IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 32 OF 2016

BETWEEN

GEOFFREY MUNYAO NGUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a Judgement of the High Court of Kenya at Machakos (Mutende J)

dated 27th January, 2015)

in

H.C.CR.A 44 OF 2008)

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JUDGMENT OF THE COURT

The High Court at Machakos (Mutende, J.) in a judgment rendered on 27th day of January, 2015, found the appellant guilty of causing death of Philip Ngui Mwamote, (the deceased) with malice aforethought contrary to **section 203** and **204** of the Penal Code. Upon conviction, the appellant was sentenced to death.

The prosecution presented evidence through eight witnesses to the effect that on the 31st day of July, 2007, at Kyaani Village, Liyuni Sub Location, Kola Location, of the present day, Machakos County, the appellant and the deceased attended a meeting of the Aombe clan to which they both belonged. The deceased was the chairman of the clan and on the material day he arrived at the meeting venue at around 3.00pm. The agenda of the meeting was to resolve a dispute between the appellant's wife, Mariana Munyao and PW4, Dorothy Musyimi. The appellant arrived later and was said to have been troublesome and disorderly throughout. Being an interested party to the dispute on account of his wife being a party to the dispute, he was asked to leave and indeed left the meeting to allow for free deliberations that would lead to an amicable settlement. According to eye witnesses' account, the appellant later returned and continued to disrupt the meeting and completely ignored pleas from the deceased. At one point, he approached the deceased, took out a knife which appeared to have been concealed under his clothes and suddenly stabbed the deceased on his neck. Because the action was sudden and the deceased ambushed, he had no opportunity or chance to defend himself. After the attack, he fell to the ground bleeding as the

appellant fled from the scene. The deceased was rushed to hospital by some of the clan members present. He unfortunately succumbed to his injuries and was pronounced dead on arrival at the hospital. The post mortem examination determined that the cause of death was cardiopulmonary arrest secondary to hemorrhagic shock/spinal shock secondary to an assault.

The following day, the appellant was found hiding at a cousin's house. It was further the case for the prosecution that upon being apprehended, the appellant led the investigating officer to where the murder weapon and clothes he had worn on the date of the murder were recovered. In addition to the witness testimonies, the prosecution also produced, among other exhibits, a knife, blood stained scarf, and a blood stained shirt.

The appellant in his testimony confirmed that indeed, on the material day, he attended the clan meeting at which a dispute between his wife and PW4 was to be resolved; that parties to the dispute were asked to leave briefly; that he too left and later returned to the venue at the end of the meeting; that upon returning, he was informed that his wife and PW4 had reconciled and that as a result, he had to give two bulls to be slaughtered for the clan members in attendance; that he begged for forgiveness but the clan members rejected the plea forcing him to leave. His action of leaving prompted PW1, Josephine Mumbua Lukas, to order clan security personnel to arrest him. He was seized by the security personnel but the deceased on seeing that he was being tortured, intervened in order to rescue him. He and the appellant were however shoved aside by the security personnel causing them to fall onto utensils which included knives; that in the scuffle, the deceased sustained injuries from which he died. The appellant together with other clan members helped the deceased to the roadside from where they got transport to the hospital; and that the following day he went to purchase doors for his sons in a nearby trading center, where he spent the night at his cousin's house. While there, he was arrested on allegations that he had stabbed the deceased. He denied that he had fled and went into hiding.

It was from the evaluation of that evidence that the learned Judge was persuaded that the offence of murder was disclosed. The conviction and sentence that followed aggrieved the appellant who has urged us to find that the provisions of **section 162** of the Criminal Procedure Code was not complied with; that no mental assessment report was produced as an exhibit; and that the learned Judge erred in failing to properly evaluate and analyze the entire evidence on record and for erroneously concluding that the prosecution case was proved beyond reasonable doubt.

Mr. Amutallah, learned counsel for the appellant condensed these grounds into two and argued them as such before us. His first ground was that the learned trial Judge failed in her duty to inquire into the mental soundness of the appellant before embarking on the trial as is usually the practice in all murder trials; that had she done so, perhaps she would have come to the conclusion that from his conduct, immediately prior to the commission of the offence, the appellant was not mentally stable. Secondly, counsel urged us to find that had the learned Judge evaluated the evidence presented to her, she would have found that the appellant, by stabbing the deceased, was reacting to provocation by the latter who told him that he would bury him; that the attack was not premeditated. For these two reasons, it was submitted that the appellant was entitled to be treated under **section 162** of the Criminal Procedure Code, by postponing the hearing and transmit the record to the minister for consideration by the President. As a corollary to the two grounds, it was contended that the learned Judge erroneously relied on the report by the Government analyst which was not produced at the trial.

On behalf of the State, Mrs. Murungi, the Senior Assistant Director Public Prosecutions supported the conviction and sentence for the reasons that there was overwhelming evidence that the appellant indeed stabbed the deceased thereby causing his death; that **section 162** aforesaid was only to be resorted to if the learned Judge had any reason to believe that the appellant was of unsound mind; that there was no such evidence. He had the services of an advocate throughout his trial, who could have drawn the attention of the court to any unusual behaviour; that failure to produce in evidence the Government analyst report was not fatal as there was independent evidence to prove the stabbing; that there was no provocation and that, if anything, the appellant was prepared for his actions, having armed himself with a knife prior to the attack on the deceased.

First appeals, it has been explained over and over again, are by way of a retrial and the court is obligated to re-evaluate the evidence recorded so as to make it arrive at its own findings and draw independent conclusions. See **Okeno V. R (1972) EA**

32. The determination of this appeal revolves around the broad issue framed by the learned Judge; whether the appellant unlawfully, and with malice aforethought caused the death of the deceased.

It is not in dispute that the appellant was at the scene when the deceased sustained the stab wound that was the ultimate cause of his death. While the appellant himself attributed that injury to a fall on the knives, the eye witnesses gave a different account; how the appellant moved close to where the deceased was seated, held the neck of the deceased, drew a knife and stabbed him at the nape. That account was consistent with the medical finding that there was a gaping wound at the back of the neck. The eye witnesses also discounted the version advanced by the appellant that there was a commotion that resulted in a fall on the utensils. They instead maintained that the appellant had been the only nuisance at the meeting; that there was no quarrel between the appellant and the deceased; that although it was the appellant who provoked the deceased, the latter ignored him, remained calm and simply asked him to leave him alone since the case being adjudicated did not involve him.

By the provisions of **section 208(1)** of the Penal Code, a person is provoked when a wrongful act or insult is done to him;

> **"……that is 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."**

Explaining this definition further, the Court of Appeal of England in the case of **R V Duffy (1949) I ALL ER *932*** said :-

> **"Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his** *or her* **mind …"** (Emphasis ours).

In **Peter King'ori Mwangi & 2 others V R** Cr. App No. 66 of 2014, the Court of Appeal identified the following two conditions as prerequisites for the application of provocation as a defence.

> (i) The "subjective" condition that the accused was actually provoked so as to lose his self-control; and
>
> (ii) The "objective" condition that a reasonable man would have been so provoked.

Applying the above strictures to the facts in this case, it is on record that, the appellant kept telling the deceased that he would commit suicide and the latter, as the clan chairman would "eat" the money collected for the funeral. To this, it was stated the deceased answered that it was his duty as the chairman to bury dead members of the clan. It was argued that that answer was capable of provocation and the appellant was indeed provoked. We do not think from the context of the reply by the deceased, that it was a threat to kill the appellant. The reply would not have led a reasonable man in the appellant's position to react in the manner he did. The words were not sufficient reason to invite the kind of force employed by the appellant. There was no evidence of provocation, we conclude on that ground. Instead, the prosecution witnesses testified to the fact that the appellant was the aggressor.

On the procedure under **Sections 162(1)** and **(2)** of the Criminal Procedure Code, the trial court is only required to inquire into the fact of unsoundness of mind of the accused if in the course of a trial the court

has reason to believe that the accused is of unsound mind and consequently incapable of making his defence. If the court forms the opinion that the accused is of unsound mind, it is required to postpone further proceedings in the case. It was not suggested that the appellant exhibited signs that would point to a person suffering from any disease of the mind to warrant the trial court to invoke **Sections 162(1)** and **(2)** aforesaid. Indeed, **section 11** of the Penal recognizes that, first and foremost;

> **"11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."**

It is apparent from the record that before the commencement of the trial, the court ordered and the appellant was accordingly examined, as a matter of practice. He was certified fit to plead and a medical report to that effect was presented before the trial Judge, which she relied upon though not produced as evidence.

Section 77(1) of the Evidence Act provides that:

> **"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."**

We reiterate that from the record, it is evident that the appellant did not raise the defence of insanity at all. As a general rule, the burden lies on the accused person to prove, on a balance of probabilities, that he was insane at the time of the commission of the offence. However, where he does not do so himself, it will be sufficient if, from the totality of the evidence, the court is satisfied that the accused was of unsound mind when he committed the offence. The Court said so in **Julius Wariomba Githua V R**? Criminal Appeal 261 of 2006 that:

> **"Even when an accused person fails to raise the issue of his sanity but the evidence of the prosecution witnesses suggest that the accused may in fact have been insane, it is the duty of the trial Judge to direct himself and the assessors on the issue and if necessary, invoke the provision of section 162 (1) of the Criminal Procedure Code"**

Section 166 stipulates that;

> **"166. (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission."** (Our emphasis).
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> See also **Marii V R** (1985) KLR page 710.

In this case, there was no scrap of evidence, either from the appellant or the prosecution to suggest that the appellant suffered from a disease of the mind. His behaviour prior to the attack on the deceased could not be attributed to his unstable state of mind. Relying on the mental assessment, report prepared by a medical expert, the Judge was persuaded that the appellant was capable of participating in the trial. Indeed, he fully participated and was clear in his defence. He gave a well thought out sequence of events, concluding with how he believed the deceased met his death.

With respect, we agree with the ultimate conclusion reached by the learned Judge. In view of the fact that the appellant went away and shortly returned with a knife stashed away in his clothes, and given the close range from which the stab was delivered and the part of the body targeted, there cannot be any doubt that the appellant intended to cause death or do grievous harm to the deceased.

The explanation proffered in the defence of how the deceased was likely to have sustained the fatal injuries was incredible and was properly rejected. For these reasons, we find no substance in this appeal. We accordingly dismiss it in its entirety.

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

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

……..……

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