IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 12 OF 2016

BETWEEN

K K.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of

Kenya at Malindi (Meoli, J.) dated 11th March, 2014

in

H.C.CR.C. No. 14 of 2011.)

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JUDGMENT OF THE COURT

The appellant's young daughter, M, had for a long time been suffering from epilepsy. The appellant believed that her condition could only be attributed to witchcraft. The deceased's cousin, **W K**, had also lost his daughter, **M C** in circumstances that was also ascribed to witchcraft, though fatally injured in a bicycle accident. They all figured, **H N *"the deceased"*** as the witch who was responsible for the two calamities and many more. The appellant, the deceased and W K are members of the same family. On 21st May, 2011 a family gathering was convened at the home of the deceased to discuss the issue. Several family members including those who **resided** in the same homestead as the deceased, that is; **C N** (PW 1), **KN** (PW 2), **JN** (PW 3) and **KN** (PW 4), attended the meeting. Those who did not reside in the compound but all the same attended the meeting included the appellant, his son **SK**, the appellant's co-accused during the trial, **HK** alias **JK**, **WK** and **WH**. In the course of the meeting, the "***bewitched***" girl was availed and the appellant repeated the accusation that the deceased had bewitched her.

Immediately the meeting descended into chaos, and although PW1 attempted to calm things, he in effect took sides with the deceased when he threatened to beat the appellant and immediately thereafter punched him. Two camps thereafter emerged. On one side there was the camp supporting the deceased, most of whom were the prosecution witnesses, whereas the other camp consisted of the appellant, SK, HK, WK and WH wanted him punished. Soon it was a free for all fight but it appears the latter group had an upper hand forcing the deceased and his group to retreat. The deceased attempted to flee but was pursued and

beaten senseless. The ensuing screams and noise attracted members of the public who joined in the fray. PW 1 managed to rescue the deceased and had him locked up in his house as they waited for the police from Watamu Police Station to intervene. But before they arrived the mob that had just joined the fray pulled the deceased out of the safe house and struck him repeatedly with sticks and stones, killing him instantly outside PW 1's house. It is instructive and conceded as well that as all this was happening, the appellant had left for the shops to buy bread. He was therefore not present during this second encounter that led to the death of the deceased.

Sergeant Julius Omondi (PW 5) was the first police officer to arrive at the scene only to be confronted with the sight of the deceased's body. According to him, there were many people who dispersed on seeing him and other police officers. He managed to retrieve the body and the assault weapons, including the sticks and coral stones.

On 23rd May, 2011, a postmortem was conducted on the body of the deceased by **Dr. Kaudia Beryl** who noted skull fracture, compound depressed fracture on the parental occipital area of the head and deep cut wound to the left ear with posterior bruising. She concluded that the cause of death was cardiopulmonary collapse secondary to severe head injury with intracranial bleeding. The postmortem report was tendered in evidence on her behalf by **Dr. Stephen Cherea Masaku** (*PW6*).

According to PW 5, he arrested the appellant on the very day of the incident at the hospital on the basis that he was the one who had alleged that his daughter had been bewitched by the deceased, following which a fight ensued resulting in the death of the deceased.

The appellant with the co-accused were subsequently charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars were that on 21st May, 2011 at [particulars withheld], Gede Location, within Kilifi County, the appellant, his co-accused, **HKN** *alias* **JK** jointly with others not before court murdered **HN**. The duo denied the information and were soon tried. At the close of the prosecution, the appellant's co-accused was acquitted on the grounds that having reviewed all the evidence adduced, the trial court was not satisfied that the evidence led against him met the threshold of a *prima facie* case to warrant him being put on his defence. However, the appellant was found to have a case to answer. In his unsworn defence statement, the appellant admitted to having been at the scene of crime. He explained that he had attended the family meeting because his daughter was sick and had not been responding to treatment, although she had been to hospital several times. The purpose of the meeting was to discuss the matter with his brothers and cousins. In the course of the meeting, however, a fight broke out and PW 1 locked up the deceased in his house as he waited for the arrival of the police officers from Watamu Police Station. The appellant thereafter left for the shops to buy bread and on his return found the deceased having been killed. He denied having a hand in his death.

Unpersuaded by the appellant's defence, **Meoli, J.** convicted him of the offence charged on the grounds that:-

> **"……..Although the accused may not have participated in the final assault on the deceased, he was the one who inflamed the group by his accusation of witchcraft against the deceased itself an offence, and further struck him in the initial stage. His accusation was equivalent to a death sentence in a region where witchcraft suspects are lynched liberally. The 1st accused knew how dangerous such an accusation was. His conduct of bringing his daughter to the gathering and making even more inflammatory statements against the deceased achieved the natural consequences that, those who heard them took the matter in their hands to lynch the deceased...."**

Pursuant to the conviction, the appellant was sentenced to death. Aggrieved by the conviction, the appellant lodged the instant appeal on five grounds; that the evidence adduced was at variance with the particulars in the information, prosecution evidence was not corroborated, the evidence adduced did not link him to the crime, and that his evidence regarding his own lunacy, disfigurement, paralysis and the alibi though not challenged by the prosecution was never given due consideration by the trial court.

At the hearing of the appeal however, **Mr. Ole Kina**, learned counsel for the appellant, collapsed all the above grounds into one; that the trial court did not evaluate the evidence tendered before it carefully and as a result came to the wrong conclusion that the appellant was guilty of the offence of murder. Urging the appeal, Mr. Ole Kina submitted that the fracas that led to the death of the deceased broke out even before the meeting commenced. That according to the evidence of PW 3, it was in fact PW 1 who initiated the fracas by hitting the appellant. Accordingly and contrary to the holding by the trial court, it was not the appellant but PW 1 who initiated the fight. Counsel further submitted that the trial court came to the wrong conclusion that there was common intention to kill the deceased thereby begging the question whether the family meeting had been convened for the prosecution of an unlawful or illegal purpose. To counsel, the meeting was not convened to prosecute an unlawful purpose so as to invite the invocation of the doctrine of common intention. He maintained that the fracas was incidental to the meeting.

Counsel went on to submit that when the deceased was killed, the appellant was in fact not at the scene, having gone to the shops to buy bread. In those circumstances, counsel urged that the trial court should have come to the conclusion that the appellant was not responsible for the death of the deceased. In the alternative, counsel urged that even if the trial court had come to the conclusion that the appellant was responsible, there was ample evidence of provocation based on the appellant's belief in witchcraft. His daughter had been suffering from epilepsy and the deceased had been identified as being responsible. The deceased had also been suspected of having had a hand in the death of other family members. The case should thus have been treated as manslaughter as opposed to murder. For this proposition counsel relied on this Court's decision in the case of **Charo v Republic, Criminal Case Number 125 of 2011**.

Opposing the appeal, **Mr. David Fedha**, learned Senior Prosecution Counsel, submitted that the trial court properly evaluated the evidence and came to the correct conclusion that the acts of the appellant were actuated by malice and not in the heat of passion and therefore the defence of provocation was not available to him. That it is the appellant who started the chain of events resulting in the death of the deceased by accusing him of witchcraft. That the evidence of PW 2 and PW 3 placed the appellant at the scene of crime and that he was the first person to hit the deceased. Counsel maintained that though the appellant was not present at the time the deceased was killed, he was nonetheless responsible as the initiator of the fracas.

As a first appellate court, it is our obligation to review the entire evidence given during the trial in order to determine whether the conclusion reached upon that evidence should stand. This obligation was stated in the case of **Kimeu v Republic [2002] KLR 756** thus:-

> "**This is a first appeal. That being so, we are obliged to review the evidence in order to determine whether the conclusions reached upon that evidence should stand. But as was stated by Sir Kenneth O'Connor P. (as he then was) in the case of Peters v Sunday Post [1958] EA 424, it is a jurisdiction which should be exercised with caution as unlike the trial judge, we did not have the benefit of seeing and hearing the witnesses testify. We are however free to draw our own conclusions on the evidence without overlooking those of the trial court…."**

As we stated earlier, it is common ground that the appellant was at the *locus in quo* in the group of many other people. He was there ostensibly to attend a family meeting called to deal with the accusation by the appellant and other members of the family that the deceased was a witch. It is instructive to note that the meeting was not called by the appellant nor at his instigation but at the request of the deceased. It is also common ground that the meeting was being held in the house of the deceased. Hardly had the meeting commenced than a fracas broke out attracting other members of the public who joined in the fray. From there onwards, it was total chaos resulting eventually in the death of the deceased. From the evidence, there are two versions as to who was the originator of the fracas. The first version which the trial court erroneously attributed to the evidence of PW1, PW 2 and PW 3, was that it is the appellant and his other relatives who initiated the attack. However, from the recorded evidence, PW 1 never saw the appellant attack the deceased. This is what he stated in evidence in chief:-

> **"..On 21st May 2011 I was in my home. We had a meeting at N's house. I was with KK, WH, J K who had complained that H Nis a witch. All of us are related as a family. They claimed HN had bewitched the daughter of 1st accused called M. Also S , K's son of accused 1 came. Before meeting could start. These people started to threatened** (sic) **the deceased wanting to kill him. I tried to intervene but A2 locked me in house of the deceased. HN was taken by K, my brother to my own house. Thereafter J S, W started to break into the house (mine) where H was. I could hear the noises, "*Kill, Kill.*" Eventually the door came down and he was beaten to death (H). When I managed to get out about 3 minutes later the body of deceased lay on the ground…"**

From the excerpt, it is quite clear the witnesses never saw the appellant assault or participate in the assault of the deceased. Further just as the fracas was about to commence, he was whisked away to the safety of the deceased's house and locked away. Having been so locked up, how could he have testified as to what transpired subsequently?

As for PW 2, he testified thus:-

> **"…family was meeting to discuss claims of witchcraft. While waiting I heard noises….I got out and noted K with J, KK (1st and 2nd accused). They had come for the meeting. It had been claimed that the daughter of Accused 1 had been bewitched. K was holding the neck of C as J held him on the legs. He had blood on his face and I don't know who/what had hit him. I tried to intervene and put C aside (sic) and he got a chance to escape. J's shirt was torn as I tried to separate them…..I went to my house to get another shirt for Juma. But I heard more noises outside when I got out I saw a bloodied Harry. The two accused were there. 2nd accused helped me go to the police station. There were quite a few boys and I got mixed up. I had put H in C's house but when we returned the door was broken. J remained to guard the house. On return, I found H dead….."**

It should be noted that C is PW 1 and J was the appellant's co-accused. From the above evidence, it is once again clear that the appellant was not the prime mover of the violence. It would appear that those involved were K, C and J. The appellant is nowhere in the picture, much as he was at the locus.

On the other hand, the evidence of PW 3, a sister to the deceased points squarely at PW 1 as the mastermind of the fracas. She testified in part that :-

> **"…..On 21st May, 2011 at 10.00 a.m. I was at home we had planned a meeting and we were waiting for elders. First to arrive was KK , K and J. After a while Wilson Harry left….When Wilson returned he directed Accused 1 and Accused 2 to go collect Mercy. They refused and told him to go for her. Then he went with some ladies. When they returned KK said the girl be placed at the feet of HN because he bewitched her to eat her….we tried to intervene because we wanted to settle the matter. C (PW 1) tried to intervene……C said he could beat K (Accused 1). J K (Accused 2) and Wilson came to A1's defence C hit A1……..and Harrisons N left to the back of the house…."**

Can it be doubted, from the foregoing as to who initiated the fracas? It is PW1. Yet it is his evidence that the court relied on to hold that it was the appellant who was the prime mover of the violence. Further, and contrary to what the trial court believed, it is not the appellant who brought his epileptic daughter to the gathering. Given that PW 1 was actually the initiator of the violence, the trial court should have, in our view treated his evidence with circumspection. After all, he would have said anything to paint the appellant as the troublemaker so as to save his skin. Indeed, the trial court ought, given the role he played in the violence by PW 1 to have treated him as an accomplice with his evidence attracting very little probative value.

As regards who assaulted the deceased resulting in the fatal injuries, this witness was emphatic that "***C managed to get out. I also did. When I got out I saw SK son of KK, RS, FN and JK beating H….They***

beat H with stones and sticks…." Again, from this excerpt, there is no mention of the appellant. The witness further confirmed that by the time the deceased was being killed, the appellant had in fact left the scene.

It is difficult to understand therefore, why, given the foregoing testimonies the appellant was arrested and charged for the offence in the first place. Was it because of his expressed suspicion that his daughter was bewitched by the deceased? Suspicion is not an offence and is not equivalent to having passed a death sentence on the deceased as the learned judge opined. After all, it is not only the appellant who had accused the deceased of sorcery. There were many others and it was precisely for that reason that the family had gathered to interrogate the question. In our view and as PW 5 testified, the appellant was arrested merely because "***he was the one who alleged that his daughter had been bewitched by deceased…***" It is also telling that the appellant was arrested at the hospital where he had accompanied the body of the deceased. Can this be the conduct of a guilty person?

It should also be noted that the very evidence upon which the appellant was convicted is the very same evidence that the appellant's co-accused was acquitted on at the stage of no case to answer, begging the question how possible is that? Though the trial court held that the appellant may not have participated in the final assault on the deceased, he was nonetheless the one who inflamed the group by his accusations of witchcraft against the deceased, the holding was erroneous. As earlier demonstrated, apart from alleging that the deceased had bewitched his daughter, the appellant did not peremptorily attack the deceased. If anything, it is PW 1 who inflamed the mob by assaulting the appellant in a bid to protect his brother, the deceased.

It is also important to appreciate that the investigating officer did not testify to try and tie up the loose ends in the prosecution case. No reason was proffered regarding the failure on the part of the prosecution to avail this crucial witness. Accordingly, there is no evidence as to the circumstances under which a decision was made to charge the appellant and his co-accused, and leave out others who actively participated in assaulting the deceased and who had been positively identified and names given to the police. The trial court was restless regarding the selective prosecution of the appellant and his co-accused. It rendered itself thus:-

> **"In closing I note that apart from this accused there were named accomplices including SK, WK and RS whose role in the cruel murder of the deceased should have been investigated. It is not clear whether any action has been taken against them. In my considered view, for justice to be done for the victim and his family, it is necessary that the role of these persons be investigated…."**

The only person who could have addressed the court's concerns was the investigating officer but as already stated, he never testified. Is it possible therefore that the appellant was merely a sacrificial lamb in this sordid affair?

The trial court also hinged the conviction of the appellant on the basis of common intention as defined in **Section 21** of the Penal Code. The section provides *inter alia* :

> **"…..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…."**

See also the case of **Njoroge v R [1983] 197**.

The evidence on record, in our view, does not fit this definition of common intention. The evidence suggests a spontaneous act involving many people which was not at all planned. There is no evidence that the appellant and the other people congregated in the home of the deceased for purposes of executing an unlawful purpose. They were family members who had been summoned to the meeting to discuss allegations of witchcraft involving one of their own. That meeting was not even called by the appellant

and was not being held in his house. Apart from claiming that the deceased had bewitched his daughter, there was no evidence that the appellant initiated the fight that resulted in the death of the deceased. If anything, it was the appellant's own brother (PW 1) who started the mayhem. He should have been, in our view the one standing in the dock and not the appellant because of his actions. If common intention was to be inferred then from the actions of PW 1 and the deceased, they were culpable. Nor can it be inferred that the appellant summoned the members of the public who joined the fray and were eventually responsible for the death of the deceased. Further the deceased was killed in the absence of the appellant who had left for the shops to buy bread. In our view, and given the circumstances, the trial court wrongly invoked the doctrine of common intention to found a conviction.

All in all, the evidence on record did not attain the threshold of the standard of proof required to sustain a charge of murder or even the alternative of manslaughter. It is also evident that the investigations as carried out were inadequate and shoddy. There is no independent or tangible evidence to link the appellant to the death of the deceased. This is the basis upon which this appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should forthwith be set aside at liberty unless lawful held.

Dated and delivered at Mombasa this 11th day of May, 2017

ASIKE-MAKHANDIA

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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