merit.

43. As for the sentence, the appellant stated that he was 27 years old at the time when he testified in June 2012. He stated that he was a family man with four children and that he was remorseful for having acted out of anger and that his judgment was clouded. The learned Judge does not appear to have taken the mitigation into account when she sentenced the appellant to 40 years' imprisonment. We would accordingly set aside the sentence of 40 years and substitute the same with a sentence of 25 years with effect from the date of conviction on 26th October 2012.

Orders accordingly.

Dated and delivered at Mombasa this 19th day of December, 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