IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CRIMINAL APPEAL NO. 55 OF 2015

BETWEEN

KINGI KENGA KAZUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 4th June, 2015

in

H.C. Cr. C. No. 19 of 2013)

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JUDGMENT OF THE COURT

[1] **Kingi Kenga Kazungu** (the appellant), both deceased persons and the eye witnesses were all relatives in a family matrix that is rather confusing.

[2] Kavumbi Thoya Baya (deceased No. 1), was a sister to Kenga Kazungu (deceased No. 2). Deceased No. 2 was the appellant's father. Dama Charo (PW 6) was Thoya Ndoro (PW 4's) wife and the latter was a brother to the appellant. From the evidence on record, the appellant's father (deceased No.2) had an illicit love affair with PW 6, a state of affairs her husband, PW 4 seemed to condone but which upset the appellant pretty much. PW 5 (Patrick Thoya Baya) was PW 6's son.

[3] On the date and time in question, Agnes Ngoma (PW1) and her mother (deceased No.1) and deceased No. 2 were seated outside PW 1's mother's house. Deceased No. 2 had been served a meal of ugali which he was eating as they were having a normal conversation. The appellant is said to have arrived at around 4.00 p.m. and on approaching his father, he asked him whether he was a witch. Deceased No. 1 intervened and told the appellant that he should take up the matter with the area chief and elders instead of confronting his father but the appellant is said to have declined. He is said to have pulled out a panga which he was carrying and aimed at deceased No. 1's head, she tried to duck but he cut her severely on her neck. Deceased No. 2 then took a stool and aimed it at the appellant to try and stop him from attacking deceased No.1. It was then that the appellant turned on his father and attacked him with the same panga. The appellant then ran off leaving the bag he was carrying as well as the panga he had used to slay his relatives at the scene.

[4] Haluwa Thoya (PW 2), another relative who was at home testified that she was at the scene when the appellant came and after a short discussion just slashed her sister with the panga. He also slashed his own father on the head and fled the scene leaving behind the murder weapon and his bag.

[5] According to Jackson Kitsao, the appellant's cousin and deceased No. 1's son, he had just left his home when he met the appellant. The appellant asked him if he had left deceased No.2 at his home and he answered in the affirmative. The appellant then proceeded to the home and a few minutes thereafter, the witness received a phone call informing him that his mother and uncle had been killed. He rushed back home and confirmed the sordid incident. He told the court that his mother's head was almost decapitated while his uncle had a deep cut wound on his head.

[6] PW 4 also received information about the attack and he rushed to the scene and found the two deceased persons lying dead at the scene. The matter was reported to the police station and the bodies were later removed from the scene and taken to Malindi District Hospital Mortuary where post mortems were conducted by Dr. Amina. According to the post mortem reports produced in evidence by Dr. Mumina

(PW 8) on behalf of Dr. Amina, deceased No. 1 had a deep cut transecting all neck structures including the muscles, blood vessels and spinal cord which cut was inflicted by a sharp object in a single motion. Deceased No. 2 had two lacerations on the back of the head with one exposing the skull bone and the other extending to the brain tissue.

[7] The appellant was traced and arrested and subsequently charged with two counts of murder before the High Court in Malindi. He pleaded not guilty and the prosecution witnesses gave the evidence we have summarized above.

[8] In his defence, tendered on oath, the appellant told the court that on the date in question, he had met his father who had told him that he was on his way to visit his sister (deceased No. 1). He later went to deceased No. 1's home where he found his father had already arrived. He told the court that as they were outside, he heard people shouting ***"he is armed"***. He turned around and saw his father raising a panga aiming it at him. He said he deflected the panga but unfortunately it ***"caught Kavumbi"***. He said his father then picked a stool and attacked him but he managed to take the panga and cut him on the head before fleeing from the scene. He said he went and reported the incident to an elder who then took him to the police station, where he was charged with the two counts of murder as particularized in the information sheet presented in court. He said he and his father had some differences and were not on talking terms and they had gone to Kavumbi's home to try and resolve the issue. He said he cut his father on the head after he attacked him with a stool; and explained away Kavumbi's fatal cut wound as having happened after he deflected the panga and it *'caught'* her.

[9] The trial Judge, (**Meoli, J**.), upon considering all this evidence found the appellant's version of the incident was ***"an afterthought incapable of belief"***. She accepted the version given by PW 1 and PW 2 who were eye witnesses and arrived at the conclusion that it was indeed the appellant who had attacked and killed the deceased persons.

[10] The learned Judge also found malice aforethought had been established as the appellant was armed with a very sharp panga and the severity of the cuts were a clear indication of his intention to cause grievous harm to the deceased.

[11] The learned Judge also considered the defence of ***"self defence"*** which the appellant had put forth but found it unavailable to the appellant. In the learned Judge's own words:-

> ***"…This is a case of cold blooded murder plotted in advance as against Kenga but eventually involving his sister Kavumbi because she came to Kenga's defence. I find that there is ample proof of malice aforethought***."

The appellant was thus found guilty as charged on both counts of murder and convicted accordingly.

[12] It would appear that Meoli, J. was transferred from Malindi before mitigation and sentence hence, the matter landed on **Chitembwe, J's** docket for the same. After considering the appellant's address in mitigation, the learned Judge while appreciating the mandatory sentence for murder was death, nonetheless sentenced the appellant to 30 years imprisonment on each count with an order that the two sentences run concurrently. These sentences later attracted the Notice of enhancement of sentence filed by the State on 12th June, 2017. We shall advert to that issue later.

[13] Being aggrieved by both conviction and sentence, the appellant filed some five (5) homemade grounds of appeal. His counsel, **Mr. Odera**, later filed supplementary memorandum of appeal citing four (4) grounds which he said he would rely on. These grounds were that the Judge misdirected herself on standard of proof and convicted the appellant on a standard lower than reasonable doubt; that the learned Judge failed to evaluate and analyse the evidence, thus failing to resolve "glaring" contradictions in prosecution's case; and that the appellant's defence was not considered.

[14] In his oral submissions before us, learned counsel picked out a few discrepancies in the evidence of the witnesses. For instance, evidence as to where the appellant had hidden the panga before the attack; evidence on whether or not there existed a grudge between the appellant and his late father; and whether the appellant had spoken to Kavumbi before slashing her with the panga. He also reiterated that the court ignored the defence of self defence which the appellant had raised.

[15] Opposing the appeal, **Mr. Japheth Isaboke**, learned Senior Prosecution Counsel, said that motive was proved because the appellant had armed himself with the murder weapon; that the issue of self defence was actually raised at the tail end when the appellant testified and it had not been raised with the prosecution witnesses when they were cross examined; that the deceased persons were not armed and so the issue of self defence does not arise at all. He urged us to dismiss the appeal.

[16] Our task now as a first appellate court is to re-evaluate, re-analyse and critically re-assess the above evidence and come to a conclusion whether or not the conviction of the appellant was safe. This is pursuant to **Rule 29 (1) (a)** of the Rules of this Court, which rule we have followed with unbowed loyalty in our decisions. See for instance ***Okeno v. Republic* *[1972] Ea 32*** and ***Kiilu & Another v. Republic* *[2005] KLR 174).***

[17] Having critically relooked at the evidence adduced before the trial court, we first and foremost note that the incident in question happened in broad daylight, infront of PW 1 and PW 2. There was no issue of confusing who the assailant was. We also observe that the witnesses and the deceased persons were all close relatives.

[18] PW 1 and PW 2 whose mother and sister respectively was decapitated in their presence said it was the appellant who cut deceased No. 1 on her neck when she tried to plead with him to raise any issues he had with his father before the chief or elders. The two certainly did not expect the appellant's reaction and they did not therefore keep their eyes fixed on him to see exactly where he pulled out the panga from, hence the slight variance in their evidence.

[19] In our view however, whether the panga was pulled out from the trouser or from the bag is minor and does not go to the root of the

evidence. The fact remains that the appellant had the panga, and a very sharp one at that and there is no dispute that it was the murder weapon.

[20] Indeed, we note that the learned Judge had considered the said contradiction in her judgment and resolved it by saying that it was a minor discrepancy ***"that did not detract from the substance of their evidence."*** We agree with the learned Judge on that finding. In our view, the contradictions cited before us were not material and did not raise any doubt on the prosecution's case. Ground 2 of the appellant's ground of appeal must fail.

[21] On the issue of the appellant's defence having not been considered by the trial Judge, we find that she did consider the same but found it to have been an afterthought. It is nonetheless our duty to reconsider it afresh and draw our own conclusion as to whether the same cast a doubt onto the prosecution case.

[22] His defence was that he had acted in self defence saying that his father is the one who was armed and raised the panga to cut him on the head. His claim was that he deflected the blow and it ***"caught Kavumbi"***. That in our view cannot be what happened. To start with, the eye witnesses said categorically that it was the appellant who had slashed deceased No.1 before attacking his own father. The trial court found that evidence credible. We cannot impeach it on appeal as the trial court was better suited to assess the credibility of the eye witnesses as it was that court which saw them testify and therefore had occasion to assess their demeanor. We further note that Kavumbi's neck was almost severed from the rest of her body. This could not have been from a ***"deflected blow"***. The appellant must have deliberately aimed at the neck and cut it using considerable force.

[23] Turning to the attack on his father, if the appellant's evidence was to be believed, after he deflected the blow, his father picked a stool and attacked him, which means that by the time he attacked his father so viciously, the latter was unarmed. He still used excessive force to inflict the cut wounds that dispatched his father to the next world on the spot. Like the trial Judge, we do not believe the account of events as told by the appellant.

[24] We also agree with the learned Judge that the defence was an afterthought because if it was not, the two eye witnesses could have been cross examined on the same. Ground 4 therefore also turns a cropper.

[25] On grounds 1 and 2, we are convinced that *actus reus* was proved and it was the appellant who for whatever reason went to Kavumbi's house looking for his father while armed with a panga. He even enquired and confirmed from PW 3 that indeed his father was in Kavumbi's house. When he found them outside, he picked a quarrel with his father and when deceased No.1 tried to intervene, he slashed her with a very sharp panga. Even after inflicting that serious wound on Kavumbi, the appellant still attacked and killed his father who, if we were to believe the appellant, was then only armed with a stool.

[26] As stated by the learned Judge, the severity of the injuries left no doubt that the appellant intended to kill or cause grievous bodily harm on the deceased, and this pursuant to **Section 206** of the Criminal Procedure Code amounts to malice aforethought. We do not find any fault in the learned Judge's findings.

[27] We too find that malice aforethought or *mens rea* was proved; *actus reus* was proved and the sum total of this is that the offence of murder was proved beyond reasonable doubt.

[28] We are satisfied upon re-evaluation of the evidence before the trial court, the grounds of appeal and submissions by both counsel that the offence of murder contrary to **Section 203** as read with **204** Penal Code was proved beyond any reasonable doubt and the appellant was properly convicted on both counts.

[29] On the issue of the sentence, we note that the death penalty for murder, though applicable is no longer mandatory. See **Francis Karioko Muruatetu & Another v. R [2017] eKLR**.

[30] Whereas in our view, the heinous offence committed by the appellant by brutally taking away the lives of his father and his aunt at ago deserved a life sentence, we shall not interfere with the sentence imposed by the learned Judge. We say so because although the sentence was unlawful as at the time it was passed, the invalidity has been lifted by the **Muruatetu case** (supra). We note further that the sentence was passed after the learned Judge considered a detailed address in mitigation and so it will not be necessary for us to call upon the appellant to re-mitigate.

[31] The sum total of all this is that we find the entire appeal devoid of merit, dismiss it in entirety, and uphold the conviction and confirm the sentence imposed by the High Court.

Dated and delivered at Mombasa this 12th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR