



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 95 OF 2014

BETWEEN

JOHN NYONGESA ODUOR.....1ST APPELLANT

FRANCIS JUMA ODUOR.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal of the Judgment of the High Court of Kenya at Busia, (F. Tuiyot, J.) dated 8th day of August, 2013

in

H.C.CR.A. NO. 7 OF 2008)

JUDGMENT OF THE COURT

1. The appellants, Francis Juma Odour and John Nyongesa Oduor, were charged with 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 26th June 2008, at Monda village, Kingadole sub location, Malachi Central Location in the then Busia District they jointly murdered James Omoto Olula. They were tried before the High Court at Busia and convicted in a judgment delivered on 8th August 2013. Francis Juma Odour was sentenced to serve a prison term of 50 years while John Nyongesa Oduor was sentenced to serve a prison term of 40 years. They have appealed to this Court against the convictions and the sentences. In essence, they complain that the prosecution did not prove its case to the required standard.

2. This being a first appeal, our task is to re-evaluate the evidence on record and to draw our own conclusions bearing in mind that we have neither heard nor seen the witnesses testify. [See **Okeno vs. Republic [1972] EA 32**]. In **Gabriel Kamau Njoroge v R (1982-88) 1 KAR 134** the Court stated that:

“Parties are entitled to demand of the first court of appeal a decision on both questions of fact and law, and the court is required to weigh conflicting evidence and draw its own inference.”

3. We must therefore consider the evidence that was placed before the trial court.

The evidence

4. The prosecution case was as follows. James Omoto Olula, deceased, the victim of the murder under inquiry, was married to Margaret Auma Omondi, PW1, as the first wife and to Faustine Makhokha Omoto as his second wife. The deceased's second wife, Faustine Makhokha Omoto died and her funeral was scheduled to take place on 26th June 2008. On that day, PW1 accompanied the deceased, amongst other people, to Busia District Hospital Mortuary to collect the body of Faustine Makhokha Omoto for burial. The burial was to take place in the deceased's homestead situated in the same compound as the homesteads of the appellants. The appellants are nephews to the deceased. They are the sons of the deceased's older brother who had died earlier. They were opposed to the body of Faustine Makhokha Omoto being buried on that property which they claimed belonged to their late father.

5. At about 3.00pm on that date, the vehicle carrying the body of Faustine Makhokha Omoto arrived at the homestead. PW1 and the deceased were among the persons in that vehicle escorting the body. The appellants stopped the vehicle at the entrance to the compound and barred it from entering the homestead. The deceased, who was apparently sitting in the front passenger seat, disembarked from the vehicle and approached the appellants, with a view to pleading with them to allow him bury his wife. According to PW1, the appellants stated that the body of Faustine Makhokha Omoto would not be buried on the property until a dispute over that property which was pending in court was resolved. PW1 stated that the 1st appellant then retreated and returned with a big club with which he assaulted the deceased by striking him on the head. The second appellant, who according to PW1 was armed with a panga, used that panga to cut the deceased on the head. The deceased staggered and fell down. The coffin bearing the body of Faustine Makhokha Omoto was then unloaded from the vehicle and the deceased, who was bleeding profusely, was rushed to hospital in that vehicle where he died later in the night.

6. Francis Onyango Ochieng, PW2, stated that on 26th June 2008, he was at the home of the deceased to attend the funeral of the deceased's second wife. In his own words, he stated;

“Around 3.00 p.m., the vehicle carrying the body came hooting to the gate. The people waiting at the home went to welcome the body. The two accused came to the gate armed with a rungu and panga. The deceased owner of the home came out of the vehicle. He told first accused to stop barring the vehicle to enter so that their mother could be buried. The first accused hit the deceased on the head with a rungu. The 2nd accused hit him with a panga. The man fell down. The vehicle carrying the body is the one which took the deceased to Vunyungu Health Centre. I walked to the Centre which is nearby. The deceased was treated and referred to Busia district hospital. He later died of the injuries at Busia hospital.”

7. The account by PW1 and PW2 was supported by Alfred Agoro Akumu (PW3) and Stephen Odhiambo (PW4) in every material respect. PW 4 had this to say:

“I saw the two accused Francis Juma Oduor and John Nyongesa preventing the vehicle from getting inside the compound...The accused persons were hostile and were saying the deceased would not be buried there. The deceased tried to plead with the accused persons to allow him bury their mother. He called them watoto wangu (my children). The 1st accused who was armed with a club hit the deceased on the head. Before he fell down, the 2nd accused cut deceased with a panga. The deceased collapsed. We told the driver to carry the body to drive into the compound. (sic) We removed my aunt's body and used that vehicle to take the deceased to Busia district hospital.”

8. Vincent Omoto Othieno (PW5), a son of the deceased, was in the vehicle that ferried the body Faustine Makhokha Omoto and supported the accounts by PW1, PW2, PW3 and Pw 4. He added that earlier that day, as they were leaving the homestead to go to the mortuary to collect the body of his step mother, the 1st appellant had produced an advocate's letter warning his father, the deceased, not to bury the body of Faustine Makokha Omoto on the property without permission.

9. Boniface Ouma (PW6), a village elder, and Christopher Naweno Omoto (PW8), a son of the deceased, who were also present during the incident corroborated the testimonies of the other prosecution witnesses. PW8 went on to say that there had been a long standing dispute between his father and the appellants over the property which originally belonged to his grandfather.

10. Dr. Zacharia Njau (PW7) conducted a post mortem on the deceased on 30th June 2008. He produced his post mortem report. He stated that he noted that the body of the deceased had a cut wound on the skull; that the vertex skull had two extensive fractures and intracranial hemorrhage leaking brain tissue. He opined that the cause of death was cardio-pulmonary arrest due to the head injuries.

11. The last prosecution witness was the investigating officer, O.C Kennedy Lubembe, who was stationed at Bumala Patrol base on 26th June 2008 when the incident took place. He received a report of what transpired from PW 1 who was accompanied by her two sons. Accompanied by other officers, he proceeded to the home of the deceased. They found that the appellants had already been arrested by the District Officer of the area on suspicion of having killed the deceased. After carrying out investigations they recorded witness statements, attended the post mortem of the body of the deceased and the appellants were subsequently charged with the offence. On cross examination, he conceded that a witness by the name Duredea Akoth recorded a statement in which she stated that “it was the son of the deceased who hit the deceased by accident” and that “the blow that landed on the deceased was aimed at John Nyongesa, accused no. 2” That witness stated was marked for identification.

12. In his defence, the 2nd appellant, Francis Juma Oduor, stated that his father, Silvano Oduor Orula, an older brother to the deceased, died in 1996; that his late father is the registered owner of the property known as Title Number Marachi/Kingandole/16 on which the appellants and the family of the deceased live though in separate homes with each family having separate portions of the land. He stated that at about 4.00pm on the material date, he heard a funeral convoy hooting; that whilst outside his house he saw the vehicle carrying the body of Faustine Makhokha Omoto come into the compound and stop near their latrine; that he wondered why the vehicle was in their compound instead of the compound of the deceased. His late father had apparently taught him that it is bad omen for the body of a person who is not a family member to be brought into someone else’s compound.

13. The appellant’s further testimony was that he approached the vehicle carrying the body and saw the driver and the deceased in the front seat; that he asked the deceased why he was passing the body through their gate instead of his own; that the deceased informed him that “he did not want a lot of words”; that his brother, John Nyongesa Oduor, the 1st appellant, joined him and together they demanded that the hearse should be driven out of their compound; that as the driver started reversing, the deceased who was by this time outside the vehicle, hit the 2nd appellant with his walking stick; that the 2nd appellant then got hold of the walking stick; that the deceased held the 2nd appellant with his arms round the body of the 2nd appellant; that Christopher Omoto, PW8, the son of the deceased, then came to the scene, took a piece of timber and attempted to hit the 2nd appellant on the head; that PW8 missed the 2nd appellant and instead hit the deceased by mistake; that the deceased released the 2nd appellant and the deceased then fell down; that other sons of the deceased came to the scene and beat up the 2nd appellant until he fell down; that he was also hit on the head by one of the sons of the deceased, Daniel Moto, with a piece of firewood after which the sons of the deceased ran away.

14. The 1st appellant said that he then ran away and returned to the scene after a short while. He found his mother shouting that her leg had been injured; that his brother, the 2nd appellant was also hurt and that he took him to hospital; that his mother was also taken there for treatment on a bicycle; that he also received treatment and produced treatment notes as defence exhibit 1; that he reported the matter to the Assistant Chief’s office and was referred to Bumala Police Post where together with the the 2nd appellant they reported the matter the following day; that after returning home at about 10.00 am they saw the District Officer and the local chief who arrested them and took them to Bumala Police Post. They were subsequently charged with the offence. He maintained that neither him nor the 2nd appellant hit the deceased and that the deceased was hit on the head by his son Christopher Omoto.

15. The 1st appellant, John Nyongesa Oduori in his defence stated that on 26th June 2008 when the deceased's second wife was to be buried; he was resting at home at about 3.00 pm when he heard hooting; he saw the car with the casket on top at their gate; that although the deceased had his own gate, the car went to their compound; that he saw the deceased in the front seat of the car; that his brother, the 1st appellant was already at the scene as well as other neighbours; that the 1st appellant enquired from the deceased if he had lost his way to his house; that the deceased told the 1st appellant that he did not want many questions and that the appellant should vacate the land; that an exchange ensued and the deceased became annoyed; that the 2nd appellant then told the driver of the vehicle to drive it to the compound of the deceased; that the deceased then hit the 2nd appellant with his walking stick twice; that the 2nd appellant then held the walking stick; that the deceased's son, Christopher Omoto, had a piece of timber with which he wanted to hit him; that he shielded himself and the piece of timber ended up hitting the deceased on the head; that another son of the deceased, Stephen Omoto, hit him on the head with a piece of timber and the 1st appellant intervened and was also hit on the head; that when the deceased was hit by his son Christopher Omoto, he fell down and was bleeding from the head and was thereafter taken by his sons.

16. The 2nd appellant also testified that PW1 slapped his mother; that another son of the deceased also stepped on his mother's leg; that as he was injured in the process, he went for treatment and so did his mother and his brother. He produced treatment records as defence exhibit 2. Thereafter, he went on to say, they made a report to the Police before being arrested the following day.

17. The 1st appellant's wife, Hellen Nabwire Many, (DW3) testimony echoed that of her husband. In her words:

“At 3.00pm I heard a car hoot outside our compound. I was in our side. The deceased's compound is next to ours. The car stopped near our latrine. The car stopped. We went to see when the car had stopped.”

18. And later she went on to say:

“We asked the deceased why he wanted to enter our compound with the body of the deceased. The deceased came out of the car and said that we were going to see that day (sic). He hit the 2nd accused with his walking stick. The 2nd accused held the stick with 2 hands. I saw five sons of the deceased come to the compound. They were accompanied by two sons of our Aunt. A son called Christopher Omoto had a piece of timber. The others had pieces of firewood. They started beating the 2nd accused. They also beat up the 1st accused who managed to escape and go home. Christopher wanted (sic) hit the 2nd accused with the piece of wood. It missed and hit the deceased. The deceased was holding the 2nd accused by his stomach at the time. The piece of timber hit the deceased when the 2nd accused ducked.”

19. According to the witness, it was not proper according to their customary beliefs for the body of Faustine Makhokha Omoto to pass through their gate.

20. The testimony of the appellants' mother, Maria Were Odouri (DW4), echoed that of the other defence witnesses. She however added that her family and that of the deceased lived peacefully but not on talking terms; that the deceased refused to reconcile with them because of the land dispute.

21. After reviewing the evidence, the learned Judge concluded that the testimony by the prosecution witnesses was “consistent, cogent and corroborated each other in material respects.” The Judge found as a fact that it was the 1st appellant who assaulted the deceased with a club and the 2nd appellant cut the deceased on his head with a panga. The Judge concluded:

“Having evaluated the evidence adduced by the prosecution, it was clear that the prosecution established to the required standard of proof beyond any reasonable doubt that it was the

Accused persons that assaulted the deceased respectively with a club and a panga, and thus caused him to sustain the fatal injuries. The evidence was direct. The incident was witnessed by several witnesses who adduced evidence that was consistent. Their evidence corroborated each other.”

22. The Judge rejected the appellants’ defence that it was the deceased’s son who caused the death. Being satisfied that the assault on the deceased was premeditated, the Judge proceeded to convict the appellants for the offence of murder. Thereafter the sentences, as already mentioned, were meted out.

23. Aggrieved, the appellants lodged this appeal.

The appeal and submissions by counsel

24. The appellants filed separate memoranda of appeal raising 14 similar grounds. At the hearing of the appeal, counsel for the appellants, Mr. P. Ochieng Ochieng, abandoned 9 of the grounds in the memoranda of appeal leaving the complaints that given the circumstances under which the offence is alleged to have occurred, the prosecution did not establish that the fatal blow that led to the death of the deceased came from the appellants; that the trial court failed to consider that the appellants were provoked; that the evidence of the prosecution was riddled with contradictions; and that the prosecution or the court failed to call a critical witness.

25. In his address, learned counsel for the appellants referred us to the decision in **Bukenya and Others v Uganda [1972] EA** and submitted one Duredea Akoth, whose witness statement was recorded by the investigating officer, PW9, should have been called as a witness but was not called; that the learned Judge did not in his judgment consider the witness statement of that witness; that the court itself had a duty to call that witness, aware as it should have been, of the contents of the witness statement; that that statement goes to the root of actus reus as it establishes that there was a fight and the appellants were beaten up; that had that witness been called, her evidence would have supported the defence evidence and the conclusion by the trial court would have undoubtedly been different.

26. Counsel faulted the trial Judge’s finding that the appellants committed the offence; that the Judge misdirected himself in his finding that the injury to the deceased’s head was caused by a blunt and sharp object and that a piece of timber would not occasion the injuries sustained by the deceased; that there was no evidence to support those findings.

27. On mens rea, counsel submitted that the evidence showed that the appellants had a conversation with the deceased prior to the incident; that the finding by the Judge that the appellant was prepared with a club is baseless as there was clearly a fight in which the appellants, the appellants’ mother and the deceased were injured. Counsel concluded by arguing that the trial court should have been alive to the circumstances under which the incident occurred. That had the court been alive to those circumstances, it would have acquitted the appellants. With that, counsel urged us to allow the appeals or at worst substitute the conviction with one of manslaughter.

28. Opposing the appeal, learned Prosecution Counsel, Mr. E. Ketoo, submitted that the prosecution proved its case to the required standard; that the contents of the witness statement by Duredea Akoth who was not called to testify must be measured against the other witnesses; that nothing stopped the appellants themselves from calling Duredea Akoth as a witness.

29. According to Mr. Ketoo, the post mortem report as well as the eye witness accounts by the prosecution witnesses who placed the appellants at the scene of crime support the findings by the trial Judge; that the fact that the 1st appellant after arguing with the deceased retreated and returned with a club and the fact that the 2nd appellant was armed with a panga sufficiently demonstrates the appellants’ state of mind; that they had formed the intention to commit a felony and mens rea was established within the parameters of Section 206(c) of the Penal Code.

30. On the suggestion that at best manslaughter was established, counsel submitted that the land dispute

between the appellants and the deceased was not a basis for taking the deceased's life. With that, counsel urged us to dismiss the appeal.

Analysis and determination

31. We have considered the appeal and submissions by counsel. There are two issues that arise. The first is whether the prosecution proved its case to the required standard. Related to that is the question whether the omission to call Duredea Akoth as a witness is fatal to the convictions. The second issue is whether there was evidence of provocation and whether circumstances justify the substitution of the conviction for the charge of murder with that of manslaughter.

32. We begin with the question whether the prosecution proved its case to the required standard. Based on our review of the evidence, the version of events as narrated by the prosecution witnesses intersect in many respects with the version of events as narrated by the defence. It is not in dispute for instance, that on 26th June 2008, at about 3.00 pm the appellants, being opposed to the burial of the body of the deceased's second wife on the property, they stopped the vehicle carrying the casket from either entering the property or proceeding further within the property; that the deceased who was in the front passenger seat of the vehicle carrying the casket disembarked from the vehicle; that the deceased and the appellants engaged in a confrontation regarding whether the body of Faustine Makhokha Omoto would be buried on the property; and that a scuffle ensued.

33. According to the prosecution witnesses, however, the 1st and the 2nd appellants were armed with a club and a panga respectively which they employed on the deceased inflicting fatal injuries. The appellants on the other hand maintained that the deceased's son who arrived at the scene during the confrontation got hold of a piece of timber from the vehicle and aimed to strike the 2nd appellant with it, missed and hit his father, the deceased, and as a result the deceased fell down and subsequently died in hospital as a result.

34. Faced with the two versions regarding who struck the fatal blow that resulted in the death of the deceased, the trial Judge considered the totality of the evidence including the medical evidence by PW7 and the post mortem report that he produced. The Judge was impressed by the consistency in the testimonies of the prosecution witnesses. He concluded that the injuries the deceased sustained were consistent with the weapons he found the appellants to have had in their possession, namely a club and a panga respectively.

35. On our part, we are also satisfied that the prosecution proved its case against the appellants to the required standard. There was evidence that the appellants had intimated from the onset that the body of Faustine Makhokha Omoto would not be buried on the property. They had waved an advocate's letter earlier that morning, warning that burial should not take place on the property. They prevented the vehicle carrying the casket with the body from proceeding into the compound. The testimony that they were armed with a club and a panga respectively was not shaken on cross examination. Neither was the testimony that the 1st appellant struck the deceased with the club on his head and the 2nd appellant followed that up with cutting the deceased with the panga. In his post mortem report, Dr. Zacharia Njau, PW7, who examined the deceased's body on 30th June 2008 observed that the deceased had a "cut wound on the scalp extending from the frontal to the vertex" that was stitched. The vertex skull had two extensive fractures. Like the trial Judge, we too take the view that these injuries are consistent with the objects used by the appellants. There is also the consideration that although the appellants claimed to have sustained injuries in the course of the scuffle with the deceased and produced treatment notes in that regard, Dr. Njau, who examined them on 15th July 2008, hardly 15 days after the incident, and produced P3 forms did not observe any physical injuries on the appellants.

36. As to whether the omission to call Duredea Akoth as a witness is fatal to the convictions, we accept, as submitted by counsel for the appellants, that **Bukenya and Others v Uganda** (supra) is authority for the proposition that the prosecution must make available all witnesses necessary to establish the truth and that court has the right and duty to call witnesses whose evidence appears essential to the just decision of

the case. In this case, the witness statement of Duredea Akoth was before the court although the witness was not called for reasons that are not apparent from the record. The substance of her evidence as contained in that statement was that she saw the appellants asking the driver of the vehicle that was ferrying the body of Faustine Makhokha Omoto to use an alternative route; that she saw the deceased alight from the vehicle with a rungu; that she saw the sons of the deceased assault the appellants with planks of wood; that she witnessed the son of the deceased aim at hitting the 2nd appellant but missed and instead hit the deceased hard on the head after which the deceased collapsed. Although that witness was not called to testify for reasons that are not apparent from the record, the substance of her statement was considered against the prosecution evidence before the Judge concluded that the prosecution evidence was not dented. Although the prosecution and the court should have considered calling Duredea Akoth, we are not prepared to say that the failure to do so was fatal to the convictions. There was overwhelming evidence on the basis of which the Judge was satisfied that the prosecution had proved its case to the required standard.

37. That leaves the question of provocation. Counsel for the appellants suggested that the circumstances were such that a verdict of manslaughter should have passed as opposed to murder. Although, the appellants did not, in their defence, assert that they were provoked, it was nonetheless incumbent upon the trial court to consider the matter in light of the evidence tendered by the prosecution. See **Gunga Baya & Another v Republic [2015] eKLR.**

38. Under Section 208(1) of the Penal Code, provocation is defined as follows:

“The term 'provocation' means and includes, except hereinafter stated, any wrongful act or insult of such a nature as to be 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 servant, to deprive him of the power of self-control and to 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...”

39. As this Court stated in **Peter King’ori Mwangi & 2 others v Republic [2014] eKLR:**

“...Provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation.”

40. In our view, there was no evidence before the trial court on the basis of which the court could find that the appellants were provoked. As already indicated, the appellants set out early in the morning to ensure that the body of Faustine Makhokha Omoto would not be buried on the property. It cannot be said that the circumstances were such as would have caused the appellants to have lost their power of self control and to induce them to commit the offence.

41. There is the matter of the sentence meted out by the High Court. This Court in Joseph **Njuguna Mwaura vs. Republic, Cr. Appeal No. 5 of 2008** that reversed the earlier decision in Godfrey **Ngotho Mutiso vs. Republic Cr. Appeal No. 17 of 2008** affirmed that where, as here, a mandatory death sentence is prescribed by law, the trial court does not have a discretion to impose any other sentence. The custodial sentence imposed by the trial court in lieu of the death sentence is therefore illegal. We have the mandate to interfere. See **Musyeki Lemoya vs. Republic [2014] eKLR.** We therefore substitute the illegal custodial sentence with the death sentence.

42. For all these reasons, the appeal fails and is hereby dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR