IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 94 OF 2015

BETWEEN

VICTOR WEKESA WANYAMA.....1ST APPELLANT

SILVESTER WANYAMA MKERE.....2ND APPELLANT

ANDREW WAFULA WANYAMA.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kitale,

***(J.R. Karanja, J.)** dated 3rd day of March, 2015*

in

HCCRC NO. 31 OF 2010)

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JUDGMENT OF THE COURT

[1] This is an appeal against conviction and sentence for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. Upon conviction, the High Court **(J.R. Karanja, J.)** sentenced the 1st and 3rd appellant to 50 years imprisonment. The 2nd appellant was sentenced to 10 years imprisonment.

[2] The 1st and 3rd appellants are sons of **Silvester Wanyama Mkere**, the 2nd appellant herein. The evidence of the prosecution witnesses and of the 1st and 3rd appellants showed that the land of the 2nd appellant adjoins the land of **Judith Nekesa Barasa *(deceased)***. The prosecution evidence also showed that there was a long standing boundary dispute between the deceased and the 2nd appellant and a case relating to the boundary dispute had been filed in court.

[3] The prosecution case was briefly as follows.

On the morning of 16th May, 2010, **Nancy Nasimiyu *(Nancy)*** and her husband **Hamisi** were at their house within the homestead of the deceased. Hamisi is the son of the deceased. The 2nd appellant and his two sons went there and started demolishing a toilet. Nancy and her husband called a neighbour who advised the 2nd appellant and his sons to wait for the matter to be resolved by the Chief. The 2nd appellant and his sons went away.

[4] In the meantime, **Zainabu Nafuna Musa *(Zainabu)*** and **Teresia Nafula *(Nafula)*** who are relatives of the deceased went to the home of the deceased. Later, the 2nd appellant accompanied by his three sons, the 1st appellant, 3rd appellant and Wamalwa went back to the home of the deceased. They were armed with a panga, slasher, hammer and sticks and said that two people would die. The three sons of the 2nd

appellant removed Hamisi from his house and dragged him towards the boundary and assaulted him and cut him with a panga on the head.

Nancy, Zainabu and Nafula screamed and the deceased came out of her house and enquired what was happening. Thereupon, the 3rd appellant hit the deceased with a hammer on the head and she fell down. The 1st appellant cut her with a panga and Wamalwa hit the deceased with a big stick. The 2nd appellant who was standing close by armed with a slasher according to Nancy, cut the deceased on the head and also told his sons to cut the deceased and her son into pieces. The appellants went away after the incident.

[5] The deceased and her son Hamisi were taken to Kitale District Hospital but the deceased died while undergoing treatment. The 1st appellant was arrested at the Hospital by **Pius Kimutai Kirui** – a security guard at the hospital and handed over to the police on 18th May, 2010. **Dr. Kakundi Blastus** performed a post-mortem on the body of the deceased. The deceased had two fractures of the skull and bruises. He formed the opinion that the cause of death was due to severe head injuries. The appellants were later arrested but Wamalwa could not be traced and is still a fugitive.

[6] The 1st appellant stated at the trial that he and the 3rd appellant were ploughing in their land when the deceased accompanied by her son **Martin** jumped over the fence. The deceased then hit the 1st appellant with a panga and he fainted. He further stated that he did not know what happened to the deceased after he fainted.

The 2nd appellant stated that he was in Kiminini on the material day and did not know what happened.

On his part, the 3rd appellant stated that the deceased and her son crossed into their land where he and the 1st appellant were working; that the deceased was armed with a panga while her son was armed with an iron bar; that they alleged that the 3rd and 1st appellants were trespassing on their portion of the land; that the deceased and her son attacked them and slashed the 1st accused with a panga and that they fought and the deceased was seriously injured.

[7] The trial judge reviewed the evidence and made a finding that the evidence of Nancy, Zainabu and Nafula was cogent and credible; that the evidence of the three witnesses discredited the appellants' defence that it was the deceased and her son who confronted them while they were in their farm; that the 1st and 3rd appellants who were armed with crude weapons were responsible for assaulting and injuring the deceased; that defence of alibi by the 2nd appellant was discredited; that the appellant aided and abetted the unlawful acts of the 1st and 3rd appellants and the fact that the 1st and 3rd appellants were armed with crude weapons and refused to wait for the boundary dispute to be resolved by the Chief indicated that the incident was premeditated and that they intended to cause maximum harm to the deceased and her son and to anyone who attempted to prevent them from executing their macabre mission.

[8] The grounds of appeal raise three issues, namely, insufficiency of the evidence against the three appellants to prove the offence of murder; failure to comply with **section 200** of the Criminal Procedure Code and lastly imposing an illegal, harsh and excessive sentence. **Mr Miyienda**, learned counsel for the appellants submitted that the evidence of the three eye witnesses was contradictory and conflicting as regards who actually committed the offence; that the runaway Wamalwa is the one who hit the deceased as the appellants were standing by; that there was a fight between 1st and 3rd appellant and the deceased; and that the conviction of the 2nd appellant was not supported by the evidence.

Ms Oduor, learned counsel for the respondent on her part submitted, amongst other things, that, the evidence of the three witnesses was consistent; that all the appellants were at the scene; that the evidence of the three witnesses proved that all the 1st and 3rd appellant assaulted the deceased; while the 2nd appellant was standing there giving instructions to chop the deceased; that 2nd appellant had common intention with the 1st and 3rd appellants; and that the defences of the appellants were considered and rejected.

[9] Our duty as a first appellate Court is to re-evaluate, reconsider and re-analyze the evidence and make our own independent finding.

The evidence that there was an existing long standing boundary dispute between the family of the deceased and the 2nd appellant was overwhelming.

The evidence of Nancy showed that the dispute flared because of construction of a toilet apparently on a disputed portion of the land. The evidence of Nancy was consistent that the appellants started demolishing the toilet but after a neighbour intervened, the appellants went away only to come back later armed with pangas, hammers, sticks and slashers threatening that two people would die.

[10] Nancy, Zainabu and Nafula described the events which took place thereafter in detail. All the three witnesses stated that when the deceased emerged from her house, the three sons of the 2nd appellant including the 1st and 3rd appellants viciously assaulted the deceased. Each witness described in detail the type of weapon each of the three sons had and the role placed by each of them.

The appellants' counsel did not give an analysis of the alleged contradictions and inconsistencies in the evidence of the three witnesses.

[11] Contrary to the submissions of the appellants' counsel that there were contradictions and inconsistency, on our analysis of the evidence of the three witnesses, reveal that their evidence was consistent that the 1st and 3rd appellants and their brother Wamalwa including the 2nd appellant had formed a common intention to prosecute an unlawful purpose that is either of killing or causing grievious harm to the deceased and her son in the cause of which murder was committed. The 1st and 3rd appellants in their statement of defence admitted there was a confrontation between them and the deceased and her son. The 3rd appellant described it as a fight which resulted in the deceased sustaining serious injuries.

Dr. Kakundi Blastus assessed the apparent age of the deceased to be in her 50s. It is not probable that the deceased at that age could have been involved in a fight with three sons of 2nd appellant.

[12] Although the 1st and 3rd appellants stated that the 2nd appellant was not present, all the three witnesses testified that he was present and was armed with a slasher.

Nancy testified that the 2nd appellant told his sons to cut her husband and the deceased into pieces. According to the evidence of Nancy the 2nd appellant also cut the deceased with a slasher. According to Zainabu, the 2nd appellant was standing about 10 metres from the scene and told his sons to slaughter the deceased and her son as chicken meat. On her part, Nafula testified that the 2nd appellant was armed with a slasher and after his son had attacked the deceased and her son, he asked his sons whether they had completed the job.

It is clear from the evidence that the alibi of the 2nd appellant was rebutted by the three witnesses and that he was present and encouraged his sons to kill the deceased. He did not do anything to dissociate himself from the actions of his three sons. The finding of the judge that he was a principal offender by aiding and abetting his sons to kill the deceased cannot be faulted. Moreover, it is evident that the 2nd appellant and his three sons had formed a common intention to prosecute an unlawful purpose in the cause of which the deceased was murdered. The 2nd appellant is deemed by virtue of **section 21** of the Penal Code to be a principal offender and therefore to have also committed the offence.

[13] The learned judge made a finding that Nancy, Zainabu and Nafula gave credible evidence. Upon reconsideration of the evidence, we are satisfied that the version of the prosecution case relating to where and how the offence was committed was credible and proved that the appellants committed the offence of murder beyond all reasonable doubt.

[14] As regards the non-compliance with **section 200(3)** of the Criminal Procedure Code *(CPC)* which requires a succeeding magistrate to inform an accused of the right to have the witness resummoned to testify, it is true that the trial was conducted by three judges. **Koome, J**. received the evidence of two witnesses. The record shows that when **Muketi, J**. took over, **section 200** of the CPC was complied with and the judge ordered the trial to proceed from where it had reached. After Muketi, J. received the evidence of two witneses, she was succeeded by **J.R. Karanja, J**. The record does not show that J.R. Karanja, J. explained the provisions of **section 200** of the CPC. After the trial was adjourned several times, J.R. Karanja, J. released the appellants on bail and thereafter received the evidence of three prosecution witnesses and the evidence of the appellants in defence and eventually delivered the judgment and passed the sentence.

[15] The appellants were represented by a counsel throughout the trial. The appellants' counsel did not apply before J. R. Karanja, J. that the trial starts anew. Further, the appellants' counsel did not in his submissions at the trial raise the issue of non-compliance with **section 200** of the CPC.

By **section 200(1) (b)** of the CPC, it was lawful for J.R. Karanja, J. to continue with the trial and pronounce a judgment. If there was non-compliance with **section 200** of the CPC that was an irregularity. By **section 382** of the CPC, an appeal can only be allowed on that ground if such an irregularity has occasioned a failure of justice.

Further, by **section 200(4)** of the CPC as read with **section 201(2)** of the CPC, this Court has power to order a retrial if the non-compliance with **section 200(3)** of the CPC has occasioned the appellants' material prejudice.

[16] It has not been established as a fact that the appellant intended that the trial should start afresh. That the appellants' counsel did not say so and participated in the trial without raising any issue, indicated that the intention of the appellants was that the trial should continue from where it had reached. The appellants do not say that they suffered prejudice by the continuation of the trial. In the premises, we are satisfied that **section 200** of the CPC was complied with and that the ground of appeal is raised as an afterthought and amounts to a mere technicality.

[17] As regards the sentence, the court was faced with two decisions of the Court of Appeal namely: **Godfrey Ngotho Mutiso V. R. [2010] eKLR** which held that although the death sentence was lawful, it was not the only sentence for a crime of murder and **Joseph Njuguna & 2 Others V. Republic [2013] eKLR**, which held that the decision of **Godfrey Ngotho Mutiso *(Supra)*** was per *incurium* in so far as it purported to grant discretion in sentencing with regard to capital offences and that the sentence of death for murder is mandatory. The trial judge opted to apply the decision in **Godfrey Ngotho Mutiso** case to avoid *"wiping out an entire family with the stroke of a pen."*

[18] The Supreme Court in **Francis Karioko Muruatetu & another V. Republic – Petition No. 15 of 2015** *(consolidated with Petition No. 16 of 2015)* has upheld the decision in **Godfrey Ngotho Mutiso** case and has held that the death sentence for murder is not mandatory but a discretionary maximum punishment. It follows that the custodial sentences passed by the learned judge are lawful.

[19] The learned judge received a pre-sentence report and heard the appellants' counsel in mitigation before passing sentence. We have considered the appeal on sentence. The 2nd appellant is elderly and considering the role he played, the sentence of ten years imprisonment was appropriate. The sentence of 50 years imprisonment imposed on the 1st and 3rd appellants was harsh and manifestly excessive. Having regard to the circumstances including the underlying boundary dispute, a sentence of 20 years imprisonment would have served the ends of justice.

[20] For the foregoing reasons, the appeal against conviction is dismissed. The appeal against sentence by the 2nd appellant is dismissed. The appeal against sentence by the 1st and 3rd appellants is allowed to the extent that the sentence of 50 years imprisonment against each is set aside and in lieu thereof the 1st and 3rd appellants are each sentenced to 20 years imprisonment.

It is so ordered.

Dated and delivered at Eldoret this 14th day of June, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR