IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 19 OF 2013

BETWEEN

MBUU SAID.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Mombasa (Tuiyot, J.) dated 27th February, 2013

in

H.C.CR.C. No. 10 of 2010)

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JUDGMENT OF THE COURT

The only issue at the trial of the appellant was whether he was responsible for the death of his father-in-law, thedeceased, who was viciously and fatally attacked with a panga on 28thApril,2010 at around 8p.m.At the scene was the appellant's wife(PW2), mother-in-law(PW1)and the deceased. Earlier on the material day, the deceased had sent his wife(PW1) to fetch their daughter, PW2, from the appellant's home because the appellant had not fully settled the dowry. It was common factor that the appellant was expected to pay dowry of 14 cows but had only paid the equivalent Kshs.5,000 for the six months period he had lived with PW2 as his secondwife. At the time the appellant marriedPW2 she alreadyhad two children from her first marriage. These children however lived with her parents.

The trial revolved around the foregoingfacts, with the appellant confirming that he had indeed been to his in-law's home but only to see PW2's child who was sick. On the other hand the prosecution, through PW1 insisted that infuriated by the fact that PW2 had been reclaimed, the appellant stormed the deceased person's home armed with a panga, demanding to be refunded the dowry he had paid. Without giving the deceased any opportunity to explain himself; the appellant slashed the deceased on the upper part of the body including upper arm,neck,forehead and the head causing a fracture to the skull and exposing the brain matter.When post mortem was conducted, the pathologist was of the opinion that the cause of death was cardio respiratory arrest due brain injury. The deceased died shortly after the attack. It was alleged that the appellant fled the scene soon after.

The appellant having denied involvement and bearing in mind that the attack was perpetrated at night, the question before the trial court was whether the conditions prevailing at the time was favourable for accurate identification.

The learned Judge(**Tuiyot J**)first expunged the testimony of PW2 after he found that she was a wife to the appellant within the meaning of **section 127(3)** of the Criminal Procedure Act and though competent to testify against the appellant, she was not compellable. That therefore left the evidence of PW1 as the only incriminating evidence against the appellant. Drawing from **Anjonini & Others V R** (1980)KLR 59 and **R V Turnbull**(1970)3 All ER 549, the learned Judge was persuaded, from the relationship between PW1 and the appellant, thefirm account of events by the former and the appellant's own admission that he was at the scene, thatthe fatal injuries on the deceased were inflicted by the appellant. In addition he was convinced that there was credence in the testimony of the witness regarding the weapon used in the attack, a fact which was corroborated by the medical evidence on the nature of the injury and the type of probable weapon used.Consequentlythe appellant was found guilty of murder,convicted and, contrary to the applicable law, he wassentenced to serve a term of imprisonment of35 years.

With five grounds of appeal, the appellant seeks to reverse that decision. Those grounds were condensed by **Miss Otieno**,learned counsel for the appellant, into two broad but related grounds, one being in the alternative that the offence of murder was not proved beyond reasonable doubt and that, from the facts, the offence disclosed was manslaughter. Learned counsel submitted that the conditions for positive identification were lacking as the attack took place in darkness; that the brightness of the moonlight and the tin lamp was not ascertained; that six months period of the marriage between PW2 and the appellant did not afford PW1 sufficient time to be in a position to recognize the appellant at night; that the appellant gave a plausible *alibi* defence which was not displaced; and that by voluntarily going to the police station in the company of the area chief, the appellant did not exhibit any traits of a guilty person.Counsel relied on the celebrated decision of **Maitanyi V R**(1986)KLR 198,on the burden and standard of proof in a criminal case and the necessity of testing with greatest care, the evidence of a single identifying witness when it is apparent the conditions for identification were difficult.

As an alternative to the foregoing submissions, counsel urged us to find that the learned Judge ought to have found, from the circumstances of the case that the appellant was provoked following a quarrel over dowry; that the fact that his new wife(PW2)had been taken away from him led to the altercation that culminated in a fight between him and the deceased.

Counsel relied on the decisions in **Nelson Ambani Mbakaya vR**Cr.Appeal No.1 of2016,**John Muriithi Nyagah v R** Cr. Appeal No.201 of 2007 and **Reuben Matiro Mbilishe v R**Cr.Appeal No.257 of 2011 to persuade us that there was provocation and to invite us to consider a sentence of seven years.

Mr. Monda,the learned Senior Assistant Director of Public Prosecutions for his part urged us to dismiss the appeal as lacking substance and to uphold the decision of the trial court for, in his view the learned Judge arrived at the correct conclusion after evaluating the evidence; that the appellant was at the *locus in quo* and was clearly seen byPW1; that that evidence displaced the *alibi* defence; that from the nature of the injuries inflicted upon the deceased, there was little doubt that the appellant intended to cause his death; that provocation was not proved. Counsel however faulted the learned Judge for imposing an illegal sentence of 35 years in prison after a definitive conviction for the offence of murder.

It now remains for us to consider, through re-evaluation of evidence recorded by the trial court, whether there was any evidence upon which the appellant's conviction could be based. As we do this we remain alive to the fact that, unlike the learned trial Judge we have not heard or seen the witnesses as they testified. See**Shantilal Ruwala V R**(1975)EA 57.

Although the incident occurred at about 8 pm,there was evidence that there was moonlighting and a tin lamp at the scene. Indeed it was the case for the prosecution that the deceased was reading the Bible when the attacker struck; that the attacker talked to him demanding sarcastically a refund of the dowry saying ***"give me what I had paid you"*** so that he could instead distribute it to his friends; andthat without giving

the deceased any chance to say anything, the appellant simply beganto slashthe deceased several times with the panga with which he had come armed. When he was done with him he announced to his friends, who apparently had accompanied him and were hiding away in the nearby bushes that he had ***"finished with the deceased".***

Like the learned trial Judge we think, in view of the relationship between the appellant and PW1, the events,including the conversation prior to the attack that obviously took some time; the fact that the appellant was well known to PW1; the existence of a moonlight and a tin lamp and not losing sight of the fact that the deceased was instrumental in causing the appellant's wife to return to her matrimonial home; all amounted to credible evidence that proved the appellant was the person who attacked the deceased.He himself conceded that indeed he was within the scene just about the same time the attack occurred. His evidence was that he left the scene at 7.45p.m. while the attack was at about 8p.m.We do not think this is a point of consolation. Indeed that evidence went to add credence to the testimony of PW1 that as a matter of fact the appellant was responsible for the death of the deceased in view of his presence at the scene, the role he played and the words he uttered before, during and after the attack.

For the foregoing circumstances we come to the conclusion that although it was at night when the deceased was attacked,PW1, a single eye witness properly and accurately identified the attacker, the appellant. The witness maintained that she had known the appellant before; that his home was at a place called Pongwe. In our view there is no merit in the argument that the period of six months she had known the appellant was not long enough to enable her to recognize him.

The appellant came armed with a panga, did not entertain any conversation but demanded the refund of the dowry and struckthe deceased with a panga several cuts on the upper part of the deceased person's body, a manifestation of a clear intention to kill. There was no evidence of a quarrel or altercation between the appellant and the deceased. There was no provocation at all in the sense of **section 208** of the Penal Code. The deceased was cut while seated reading the Bible and offered no resistance or attempted to fight back. Being deprived temporarily of his wife until he settled in full the outstanding dowry was not an act that would amount to provocation.

Both grounds must fail and we reject them in the same way the learned Judge properly rejected the *alibi* defence.

Before the hearing of this appeal commenced the appellant was granted nearly five months to reflect on whether he would prosecute the appeal after his attention was drawn to the illegal sentence of 35 years imprisonment imposed by the trial court. When the hearing resumed, throughMiss Otieno the appellant indicated his desire to proceed with the appeal the likely consequences notwithstanding.

The murder was committed in the most ghastly and egregious manner for the refund of only Kshs.5,000 which the deceased was not even given the opportunity to refund. The learned Judge did not explain the reason for 35 year sentence even after noting that there was no justification for the action the appellant took and further that the punishment ought to reflect and attract the seriousness with which the society views such offence. The sentence was illegal and it is our duty to correct it.

Accordingly, we dismiss the appeal in its entirety, and interfere with the sentence and substitute term of imprisonment of 35 years with that of death. It is so ordered.

Dated and delivered at Mombasa this 17th day of February, 2017

M. K. KOOME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR