IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 83 OF 2015

BETWEEN

N M W.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi

(Muchemi, J) dated 30th July, 2014

in

HC. CR. A. NO. 48 OF 2009*)*

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (F. N. Muchemi, J) delivered on 30th July 2014 in which the appellant, N M W, was convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and sentenced to death. The particulars of the offence were that on 11th May 2009 within Kiambu West, Kiambu District, the appellant murdered F W M, his son (the deceased).

The facts

2. On 11th May 2009, at about 9.00.am, Martha Wairimu Mburu (PW3), a resident of Rusingiti village, Kiambu was on her way home when she met the appellant riding on a bicycle. The appellant told her (PW3) to move out of road. She complied and jumped to the side of the road. The appellant passed and rode ahead and reached his nearby home from where PW3 heard the appellant shouting and making threats. She also heard a child crying. As she watched the appellant's house, she saw the appellant get out of his house "carrying a young child in his hands and put him down." He instructed the child, the deceased, to get up and look after goats and chickens but the deceased retorted that he could not get up. According to PW3 the deceased could not walk or move. The appellant then took a stick, with which he hit the deceased. The stick the appellant allegedly used to beat the deceased was produced before the trial court.

3. Alarmed by those events, PW3 moved ahead and made a telephone call to the Assistant Chief, one Kahiu, and reported to him what she had witnessed. The Assistant Chief directed PW3 to the Chief's office where she proceeded. There, she found the appellant's father and on reporting what she had witnessed, she was assigned two administration police officers in the company of whom she returned to the appellant's house and found the appellant there. The deceased had in the meanwhile been taken away by his aunt. The appellant was then arrested and taken to the Chief's office.

4. R W N (PW4), a sister of the appellant and an aunt of the deceased, stated that she was at her shop at Ruthigiti on 11th May 2009

when she received a report from Maritha, PW3, that there was a problem at the appellant's house. She ran to the appellant's house and found the appellant outside his house crying. On entering the house, she found the deceased and told him to get up. The deceased said he could not move. He appeared to have pain and his leg was swollen. She picked him up and took him to a nearby "Ndungu's clinic" leaving the appellant at his house. At the clinic, the clinical officer (PW1) gave the deceased some medicine and prescribed some more medicine to be taken by the deceased in the evening. The deceased did not appear to have physical injuries. PW4 then took the deceased to her shop and put him on a bed to watch over him. His condition deteriorated. PW4 ran back to call the doctor, but by the time the doctor got to the shop, the deceased had died.

5. The Clinical Officer, Caston Nelson Ndungu (PW1), stated that on 11th May 2009 he was at his clinic, Sunrise Medical Clinic, situated at Rusigiti when, at about noon, the deceased, aged between 12 to 15 years old was brought into the clinic by his aunt, PW4. He examined him. The deceased presented a history of having been beaten by his father. On examination, he was conscious but in great pain all over the body. He had minor bruises on the body and tenderness on the sternum. In PW1's words the boy "appeared quite tortured and tired." He administered a strong pain reliever and recommended rest and released him. Later that day, PW4 returned to the clinic and informed him that the boy's situation had worsened. He quickly went to PW4's house only to find that the boy was dead.

6. Sergeant James Partorp (PW5) was at his place of work at Karai Administration Police Post on 11th May 2009 when the appellant's father, one W W K, reported that his son (the appellant) had stolen his household goods and requested assistance for the appellant's arrest. Accompanied by another officer, they proceeded to the appellant's home and arrested the appellant. On the way to the police station, they received information that the appellant had beaten his son the previous night. They took the appellant to the Administration Police Post and locked him up. At about 1.00pm the same day, a complaint was received that the appellant's boy died in PW4's house. He accompanied PW4 to her house and found the dead boy. There were no visible injuries on his body. He called the Officer Commanding Kikuyu Police Station who sent a vehicle to the Administration Police Post. The appellant was placed in the vehicle and together proceeded to PW4's house where they removed the body of the deceased and took it to the mortuary. Upon interrogation, the appellant said that he had beaten the deceased with sticks that were produced before the trial court. The appellant was then taken to Kikuyu Police Station and locked up in the cells.

7. Police constable Stephen Mweu Kivina (PW6) was at the relevant period attached to Kikuyu Police Station. On 11th May 2009 he accompanied the Officer in Charge, Crime Branch to the Chief's camp where the appellant was held in the cells on suspicion of having committed an offence. In the company of the appellant and PW5, they went to the home of PW4, the aunt to the deceased, where they found the body of the deceased lying on a bed. The body had bruises and swellings mostly on the legs and hands. They collected the body from the house and took the same alongside the appellant to the police station where the appellant was then locked up.

8. Dr. Peter Muriuki Ndegwa (PW7) a pathologist with the Ministry of Health produced a postmortem report in respect of the deceased on behalf of Dr. Jane Wasike Simiyu who performed a post mortem on the deceased on 18th May 2009 at the City Mortuary. Dr. Simiyu was apparently not available to attend court during the trial to produce the report. Based on the report, the body of the deceased had bruises on the skull, upper limbs and back of both lower limbs. There was haemorrhage (bleeding) in the brain although there was no fracture. Dr. Simiyu formed the opinion that the cause of death was head injury due to blunt force trauma caused and soft tissue injuries.

9. Corporal Elijah Yator (PW8) was the investigating officer. He was based at Kikuyu Police Station at the material time where he received the appellant on 11th May 2009. The appellant was brought into the station by Inspector Makori and constable Mweu (PW6) on suspicion of having committed the offence of murder. On 18th May 2009, PW8 had the appellant's mental status assessed at Kinoo Medical Clinic where the appellant was examined by a Dr. G. K. Mwaura and was found to be mentally fit to plead. PW8 produced a P3 Form prepared by the said Dr. Mwaura. Based on his investigations, he concluded that the appellant beat the deceased using a stick and that the appellant used excessive force when disciplining his child, the deceased which led to his death. He stated that in the course of his investigations he interrogated the family members regarding the appellant's mental status and established that he used to smoke bhang and "that this triggered his assault on the deceased."

Upon concluding his investigations, he recommended to the DPP that the appellant be charged with the offence of murder.

10. L W N (PW2) the wife of the appellant and mother of the deceased also testified for the prosecution. She stated that she was at the material time estranged from her husband; that on 3rd May 2009, the appellant was drunk and threatened to beat her with a chain; that she had as a result left the appellant and had, alongside her three children including the deceased, gone to live with her brother; that on Sunday

10th May 2009, the deceased went to the shop but did not return; that she received information from a neighbour's boy that the deceased had ridden off with his father, the appellant; that she subsequently heard that the deceased had been beaten up by the appellant and had been taken to hospital; that on her way to the hospital, accompanied by her parents, she found

Administration Police officers with the appellant at the Chief's camp and subsequently saw that the deceased had died. She went on to say that the appellant is mentally unstable and had been attending Mathari Hospital and had previously been jailed for 6 years for threatening to kill his father; and that the appellant loved his children.

11. In his sworn defence, the appellant stated that on 10th May 2009, he was on his way home from visiting his mother when he met his son, the deceased; that he went with him to his home in Rusigiti in Kikuyu on his bicycle and prepared supper for both of them. That evening, he checked his mason's tool box and found his hammer and tape measure were missing; that suspecting his son had taken them, he decided to discipline him as he denied having taken them; that he used "a stick which was as thick as [his] finger and…2ft long" to beat his son for "about five(5) minutes with the intention that he could admit that he had taken the items and disclose where he had hidden them;" and that they then slept.

12. According to the appellant the deceased had a problem of walking the following morning. When he enquired from his son what the problem was, his son told him that he (the appellant) had injured his leg when he beat him up the previous day. The appellant went on to say that he then went to the shops where he narrated to his sister R W, PW4, what had happened and requested her assistance to take the deceased to hospital; that PW4 left him at the shopping Centre, collected the deceased from his house, and took him to Dr. Ndungu's clinic; that as the deceased was taken to hospital, he remained at home to feed his animals. He was later arrested and charged with the offence.

13. The appellant stated further that he had taken alcohol at the shopping Centre on the day when he assaulted his son; that he had a history of mental illness and had been admitted to Mathari Hospital in 2003 for about two months; and that he loved his children and had no intention of killing his son. He maintained that he beat up the deceased "just to discipline him." He added that the deceased had a problem of fainting and having serious headaches.

14. In her judgment, the learned trial Judge was satisfied, based on direct and circumstantial evidence, that the facts and circumstances "are incompatible with the innocence of the [appellant] and point the guilty (sic) to no other person but the [appellant]". The appellant was accordingly convicted for the offence of murder and sentenced to death. Dissatisfied with the conviction and the sentence, the appellant lodged the present appeal.

The appeal and submissions

15. In his supplementary memorandum of appeal on which learned counsel for the appellant Ms. Celyne Odembo relied, the appellant complains that the offence was not proved beyond reasonable doubt; that the ingredients of the offence of murder were not established; that the trial court shifted the burden of proof to him; that the language in which the proceedings were conducted was not indicated; and that his defence was not considered.

16. Expounding on those complaints Ms. Odembo submitted that the ingredients of the offence of murder were not established; that the prosecution did not establish the cause of death, nor the element of malice aforethought; that trial court ought to have considered the evidence of the appellant's wife that the appellant loved his children and that the appellant was disciplining his child; and that the court should also have considered that the appellant had a history of mental problems.

According to counsel, the appellant should have been given the benefit of doubt and, at worst, should have been charged with the offence of manslaughter in view of the circumstances under which the deceased died. Counsel further submitted that the language in which proceedings were conducted before the trial court was not indicated.

17. Learned Senior Assistant Deputy Public Prosecutor for respondent Mr. Peter Mailanyi opposed the appeal. He submitted that all ingredients of the offence of murder were established and that the charge was established to the required standard; that in his defence, the appellant admitted having assaulted the deceased with a stick in his bid to extract information; that malice aforethought was established in accordance with Section 206 of the Penal Code; and that the appellant ought to have known that his action would occasion grievous harm or death to the deceased.

18. As to the assertion that the appellant had mental problems and that he was drunk when he assaulted the deceased, counsel argued that there was no medical evidence to establish this; that the appellant could only blame his actions on intoxication if the state of intoxication was caused without his doing.

19. As regards the language in which the proceedings were conducted, counsel pointed out that the record shows that the language was indeed indicated; that even if the language was not indicated, the appellant has not demonstrated what prejudice, he suffered; and that the appellant was represented during the trial and there is no indication that he was not following the proceedings.

Analysis and determination

20. We have considered the appeal and submissions by counsel. The main question in this appeal is whether the necessary ingredients of

offence of murder, and in particular mens rea, was established. In effect, whether the charge was proved. In that regard, we are mindful that we have a duty, in a first appeal such as this, to examine afresh the evidence presented before the trial court so as to draw our own conclusions. As held by the Court in ***Okeno vs. Republic [1972] E. A. 32*** "it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

21. The circumstances under which the deceased met his death are not in contention. It was established before the trial court that the appellant did beat the deceased with the object of extracting a confession from him that he had taken the appellant's tools of trade, namely a hammer and a tape measure. As a result, the deceased sustained injuries from which he died. The question is whether the appellant had 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*) escape from custody of any person who has committed or attempted to commit a felony."**

22. In interpreting those provisions, the Court in ***Roba Galma Wario vs Republic [2015] eKLR,*** stated that it is imperative, for the conviction of murder to be sustained, for the prosecution to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought; that without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased was not intentional. See also ***Nzuki vs. Republic [1993] K. L. R. 171.***

23. What then was the evidence before the trial court with regard to mens rea? According to PW1, the clinical officer who first attended to the deceased on 11th May 2009 when he was taken to his clinic by PW3, the deceased had minor bruises on the body; had tenderness on the sternum; felt pain all over the body and "appeared quite tortured and tired." He prescribed pain reliever and rest.

24. PW3, deceased's aunt, who took the deceased to the clinic stated that she was near the appellant's house when she saw him enter his house; that she heard him shout and also heard a child cry; that she heard appellant threaten to kill; that he then emerged with a young child and put him down; that he took a stick to beat the child and saw the appellant hit the boy with the stick. PW 3 was the only witness who claimed to have witnessed the appellant beat the deceased. She identified the stick.

25. The post mortem in respect of the deceased was produced by Dr. Ndegwa, PW7. Externally, it was noted that the deceased's body had bruises on the scalp, upper and lower limbs and extensive subcutaneous haemorrhage both limbs. The pathologist formed the opinion that "the cause of death was head injury and soft tissue injury following blunt trauma. It is not clear from the post mortem report whether the primary cause of death was the head injury or the soft tissue injuries and neither is it clear whether the head injury was attributable to or consistent with injury inflicted by a stick the appellant is said to have used. Indeed, under cross examination, PW7, Dr. Ndegwa opined that "the head injury may be caused by a fall."

26. On his part, the appellant whilst maintaining that he had no intention of killing his son and while asserting that he loves his children, stated that the deceased used to have a problem of fainting and having serious headaches. He described the stick that he used to beat his son "as thick as my finger and was 2 ft long."

27. The appellant's estranged wife, PW2, who described the appellant as "mentally unstable" and as one who used to smoke bhang stated that the appellant "loved his children" and that he never used to beat the children. She did not, however, witness the beating.

28. In concluding that the appellant had malice aforethought, the learned trial Judge stated that "the severity of the injuries leads this court to the conclusion that the accused intended to cause the death of the deceased." The Judge does not appear to have taken all the surrounding circumstances into account. As this Court stated in Bonaya Tutu Ipu & another vs. Republic [2015] eKLR:

> ***"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."*** **[Emphasis]**

29. In particular, and without in any way condoning the appellant's actions, the Judge does not appear to have considered that the "weapon" used by the appellant used a thin stick. In ***REX V. TUBERE S/O OCHEN (1945) 12 EACA 63***, the former Court of Appeal for Eastern

Africa stated:

> ***"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick…"***

30. Had the Judge taken all surrounding circumstances into account, we think she would have reached the conclusion that there was insufficient evidence to support her conclusion that mens rea for the offence of murder was established, beyond any reasonable doubt. On our part, we think the evidence on record cannot sustain the offence of murder as charged, tried and convicted. The totality of the evidence by the prosecution points to the irresistible conclusion that the unfortunate death of the deceased was undeterred and without malice aforethought. In that regard the benefit of doubt ought to be given to the appellant. That was not done by the trial court, consequently there is merit in the submission made by Ms. Odembo Advocate.

31. There is no merit in the complaint that the language in which the proceedings were conducted was not indicated. As submitted by counsel for the respondent, the record of the proceedings does indeed indicate, though not consistently on each day, the language.

32. Consequently, and in conclusion, we hereby quash the conviction for the offence of murder and set aside the death sentence imposed on the appellant. We substitute therefor a conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and sentence the appellant to serve a prison term of 20 years with effect from 21st May 2009 when he was first arraigned before the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR