IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 257 OF 2011

BETWEEN

REUBEN MATIRO MBILISHE …..…. APPELLANT

AND

REPUBLIC ……..……..RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 18th July, 2011 in H.C.CR.C. No. 22 of 2007)

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JUDGMENT OF THE COURT

The appellant, **Reuben Matiro Mbilishe** was charged jointly with his wife, **Christine Mkamburi Kalutu** with the murder of **Philip Nyayo Asibo,** the deceased, on 10th October, 2007 at Singila-Majengo Village, Mwatate in Taita Taveta County. Their trial in the High Court culminated with the acquittal of the appellant's wife under **section 306** while he was convicted, the court holding that the circumstantial evidence upon which the case turned pointed to the appellant as the person who inflicted the fatal injuries on the deceased. The learned Judge (**Odero, J.**) further concluded from evidence that malice aforethought was established. She said;

> ***"I am satisfied that the facts of this case reveal malice aforethought as described by S. 206(b). The 1st accused was clearly aware that hitting the deceased on the head with a jembe would at the very least cause grievous harm and at the worst would lead to the death of the deceased. The actions of the 1st accused were reckless and irresponsible in the extreme and led to the death of the deceased.***
>
> ***Finally I am satisfied the prosecution have****(sic)* ***proved that all the ingredients of the offence of murder against the 1st accused beyond a reasonable doubt****(sic). I therefore enter a verdict of guilty and I convict the 1st accused of the murder of the deceased named in this charge sheet".***

Upon that conviction, the learned Judge, relying on **Godfrey Ngotho Mutiso v R, Criminal Appeal No. 17 of 2008** sentenced the appellant to 25 years imprisonment reasoning as follows;

> ***"I have considered the mitigation of the accused. I have also read and considered the pre-sentence report prepared by the Probation Department. The accused used far much force than***

was necessary in the circumstances and his actions led to the needless loss of a human life. Following recent pronouncements from various courts including the Court of Appeal see [GODFREY NGOTHO MUTISO VS REPUBLIC CRIMINAL APPEAL NO. 17 of 2008] the death sentence can no longer be deemed as a mandatory sentence even for offences of murder. Each case must be looked at individually. The accused stands convicted of a serious crime. I hereby sentence him to serve twenty-five [25] years of imprisonment."

This is a first appeal brought by the appellant to challenge his conviction and sentence on the grounds that murder was not proved; that the defence of provocation was improperly rejected, and that the sentence was excessive. We think from our ultimate determination of this appeal that **Mr. Monda**, learned counsel for the respondent properly conceded the appeal. By **section 361** of Criminal Procedure Code we are enjoined to consider afresh the evidence presented at the trial so as to arrive at our own independent conclusion based on those facts and the law. As we do so we bear in mind our disadvantaged position as far as the observation of the demeanor of witnesses is concerned. See **Shantilal Ruwala** v **R** [1975] EA 57.

So as to effectively re-evaluate the evidence on record the following background is vital. On the fateful day the appellant and his wife were engaged in the business of selling traditional brew (*muratina*) at their home. One of their usual customers was the deceased. On this day the deceased drunk with the rest of the customers and when time came for them to leave for their respective homes he remained behind and refused to go away even as the appellant and his family retired to bed. The deceased un-relentlessly tormented the appellant's family by banging and kicking the appellant's door for nearly one hour. The appellant's pleas to him to leave them alone went unheeded. Irritated and vexed the appellant left his family in the house and went outside where the deceased was carrying a *jembe*. Shortly he returned to the house and the family slept until the next morning. That morning the body of the deceased was found dumped nearby with a wound on the head. The police followed the drag marks on the ground and traced them back to the appellant's home, where blood stains were noted outside the door. After interrogation the appellant led the police to a gulley near the scene where the body had been recovered and blood stained *jembe* retrieved. The autopsy report attributed the deceased's death to head injury due to subdural hematoma as a result of a blow by a sharp heavy object.

In his defence the appellant recalled how upon returning home at 8.00 p.m. from tapping palm wine and doing other errands, he found the deceased in his homestead touching his wife. When he confronted him the deceased let the appellant's wife go and began to beat the appellant. The latter's wife intervened and separated them. The deceased left but as soon as the appellant and his wife entered the house he returned threatening to beat the appellant and his wife. He began to hit and kick the door. He would go away but return shortly – four (4) times! Infuriated, the appellant picked a *jembe* and hit the deceased on the back. The deceased left and the appellant returned to the house and slept. The next day he was arrested and shown the body of the deceased. He was surprised that the deceased was dead. He was arrested and subsequently charged. He maintained that after hitting the deceased he did not fall. Instead he walked away and the appellant did not follow him.

This is the totality of evidence upon which the learned trial Judge concluded that the appellant, with malice aforethought, caused the death of the deceased. From those facts it is apparent that although the appellant admitted having hit the appellant, there is no evidence that that blow was the proximate cause of the deceased person's death. The deceased, according to the appellant who was the only person at the scene, walked away. His body was discovered the next day. The determination of the question of who caused the appellant's death turns on circumstantial evidence, the most obvious being that the appellant found the deceased with his wife in a compromising position; that there was a brief scuffle; that even after the situation was pacified the deceased stealthy caused the appellant annoyance; that the appellant with a single blow hit him with a *jembe* on the head; and that the post-mortem examination confirmed and attributed the cause of death to such force. The learned Judge, in our view properly directed herself on this question and relied on the case of **James Mwangi v R (1983) KLR 327** to test the principles of circumstantial evidence. We are persuaded from the above set of circumstantial evidence that that evidence irresistibly pointed to the fact that the appellant hit the deceased on the head resulting in the latter's death. In addition we find no co-existing factor in the entire evidence that would weaken or even

destroy that inference. See **Kipkering Arap Koske & Another v R (1949) 16 EACA 135.**

We conclude on the first requirement for proof of murder that the appellant caused the death of the deceased. But was the death caused with malice aforethought? Under **section 206** of the Penal Code death is caused with malice aforethought if the accused person is proved to have, *inter alia*, intended to cause the death of or to do grievous harm to the victim. The learned trial Judge was of the mind that malice aforethought was established by the appellant's action of hiding the murder weapon, the *jembe*, which suggested a guilty mind; that by hitting the deceased with a *jembe* on the head, the appellant did not expect any different result from that which occurred or at the very least a grievous harm to the deceased. The learned Judge dismissed the appellant's defence as an afterthought, the appellant having failed to raise it during cross-examination. The defence advanced by the appellant was that the deceased was touching his wife; that the deceased beat him; and then started kicking the door, our mind amounted to provocation under section 207 of the Penal Code. See **Elphas Fwamba Toili v R Criminal Appeal No. 305 of 2008 (Eld)**. The deceased returned to the appellant's homestead four times, banging and kicking the door and demanding that he be let in, clearly courting trouble. From the medical evidence there was only a single blow. This fact coupled with the appellant's conduct of leading the police to the recovery of the *jembe* was itself a demonstration that the turn of events were not intended.

For these reasons, we find substance in this appeal and hold that learned Judge failed to analyse properly the evidence, which clearly demonstrated that the offence committed was not murder but manslaughter.

In the circumstances we allow the appeal and substitute the conviction for the offence of murder with that of manslaughter set aside the death sentence imposed by the trial court and in place thereof sentence the appellant to the term already served. Accordingly, the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 17th day of June, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR