IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

CRIMINAL APPEAL NO. 167 OF 2011

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

Z K.....……..….....APPELLANT

AND

REPUBLIC.....……..….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Lesiit, J.) dated on 12th day of May, 2011

in

H.C.Cr.C. No. 50 of 2007

****

JUDGMENT OF THE COURT

The appellant **Z K** was arraigned in 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 on the 7th day of September, 2007 at [particulars withheld] Village, [particulars withheld] Sub-location, Nkomo Location in Meru North District of the Eastern Province she murdered **C K (deceased).**

The appellant denied the offence prompting a trial in which the prosecution called six (6) witnesses in support of their case. These were A K PW1, (A); P G PW2, (P); Martha Atuma PW3, (Martha); Catherine Kawira PW4, (Catherine); Gedion Mukaba PW5 (Gedion) and PC Justus Wambua (PC Justus).

The brief facts of the case are that the deceased was a sister to P who was grandmother to A and mother to the appellant. On the material date, A woke up at around 6.00 am and headed for the toilet. On his way back he heard screams about fifty (50) meters away. He alerted P who was allegedly asleep in her house. P instructed A to find out what the scream was all about. A headed in the direction of the screams and saw the deceased as the person who was screaming lying down while being cut by the appellant whom A knew very well. On noticing his presence the appellant chased him away with the *panga*. He escaped but then came back and saw the appellant continuing to cut the deceased. The appellant then picked up the jerry can that had been lying nearby and walked away still carrying the *panga.*

P left for the scene and found the deceased already dead according to her. It was her testimony that she did not find the appellant at the scene.

Meanwhile Martha who lives in the vicinity heard the screams. She alerted other family members and walked to the scene. On arrival she saw both the appellant and P at the scene. On seeing her, the appellant ran away while P walked towards them. She noticed the deceased had multiple cuts. Catherine who had sent the deceased to deliver milk at the nearby market was alerted by Martha about the incident. She left for the scene and found the deceased already injured. She, Gedion and other persons mobilized for transport to take the deceased to hospital through the area police station but the deceased died before receiving treatment.

Investigations were commenced into the murder. It was PC Justus' evidence that they interrogated persons at the scene, identified witnesses and recorded their statements. Both P and the appellant were arrested in connection with the murder of the deceased. P was however released after two weeks' stay in custody upon police establishing that she was not involved in the murder.

Upon re-arresting the appellant from members of the public, PC Justus proceeded to the scene and drew a sketch plan. He went to the appellant's home where he recovered two blood stained ropes on the floor; a blood-stained skirt from a bed and a blood stained panga from behind the house. He caused blood samples to be taken from both the deceased's body and the appellant for analysis by the Government Chemist and received the report. He also witnessed the post mortem examination carried out on the body of the deceased. He produced the exhibits in evidence.

When put on her defence the appellant gave sworn testimony and called no witness. It was her testimony that on the eve of the incident the deceased had taken a cardigan belonging to her mother P, but the appellant took it away. The next morning while on her way taking milk to their local market at Kianjai she spotted the deceased on the road. On reaching the deceased, the deceased did not utter a word to her but aimed a panga at her but missed as she held it and threw it behind her. The deceased then grabbed her and wrestled her to the ground. She screamed and her mother P came to her rescue. According to her, it is her mother P who picked the panga and cut the deceased.

The screams from the scene attracted her brother Gedion among others. While she proceeded to the market to deliver her milk the brother and others took the deceased to the hospital through the police station but she succumbed to her injuries. She denied cutting the deceased or seeing A on the material day.

At the close of the trial, the learned trial Judge (Lesiit J.) found the appellant guilty of the offence as charged, convicted her and sentenced her to death.

The appellant was aggrieved and she is now before us on a first appeal. She had initially raised five (5) grounds of appeal in a home made memorandum of appeal. Learned counsel Mr. Amos Wamache who appeared for her abandoned ground 3, 4 and 5 and only agitated grounds 1 and 2, stating: **That the learned trial judge erred both in law and fact:-**

- **in not making a finding that the prosecution failed to prove the offence of murder.**
- **in not substituting the charge of murder with the lesser charge of manslaughter.**

In his submissions, **Mr. Wamache,** urged that the evidence was not water tight. The prosecution relied on the evidence of a single identifying witness who was also a minor. There was no corroboration for the minor's evidence. Further, the other witnesses said that it was dark and not very clear at the time of the incident. The witness could have been mistaken on the identity of the assailant. Finally, he submitted that the appellant's assertion that it was the mother who cut the deceased could not be ruled out.

In response, **Mr. A. Musyoka** the learned Prosecution Counsel urged us to dismiss the appeal on the grounds that the minor's evidence was well corroborated by the evidence of Martha who saw the appellant walking away from the scene of the murder.

In reply, Mr. Wamache reiterated his earlier stand that the minor's evidence was not well corroborated and he could have been mistaken and that there was nothing to oust the appellant's assertion that it is her mother P who cut the deceased.

This being a first appeal, we are obligated to freshly and independently consider and analyze all the evidence on record and make our own findings without overlooking the findings of the trial court and bearing in mind that we did not have the advantage of seeing and hearing the witnesses testify. In **OKENO VS. R [1972] EA 32 at Pg 36**, the predecessor of this Court stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R [1957] EA 336) and to the appellate courts own decision on the evidence and draw its own conclusions (Shantilal Maneklal Ruwala Vs. R [1957] EA 570).

We have given due consideration to the record and considered it in the light of the rival arguments set out above. The issues that fall for our determination are the two raised by the appellant.

Regarding the first ground, the learned trial Judge pinned responsibility for the murder of the deceased on to the appellant based on both direct and circumstantial evidence. The direct evidence was that adduced through A. The appellant attacked that evidence as demonstrated above. The approach a court of law is supposed to take when confronted with the issue of identification was explicitly set out in the persuasive authority of **R. Vs. Turnbull and others [1976] 3 All ER 549,** where it was stated thus:

"First, whether the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness can be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?

….....

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Since then this Court has pronounced itself on this issue in many cases including; **Abdallah Bin Wendo & another versus R [1953] 20 EACA 166** where the predecessor of this Court laid down the principle that a fact maybe proved by the testimony of a single witness with the only caveat being that such evidence has to be tested with the greatest care with regard to the conditions for making such an identification. See also **Maitanyi versus Republic [1986] KLR 198.**

The learned trial Judge unreservedly accepted A's direct evidence because the time he heard the screams was around 6.00 am when visibility was clear. He went close to the scene and there was no impediment in his view. Both the victim and the appellant were persons known to him and so he readily recognized them. Moreover, the investigating officer said that A was a son to the appellant who had no reason to fabricate evidence against his own mother. The reason for his disappearance from the scene was given as a possible trauma for a child watching such a gruesome episode and it being a Friday he had to go to school. We find all the above findings supported by the evidence on the record and lead to the conclusion that the circumstances surrounding the identification were conducive to positive identification.

Turning to the circumstantial evidence, the position in law was stated by the predecessor of the Court in **Republic versus Kipkering Arap Koske & another [1949] 16 EACA 123** as follows:

"In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the driving of this inference from the facts to the exclusion of any reasonable hypotheses of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

See also **Tepar versus R [1952] AC 480 and R versus Musore [1958] EA 715."**

The circumstantial evidence relied upon by the learned Judge in support of A's direct identification evidence came from the testimony of Martha, a neighbour of both the appellant and her mother P. She too heard screams and headed in the direction of the screams. As she approached the scene, she saw mother and daughter standing over a person who was lying down and whom she recognized as the deceased when she got to the scene. The appellant ran away on seeing her while P walked towards her. The trial Judge believed this testimony as truthful. We find nothing on the record to decide otherwise.

Further evidence was the recovery from the house where appellant lived with P of ropes, a skirt and panga stained with human blood of the blood group that matched that of the deceased. The learned Judge rejected the appellant's explanation that the items had been taken there by P after committing the murder. The learned Judge stated that P's conduct in taking the deceased to hospital via the police station on the material date was inconsistent with a guilty mind. Instead, it is the conduct of the appellant that portrays a guilty mind as she disappeared from the scene after the act. The Judge observed that it was unfortunate that the prosecution did not lead evidence as to whose skirt it was (the skirt with the deceased's blood stains) but nonetheless having exonerated P from blame the only reasonable inference to be drawn from the facts on the record is that the only other person who had contact with the deceased in connection with the murder was the appellant.

We think from our own consideration of the record that there was overwhelming evidence that it is the appellant who inflicted the multiple and fatal injuries on the deceased.

We next consider the appellant's contention that the learned Judge should have considered a manslaughter as opposed to a murder verdict. The deciding factor is malice aforethought which is set out in **Section 206** of the Penal Code thus:-

"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) .....

(d) .....

Case law abounds on the threshold required to be met by the prosecution with regard to the proof of murder. In **Nzuki versus Republic [1993] KLR 17** this Court put it thus:

"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 those 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 mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensure from his conduct is not by itself enough to covert a homicide into a crime of murder (see Hyman vs. Director of Public Prosecutions [1975 AC 55]

The Court in **Joseph Kamau Njau vs. R [2014] eKLR** expounded on categories of malice aforethought thus:

"Our evaluation of the evidence on record in the instant case comes within the legal principles laid out in the Nzuki's case and we adopt the conclusions stated therein. In the case of Isaak Kimanthi Kanuachobi vs. Republic – Nyeri Criminal Appeal No. 96 of 2007 (ur) this court expressed itself on the issue of malice aforethought in terms of section 206 of the Penal Code:

There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm he is said to have had constructive malice aforethought (see Republic vs. Stephen Kiprotich Letina & 3 others [2009] e KLR HCCC No. 34 of 2008). In the circumstances of this case, where there was a fight involving the appellant and the others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter (see Juma Onyango Ibrahim vs. R. Criminal appeal No 312 of 2009 Court of Appeal (Kisumu)

We come to the conclusion as did the learned Judge, that the appellant had an intention to kill by reason of the multiple cuts she inflicted on the deceased. Her conduct of disappearing from the scene shortly thereafter also dispelled her innocence.

The upshot is that we are fully satisfied that the appellants' conviction was based on sound evidence.

We find no merit in this appeal. It is accordingly dismissed.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR