IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE , JJA)

CRIMINAL APPEAL NO. 45 OF 2016

BETWEEN

VICTOR NTHIGA KIRUTHU .....1ST APPELLANT

JAMES NYAGA GITEMBA….....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeals from the Conviction of the High Court of Kenya at Meru (Lesiit, J) Dated 23rd October, 2014*

in

H.CC.R.C NO. 68 of 2010)

****

JUDGMENT OF THE COURT

The appellant **Victor Nthiga Kiruthu (Victor),** and **James Nyaga Gitemba (James),** were arraigned before the High Court at Meru for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, in that on the 30th day of October, 2010 at Rwani village, Kamaguna sub-location, Maragua Location, Gatue Division, Tharaka North District, within Eastern Province (as it was then known) with others not before Court they murdered **David Munyambu Nkandi** (the deceased). The appellants denied the charge, provoking a trial in which the prosecution called seven (7) witnesses in support of its case, while both appellants gave sworn evidence and called two witnesses.

The brief background to the appeal is that, on the 30th October, 2010 at about 9.00am, the deceased in the company of PW1, **Stephen Njeru Gikandi (Stephen)**, a son in law to the deceased; PW4, **Catherine Kathina (Catherine),** a daughter to the deceased, and wife to **Stephen;** PW2, **Mary Muthoni Mutegi (Mary**), and PW5, **Susan Karauki Kithuka (Susan),** both neighbours to the deceased, were in the *shamba* of the deceased planting green grams and sorghum. It was in the course of the said planting exercise that **Victor** and **James**, while in the company of four others namely, **Josephat Maregi; Stanley Kithinji; Catherine Nthiga and Nthetha Kirema** arrived at the scene. Each was armed with a *panga and* without any provocation from the deceased who was not armed, **Victor** struck the deceased with *panga* on the neck almost severing it. The rest of **Victor's** companions then joined in the attack, cutting the deceased all over the body till he fell down. **Stephen, Catherine, Mary** and **Susan** on seeing what

had befallen the deceased ran away into a nearby bush, with **Victor** in hot pursuit while armed with a bow, and arrows.

Stephen reported the incident to the assistant chief of **Maragua** location, a **Mr**. **Nyaga Karingo (Mr. Nyaga)** who in turn reported to the chief PW6, **Patrick Kirea Gaichu (Patrick),** and thereafter to Gatunge police station where the report of murder was filed.

On the same date, **Patrick** acting on information received traced, **Victor** at Karandini market, arrested him and handed him over to the police. **James** was also arrested on the same date by **APC Toroitich** and also handed over to police. The police visited the scene on the same date and collected the body, which they took to the hospital mortuary, where a post mortem was carried out by a **Dr. Mutuku C.M**, on the 2nd day of November, 2010, but the report was tendered in evidence by PW3**, Dr. Kagazi Trevor.** According to the findings in the post mortem report, the cause of death of the deceased was severe neck and head injury, secondary to trauma as a result of injuries inflicted by a sharp object.

Both **Victor** and **James** gave sworn evidence and called two defence witnesses namely, DW3, **Josphat Maregi (Josphat),** and DW4, **Githinji Stanley Nchabari (Stanley).** The sum total of the defence case was that on the material date, both appellants while in the company of **Josphat Maregi, Stanley Kithinji, Nyaga Gitemba, Catherine Nthiga and Thetha Kirema** went to **Victor's** land which was distinct from that of the deceased to plant crops. As they went about their planting exercise, the deceased appeared in the company of **Stephen;** and after an exchange of unpleasantaries, the deceased who was armed, aimed a *panga* at **Victor,** which **Victor** dodged. The deceased then picked a stone and hit **Victor** with it on the head and he started bleeding. **Victor** defended himself by waving a *panga* with speed towards the deceased, and managed to push the deceased to a tree trunk on which the deceased got stuck and injured himself. Since **Victor** was bleeding with both eyes covered with blood, he was not able to see how the deceased got injured. When he wiped blood from his eyes, he just saw the deceased lying on the ground injured. It was **Victor's** testimony, as confirmed by **James** himself and the other two defence witnesses, that, **James** was never involved in the fight between **Victor** and the deceased; that it was the deceased who was the aggressor; that **James** and the others who had accompanied **Victor** to the *shamba* all ran away when the deceased picked a stone and hit **Victor** with it. They did not therefore witness the infliction of the fatal injuries on the deceased.

At the conclusion of the trial, the learned Judge **Jessie Lesiit, J** found the prosecution case proved to the requisite threshold of proof beyond reasonable doubt, and on that account found both appellants guilty of the offence charged, convicted them and sentenced them to death.

The appellants are now before us on a first appeal. They had initially raised nine (9) grounds of appeal, which were subsequently abandoned, and substituted with three common grounds in supplementary grounds of appeal filed separately but similar in material particulars. In these, the appellants complain that the learned Judge of the High Court erred in law and fact:

> ***(1) by convicting the appellants for the offence of murder wherein the essential ingredients of the offence were not proved by the prosecution beyond reasonable doubt.***
>
> ***(2) by misconstruing the evidence on the circumstances of the case and therefore arrived at a wrong decision.***
>
> ***(3) that the judgment of the superior court was against the weight of the evidence.***

In his submissions before us, learned Counsel **Mr. Muia Mwanzia** who held brief for **Dickson Kimathi Kibiti** Advocate, submitted globally on all the three grounds of appeal that the deceased and **Victor** were brothers; that both claimed the piece of land over which the dispute arose; that all that **Victor** and his five companions did on that day was simply to tell the deceased to get out of the disputed land, and instead of doing just that, the deceased picked a stone and struck **Victor** with it and therefore provoked the reaction from **Victor.** In **Mr. Mwanzia's** view, there was therefore no malice aforethought and the learned trial Judge ought to have returned a verdict for manslaughter. This Court is therefore invited to reverse the

conviction for murder, set it aside and substitute it with one for manslaughter in respect to **Victor** and substitute the sentence for the period already served. We are also asked to order an absolute discharge for **James** as he was never involved in the commission of the crime.

To buttress his submission, **Mr. Mwanzia** cited the case of **Republic versus Andrew Mueche Omwenga [2009] eKLR**, for the proposition that where the evidence adduced demonstrate that death occurred as a result of an accused person acting in self defence, the offence disclosed is manslaughter and not murder. Also the case of **Mungai versus Republic [1984] eKLR** for the proposition that where circumstances of the case show that the fatal blow was given in the heat of passion or a sudden attack or threat of attack which is serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter as in the circumstance the element of provocation would have merged into that of self defence.

In response to **Mr. Mwanzia's** submissions, **Mr. E.O. Onderi**, the learned senior Assistant Director of Public Prosecution, submitted that the issue of death and the involvement of the appellants in the causation of that death is not disputed. What is in dispute according to him is whether the death occurred as described by the prosecution, or on account of provocation and self defence as contended by the defence. In **Mr. Onderi's** view, the prosecution evidence established the presence of both appellants at the scene of the murder; that the alleged self defence if any was disproportionate considering that there was no attack on the appellants by the deceased. **Mr. Onderi** agrees that the defence of self defence is available in law and where it is raised like in the instant appeal, an accused person is responsible for any excessive force that may result from his actions.

Mr. Onderi further urged that if it is true as claimed by the appellants that it is the deceased who was the aggresser, then the appellants and their companions had an opportunity to retreat and seek legal redress, instead of fatally wounding the deceased. Lastly, counsel submitted that evidence of numerous deep cut wounds inflicted on the body of the deceased were not proportionate to the danger posed to the appellants by the deceased, if any, as none of the appellants or their named companions suffered any injuries. He therefore urged us to affirm the findings of the learned judge and dismiss the appeals.

These being first appeals, our mandate, as set out in rule 29(1) of this Court's Rules is to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellants. The appellants are entitled to have our own consideration and view of the evidence as a whole and our own decisions thereon. We have a duty to re-hear the case and reconsider the record in totality as laid before the trial judge. See the case of **Kariuki Karanja versus Republic [1986] KLR 190.**

The approach the learned judge took in evaluating the evidence before her, was to remind herself of the obligation of the prosecution namely, to prove that the appellants inflicted injuries on the deceased unlawfully, as a result of which the deceased died; and that at the time the said injuries were inflicted, both appellants had formed the intention to cause death or grievous harm to the deceased. Further that since the appellants were more than one, the prosecution also had the burden of proving that both of them either on their own or with others not before the court had formed a common intention either to cause death or grievous harm to the deceased.

On the identification of the assailants, the learned Judge applied two principles from the case of **Cleophas Otieno Wamunga versus Republic [1989] eKLR namely**; that evidence of visual identification can sometimes cause a miscarriage of justice and therefore the need for the Court to examine such evidence carefully to minimize such a danger. Second, that instances where an accused person alleges that his alleged identification in connection with the commission of the offence was mistaken, the Court is obligated to warn itself of the special need for caution before accepting and convicting an accused in reliance on the correctness of such identification.

Bearing the above principles in mind, the learned trial judge proceeded to make observations on the evidence before her that the incident took place in broad day light; that the key prosecution witnesses namely **Stephen, Mary, Catherine** and **Susan** were within a proximity of twenty five (25) meters from the scene of the attack; that the eye witnesses were known to the attackers as relatives in the case of

Stephen and **Catherine**; and as neighbours in the case of **Mary** and **Susan**; that the evidence of **Stephen** and **Catherine** though it needed to be treated with caution, being evidence of family members of both the assailants and the deceased, the Court found it reliable and safe to act on it as it had received support from the independent evidence of **Mary** and **Susan** who were not related to either side, and against whom the appellants had not imputed any ill will, bias or fabrication of the evidence against them.

With regard to the nature of the injuries inflicted on the deceased, the learned judge made findings that the post mortem report revealed multiple deep cuts all over the body, the neck completely severed leaving a piece of skin holding it to the body, deep cut on the scalp exposing the skull bone, multiple deep cuts on the right hand, deep cuts on the forearm cutting through the bones, multiple cuts on the lower limbs with three deep cuts on the thigh, knee joint, lateral side and the leg on the right, a deep cut on the left leg at the medial aspect of the ankle joint.

On account of all the above observations, the learned Judge made findings as follows:

> ***"34. The first fact which is clear is that the injuries could not have been caused by one person aiming blindly with a panga as the first accused alleged. The neck was hanging on a piece of skin. There was no way the deceased could still have remained standing after the neck injury of the nature described by the doctor was inflicted. As the eye witnesses said, that was the first injury inflicted on the deceased. The deceased must have fallen down after this injury. That meant that the bulk of the injury were inflicted upon the deceased as he lay on the ground, just as PW2, 4 and 5 described"***
>
> **……..**
>
> ***"35…..……PW7 stated that he found the body of the deceased's lying on the ground inside his, the deceased's farm. The defence did not, during the cross-examination of the investigating officer question the accuracy of his evidence in regard to where the body of the deceased was found. The accused person defence that the deceased walked over to the farm of the 1st accused was not only an afterthought but a lie."***

With regard to common intention, the learned judge drew inspiration from the case of **Njoroge versus Republic [1983] KLR 197, 209** and then made findings as follows:-

> ***"37. I find that the evidence of PW1, 2, 4 and 5 that the two accused with four others surrounded and set upon the deceased with pangas, cutting him all over the body is credible, truthful and overwhelming evidence against the accused persons. I find that the two accuseds and their accomplices had formed a common intention to attack and cause either death or grievous harm on the deceased. Each of them was armed with a crude and dangerous weapon. By so arming themselves and setting upon the deceased as they did, I am satisfied that they had formed a common intention to cause grievous harm or death of the deceased."***

Turning to the last issue of establishing malice aforethought by the prosecution, the learned Judge drew inspiration from the case of **Daniel Muthee versus Republic CRA No.218 of 2005 (UR**) **and Morris Aluoch versus Republic CR Appeal No. 47 of 1996 (UR),** and then made findings as follows:-

> ***"40. The deceased was cut several times. In fact the doctor described the injuries as multiple deep cuts all over the body. In view of the multiplicity of the cuts and the deep nature of the injuries inflicted, I am satisfied that the accused person and their accomplices had the necessary malice aforethought to commit the offence of murder."***

It is the above reasoning and findings that we have been invited by the appellants to fault, and by the respondent to affirm.

We have given due consideration to the totality of the above. In our view, the issues that fall for our determination are as follows;-

(1) Whether the defence of provocation and self defence is available to Victor.

(2) Whether the charge against James was proved beyond reasonable doubt.

On the first issue, the approach we take is to fully associate ourselves with the principle in **Mungai versus Republic [1984] KLR 85,** as approved in **Joseph Muriuki versus Republic [2016] eKLR,** that the defence of self defence is known to law and where it is raised and the circumstances exist to show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is serious enough to cause loss of control, then it is merged into provocation and the inference of malice is rebutted and the offence if disclosed will be one of manslaughter.

Under **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 or 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.***
>
> See also ***Cheboi versus Republic [2002] 1KLR 790.***

The above definition was ably explained by the Court of Appeal of England in the case of **Republic versus Duffy [1949] 1 ALLER 932** as follows:-

> ***"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 from the moment not master of his or her mind……"***

In **Peter King'ori Mwangi & 2 others versus Republic CR. APP. No. 66 of 2014,** the Court identified two conditions as prerequisites for the application of provocation as a defence, namely:

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

The effect of upholding the defence of provocation in favour of an accused person is to reduce the offence of murder to manslaughter. See the case of **Tei S/O Kibaya versus Republic [1961] EA 580** as approved in **Roba Galma Wario versus Republic [2015] eKLR**, thus:-

> ***"In considering whether provocation was sufficient to reduce the offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used."***

Turning to the doctrine of self defence, it is provided for under **Section 17** of the Penal Code thus:-

> ***"17. Subject to any express provision of this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law".***

The section has been ably construed in the cases of **Republic versus Andrew Mueche Omwenga** (supra); **Roba Galma Wario versus Republic** (supra) and **Ahmed Mohamed Omar & 5 Others versus Republic [2014] eKLR**.

The principles that have emerged from these and other authorities are as follows:-

> *(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.*
>
> *(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.*
>
> *(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.*
>
> *(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.*
>
> *(v0 What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.*

The reasons the learned Judge gave for rejecting **Victor's** plea of provocation and self defence were, first, that the scene of the attack was in the deceased's land as confirmed by **Albert Gakanga** the investigating officer, whose evidence corroborated that of the eye witnesses who were consistent that it is **Victor** and his other companions who invaded the deceased and attacked him on his land. Second, that waving a *panga* blindly against the deceased would not have caused the multiple injuries noted on the body of the deceased.

As for **James**, the learned Judge found him liable on the basis of the eye witnesses account which the learned Judge found truthful and credible and which portrayed **James** as an active participant in the infliction of the multiple injuries on the deceased; and, second, on account of the application of the doctrine of common intention.

In **Republic versus Tabulayenka S/O Kirya [1943] EACA 51** the predecessor of the Court laid down the following principle;-

> ***"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."***

See also **Njoroge versus Republic [1983] KLR 197, 204** cited with approval by the learned Judge for the holding, *inter alia,* that:-

> ***"if several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly"***

The learned judge believed the testimonies of the eye witnesses whom she found truthful, that the scene of the murder was the deceased's own land, meaning that the appellants and their accomplices had resolved to attack the deceased which was their common intention and which common intention they executed by inflicting fatal injuries on the deceased from which he succumbed to death, and which injuries, as correctly found by the learned Judge, could not have been caused by one person blindly waving *a panga*.

In the case of **Republic versus Oyier [1985] KLR 553**, the Court laid down this principle:-

> ***"The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that the trial magistrate erred in his findings or that he acted on wrong principles."***

We fully associate ourselves with the above principle as restating the correct position in law. In the instant appeal, the learned trial Judge who observed the eye witnesses when they testified before her formed an impression that they were truthful and therefore credible. We have no reason to differ from that assessment. We find that the learned Judge acted on the evidence tendered on the record before her. She correctly analyzed it and applied the correct principles of law to the facts at each and every stage of the analysis. She did not misapprehend any issues raised and drew out the correct conclusions on each of the issues identified for determination by her.

All in all we find the offence was proved beyond reasonable doubt against both appellants. We find no merit in the appeals. The same are dismissed in their entirety.

Dated and Delivered at Meru this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..…....

JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR