



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 5 OF 2017

BETWEEN

SALIM TSOFA MKALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.)

dated 27th October, 2016 *in H.C.C.R.C No. 25 of 2014.*)

JUDGMENT OF THE COURT

This is a first appeal against **Salim Tsofa Mkalla** (the appellant's) conviction for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The scope of our jurisdiction in such an appeal is well settled. We are required to carry out an exhaustive appraisal and re-evaluation of the evidence not merely to see whether it supports the findings and conclusions of the trial court; but we are bound to weigh conflicting evidence, make our own findings and draw our own independent conclusion. Nonetheless, we appreciate that we did not have the privilege of seeing the witnesses' demeanour as they testified unlike the trial court. See ***Kiilu & Another vs. R [2005] KLR 174.***

2. The pertinent facts which gave rise to the appeal were that on 10th September, 2014 at around midday, Alfred Kesi Ngumbao (PW3), saw a crowd heading towards his neighbour's homestead, one Tsofa Kalama Mkala (deceased), chanting that he was a witch. On the forefront was the appellant who happens to be the deceased's son. He observed the deceased being manhandled out of the compound onto the road to an unknown destination. It is at this point that Alfred decided to call and inform the area chief, Patrick Samimi Yaa (PW4) and the police.

3. Moments later, Alfred was informed that the said crowd was heading to his sister's home, Patience Peter Ngumbao (PW2), in search of his mother, Kanze Peter Ngumbao (PW1), who they believed was also engaged in witchcraft. Fearing for his mother's life, Alfred left for his sister's house which was some distance away but fortunately he ran into a police vehicle which was responding to the call he had made. He got into the vehicle and they drove to his sister's house.

4. Meanwhile Patience and Kanze who were by then outside the house noticed the crowd approaching the compound. They also saw the deceased being frog marched and assaulted by the unruly crowd. Some people entered into the compound while others were left by the road side. The people who had entered into the compound pounced on Kanze claiming she was a witch and dragged her out of the compound. Patience's efforts to rescue her mother were unsuccessful thus she ran in the opposite direction of the crowd to seek help from neighbours.

5. Kanze narrated the horrific events that took place thereafter; the crowd set the deceased on fire and she watched him scream out in pain; the crowd then turned on her and doused her with petrol and set her ablaze. Whilst still on fire, she ran from the crowd and fortunately, some good Samaritans put off the fire using sand. At this point in time the police in the company of Alfred and Patrick had arrived at the scene. By then the crowd had dispersed and unfortunately, the deceased had died. Kanze was rushed to hospital where she spent three months receiving treatment and recuperating. Both Kanze and Patience placed the appellant within the vicinity.

6. Apparently, a few days prior to the incident, the deceased had informed Alfred who is a village elder, that the appellant had made threats against his life. Specifically, Alfred testified that on 6th September, 2014 the deceased told him that the appellant wanted to sell the family land for purposes of buying a motor bicycle and he refused to accede to the suggestion hence the appellant threatened to kill him. Alfred referred the deceased to the area chief, Patrick, who in turn wrote a letter to the appellant asking him to appear in his office but the appellant

rebuffed that invitation. A subsequent letter was written and once again the appellant did not honour the summons.

7. Left with no other option, Patrick referred the deceased to Kilifi Police Station where he reported the threat made on his life on 8th September, 2014. PC Abdalla Said (PW8), wrote a letter to the appellant directing him to appear at the police station. Just like the chief's summons the appellant did not comply with the said direction. According to PC Abdalla, they had made arrangements to arrest the appellant however, the deceased was killed before they could do so.

8. Based on the foregoing set of circumstances the appellant and his brother, Kazungu Tsofa Mkala were arrested, arraigned and charged with murder in the High Court at Malindi. In his sworn statement the appellant maintained that he had not committed the offence and on the material day he was at Timboni loading sand onto a lorry.

9. Upon weighing the evidence before him the learned Judge (**Chitembwe, J.**) in a judgment dated 27th October, 2016 found on one hand, that the appellant was culpable while on the other hand, no case had been established against his co-accused. He expressed:

“Given the evidence on record, I do find that the evidence against the 1st accused (the appellant herein) is direct. There was motive to kill the deceased. The 1st accused wanted his father to sell land so that he could buy a motor bike. The deceased felt that his life was in danger. He confided to the village elder, the assistant chief and even the police at Kilifi police station. There is no evidence that PW3 is on a revenge mission due to the injuries sustained by his mother. If that were to be so, there is the independent evidence of PW4 and the police.

The defence evidence does not raise doubt on the prosecution case. The 1st accused was present when the deceased was killed. The issue of witchcraft was only an excuse. The deceased informed the administrators that the dispute was on the sale of land so that the 1st accused could buy a motor cycle. The deceased seems to have been opposing the sale of land and had to be killed. The 1st accused participated in the killing of his father. He is a principal offender. He is found guilty of the offence of murder contrary to section 203 as read with section 204 of the penal code and is convicted accordingly.”

10. It is that decision which has provoked the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by-

a. Failing to find that the offence of murder was not proved beyond reasonable doubt.

b. Disregarding and/or rejecting the defence of provocation and alibi.

11. Ms. Otieno, learned counsel for the appellant, submitted that there was no evidence that connected the appellant to the murder of the deceased. In point of fact, no evidence was tendered with regard to the circumstances surrounding the purported identification of the appellant; how long had the witnesses observed the appellant? Whether the appellant was known to the said witnesses prior to the incident. All of which were crucial to establish the veracity of the identification evidence.

12. She argued that the deceased's death was as a result of mob justice therefore, there was no direct evidence against the appellant. In other words, the prosecution had not established that there was a common intention between the crowd and the appellant to kill the deceased. In the alternative, counsel contended that the defence of provocation was available to the appellant for the reason that the deceased was suspected of practicing witchcraft. Moreover, the appellant's defence on *alibi* had not been displaced.

13. In opposing the appeal, Mr. Isaboke, Senior Prosecution Counsel, asserted that the appellant's identification was positive and free from error. The incident occurred in broad day light and there was no chance of a mistaken identity. He had been identified by Kanze and Patience who had known him for a long period of time. The identification was further supported by the chief's evidence to the effect that the deceased had reported the threats made on his life by the appellant prior to his death. The evidence as a whole established the appellant's guilt.

14. We have considered the record, submissions by counsel and the law. **Section 203** of the **Penal Code** is clear that there are three elements which the prosecution must prove to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellants committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured *malice aforethought*. See ***Nyambura & Others vs. R* [2001] KLR 355**.

15. It is not in dispute that the deceased was killed by a crowd. What is in issue is whether the appellant was part of the said crowd and was culpable for the murder.

16. The evidence placing the appellant within the crowd was first tendered by Alfred who saw him amongst the crowd that dragged the deceased out of his compound. Furthermore, both Kanze and Patience testified that he was present in the crowd that led the deceased to Patience's house and attacked Kanze. All the three witnesses gave uncontroverted evidence that the appellant was known to them prior to incident. Furthermore, the incident occurred in broad day light negating the possibility of a mistaken identity.

17. We concur with the trial court that the appellant's identification by recognition was positive and free from error. In ***Anjononi & Others vs. R* [1976-80] 1 KLR 1566**, this Court held the evidence of recognition was more assuring and reliable since it is based on the personal knowledge of the assailant. In addition, this piece of evidence displaced the appellant's *alibi* that at the material time he was at Timboni loading sand onto a lorry.

18. We note that there was no evidence by any of the witnesses to the effect that they saw the appellant assault or set the deceased or Kanze

ablaze. Does this mean that he was not culpable for the deceased's death? We think not. In this regard, *Section 21* of the *Penal Code* is instrumental:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

19. In this case, the fact that the appellant led the crowd to the deceased's compound and accompanied them to Patience's house where they attacked Kanze establishes the common intention between the appellant and the crowd to cause grievous harm. It matters not that there was no evidence of an express agreement between the crowd and the appellant to execute the acts they did prior to the incident. This common intention can be inferred from the crowd and appellant's conduct. The common intention is also fortified by the evidence of threats made by the appellant to the deceased. Alfred testified how the deceased reported to him threats made by the appellant on his life because he refused to accede to the request to sell his land to enable the appellant purchase a motorcycle. The appellant was summoned by the chief but he declined to answer and the matter escalated to the police where by PC Abdalla wrote a letter to the appellant but he declined to go to the police station and just as PC Abdalla was arranging to arrest the appellant, the threat was effected.

20. Our position is further fortified by the case of Mabel Kavati & Another vs. R [2014] eKLR wherein this Court quoted with approval the following excerpt of the case of Rex vs. Tabula Yenka S/o Kirya & 3 Others [1943] 10EACA 51:

“To constitute a common intention to prosecute an unlawful purpose... it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”*[Emphasis added]*.

21. Further, we agree with the following sentiments of this Court in Njoroge vs. R [1983] KLR 197 at page 204, which echoes the circumstances of the case before us:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

22. Malice aforethought as against the appellant can be deduced not only from the heinous manner in which the deceased was killed but also from the threats he issued to the deceased prior to his death.

23. As for the defence of provocation arising from the allegations that the deceased was a witch, we find that the same does not hold any weight. Why do we say so? Apart from not raising the said defence at the trial court the appellant did not tender any evidence of circumstances directly affecting him from which it could be readily concluded that on account of his belief in witchcraft, he was provoked to murder the deceased. The requisites of this defence have been extensively considered by this Court. In particular, this Court in Thoya Kitsao vs. R [2015] eKLR aptly summed up those requisites as follows:-

“In none of the cases was belief in witchcraft alone, without evidence of circumstances negatively affecting the appellant directly and which he attributed to witchcraft, deemed sufficient to excuse a murder merely because by repute the deceased was regarded as a witch.”

24. In the end, we find that the prosecution had established the aforementioned three elements against the appellant to secure his conviction for murder. We equally see no reason to interfere with the sentence of 25 years imprisonment meted out to the appellant. This is because taking into account the circumstances of this case coupled with the Supreme Court's decision in Francis Karioko Muruatetu & Others vs. R [2015] eKLR which recognized that a court has discretionary latitude in issuing sentence for a conviction of murder we deem 25 years imprisonment as reasonable. Accordingly, the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 11th day of October, 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