IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: GATEMBU, SICHALE & KANTAI, JJA)

CRIMINAL APPEAL NO. 35 OF 2016

BETWEEN

JOSEPH KIPKEMOI NGETICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal against judgment of the High Court of Kenya

at Kericho (Koome, J.) dated 23rd July, 2009

in

H. C. CR. C. No. 42 of 2005)

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JUDGMENT OF THE COURT

In an information dated 17th November 2005, the appellant was charged with the offence of murder contrary to section 204 of the Penal Code. The particulars of the offence were that on 20th October 2005 at Bisiobei Sub-Location of Kaptebengwet Location in Bureti in the then Bureti District he murdered **LUCUS KONGO.**

On 8th May 2006, the appellant pleaded not guilty. His trial commenced in earnest on 3rd October 2006 before **Koome, J.** (as she then was). The prosecution called a total of 9 witnesses. Upon conclusion of the prosecution case, the trial court found the appellant had a case to answer. In his defence, the appellant chose to make an unsworn statement of defence and did not call a witness.

In a judgment delivered on 25th July 2009, the appellant was found guilty of murder and sentenced to death as prescribed by the law then.

The appellant was dissatisfied with the outcome of his trial, hence the appeal before us. In his home made grounds of appeal filed on 28th July 2009, the appellant's complaints were that his conviction was based on insufficient evidence and secondly, that the trial court failed to consider that PW4 harboured a grudge against him.

On 29th August 2018, the appellant filed supplementary grounds of appeal and listed 4 grounds. These are that the trial court failed to find that:-

i) the murder of the deceased was unintentional and was as a result of “alcoholic drinks.”

ii) death sentence is not mandatory.

iii) the evidence was unsatisfactory.

iv) the appellant's defence was reasonable.

On 29th August 2018 the appeal came before us for plenary hearing. **Mr. Ombali,** learned counsel for the appellant urged us to find that the evidence on identification was insufficient; that there was no dying declaration; that the trial court failed to consider the appellant's evidence and finally that a mandatory death sentence is unlawful. He asked that we refer the matter to the High Court for purposes of having the appellant re-sentenced, should we find that the appeal is unmerited.

On behalf of the State, **Mr. Motende,** Senior Principal Prosecution Counsel (SPPC) opposed the appeal. He contended that the evidence of PW2, PW3, PW4 and PW5 who were eye witnesses was free of contradictions; that the heinous act happened during the day and that although there was a dying declaration, this was not the basis of the conviction. He refuted the appellant's contention that his defence was not considered by the trial court. However, the learned SPPC conceded that a death sentence is not mandatory and he too was of the view that we should refer the matter to the High Court for re-sentencing.

We have considered the record, the grounds of appeal, the rival oral submissions made before us and the law.

The appeal before us is a 1st appeal. In the case of ***OKENO V. R [1972] EA 32***, at page 36, the predecessor to this Court stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions –Shantilal M Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses – see Peters v. Sunday Post [1958] EA 424."***

As a first appellate Court, our mandate is to re-evaluate and re-analyse the evidence and thereafter make our own independent findings. In so doing, we shall take into account that unlike the trial court, we did not have the benefit of hearing and/or seeing the witnesses.

An evaluation of the evidence shows that there was overwhelming evidence against the appellant who was with his mother, **ESTHER ISII** (PW2) and the deceased on 20th October 2005. PW2 said the appellant hit the deceased on the forehead using a *'kiboko'*. **REGINA BETT** (PW3), a neighbour went to the scene after being alerted of the incident. She found the deceased with a cut. The deceased told her that he had been cut by the appellant. Then there was the evidence of **SAMWEL KIPKORIR NGETICH,** a brother to the appellant. During his testimony, it became apparent that he had turned hostile. The prosecution applied to treat him as a hostile witness after which he was cross-examined on his statement wherein he had recorded that he saw the appellant hit the deceased using a walking stick. **VICKY CHEPKEMOI,** (PW5) a niece of the appellant also told the trial court that she saw the appellant and the deceased fighting. It was after PW3 reported the matter that **JOEL KIMUTAI** (PW6), **PC JOHN ELOKULE** (PW8) and **PC PETER KINUTHIA** (PW7) visited the scene and recovered a blood stained axe and arrested the appellant.

DR. EDWARD SEREM (PW9) carried out a post postmortem on 24th October 2005 and found that the deceased had multiple cuts on the head and legs. He concluded that the deceased died as a result of massive bleeding due to the cut wounds.

In his unsworn statement of defence, the appellant told the trial court that he left home on 20th October 2005 at about 11 am. He visited his friend, one William and was away up to 4 pm. Upon his return home, he found people had gathered. He however avoided going to the place where there was a gathering as he was already drunk. He went to his house where he was later removed from.

The learned trial Judge evaluated the evidence tendered as follows:-

> ***"The evidence by PW2 and PW5 that is the mother of the accused person and her granddaughter is clear. On 20th October, 2005 the accused person became violent and went berserk. He was seen by PW1 attack the deceased because the deceased had been given vegetables by PW2 for which he paid Kshs.5/-.***
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> ***PW2 testified that she saw the accused person beating the deceased with a kiboko. At that time she ran away fearing for her life. She returned a few minutes later and started milking the cows. That is when the accused person threatened her with a plunk of wood. She drove the cow she was milking to the field and she also hid in the field.***
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> ***PW5 also found the accused person fighting with the deceased but the accused chased her away. PW4 found the accused person brandishing an axe. He recovered the axe from the accused person which was handed to the police and it was produced in this case as exhibit."***

In our view the learned Judge considered the above evidence and rightly came to the conclusion that the appellant murdered the deceased. It would appear that PW2, the mother of the appellant fearing for the consequences of the appellant's actions chose to become economical with the truth and called the weapon that was used to inflict a cut a 'kiboko' as opposed to an exe. In our considered view, the evidence against the appellant was not insufficient and neither did the trial court fail to consider the appellant's defence which was a mere denial. On the issue that the appellant was drunk, we find that nothing much turns on this. He was at home with his mother, PW2 on the fateful day. However, after the commission of the offence, he feigned drunkenness so as to avoid the natural consequences of his actions. In any event, it is too late in the day for the appellant to now raise the defence of intoxication. This issue was not raised at all in the trial court. If anything the appellant

denied the offence and gave a chronology of the events of the day which included going to a bar to drink. It was his defence that after his drinking escapades, he left for his house from where he was removed. This cannot be said to be a defence of intoxication and we reject the appellant's ground of appeal that the killing was due to "alcoholic drinks". We also find that the trial court considered the appellant's defence which it dismissed in view of the overwhelming evidence against the appellant. In view of the above, we too have come to the conclusion that the conviction was based on sound evidence and the appellant's guilt was proved beyond reasonable doubt. Consequently, the appellant's appeal against the conviction has no merit and is hereby dismissed.

However, we do think that there is merit in the appellant's contention that the trial court ought to have found that death sentence is not mandatory. We say this in light of the Supreme Court's decision of **FRANCIS KARIOKO MURUATETU & ANOTHER V. R. SCK PET. NO. 15 OF 2015 [2017] eKLR** which held, *inter alia*, that:

> ***"The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional."***

Accordingly this matter is remitted to the High Court on priority basis for re-hearing on the issue of mitigation and sentence.

Dated and delivered at Nakuru this 22nd day of November 2018.

GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR