IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 16 OF 2016

BETWEEN

DAVID GATEMBO MBETI.....……..……APPELLANT

AND

REPUBLIC…….……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Nicholas Ombija, J.) dated 30th April, 2015

in

H.C.CR.C. No. 6 of 2011)

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JUDGMENT OF THE COURT

Antonius Odhiambo "the deceased" and **Absalom Agesa Otieno** (PW1) were welders in the employ of Kay Construction Company based in Athi River, Machakos County. On 8th November 2011 at about 7.00 pm they were on their way home from work when they boarded a matatu from Mlolongo enroute to their home at Pipeline Estate in Embakasi. The conductor of the Matatu was **David Gatembo Mbeti, "**the appellant". Along the way the appellant asked for fare of kshs 20/= from each one of them. PW1 allegedly gave the appellant a 200/= shilling note and expected change of kshs 160/= but the appellant instead gave him kshs 60/ =. An argument over the change ensued which soon degenerated into a scuffle and thereafter into a confrontation with a fatal consequence. It is alleged that in the process of the scuffle, the appellant hit PW1 on the head using his fist and when the deceased saw this and joined the fray, the appellant pulled out a screwdriver and stabbed the deceased on the leg. When the appellant and the Matatu driver, one, **Alexander Kironji Mwangi** raised the alarm that the deceased and PW1 were carjackers, the deceased and PW1 alighted from the Matatu. Each one of them apparently ran in different directions, according to PW1. As he ran home PW1 tried to reach the deceased on his cell phone in vain. The following day at about 6.00 am an anonymous caller using the deceased's cell phone who identified himself as a police officer, **PC Maurice Mukara Igos** (PW5) stationed at Embakasi Police Station asked him to report to the said police station. PW1 first thought that the deceased had been arrested. However, PW5 opened up to him and informed him that the deceased had actually passed on and that his body had been recovered and taken to the City Mortuary. He immediately contacted **George Ouma Odunga** (PW2), a cousin of the deceased who also worked with the same company, and informed him of what had

transpired. Together they proceeded to Embakasi Police Station and found the appellant as well as the driver of the Matatu under arrest. Inside the Matatu there was a lot of blood, suggesting that contrary to what he thought, the deceased died inside the Matatu and in fact never ran away. Subsequently they went to the City Mortuary and viewed the body of the deceased. After the post mortem, the body was released to the family for burial.

The post mortem was conducted by **Dr Njau Mungai** (PW6) in the presence of PW5, the body having been identified by PW2. During the post mortem, PW6 noted two cuts on the forehead, upper thigh wound, penetrating from the upper thigh having gone through the major blood vessels of the thigh and clotted blood but no fractures on the forehead. As a result of his examination PW6 formed the opinion that the deceased had died of severe bleeding and the probable weapon used was a sharp object.

The appellant and the driver were then on 12th January 2011 arraigned before the High Court of Kenya at Nairobi on information, charging them with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that the appellant and **Alexander Kironji Mwangi** on 8th January 2011 at Nation Media in Embakasi area within Nairobi County jointly murdered Antonius Odhiambo.

The appellant and co-accused entered a plea of not guilty and their trial was scheduled for 29th and 30thJune 2011. However on 9thMarch 2011 the State entered a *nolle prosequi* against the appellant's co-accused, the driver, which the trial court accepted. Accordingly the case proceeded against the appellant alone.

In his unsworn statement of defence, the appellant claimed that at all material times he was a conductor of a matatu registration number KAS 354A, Toyota Shark plying the Mlolongo-City Centre route. On 8th January 2011 at about 11.00pm at Mlolongo 10 passengers boarded the Matatu. Two of them however proved to be uncooperative and appeared drunk. When he demanded fare from them, PW 1 gave him a 100/= shillings note. He gave him back kshs 60/= as change. PW1 then claimed that he had not been refunded proper change. That he should have been refunded Kshs 160/= instead. A fight thereafter erupted. The deceased jumped on him and held him by the collar of the shirt and tried to strangle him. One of the passengers told the driver to stop and the driver complied. The deceased was still holding his throat with the shirt. It was then that the driver stabbed the deceased with something and the deceased let go his throat and fell down. The appellant and the driver called for a taxi from Mlolongo and proceeded to Embakasi Police Station to report the incident. They recorded their statements at the police station and were both placed in the cells. Later on the driver was released and he was charged with the offence of murder as the deceased had succumbed to his injuries. He denied having a screw-driver and using it to stab the deceased.

In finding for the State, **Ombija,** J observed:

> ***"Against this backdrop of evidence I am persuaded that the accused person stabbed the deceased with a flat screw-driver exhibit 1 inside the Matatu. The driver was on the wheels when the fight broke out. This finding is based on the premise that accused person did strike me as a person who is economical with the truth. He gave me the impression that he was telling a lie to save his skin. I reject his defence. It is a hollow-sham. It has no ring of truth. I further find as a fact that the injuries that resulted in massive loss of blood was occasioned by a sharp object. I find as a fact that it is the screw-driver that accused had in his possession that caused the fatal blow to the body of the deceased. Given the force used, the malice aforethought as defined in section 206 of the Penal Code is established. Accordingly I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused guilty as charged. I convict him accordingly***"

Upon conviction as aforesaid, the appellant was sentenced to suffer death as prescribed by law. Aggrieved by the decision, the appellant preferred this Appeal both on conviction and sentence. Through M**essrs Kidenda Onyango Anami & Associates**, the appellant advanced 8 grounds in a bid to impugn the

decision of the High Court. These are, that the trial court erred in law in failing to comply with section 163 of the Criminal Procedure Code, basing the conviction of the appellant on the use of the screw-driver when it did not form part of the particulars of the information and when it was not even proved that he was in possession thereof; failing to re-evaluate the evidence of identification offered which was unclear, assailable and thus arriving at a wrong decision; failing to appreciate that the evidence against the appellant was inconsistent, contradictory, unreliable and unsafe to convict the appellant; failing to indicate the language used in the proceedings thereby exposing the appellant to a violation of his constitutional right to a fair trial; shifting the burden of proof to the appellant; failing to note that the appellant's constitutional rights under Article 49 of the Constitution had been contravened as the appellant was arraigned in court 3 days after his arrest and, finally; imposing the death penalty upon convicting the appellant in violation of section 329 of the Criminal Procedure Code.

Urging the appeal, **Mr Chipinde**, learned counsel for the appellant condensed the grounds into 3 broad issues for determination in this Appeal:

(a) Whether the evidence that was relied upon by the High Court was consistent,

(b) Whether the threshold to convict the appellant was met and

(c) whether the constitutional rights of the appellant were violated.

On the first issue, counsel submitted that the evidence of identification of the appellant was wanting. The circumstances in which the identification came to be made were not explored by the trial court, which did not even consider how long the witnesses had the appellant under observation and, whether there was light in the Matatu and if so, the source thereof and its intensity. For all these propositions counsel referred us to the case of **Wamunga v Republic (1989) KLR 424** where it was held that when circumstances are difficult, mistakes may be made even in recognising close friends and relatives and that a trial court has to be particularly careful not to cause a miscarriage of justice by finding a conviction on unreliable evidence of identification. Counsel further submitted that PW1, the sole identifying witness only saw the appellant briefly, the circumstances during the incident were difficult, that in any event PW1 was drunk and therefore his mind was not in an optimum condition. Against this backdrop counsel submitted that it would be an injustice to convict a person for a capital offence based on the evidence of a single witness who was drunk and not of proper frame of mind. Counsel also questioned why some crucial witnesses such as the passengers in the Matatu and the driver thereof were never called to testify and in terms of **Bukenya v Uganda (1972) EA 549** urged us to draw an adverse inference. Counsel maintained that on the basis of the foregoing the prosecution totally failed to link the appellant with the death of the deceased. Further, it was submitted that for the crime of murder, two ingredients, *actus reus* and *mens rea* have to be proved beyond reasonable doubt. Counsel submitted that all that was gatherable from the evidence tendered in the trial court was no more than the deceased could have died of a cause not related to what the appellant is alleged to have done to him, even if that had been proved, which was not the case here. And even if the appellant had been linked to the death of the deceased, the motive and *mens rea* could not be discerned from the evidence adduced.

Mrs Murungi, learned senior Assistant Director of Public Prosecutions however conceded the appeal on the grounds that no malice aforethought was established; that the evidence on record proved beyond reasonable doubt the offence of manslaughter; that the post mortem report confirms the cause of death which is consistent with the stab wound on the thigh; that the appellant in his defence confirmed that he was in the Matatu when a scuffle involving him and the deceased ensued. However he blamed the driver of the Matatu for stabbing the deceased.

Section 29 (1)(a) of the Appellate Jurisdiction Act provides *inter alia,* that on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have the power to re-appraise the evidence and to draw inferences of fact. In the case of **Joshua Ochieng Rakwel v Republic (2011) eKLR,** the case of **Njoroge v Republic (1987) KLR 19** at page 22, was cited, in which the Court observed;

> ***" ..... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of facts as on questions of law, demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect....."***

So that it does not matter whether the respondent has conceded to the appeal, it is still our duty to subject the evidence tendered in the trial court to fresh and exhaustive re-appraisal, re-evaluation and analysis so as to reach our own independent conclusions as to the guilt or otherwise of the appellant.

The appellant has anchored his appeal on the ground of identification. He made no submissions on the other two broad grounds aforesaid. It is true that only one witness identified the appellant during the fatal encounter. However, that is not to say that a conviction cannot be founded on the evidence of a single identifying witness. As this Court stated in the case of **Abdalla Bin Wendo v Republic (1953) 20 EACA 166:**

> ***" ..... Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error....."***

From the recorded evidence, it is not difficult to see why the findings of the trial court on the question of identification cannot be faulted. The appellant himself in his defence places himself at the locus. He concedes he was involved in a scuffle with the deceased. He does not deny that as a result of the scuffle the deceased was stabbed with the screw driver and fatally injured. However, he disavows responsibility and instead blames it on the driver of the Matatu. Indeed after the appellant and the driver realised that the deceased had been fatally injured when he collapsed on the floor of the Matatu, they drove with him to Embakasi Police Station to report the incident. By which time the deceased had already passed on. It is then that the appellant and the driver were arrested and locked in the police cells. In the premises the appellant's identification is a non issue. The issue is who between the appellant and the driver stabbed and fatally injured the deceased? The trial court discounted the appellant's defence. The trial court took the view that it was the appellant and not the driver who stabbed the deceased with the screw driver inside the Matatu; that the driver was on the wheel when the fight broke out. This finding was premised on the ground that the appellant did strike the trial court as a person who was economical with the truth and gave the impression that he was telling a lie so as to save his skin. This is a finding on the demeanour of a witness by the trial court which we are duty bound to respect unless it is demonstrated to us that the trial court in reaching that determination was plainly wrong and no reasonable tribunal properly directing itself on the facts and evidence would have reached such verdict, or such finding is inconsistent with the evidence generally. Nothing has been brought to our attention as would justify such criticism of the finding by the trial court.

However from the totality of the evidence tendered by the prosecution, we are not satisfied that the appellant set out to kill the deceased. It was purely accidental and spontaneous reaction to a scuffle. The fact that the appellant stabbed the deceased on the knee as opposed to critical areas such as the chest, stomach and head, point to the fact that the intention of the appellant was not to kill but to disentangle himself from the grip of the appellant. Further the act of the appellant and the driver of the Matatu driving to Embakasi Police Station with the body of the deceased and with the deceased blood all over the floor of the Matatu does not point to a person intent on hiding the crime he had committed. Further, the learned judge having found that the deceased passed on in a scuffle with the appellant, he should have considered a possible defence of either provocation or self defence. In our view the evidence on record point to the offence of manslaughter as opposed to murder. Accordingly the learned counsel for the respondent was right in conceding the appeal on that score.

We therefore have no hesitation whatsoever in allowing the appeal, quashing the conviction and setting aside the death sentence imposed for murder. In lieu thereof, we enter a conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and impose a sentence of 7 (seven) years imprisonment effective from the date of sentence for the offence of murder.

Dated and delivered at Nairobi this 22nd day of September, 2017

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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