



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE JJA)

CRIMINAL APPEAL NO. 38 OF 2013

BETWEEN

MOSES MBAYA ALIAS MBARA MBURAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Makau, J.) Dated 18th April, 2013)

in

(H. C. Cr. C. No. 37 of 2013)

JUDGMENT OF THE COURT

The appellant **Moses Mbaya Alias Mbara Mbura** was arraigned before the High Court of Kenya at Meru on the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that the appellant on the 25th day of June, 2010 at [particulars withheld] Village, [particulars withheld] Sub-Location, Uruku Location, within Eastern Province he murdered **N J M** (deceased).

The appellant denied the charge prompting a trial in which the prosecution called six (6) witnesses to prove the charge. These were **F G M PW1, (F); C K G PW2 (C); F M G; PW3, (F); Mercy Kinyua Mburugu `PW4, (Mercy); Dr. Norah Tharamba; PW5 (Dr. Norah)** and lastly **Cpl. Jacob Nyangwe, PW6 (Cpl. Jacob)**. The sum total of their testimonies is that on the material day **F** was in his homestead with his wife and children. He was inside his house with his wife. The deceased was outside the house. Her sisters **C** and **F** were also around. According to **C** she saw the appellant come to their home grab the deceased by the legs and then started hitting her head on a tree trunk within the compound. **C** rushed to the scene screaming and wrestled the child from the appellant and handed it to her sister **F**. Their screams attracted **F** and members of the public to the scene. **PW4, Mercy** is one of the members of the public who responded to the screams. Upon arrival, she was explained what had happened. She called for a **'boda boda'** and took the child to the hospital where it was pronounced dead on arrival.

Meanwhile **Cpl. Jacob** was on the material day on duty at **Kariene** Police Station when he received a report that there was a person who was being roughed up by members of the public in his area of jurisdiction over an alleged incident of murder. In the company of other police officers, he left for the scene. On arrival, he found the appellant detained by the members of the public over the alleged murder of the deceased. They rescued him from the members of the public and then left for the scene where they were shown a tree trunk lying in the compound of **F** on which the appellant allegedly smashed the head of the child which **Cpl. Jacob** collected and later produced in court as an exhibit.

Cpl. Jacob also arranged for a post mortem to be carried out on the body of the deceased by **Dr. Norah**. The findings were that there were no obvious external injuries on the deceased. Internally the Doctor observed comminuted fracture of the occipital bone with intracranial bleeding. The cause of death was indicated as intracranial haemorrhage with the skull fracture. **Dr. Norah** tendered the post mortem report in court as an exhibit.

When put to his defence the appellant gave sworn evidence and called no witness. It was his testimony both in his examination in chief and cross examination that he was a casual labourer in the locality. He used to cut nappier-grass for **F**. He was therefore, well known in **F's** home. When not at his chores he would play with **F's** children who were all familiar with him including the deceased.

On the material date as he approached **F's** home, he saw the deceased in the compound looking very jolly. The child ran towards him as usual. He held her and then playfully thrust her in the air but unfortunately failed to firmly wait way down. She fell to the ground. He denied that he intentionally hit the child's head on the tree trunk within the compound. He maintained that although he had taken some alcohol shortly before the incident, he was sober. He confirmed there was no bad blood between him and the family of **F**.

The learned trial Judge **J. A. Makau J.** In a judgment dated the 18th day of April 2013 found the appellant guilty of the offence charged, convicted him and sentenced him to death. The appellant is now before us on a first appeal. He has raised six grounds of appeal in a supplementary memorandum of appeal. These are:

- 1. That the trial was a nullity as no plea was taken.**
- 2. That the learned judge erred in law and in fact in convicting the appellant based on evidence that was inconsistent, insufficient and contradictory in nature.**
- 3. That the conviction was against the weight of evidence.**
- 4. That the offence of murder was not proved beyond all reasonable doubt.**
- 5. That the ingredients for the offence of murder were not proved.**
- 6. That the learned judge erred in law and in fact in failing to consider the appellant's defense of accident and intoxication.**

In her brief submissions, **Miss Jaqueline Nelima** learned counsel for the appellant urged those grounds as two: the failure to take a plea before trial, and failure by the prosecution to prove the case beyond reasonable doubt. She argued that:

- (i) The alleged eye witnesses came after the fact.
- (ii) The appellant's defence that he had taken drinks was plausible and was not rebutted. He was therefore incapable of forming the necessary intention to kill.
- (iii) There was no grudge disclosed.

To buttress her arguments **Miss Nelima** relied on the case of **Kedisia vs. Republic [2009] KLR 604** for the holding *inter alia* that evidence of drunkenness need not necessarily come from the prosecution witnesses and where it has been tendered it cannot simply be ignored because it has come from the prosecution witness. Second, the case of **Omor vs Republic [1994] KLR 496** for the holding *inter alia* that:

“1. Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions:-

(a) The intention to cause death.

(b) The intention to cause grievous bodily harm

(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse.

2. Without an intention of one of these three types the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not itself enough to convert a homicide into the crime of murder.”

Third, and lastly the case of **Baya vs. Republic [1984] KLR 657** for the holding *inter alia* that:

(i) The charge and all its essential ingredients must be explained to the accused in his vernacular or some other language that he understands and the exact words in reply should be correctly translated in English and then carefully recorded.

(ii) Where the trial was unsatisfactory and full of irregularities occasioning injustice which are not curable under sections 382 of the Criminal Procedure Code an order for a retrial is the proper order to make in such circumstances.

In response to the appellant’s submissions **Mr. E. Ondari** Senior Assistant Director of Public Prosecution (SADPP) has urged us to dismiss the appeal. It is his submissions that though he agrees that there is no indication on the record that plea was taken, no prejudice was occasioned to the appellant. This is borne out by the appellant’s response when put to his defence that he was aware of the charge facing him. According to the learned SADPP, this was sufficient proof that plea had been taken before the commencement of the trial although not noted on the record.

Alternatively he submitted, even if it had not been taken, the error is curable under **section 382** of the Criminal Procedure Code. Further that had the appellant been prejudiced in any way by this procedural failure in his trial process he would have raised the issue at the earliest opportunity.

Turning to the appellant’s defence **Mr. Ondari** urged that the issue of the appellant having taken some drink does not assist in his defence as he did not raise intoxication as a defence. Furthermore from the appellant’s own words, when he threw up the child in the air he was sober. He was therefore, alive to all that he was doing. The amount of drink he allegedly took was not sufficient to make him unaware of what he was doing.

It was further **Mr. Ondari’s** argument that proof of motive is not a necessary ingredient in a murder trial. He observed that PW1 and 2 were eye witnesses to the fact as they witnessed what happened and the trial court believed them as credible witnesses. There is nothing to make this court doubt that finding. The two witnesses actually saw the appellant grab the child and hit it on a tree trunk in the compound.

There was no reply to the respondent’s submissions.

This is a first appeal and our mandate, as has been repeatedly restated by the court is the duty to

scrutinize the evidence to see if it supports the lower court's findings and to make its own conclusion on the matter, while bearing in mind that we neither saw nor heard witnesses and make due allowance for that. See the case of **Okeno vs Republic [1972] EA 32**.

We have revisited the record and considered it in the light of the rival arguments set out above. In our view, the issues that fall for our determination are those raised by the appellant in the supplementary grounds of appeal. With regard to ground one, (1) there is no dispute that the appellant faced a criminal charge. The law obligated the court of the first instance to take a plea from the appellant. Both sides are in agreement that the record does not bear any evidence that plea was ever taken from the appellant with regard to the offence he then faced. In **Baya vs. Republic** (supra) the court was categorical that:

“The charge and all its essential ingredients must be explained to the accused in his vernacular or some other language that he understands and the accused's own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission of (sic) a plea of guilty should be recorded.”

In the same **Baya** case (supra) the court went further to add that where the trial was unsatisfactory and full of irregularities occasioning injustice which are not curable under **section 382** of the Criminal Procedure Code, the proper order for the court to make in such circumstances is to order a retrial.

The court when confronted with a similar scenario in the case of **Murage and Another versus Republic [2006] KLR 63**, held thus:-

“The irregularities and omissions arising from lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.

We fully adopt that holding as applicable to the appellant's complaint herein. This is because as submitted by the respondent, the appellant participated fully in the trial, cross examined witnesses and when he took the witness stand to defend himself, he was categorical that he understood the charge then facing him.

With regard to the complaint in ground 2, learned counsel **Miss Nelima** did not point out what she meant by saying that the prosecution's case was inconsistent, insufficient and full of contradictions. The position in law with regard to discrepancies, inconsistencies and contradictions in the prosecution's case was considered in the case of **Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993** where court stated:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

In **Vincent Kasyula Kingoo vs Republic Nairobi Criminal Appeal No. 98 of 2014** the court approved the stand taken by the court in **Josiah Afuma Angulu vs Republic Criminal Application No 277 of 2006** and **Charles Kiplangat Ngeno vs Republic Criminal Appeal No. 77 of 2009 (UR)** where in the court reconciled the discrepancies resulting in a reduction in the offence charged in the **Josiah Afuma** case supra and an acquittal in the **Charles Kiplangat Ngeno** case (supra).

The learned trial Judge in this case made the following observation on the evidence tendered by the prosecution:-

“In this case there were direct eye-witnesses evidence of the accused hitting the deceased against a tree trunk. The trunk was produced as exhibit No. 1 by PW5. PW1 in his evidence testified that when he came out of his house he saw accused struggling with PW2 and PW3 who were trying to snatch the deceased child from the accused. PW2 and PW3 who knew the

accused very well testified that at 8.30 a.m. they were at their home attending to household chores outside their home with their sister N J M, a child aged about 4 years, when the accused came to where they were and suddenly grabbed N J M and holding her by her legs started hitting her head against a tree trunk outside their house. PW2 and PW3 rushed to the aid of the child screaming for help. PW2 picked the child from the accused after struggling with the accused and gave the child to her sister PW3. That the neighbours and deceased's parents came to the scene. The incident took place at around 8.30 a.m. during day time and the accused was clearly seen and recognized by PW1, PW2, PW3 and Pw4 who had known the accused before. The evidence of PW2 and PW3 was consistent, and they corroborated each other, their evidence was credible cogent and without contradictions.”

Following the above observations on the credibility of the witnesses the learned Judge rendered himself thus:

“From the evidence of the prosecution witness it is clear that the accused was seen in broad daylight by PW2 and PW3 grabbing the deceased by her legs lifting her up and hitting her head against a tree trunk leading to the injuries on her head and which injuries according to the postmortem report produced by PW5 was the cause of her death. The postmortem report shows that the cause of death was due to intracranial haemorrhage with skull fracture. The accused admitted being at the scene of incident at the material time but only gave a different version as to how the deceased met her death. I find PW2 and PW3 to be credible witnesses, who had no grudge with the accused, and who were eye-witnesses to the incident and who told the court the truth. The accused was not truthful witness and he even admitted that PW2 and PW3 told the court the truth”.

It therefore follows that in the absence of learned counsel pointing out exactly what she meant by inconsistencies, insufficiencies and contradictions in the prosecution's case there is nothing to counter the careful assessment of the evidence by the learned Judge. We therefore find no merit on this ground. It is accordingly dismissed.

As for the defence of intoxication we find contrary to the submissions by the learned ADPP that it was raised by the appellant at the trial. This is borne out by the learned Judge's observations on this evidence thus:

“The accused alleged that he had taken some liquor, however though there was no proof of him having taken some liquor, he stated during cross-examination he was sober and so he knew what he was doing. He even thereafter stated in evidence he knew what he had done was wrong.”

The position as set out in the **Kedisia** case (supra) is that where such defence is raised, it should not be ignored. In **Johnson Njue Peter vs. Republic** Nyeri Criminal Appeal No. 85 of 2014 the court had this to say;

Section 13 of the Penal Code provides in part as follows:

“13(1) save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

.....

(4) Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

In **Said Karisa Kimunzu vs. R** Criminal Appeal No. 266 of 2006, this court while considering Section 13(4) of the Penal Code observed,

But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son"

We fully adopt the stand taken by the court in the **Johnson Njue Peter** case (supra) as the correct position when dealing with a defence of intoxication.

The appellant's defence of accident is interrelated with grounds 3, 4 and 5 with regard to the threshold set for the proof of an offence of murder. We fully adopt **section 206** of the Penal Code as setting out the ingredients for the offence of murder. It provides:

"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 of 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) ...

(d) ...

We also associate ourselves with the stand taken by the court in **Nzuki vs. Republic [1993] KLR 171** at page 175 paragraph 34 thus:- that malice aforethought is a term of art and then emphasized that;

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

The learned Judge in arriving at the conclusion that the prosecution case had met the threshold had this to

say:

“The accused did not deny being at the scene of murder; but he denied the way the deceased met her death. His version is that he was playing with the child when he threw her up in the air but failed to catch her on her way down. That she fell and was injured. I am not convinced by accused version as to how the deceased met her death. PW2 and PW3 who were eye witnesses saw the accused, who was known to them grab the deceased by her legs and started hitting her against a trunk of tree exhibit 1. They rushed to her aid screaming for help. PW2 and PW3 evidence was not shaken even in cross examination. Their evidence was corroborated by PW5’s postmortem report as to the nature of injuries. That as the accused stated, if the deceased landed on his feet, and fell on her back the force was not great to cause injuries such as listed by the Doctor. The accused evidence cannot be believed in view of the evidence and especially in cross examination.”

The learned Judge then rendered himself thus:

“The accused used excessive force to hit the deceased against a tree trunk exhibit 1 more than once. The head is a very sensitive area and especially for a child of tender years to be hit against a tree trunk at full force. In addition to the above the accused held the deceased minor by her legs, lifting her up and with full force hitting her head on the tree trunk on the ground. The accused action was both calculated and deliberate.”

The above findings are well founded on the evidence on the record. We therefore, agree with the submissions of the state that the appellant’s appeal lacks merit. It is accordingly dismissed.

Dated and delivered at Meru this 24th day of June, 2016.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL