IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED JJ.A.)

CRIMINAL APPEAL NO. 130 OF 2016

BETWEEN

REUBEN OMBURA MUMA.....FIRST APPELLANT

NELSON OCHIENG MWAGA.....SECOND APPELANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Homa-Bay, ***(Majanja, J.)*** *dated 24th June, 2016*

in

HCCR CASE NO. 54 OF 2013)

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JUDGMENT OF THE COURT

[1] Reuben Obura Muma and Nelson Ochieng Mwaga, hereinafter referred to as the 1st and 2nd appellants respectively, were tried and convicted by the High Court sitting at Homa-Bay (Majanja J) for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The two appellants together with four others were charged with two counts of the offence of murder it being alleged that they had jointly murdered Kepha Onyango Owuor on the 24th July, 2013; and Fred *alias* Jakoti on the 30th July, 2013.

[2] During the trial, four witnesses testified for the prosecution. These were: Collins Onyango (Collins) and Kennedy Louria Okindo (Kennedy) who were eye witnesses; P. C. Nancy Kosgei who was the Investigations Officer; and Dr. Peter Ogolla, the medical Officer of Health, Rachuonyo South who produced in evidence a Postmortem Examination Report.

[3] The prosecution evidence was that, on the 24th July, 2013, a group of persons who beat Kepha Onyango Owuor with metal bars, sticks and stones and set him ablaze claiming that he was a robber.

Collins identified the two appellants as having been among the group. Collins stated that the 1st appellant, who was armed with a panga and the 2nd appellant who had a wooden club actively participated in the assault. Kennedy identified the 1st and 2nd appellants whom he knew well as having been in the group that attacked Kepha *(the deceased).*

[4] In regard to the second count, Collins testified that he saw the two appellants escorting a man whom he identified as Evans Shiele and that the man was also similarly attacked, beaten and set ablaze. Dr. Ogolla, testified that he performed a postmortem examination on the body of a deceased person who was identified to him as Ali Ogembo Ogundo. He confirmed that the cause of death was head injury and burns with smoke inhalation.

[5] In their defences both the appellants denied having committed the offence. The 1st appellant contended that he was at his place of work and claimed that there was bad blood between him and the person who testified against him. The 2nd appellant testified that he travelled to Nairobi from Oyugis on 22nd July, 2013 and on 24th July, 2013, attended a game between City Stars and Gor Mahia. He remained in Nairobi until 31st July, 2013 when he travelled back to Oyugis. He was arrested two weeks later and charged with the offence, which he claimed he knew nothing about.

[6] In his judgment, the learned judge rejected the defence of the appellants finding that, the 1st appellant was clearly recognized by Collins and Kennedy at the scene during the incident and that the *alibi* raised by the 2nd appellant was an afterthought. He found that they were involved in the crowd that beat and burnt Kepha and that they had a common intention with the others as a vigilant group to kill the deceased. He therefore found the 1st and 2nd appellant guilty of the first count. As regards the second count, the learned judge found that the postmortem examination related to one Ali Ogembo Ogindo and that the prosecution failed to show that this was the same person as Evans Shiele who was assaulted by the appellants. He therefore acquitted the appellants of the second count.

[7] The 1st and 2nd appellants are aggrieved by their conviction and sentence in regard to the first count. The 1st appellant has raised three grounds of appeal contending that the learned judge erred by failing to properly evaluate the evidence before him and convicting the appellants when the evidence on record did not meet the threshold and standard of proof required in law; and that the learned judge erred in disregarding the cogent defence by the appellants.

[8] On his part, the second appellant raised five grounds contending that the learned judge misdirected himself in law and fact and erred in making a finding that Kepha Onyango Owuor, died as a result of the beatings and burns when there was no autopsy report produced; in relying on evidence of witnesses who were among the mob and whose evidence should have been treated with caution as they may have been accomplices; in holding that the *alibi* defence raised by the 2nd appellant was an afterthought when the alibi had been raised during the examination of prosecution witnesses; and in applying the principle of common intention to the appellant on the basis of evidence of identification of the same witnesses who made a mistake in the identification of other accused persons whom he had acquitted.

[9] Written submissions were duly filed on behalf of each appellant. During the hearing of the appeal, the 1st appellant was represented by Mr. O. M. Otieno, and the 2nd appellant by Mr. G. S. Okoth while Ms. Jecinta Nyamosi, a Senior Assistant Deputy Public Prosecutor, appeared for the Republic.

[10] In arguing the appeal, learned counsel for the 1st appellant, Mr. Otieno, consolidated the three grounds and argued that the learned judge erred in law when he failed to properly evaluate and analyze the evidence before him, and erred in convicting and sentencing the 1st appellant on the first count of murder whereas the evidence and material placed before him did not meet the required threshold or support such a finding.

[11] Counsel submitted that there were salient issues that escaped the attention of the learned judge, and which if considered, would have led to a different conclusion. He pointed out that while the learned

judge acquitted the appellants of the second count of murder, he relied on the same evidence in convicting the appellants of the first count; that the learned judge having found that there was contradiction in evidence of the witnesses, he ought to have warned himself and not relied on the evidence of the same witnesses.

[12] Further, counsel for the 1st appellant argued that contrary to the finding of the learned judge that the evidence of Collins and Kennedy was succinct, vivid and accurate, the evidence had contradictions with regard to the identity of the deceased alleged to have been murdered; that some of the witnesses referred to the deceased as Kepha and others as Jeff; and that there was no evidence to confirm that Jeff and Kepha Onyango Owuor were one and the same person. It was pointed out that the evidence of Kennedy regarding the identity of the deceased was doubtful, and that the evidence of PC. Nancy Kosgei was not of any help as it is not clear as to how she got the name of Kepha Onyango.

[13] Counsel for 1st appellant concluded that there was a serious gap in the prosecution case, the benefit of which ought to have gone to the appellants. Relying on ***Bukenya & Another vs Buganda [1972] 1 E.A.549,*** counsel urged the Court to draw a negative inference from the omission to produce relevant evidence. He distinguished the case of ***Wahi & Another vs Buganda [1968] E.A.*** arguing that a conviction for the offence of murder in the absence of an autopsy should only be done in exceptional circumstances which was not the case herein. The Court was therefore urged to allow the appeal.

[14] Learned Counsel, for the 2nd appellant, Mr. Okoth, made submissions on three aspects namely; identification, alibi, common intention and autopsy. On the issue of the autopsy and identification, it was noted that none of the witnesses who identified the body to the doctor who performed the postmortem examination, was called to testify. There was therefore a missing link between the person who was allegedly assaulted and the postmortem examination. This was more so because Collins did not know the person who was being assaulted before but claims only to have heard the crowd shouting the name 'Kepha'. Kennedy on the other hand, refers to the man assaulted on 24th July, as 'Jeff' whom he claims to have known very well. He also referred to the same person as 'Shiele'.

[15] On the identification of the appellants, it was posited that Collins may have named the 2nd appellant because of political differences. As for Kennedy, his reference to a piece of paper created doubt and the possibility that he may have been couched to name certain people.

[16] Concerning the law regarding the defence of *alibi, Wang'ombe vs Republic [1980]KLR 151, Uganda vs Sebyala & Others [1969] E.A 204 and Karanja vs republic[1983] KLR 501,* were relied on. It was contended that the learned judge did not properly apply the law or analyze, the defence of *alibi* put forward by 2nd appellant. Finally on common intention, it was submitted that there were too many errors in regard to the identification of the 2nd appellant that created a genuine doubt, the benefit of which must go the appellants.

[17] This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses. The appellants were charged with the offence of murder, this required the prosecution to prove the essential elements of that offence. A crucial element is the fact that the deceased person died and that the death was as a result of an act or omission on the part of the appellants. In this case, the deceased in regard to the charge of which the appellants were convicted was 'Kepha Onyango Owuor'. Therefore, it was imperative that the prosecution proves that Kepha Onyango Owuor died and that his death was caused by an act or omission on the part of the appellants. The evidence adduced by the two prosecution eye witnesses was to the effect that a person whom Collins identified as 'Kepha Onyango' and whom Kennedy identified as 'Jeff' was beaten to death and set ablaze. The investigations officer PC Kosgei, testified that no postmortem examination was done for Kepha Onyango Owuor as the body was burnt beyond recognition, and the relatives were not willing to have the postmortem done. No relative was however called to testify. This means that the Court had only the evidence of Collins and Kennedy to go by. There was however no evidence that tied the evidence of these two witnesses so as to confirm that the 'Kepha Onyango' that Collins spoke of was the same person as 'Jeff' whom Kennedy

spoke of. In his judgment the learned judge stated that:

> ***"PW1 gave a vivid account of the events that led to Kepha's death. He was beaten severely and burnt when a tyre was put on him. PW2 also confirmed that the A3 and others beat Kepha until he fell and then set him on fire. PW 3 testified that Kepha's body was burnt beyond recognition and the family did not want an autopsy done. There can be no doubt that Kepha was violently assaulted and burned and such violent assault and burns caused his death."***

[18] It is obvious that the learned judge did not properly analyze the evidence of Kennedy. We have carefully perused the evidence and nowhere in his evidence has Kennedy mentioned Kepha. Kennedy testified that he knew the person who was attacked very well as he was a former classmate and that his name was 'Jeff'. There was therefore need for evidence to confirm whether Kepha and Jeff were one and the same person. Evidence of identity was therefore critical in establishing that the deceased whom the appellants were alleged to have murdered had indeed died.

[19] Even if the body of the deceased was burnt beyond recognition, that body must have been given a burial. Evidence from the deceased's relatives confirming the identity of the person whom they buried and a clarification regarding the two names given by Collins and Kennedy would have gone a long way in removing any doubt concerning the death of the deceased. It would also have provided a nexus between the alleged actions of the appellants and the death of the deceased. Death is a matter that requires proof that is both factual and scientific. In this case, no such proof was availed before the learned judge and the appellants' conviction cannot be supported.

[20] On the evidence regarding identification, it is clear that the evidence that was implicating the two appellants with the commission of the offence was the evidence of Collins and Kennedy who purported to have identified them. In ***Wamunga vs Republic [1989] KLR 426,*** this Court stated as follows:

> ***"it is trite that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can be safely make it the basis of conviction."***

[21] Collins maintained that he identified the 1st appellant and the 2nd appellant among the crowd that beat up the person he named as Kepha. Collins explained that both appellants were known to him and therefore his identification of the appellants can be said to be evidence of recognition. Similarly, Kennedy also claimed to have seen both appellants leave with the person he identified as Jeff, and that this was the same person who a few hours later was beaten and set ablaze by a mob. He identified the 2nd appellant as having been in the mob but did not name the 1st appellant. During cross-examination, Kennedy conceded that he had to refer to a piece of paper to refresh his memory. The evidence of Kennedy was suspicious because if he knew the two appellants well and had indeed seen them participate in the beating of Jeff, he would not have needed to refresh his memory to confirm the names of the person he saw.

[22] It is noteworthy that although the learned judge did not find the evidence of Collins and Kennedy sufficient in regard to the identification of the appellants co-accused, he used the same evidence against the appellants. The learned judge did not warn himself about this evidence nor did he carefully analyze the evidence of identification. The judge appeared to have been influenced by his rejection of the alibi defence of the appellants. However, that defence only became relevant if there was proof beyond doubt that the appellants were indeed present at the scene of the crime.

[23] Moreover, failure to prove the death of the deceased was critical. Without proof of death, the evidence of identification of the appellants on its own was not sufficient to establish the charge. We therefore, allow the appeal as failure to prove that the person the appellants are alleged to have murdered was actually the one they attacked and the one who died is fatal to the charge.

[24] We therefore allow this appeal; set aside the judgment of the High Court; and quash the conviction

and sentence of both appellants on the first count. We direct that both appellants shall be forthwith released unless otherwise lawfully held.

Dated and delivered at Kisumu this 15th day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.