IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE JJ.A)

CRIMINAL APPEAL NO. 129 OF 2014

BETWEEN

DAVID KIMATHI NDATHO………………………….……… APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the conviction and judgment of the High Court of Kenya at Meru (Lesiit, J) dated 15th December, 2011

IN

H.C.CR.C. NO. 66 OF 2007)

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JUDGMENT OF THE COURT

By a judgment rendered on 19th December 2012, the High Court at Meru (Lesiit J) found the appellant **David Kimathi Ndatho** guilty of the murder of **H M K** (deceased), convicted and sentenced him to suffer death as by law provided.

That judgment followed a trial at which the prosecution led evidence through five witnesses to show that on the evening of 22nd July 2005 at about 7.30 p.m. the deceased in the company of his brother **I G K** (I) who was a standard five pupil at the time were walking home. They had come from the local Kaukene Market. As they approached their home at [Particulars withheld] village, they were alarmed by loud screams emanating from their homestead to which they rushed, with the deceased running ahead. As they entered the gate to the home, they met the appellant who was carrying a thick piece of timber. He wielded it with both hands and struck the deceased once on top of the head felling him on the spot, unconscious and bleeding from the nostrils. The moon shone bright directly overhead and I clearly saw the appellant who was well-known to him as a neighbour and a good friend of the deceased. He was a mere 5 meters away. The appellant dropped the piece of timber at the scene and left.

Seeing the deceased thus stricken, I raised the alarm and neighbours came. They included **Elizabeth Kanyiri** (Elizabeth) who is the appellant’s sister. Some of these neighbours took the deceased to hospital

but he succumbed to his injuries and died the following day at 5.00 p.m.

Upon post-mortem examination of the body, the Meru Medical Superintendent, **Dr. Maiji** formed the opinion that the cause of death was brain compression by large extra dural hematoma following blunt trauma to the head with severe hemorrhage leading to shock.

It turns out that the screams that caused the deceased to hasten homeward only to be mortally assaulted were those of his other brother **C M** (C) who at the time was on the receiving end of lashing with a rubber whip wielded by the appellant. The appellant did not say so but he apparently was whipping C for being together with one **Purity Makandi**, a young lady who is the appellant's cousin.

Elizabeth testified that on the day the deceased died, the appellant ran away from home. Inspector **Harriet Kinya** who investigated the case testified that the appellant could not be found within Meru and his home area. It was not until 29th July 2007, some two years later that she received information from Maua Police Station that a suspect going by the name **George Kimathi** was being held there in connection with a different offence. He was transferred under security escort to Meru Police Station, and confirmed to be **David Kimathi** the appellant. He was charged with the murder of the deceased leading to the trial, conviction and sentence.

In his sworn defence the appellant denied murdering the deceased with whom he said he had drunk on the material day to the point of intoxication. He suggested that the case against him was fabricated by Elizabeth who had built on his land.

Aggrieved, the appellant at first filed a self-crafted memorandum appeal followed by a supplementary memorandum of appeal filed on his behalf by the law firm of **J. Nelima & Associates**. Both were abandoned by **Mrs. Ntaragwi,** the appellant's learned Counsel who relied on a supplementary memorandum filed by herself in which the learned Judge is said to have erred in;

- **Ordering the trial to start afresh without affording the appellant the opportunity to choose the options in Section 200 of the CPC, to his prejudice.**

- **Failing to enquire into the conditions for and analyze the evidence of recognition.**

- **Putting up theories and hypotheses and shifting the burden of proof to the appellant.**

- **Relying on the evidence of the appellant's absence from his home to make a finding of guilt.**

- **Rejecting the appellant's defence.**

- **Failing to make a finding that the elements of murder were not proved.**

- **Basing the conviction on the evidence of PW3 a single identifying witness without warning herself of the danger of so doing.**

During argument, Mrs. Ntarangwi first contended that the learned Judge did not give the appellant opportunity to elect how the matter was to proceed when she took over the case and started it *de novo.* This was following the transfer of Emukule J, who had previously heard 4 witnesses. According to Counsel, the appellant was entitled to elect to either go on with the case from where it had reached or have it start afresh. The court's decision to start the matter *de novo* prejudiced the appellant, in counsel's view, because Isaya's prior evidence given when he was a minor was now taken before the learned Judge when he had become an adult and the Judge did not have to treat this evidence with the earlier caution. Further, the witnesses who testified afresh got an opportunity to change their testimonies to the appellant's detriment. She cited the decision of this Court in **HENRY KAILUTHIA NKARICHIA & ANOR –VS- REPUBLIC** [2015] e KLR.

Even though **Mr. Mugo**, the learned Senior Prosecution Counsel conceded the appellant's argument

about **Section 200** of the **C.P.C**., we are of the respectful view that both counsels misapprehended the effect of a succeeding Judge's order that a matter start *de novo* and the case law around the section. Far from being a cause of prejudice to an accused person from a fair trial perspective, it actually provides the best safeguard in that the new Judge gets the opportunity to see and hear the witnesses and so make impressions on their credibility. It also allows the accused person to challenge afresh the testimony of prosecution witnesses. Indeed, a trial *denovo* is therefore a full realization, even when at the court's own motion, of the protection afforded an accused person under **Section 200 (3)** which provides that;

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right"***

In the eyes of the law and as practical matter, it is the conviction of an accused person by a magistrate or judge who recorded only part as opposed to the whole evidence that may constitute a prejudice to the accused person and may, if material, compel a retrial under **Section 200 (4)** of the **CPC.** Conversely, the taking of evidence wholly by a succeeding, magistrate or judge is not prejudicial beyond the inconvenience of delay and cannot be a basis for a valid complaint. Nothing therefore turns on this ground of appeal.

Mrs Ntaragwi next submitted that the trial court did not enquire into whether there was sufficient light to enable **I** to positively and assuredly identify the appellant as the assailant. She pressed that even though witnesses stated that there was moonlight on the night, **I** did also state that "it was dark". Mr. Mugo countered this submission by pointing out that **I** stated quite categorically that he could recognize the appellant because of the moonlight which was very bright. We have ourselves perused the record in keeping with our duty as a first appellate court and subjected the entire evidence to a thorough, fresh and exhaustive analysis and reappraisal while bearing in mind that we have not had the advantage of observing the witnesses as did the trial court as they gave live testimony. (See **<u>OKENO –VS- REPUBLIC</u> [1972] EA 32).** Isaya is recorded as having stated as follows;

> ***"He ran to where we were and hit my brother on the head. I was 5 meters from Kimathi when he hit my brother. I could see him with moonlight. The moonlight was very bright because the moon was directly above us."***

Even when he stated in cross-examination that "it was dark" he was nonetheless quite emphatic that he could see Kimathi clearly. The intensity of the moonlight was confirmed by Cyprian who also stated as follows;

> ***"I was able to identify Kimathi with moonlight. The moonlight was very bright."***

Having carefully considered that evidence and all the surrounding circumstances including the account given by Elizabeth about the appellant's flight and disappearance from home and Meru immediately the deceased succumbed to the injury inflicted on him, we are fully satisfied, as was the learned Judge, that it was the appellant who fatally struck the deceased that moon-bathed night.

There seems to be some merit in the appellant's next complaint that the learned Judge ***"created a theory of premeditation"*** when she stated that when the deceased and **I** rushed to their home in response to the screams that turned out be C's "***they met with the accused who had waited for them at the gate, with his hand lifted with a huge piece of timber in his hand."*** We think, with respect, that there was no evidence that the appellant actually waylaid the two brothers. In fact, there is no indication that he even knew in advance that they were on their way, though he may well have seen them as they approached. That notwithstanding, nothing much turns on the issue because the critical fact is that the appellant did wield and use the piece timber on the deceased.

The manner in which the deceased used the timber, lifting it and bringing it down in a swell to blow the deceased's head was intended to either cause his death or cause him grievous harm. This fits into the

definition of ***"malice aforethought"*** found in **Section 206** of the **Penal Code** which the learned Judge cited and properly analyzed and applied to the facts as established before her to find that the offence of murder had been committed. The force used was so great that the head was observed to have had "***extensive linear fractures"*** of the skull leading to ***"massive extradural haematoma approximately 10 cm long and 5cm deep compressing the brain".*** That the appellant's action was inexplicable did not negate the malice aforethought. It may well be that there was no concrete or readily ascertainable motive for his violent act on the deceased who was his friend but, as Mrs. Ntarangwi readily conceded, premeditation or motive are not a necessary ingredient of the offence of murder under our laws. All that is required to be proved is the act of killing coupled with malice aforethought which, as we have already found, were amply proved.

If anything, it would seem from his whipping of **C** over his relationship with **P** that the appellant was anything but thrilled by the gravitation of his sister and female cousin towards the menfolk of the deceased's family. In fact, his own testimony was to the effect that the deceased had ***"as good as married Elizabeth"*** who had built a house on his (the deceased's) land, which provides a glimpse into the animosity he must have borne towards the deceased but, as we have stated, all that is of no moment the ingredient of malice aforethought having been satisfied.

The appellant's conduct in running off and going into hiding immediately after the offence, coupled with the obvious lies that he told during his testimony that he came back to participate in the funeral arrangements; that he attended the burial and had earlier visited the deceased in hospital in the company of ***"Mutembei and others"*** are all indicative of a guilty mind. We therefore think that the learned Judge was within rights to reject the defence offered and to apply the principle stated by this Court in **ERNEST ABANGA ALIAS ONYANGO -VS- REPUBLIC CR. A. 32 of 1990** that when an accused person tells an obvious lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available.

The totality of our consideration of this matter is that the appellant was properly convicted and the sentence imposed upon him was correct. We have no basis upon which to interfere with either. The appeal fails and is accordingly dismissed.

Dated and delivered at Meru this 18th day of July, 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 this is a

true copy of the original.

DEPUTY REGISTRAR