IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 118 OF 2016

BETWEEN

WYCLIFFE OPURU OYAKAPEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Busia, Tuiyot,J) dated 18th May 2016,

in

H.C.CR.A No. 16 of 2013)

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JUDGMENT OF THE COURT

The appellant, Wycliffe Opuru Okapel, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars are that, on the 6th September 2013 at Kakemar sub location in Chamasir location Teso North district within the Busia County, he murdered ***Ruth Imachidang Imoo (the deceased)***.

On 5th September 2013, at about 6.00pm ***Margaret Imoo, PW3 (Margaret)*** found the appellant assaulting the deceased on the road leading to her house. The appellant was holding the deceased's hand, and kicking her. Margaret, the appellant's aunt tried to intervene, and pleaded with the appellant to leave the deceased, but the appellant became hostile towards her, and threatened to shoot her. Margaret ran to ***Miriam Imo Tata's PW 2 (Miriam)***, home, and informed her of what was happening, and the two returned to the scene to find the deceased in critical condition. Miriam immediately telephoned her husband, ***Richard Imo Masai, PW1 (Richard)***.

Earlier, Miriam had seen the appellant with her two grandchildren, and had questioned him on the whereabouts of the deceased. The deceased is Margaret's co- wife. She had invited him into her house as there were some slight showers. The appellant declined saying he had something to discuss with the deceased, but promised to return later. About 20 minutes after that, Margaret came running to inform her that the appellant was assaulting the deceased.

Upon receiving this information, Richard rushed to where the deceased was lying, and found her

unconscious. Her heart was beating slowly. He rushed to make a report at the Kakemar Police Post, where he was advised to take the deceased to the hospital. With the assistance of a motor cycle rider, he took the deceased to the Omoding Health Centre where she was pronounced dead upon arrival.

Alfred Iseiepei Jacob Isemeki, PW4 (Alfred), who is Richard's neighbor, heard the commotion from Richard's home. He also heard Margaret say, *"Opuru why are you killing Ruth?"* He recognized Margaret's voice because he spoke to her often. He rushed in the direction of the screams and found the deceased still lying on the road. He later accompanied Richard to the hospital, and was present when she was pronounced dead.

Inspector Moses Kameli, PW 7 was at the material time the Officer In-Charge of Malaba Police Station who investigated the incident. After receiving information of the incident, on 5th September 2013, at about 8.30 p.m, he visited Omoding Hospital with other officers. They found that the deceased had already passed on, and an examination of the deceased's body, did not reveal any visible injuries. He also visited the site, but did not recover anything. Thereafter, he proceeded to the appellant's homestead, where he found and arrested him.

Dr. Cynthia Chemonger, PW6 examined the deceased on 11th September 2013, and observed that though there were no external injuries, the deceased had suffered fractured ribs, of 1- T12 on the right side, and T8 – T12 on the left side, her spleen was ruptured and the Spinal Column (C2-C3) had suffered a fracture. Dr. Chemonger concluded that the cause of death was exsanguination secondary to severe blunt force trauma from repeated kicking.

In his defence, the appellant stated that, he was a Police Officer attached to the Administration Police Service since 2008, currently serving with the Security of Government Buildings Unit; that on 5th September 2013, he was at his rural home, having been provided with a few days off duty to attend a funeral of a relative. After attending the funeral, he returned to his home in the company of one Davis Oyakapel (David), where they had tea with his wife. As he escorted David home, at about 5.00 p.m, the deceased came over to where they were having a discussion. The deceased accused David of ganging up with the appellant against her. The appellant requested David to ignore her as she was like a mother to him, which incensed the deceased who responded by cursing them, and then proceeded to undress. He returned her clothes, but she remained naked and continued to curse them. As a crowd of onlookers had begun to gather, he decided to return home. At about midnight he was woken by Police Officers on allegations that he had assaulted the deceased, the offence of which he denied. He further stated that he enjoyed a cordial relationship with the deceased.

The High Court found the appellant guilty of the murder of the deceased, and in so doing convicted and sentenced the appellant to death for the offence of murder.

Dissatisfied with the decision, the appellant has appealed to this Court on grounds that the facts as set out by the prosecution did not amount to the offence of murder; that the High Court failed to consider the circumstances under which the offence was committed; that the court wrongly shifted the burden of proof, and the incidence of the burden of proof; that the medical evidence was contradictory; that the conviction by the High Court was against the weight of the evidence.

In his submissions, learned counsel for the appellant, ***Mr. Onsongo,*** stated that he would argue all the grounds together. Counsel begun by submitting that the circumstances and facts of the case did not point to murder, for reasons that, it was uncontested that the locus in quo was a rural setting in Teso where, the local community is deeply steeped in customs and traditional beliefs; that according to Teso beliefs, it is a curse for a mother to undress in front of her children; that the deceased provoked the appellant by undressing in front of him, which led to a scuffle; that he was unarmed, and only wore sports shoes so that no external injuries were inflicted on her. Furthermore, the appellant did not run away from the scene, but walked back to his home. It was counsel's submission that, when these facts and circumstances are considered in conjunction with the defence of provocation, the High Court ought to have convicted and sentenced the appellant for the offence of manslaughter, and not murder.

Another complaint was that when the High Court found that the appellant had a case to answer, the court should have directed the question as to the conduct of the defence's case to the appellant's counsel, and not at the prosecution. In so doing counsel submitted, a mistrial was occasioned.

On behalf of the State, learned counsel, ***Mr. Ketoo***, conceded the appeal on the basis of the facts, and contended that this was a case of manslaughter, as there was no weapon used, and malice aforethought was not established. And with regard to whether mistrial should be declared on account of the court having addressed the prosecution instead of the defence, counsel submitted that since the appellant was represented by counsel, he had not suffered any prejudice.

This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and reach our own conclusions, but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses. In ***Mwangi vs Republic*** [***2004] 2 KLR 28*** at page 30, this Court stated:

"In *Okeno v R* ***[1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:***

> ***"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* ***[1975] EA 336). 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 court's 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".***

Bound by these strictures, we consider that the issues for our consideration are whether the prosecution's case pointed to the offence of murder, or manslaughter; and whether the conviction by the High Court was against the weight of the evidence; and whether the defence of provocation was applicable to the appellant.

So as to arrive at a determination, the High Court framed the issues thus;

> *1) Did the accused inflict injuries on the deceased?*
>
> *2) If the answer to the above is in the affirmative, did those injuries lead to the death of the deceased?*
>
> *3) It the answer to (2) is in the affirmative, is the defence of provocation available to the accused person?*
>
> *4) If the answer to (1) and (2) are in the affirmative, was malice afore thought proved?*

We will begin with the issue whether the prosecution proved the offence of murder. ***Section 203*** of the ***Penal code*** provides;

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".***

Therefore to establish murder, the prosecution must prove beyond reasonable doubt the essential ingredients for the offence of murder which are; the fact as well as the cause of death of the deceased; that the deceased's death was due to an unlawful act or omission on the appellant's part, in other words, the *actus reus* for the offence of murder; and that said unlawful act or omission was committed with malice aforethought, in other words, the *mens rea* of the offence.

With regard to the cause of death of the deceased, the High Court begun by establishing whether the injuries were inflicted by the appellant. In this regard, it held thus;

> ***"There is overwhelming evidence that on the evening of 5th September 2013, at about 6.00 p.m. the Accused person inflicted bodily blows on the Deceased by repeatedly kicking her. The Post Mortem carried out by the Doctor (PW6) revealed the damage caused by those blows. The Doctor formed the opinion that the cause of death was exsanguination secondary to severe blunt force trauma. The Doctor stated that the injuries were consistent with consistent with repeated kicking. This Court reaches a Decision that the Deceased died as a result of assault on her by the Accused Person."***

In reaching this conclusion, the High Court considered the evidence of Margaret, Miriam, Alfred and Dr. Chemonger. In reevaluating this evidence, it is evident that on 5th September 2013, at about 6.00 p.m, Margaret found the appellant assaulting the deceased on the road leading to her house. The appellant was holding the deceased's hand and kicking her. She pleaded with him to stop, but he became hostile towards her, and threatened to shoot her. Margaret went to Miriam's home, to inform her of the assault, and the two returned to the scene to find the deceased lying on the ground in serious condition.

Meanwhile, Alfred, Richard's neighbor, heard screams from Richard's home. He heard Margaret asking, *"Opuru why are you killing Ruth"*? He recognized Margaret's voice because they spoke often. He rushed in the direction of the commotion, and found the deceased still lying on the road.

Margaret's evidence is clear. She saw the appellant kicking the deceased and when he refused to stop after threatening to shoot her, she ran to call Miriam. They returned to the scene to find the appellant walking away, having left the deceased in critical condition.

There can be no doubt, and we find that, the appellant assaulted the deceased, by indiscriminately kicking her and causing her to suffer grievous harm.

As to whether the injuries caused the deceased death, Richard and Alfred testified that the deceased was pronounced dead on arrival at Omoding Health Centre. According to Dr. Chemonger, an internal examination of the deceased revealed fractured ribs, 1-T12 on the right side, and T8-T12 on the left side. She had a ruptured spleen and also a fracture in the Spinal Column (C2-C3). The doctor formed the opinion that the cause of death was exsanguination secondary to severe blunt force trauma, and that the injuries were consistent with repeated kicking.

When the evidence is considered in its totality, we are satisfied that the learned judge correctly concluded that the deceased died as a result of the injuries sustained from the assault by the appellant.

Having established that the appellant was responsible for the deceased's death, we now turn to consider whether the defence of provocation was applicable to the circumstances of the case. It was the appellant's case that the deceased provoked him when she undressed in front of him and his child.

In determining this issue, the learned judge stated,

> ***"In my assessment of both the Prosecution and Defence evidence, the Defence of provocation was not set up nor could its existence be inferred. The Accused was firm in his evidence that he walked away from the Deceased's attempts to provoke him and that he did not assault her. I therefore hold that the Defence of provocation fails."***

Section 208 (1) of the ***Penal Code*** provides that;

> ***The term "provocation" means and includes, except as hereinafter stated, <u>any wrongful act or insult of such a nature as to be likely, when done to an ordinary person</u> 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, <u>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</u> upon the person by whom the act or insult is done or offered*** *(emphasis ours).*

As rightly observed by the learned judge, the defence of provocation was raised for the first time in the appellant's counsel's submissions. But having said that, the appellant stated that though it was a bad omen for the deceased to undress in front of them, he had given her back her clothes to hide her nakedness, and because of a crowd was beginning to gather around, he decided to go home. He then stated on cross examination that;

> ***"I tried to stop MAMA RUTH from stripping as my son was there. I failed and so I left to avoid a curse."***

Clearly, if the deceased had undressed as alleged, the action did not in any way provoke the appellant so as to impair his faculties, and drive him to viciously attacking the deceased. To the contrary, the appellant portrayed himself as a calm and composed individual, of whom was incapable of succumbing to such provocation, and who chose to walk away instead.

In conjunction with this, the learned judge also considered whether the facts lent support to provocation by the deceased. It was appreciated that despite the appellant's contention that she undressed, Margaret was emphatic that she did not undress, and therefore as rightly concluded by the learned judge, the allegation that the deceased provoked the appellant was unsupported.

We find that the circumstances did not point to provocation by the deceased or of the appellant, and we agree with the learned judge that since provocation was not established, it was not available to the appellant as a defence.

We now turn to consider whether malice aforethought was established, so as to determine whether all the ingredients of the offence of murder were satisfied.

It is the appellant's argument that since he was not armed with any weapon, and only wore sports shoes, and did not flee from the scene, the High Court was wrong to find that malice aforethought was established.

Section 206 of the ***Penal code*** defines malice aforethought thus;

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***
>
> > ***a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
> >
> > ***b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
> >
> > ***c. ....."***

The medical evidence attests to the fact that the deceased died from fractured ribs, 1 – T12 on the right side, and T8 – T12 on the left side, a ruptured spleen and a fracture of the Spinal Column (C2-C3). The cause of death was exsanguination secondary to severe blunt force trauma, and that the injuries were consistent with repeated kicking.

The learned judge held that malice aforethought was indeed established when it stated thus;

> ***"By repeatedly kicking the Deceased who was an elderly woman of 68 years, the Accused person must have intended to cause grievous harm to the Deceased. Indeed the harm was so grievous that it proved fatal. I hold and find that malice aforethought has been established."***

We are in agreement with this finding. The appellant may not have inflicted injuries on the deceased with a weapon, but the repeated and vicious kicks were sufficient to inflict severe internal injuries on the deceased. And even when Margaret pleaded with him to stop, he did not, and instead threatened to shoot her. He thereafter walked away unperturbed leaving the deceased writhing on the ground in perilous state. The appellant ought to have known that incessantly kicking the deceased on her abdomen and back would cause her to sustain severe injuries, which would undoubtedly lead to her death. Accordingly, as did the learned judge, we find that malice aforethought was indeed made out.

With all the ingredients for the offence of murder having been established, we find that the prosecution proved beyond reasonable doubt that, the appellant murdered the deceased, and that a finding of the offence of manslaughter was unjustifiable, as the defence of provocation was not applicable, having regard to the circumstances of this case.

On the final issue that the High Court failed to address the appellant on the mode of conduct of his case, we take the view that since he was represented, there was no prejudice occasioned to the appellant.

Accordingly, in view of the above, the appeal lacks merit, and we order that the same be and is hereby dismissed.

Orders accordingly.

DATED and delivered at Kisumu this 20th day of July, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR