



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, VISRAM & G. B. M. KARIUKI, J.J.A)

CRIMINAL APPEAL NO. 57 OF 2015

BETWEEN

JOHN MUTUMA MWITIAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru

(Lesiit, J.) dated 15th December, 2011

in

H. C. Cr. C. No. 24 of 2009)

JUDGMENT OF THE COURT

1. Before us is a first appeal against the appellant's conviction and sentence for the offence of murder. As such we are cognizant that a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See **Okeno vs. R [1972] EA 32** and **Kiilu & Another vs. R [2005] KLR 174**.

2. On 24th February, 2009 J N M (PW1) and her daughter, D K (PW5) were working in their canteen as on any normal day. At around 7:30 p.m. Patrick Kinyua (deceased) came in and informed them that he had fought with the appellant. Moments later, the appellant charged into the canteen from the rear entrance, shoved Dolly to the side and pounced on the deceased. Judith intervened and managed to pull the appellant away from the deceased who immediately fell down. It is at that point that Judith noticed the appellant was holding a knife. She called out for George Kirimi Muguna (PW3) and Kenneth Kinoti Muratha (PW4) who were seated outside, to assist her. After disarming the appellant, they noticed that the deceased had been stabbed and rushed him to hospital. Unfortunately, he died before receiving any treatment. It is under those circumstances that the appellant was arrested, arraigned and charged in court with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

3. The appellant maintained that he never intended to kill the deceased and that it was the deceased who had provoked his actions. In his sworn testimony, he elaborated that he and the deceased were good friends; the deceased used to brew and sell liquor. On the material day he had drunk liquor worth Kshs.50/= and gave the deceased Kshs.200/=. Instead of the deceased giving him back the balance, the deceased claimed that he had not paid for the liquor and begun beating him up. He ran to the canteen and the deceased followed him. The deceased picked up a knife while he picked up a stool for protection. Unrelenting, the deceased hit him and he fell down. During the scuffle both the stool and knife fell on him. The appellant maintained that immediately after he had picked up the knife, the deceased jumped on him and was stabbed.

4. Faced with the two versions of events, the trial court was convinced that the appellant's actions depicted *malice aforethought* on his part, and convicted him of the offence of murder. He was sentenced to death. It is that decision that provoked the appeal before us. The main complaint is that the appellant ought to have been convicted of a lesser offence of manslaughter.

5. Ms Thibaru, learned counsel for the appellant, submitted that there was clear evidence of provocation by the deceased. According to her, there was a confrontation between the deceased and the appellant which culminated with the deceased's death. She urged us to allow the appeal and substitute the conviction for murder with manslaughter.

6. Mr. Murage, Prosecution Counsel, in opposing the appeal, admitted that there was a scuffle between the appellant and the deceased. However, in his view, it was the appellant who had followed the deceased armed with a knife indicating a calculated move on his part. He contended that the evidence before the trial court established that the appellant had killed the deceased with *malice aforethought*.

7. We have considered the record, submission by counsel and the law. Once again, we remind ourselves that in reappraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule, therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. See ***Sango Mohamed Sango & Another vs. Republic [2015] eKLR***.

8. It is not in dispute that the appellant killed the deceased. This leaves only one main hurdle to surmount and that is, whether he killed the deceased with *malice aforethought* or whether he acted spontaneously upon being provoked as he said in his defence. Provocation is defined under **section 208** of the Penal Code to mean and include:

“.....except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

9. Where a defence of provocation is raised the onus still lies with the prosecution to prove beyond reasonable doubt that the defence is not available to the accused. This much was demonstrated in ***Joseph Kimanzi Munywoki vs. R [2006] eKLR*** wherein the Court stated,

“It is trite that in a criminal case it is for the prosecution to prove that the accused is guilty, such proof being beyond all reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence, and if in respect of any matter the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self-defence or accident.”

10. Going back to the facts of the case, it clear that the deceased and the appellant had fought prior to the

incident at the canteen. Judith and Dolly testified that when the deceased came into the canteen he told them that he had fought with the deceased and the appellant also testified as much. It appears that there was no eye witness account of the said fight and the only evidence in regard to the cause of the fight was given by the appellant. We find that the possibility that they fought over payment of liquor could not be ruled out, hence the appellant was entitled to the benefit of doubt on that important aspect of the case.

11. However, when it came to the incident at the canteen two divergent scenarios were given. According to Judith and Dolly, it was the appellant who had followed the deceased into the canteen and attacked him. The appellant testified that it was the other way round. Be that as it may, the trial Judge in her own words found-

“I find that the eye witnesses were clear that the deceased was the first one to enter the hotel of PW2 followed by the accused. They are also clear that it is the accused who attacked the deceased in a fact (sic) but calculated move, stabbing the deceased once on the neck area.

.....

Even then it is evident that there was an earlier confrontation. I find that the evidence is clear that after the confrontation the accused entered the hotel already armed with a knife. His move to go straight to stab the deceased establishes beyond any doubt that he had formed the necessary malice aforethought to commit the offence of causing death or grievous harm to the deceased.”

12. Regardless of who entered the canteen first, or who attacked the other, it was clear that the scuffle in the canteen between the appellant and the deceased was proximate to their earlier fight. It was, therefore, probable that the appellant’s actions at the canteen were influenced and escalated by the earlier fight. This Court in ***Elphas Fwamba Toili vs. R [2009] eKLR*** expressed that-

“...once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals.”

The evidence that the appellant had a knife at the time of the fight which was accepted by the trial court and which we also accept, could not per se be evidence of ***malice aforethought*** or the appellant’s preparedness to commit murder. In our view, we cannot rule out the possibility that the deceased provoked the appellant and a fight ensued which ultimately escalated in the canteen wherein the deceased lost his life.

13. Having expressed ourselves as herein above, we find that despite the fact that the appellant killed the deceased, the prosecution failed to prove beyond reasonable doubt that he did so with ***malice aforethought***. Consequently, we give the appellant the benefit of doubt. This Court in ***R. C vs. R [2005] eKLR*** expressed thus-

“An unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. That is the language of Section 207 of the Penal Code.”

14. The upshot of the foregoing is that we allow the appeal, set aside the appellant’s conviction for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and substitute therefor a conviction for manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. We also substitute the death penalty imposed on the appellant with a term of imprisonment for 15 years which shall commence from the time of his first conviction on 15th December, 2011.

Dated and delivered at Nyeri this 23rd day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR