



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: KIHARA KARIUKI (PCA), NAMBUYE & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 46 OF 2016

BETWEEN

ISAACK NKUNJA alias PROFESSOR

SABINA MUTHONI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya*

*at Meru (Lesiit, J.) dated 31<sup>st</sup> November, 2013*

in

*H. C. CR. A. NO. 60 OF 2011)*

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JUDGMENT OF THE COURT

On the night of 25<sup>th</sup> May 2011, one **Paul Mwenda Mugambi** alias Chomelea (Mwenda) walked into a home at Thaene Village, Kithetu Location in Igembe South District of Meru County. The home belonged to one **Samuel Thiambu** (Thiambu) who, together with his wife **Sabina Muthoni** (Sabina) were brewers and sellers of a local and arguably illicit alcoholic drink known as *Chang'aa*. The business of sale of the said brew was ongoing to some customers including PW4 **Grace Mbirigi** (Grace) and PW3 **Eunice Karambu Kinoti** (Eunice).

Mwenda was in a hurry and did not even get into the liquor den. Instead, he made his order for a Kshs. 40 serving right outside the house, which he proceeded to consume. He then produced a Kshs. 1,000 note to pay for the *Chang'aa* he had taken but this seems to have been a fatal mistake for, Thiambu right there and then picked a panga (machete) with which he struck Mwenda on the head, felling him. **Nkunja**, alias 'Professor', and **Sabina** who are the appellants herein, then joined in beating the now screaming Mwenda using metal bars. They beat him all over the body in an orgy of violence that lasted all the way to half an hour past midnight. As this was happening, **Grace** and **Eunice** had cowered and run out of the compound

from where they watched, helpless, before coming back later with other villagers when the assailants had ran off. They assisted Mwenda to go to the police station. As he was completely nude from the beatings and other violence visited on him, they clothed him with a shirt and pair of trousers belonging to Eunice's husband. He was bleeding profusely and there appeared to be a metal rod forcibly inserted into his anus.

Notwithstanding all that brutal beating, Mwenda was communicative, though barely, and he told Eunice, Grace and the other villagers that should he succumb to his injuries, those who killed him were Thiambu, Sabina and Nkunja. After self-reporting his assault at the police station, Mwenda was taken to Nyambene District Hospital where he died later that night. A post-mortem examination conducted by Dr. I. Macharia showed that he had a cut on the scalp, multiple bruises on the anterior chest wall, fractures of the first rib on both sides with hemothorax as well as rupture of the small gut. The cause of death was opined to be blunt chest injury. A report was prepared which was produced by **Dr. Koome Guantai** (PW1).

After the beating to death of Mwenda, the three attackers vanished from their homes and the vicinity according to police constable **Tom Mburu** (PW5) who investigated the case. Six months later, however, Nkunja was sighted at some other liquor den by members of the public who reported to the police and PW5 went and arrested him. Sabina was also eventually arrested and the duo were charged with the murder of Mwenda. Thiambu was never traced.

The trial of the two was conducted by Lesiit, J at the High Court at Meru and after hearing the prosecution evidence as we have summarized it herein, the learned Judge placed them on their defence which was heard by Wendoh, J. In his unsworn statement Nkunja denied the charge. He insisted that he heard about the incident involving Mwenda's death but denied going to the scene of the incident on the day in question or even seeing Mwenda that day. He denied ever disappearing from home where he said he was for all the six months before his arrest as he was immobilized with a fractured leg following a robbery attack by thieves on the same 25<sup>th</sup> May 2011. He suggested that he had a court case with Eunice's father in an attempt, it would seem, to cast doubt on the veracity of her evidence.

On her part, **Sabina** stated that she used to live with Thiambu though they were not married. She denied being at his house on the fateful day and basically denied any knowledge of the incident. She insisted that she never left home in the six months before her arrest. She also cast aspersions on Eunice by stating that she used to steal maize from Sabina leading to quarrels.

At the end of the testimonies and the submissions that were made, the learned Judge found the offence established and proceeded to convict and sentence the two to suffer death as by law prescribed. Dissatisfied with that finding, the appellants through their learned counsel Ms. Nelima filed a joint supplementary memorandum of appeal stating that the learned Judge erred in;

- ***Convicting the appellants on contradictory and insufficient evidence.***
- ***Rejecting the appellants' alibi defence***
- ***Acting on insufficient and unreliable identification evidence.***
- ***Making a finding of common intention without evidence.***
- ***Improperly admitting evidence of a dying declaration.***
- ***Relying in extraneous evidence and advancing her own theory to convict.***

At the hearing of the appeal learned counsel abandoned the ground relating to the dying declaration. She went on to urge that the ingredients of the offence of murder were not established. To her, the evidence was not clear that Mwenda was unlawfully killed and it was not clear what role the appellants played in the beating. Counsel also sought to cast doubt on the true nature and extent of the injuries, contending that the injuries recorded in the post-mortem report were less severe than what the witnesses Eunice and

Grace testified to.

Counsel further submitted that it was not clear the killing was with malice aforethought especially because there was no motive for it. She cited in aid the case of ***NZUKI vs. REPUBLIC* [1993] KLR 171**. Counsel must have considered the foregoing to be the strong points of the appeal as she merely mentioned, without elaboration, that common intention with Samuel Thiambu was not established and that the alibi defences were wrongly rejected.

For the Republic, Senior Prosecution Counsel **Mr. Mungai** opposed the appeal stating that the evidence adduced at the trial, especially that of **Grace** and **Eunice** who were the eye witnesses, was consistent and not at all contradictory. He went on to urge that the ingredients of the offence of murder were proved satisfactorily in that the appellants knew or ought to have known that their actions would result in Mwenda's death and their roles in the result were well spelt out and confirmed by the post-mortem report which was sufficiently detailed even though more detail would have done no harm. Counsel went on to explain that the delay in the arrest of the appellants was due to their six month disappearance from the scene and the vicinity which was further proof of their guilty minds. He dismissed the alibi defences offered as being raised too late in the day and therefore an afterthought and easily displaced by the eye witness testimony placing the appellants at the scene of the crime.

We have given this appeal due consideration by way of a rehearing from a fresh analysis and appraisal of the entire evidence as we must do, being a first appellate court. See ***PANDYA vs. REPUBLIC* [1957] EA 336**. ***OKENO vs. REPUBLIC* [1972] EA**. From the facts as we have summarized them, there really can be no doubt that the deceased Mwenda met his death in circumstances of extreme personal violence. He was slashed by Thiambu and, once he fell, the appellants herein descended on him with iron rods. The blows they inflicted were many, repeated and lengthy in duration. There were eye witnesses in the persons of Grace and Eunice, whose testimonies were not challenged with any degree of seriousness. That the attack on Mwenda was inexplicable in that the giving of a Kshs. 1,000 note for Kshs. 40 serving of *Chang'aa* ought not to produce such a massive explosion of violence may render the attack all the more senseless, but it does not derogate from the ingredients of murder. It was **Miss Nelima's** contention that there was no motive for the attack on Mwenda and therefore malice aforethought was not established. With respect, it has never been our law for motive, in the sense of '**a factor or circumstance that induces a person to act in a particular way**' (See, **the Concise Oxford Dictionary 9<sup>th</sup> Edn**), to be proved in order for malice aforethought to be established. Rather, malice aforethought is an element of the offence of murder that has been statutorily defined in rather clear and unambiguous terms, notable in their non-reference of motive. **Section 206** of the Penal Code defines it thus;

***"206. 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) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

We have no doubt in our minds that when people set upon another with iron bars and pound him indiscriminately with vicious force causing bruises all over the body and breaking his ribs and limbs and then inserting a metal rod up his anus, and this going on for hours, their intention must be to cause such person's death or grievous harm. In the eyes of the law that amounts to malice aforethought which,

combined with the acts themselves, complete the offence of murder. We do not think upon our own perusal of **NZUKI vs. REPUBLIC** (supra) that it at all propounded a new test requiring that motive in the popular sense be established for a conviction for murder to stand beyond the elements of **Section 206** of the Penal Code. At any rate, it is evident that in this case there was malice aforethought amply proved.

As to common intention, from the evidence on record both appellants took iron bars with which they pounded Mwenda. They did so in the company of Thiambu who had struck him the first blow which was not fatal. It was the combined assault, conducted jointly by the appellants and Thiambu, that led to Mwenda's death. There is no ambivalence in this case as there was in **REPUBLIC vs. CHEYA & ANOTHER** [1973] EA 500 found in Miss Nelima's bundle of authorities where, after the two appellants assaulted the deceased as they tried to remove him from a group of women at a dance because they objected to his behaviour, a mob joined in and assaulted the deceased who later died. Here, unlike there, the actions of the appellants showed from beginning to end that they had a common intention to either kill or grievously harm Mwenda. We are accordingly satisfied that the learned Judge did not err in finding that they had a common intention to grievously injure Mwenda.

As we indicated earlier in the judgment, the appellants' learned counsel did not seriously pursue the grounds that the appellants' alibi was improperly rejected. The evidence is quite overwhelming that the duo were at the scene of the crime and they were clearly seen by **Grace** and **Eunice**, their fellow villagers who knew them well, as they variously assaulted and violated Mwenda. Their belated attempts to say they were not there that fateful night ring hollow and we, like the learned Judge, have no difficulty in rejecting them.

The inevitable outcome of our consideration of this appeal is that it is devoid of merit. It is accordingly dismissed as against both the appellants.

**Dated and delivered at Nakuru this 22<sup>nd</sup> day of November, 2017.**

**P. KIHARA KARIUKI (PCA)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**