IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE JJA)

CRIMINAL APPEAL NO. 140 OF 2014

BETWEEN

JOSEPH MURIUKI……..…….....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Lesiit, J.) Dated 11th July, 2013)

in

(H. C. Cr. C. No. 34 of 2006

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JUDGMENT OF THE COURT

The appellant **Joseph Muriuki** 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 on the 11th day of December, 2005 at Monyone village in Mumui sub Location Mituntu Location Meru North District in Eastern Province he murdered **Jackson Murerwa Gichara** (**the deceased**).

The appellant denied the charge of murder but offered to plead to the lesser charge of manslaughter which offer was declined by the State hence the trial. The prosecution tendered evidence through six (6) witnesses namely **Margaret Karambu** PW1 (**Margaret**); PW2 **George Macharari**, PW3, (**George**); **Mathew Muthinja Laiboni** PW4, (**Mathew**); **Purity Kairera Mugambi**; PW5, (**Purity**); and lastly **P. C. Samuel Mutinda** PW6 (**P.C. Samuel**). In summary, the evidence is that on the material date the deceased paid a visit to the home of **Saberio** and **Mathew**. They had a chat and then decided to escort the deceased home. After going for a short distance the deceased branched off into a bush to answer the call of nature. **Saberio** and **Mathew** decided to walk slowly ahead as they waited for the deceased to catch up with them. After going for about 14 meters from the point they parted with the deceased they

met the appellant and his brother **Mwiti** coming from the opposite direction headed to the direction **Saberio**, **Mathew** and the deceased were coming from. The two sides exchanged greetings and then by passed each other. It was **Saberio** and **Mathew's** assertion that the deceased was visible to them from where he was answering the call of nature in the bush off the road.

In no time the two heard the deceased screaming for help saying he had been stabbed. When **Saberio** and **Mathew** turned to look back they saw **Mwiti** hit the deceased with a panga. The deceased then started running towards **Saberio** and **Mathew** who also rushed back to meet him. On arrival they noticed the deceased had two stab wounds one on the shoulder and another on the abdomen near the ribs.

Meanwhile **George** (PW3) who was also on his way home heard screams and decided to head in the direction of the screams. On the way he met the appellant headed in the opposite direction holding a knife. George became apprehensive and just stopped to allow the appellant to pass. George continued and on reaching where the deceased was he found the deceased injured. He advised **Saberio** and **Mathew** to remove their clothes to tie the deceased's wounds which they did using **George's** T-shirt and that of **Mathew**.

The screams at the scene attracted many people from the neighbourhood among them **Purity** (PW5). According to **Purity** when she arrived at the scene she found six men surrounding the deceased. One of the six men whom she identified as the appellant had removed his clothes and was standing at a distance from the rest. **Purity** ran to inform **Margaret** PW1, the mother of the deceased.

The matter was reported to the police who came to the scene and removed the deceased's body to the mortuary where a post mortem was eventually carried out by a **Dr. Endaria**. The findings were that there were two incised wounds on the tenth and eleventh inter costal space, measuring 3 cm and extended to the thoracic cavity on the left side, while the other extended to the abdominal cavity. The cause of death was cardiopulmonary arrest due to internal bleeding as a result of multiple stab wounds.

When put to his defence, the appellant gave sworn evidence. It was his testimony that on the material day he left for the home of one **Joel Mungori** whose wife used to sell local brew. On arrival there he found the deceased, **Saberio** PW2 and his brother **Mwiti** already taking alcohol. He ordered a round for himself and those named. They drunk. When it got finished the deceased asked him to call **Joyce** the wife of **Joel** which he did. When she came, the deceased ordered changaa which they took. The deceased then asked the appellant to pay for it which request the appellant declined. They had an argument over it but appellant did not yield to the deceased's demands. The deceased paid the bill and then left followed by **Saberio** and **Mwiti**. The appellant continued drinking for a short while then also left.

It was on his way home near the house of one **Nyororo** that he encountered the deceased who told him that he (appellant) owes him (deceased) money because he (appellant) ought to have paid for the changaa. They started a fight and the deceased tore his T-shirt, trouser and removed his belt. The deceased flashed out a knife and stabbed him. He showed the court the scar where he was stabbed. He allegedly took a stone and hit the deceased on the hand. The knife fell. He picked it and stabbed the deceased only once and then went to the police station and reported the incident. He was issued with a P3 form the report entered in the OB and then refereed to hospital for treatment. He tendered in evidence a P3 form, the treatment notes and the letter on the OB entry all bearing the dates of 11th and 12th December 2005. He was later arrested and charged with this offence.

When cross examined, he maintained he stabbed the deceased only once and he did not know where the others mentioned by the Doctor came from. He maintained that he fought with the deceased and both of them stabbed each other. He added that the prosecution's witnesses did not give a truthful account of what had transpired at the scene.

At the close of the trial the learned trial Judge, **Lesiit J**, found the prosecution's case proved to the required threshold, and on that account found the appellant guilty of the offence charged, convicted him and then sentenced him to death.

The appellant is now before us on a first appeal. He had initially raised six (6) homemade grounds of appeal though wrongly numbered. The learned counsel appearing for him on appeal Mr. **Amos Wamache** adopted these and then abandoned grounds 4, 7 and 8 and argued only grounds 1, 2 and 3. These read that the learned trial Judge erred in law and fact;

1. **In failing to make a finding that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached**.
2. **In failing to observe that malice aforethought was not established in the present case.**
3. **In failing to substitute the main charge of murder to a lesser charge of manslaughter.**

This being a first appeal our mandate is as has been repeatedly restated by the court namely, 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 given due consideration to the record and considered it in the light of the rival arguments set out above. On the facts the learned trial Judge believed the testimonies of **Saberio, George** and **Mathew** (PW2, 3 & 4) as reliable consistent and credible. According to her, these were the witnesses who witnessed the appellant stab the deceased and then run away. She however, doubted the testimony of **Purity** (PW5) as an eye witness because her account of events differed from that of the above three. For example **Purity** said that when she responded to the deceased's distress call for help she found six men at the scene. One of the six men is alleged to have been the appellant who was half naked. This version differed from that of **Saberio** and **Mathew** who said the appellant took off as soon as he had stabbed the deceased and never mentioned witnessing a fight in any way. It also differed with the testimony of **George** PW3 who met the appellant running away from the scene while carrying a knife. This was before **George** reached the scene. It also slightly differed with the testimony of **Margaret** on the number of persons she found at the scene. **Purity** said she left six men at the scene when she ran to call **Margaret** and when she came back they had disappeared, while **Margaret** who purported to have arrived at the scene with **Purity** after **Purity** had called her stated that they found six men at the scene but only recalled the names of **Saberio, George** and **Mathew.**

Turning to the appellant's defence, the learned Judge rejected both the appellant's assertions that his quarrel with the deceased had started at a drinking den when the appellant refused to pay the bill for changaa they had taken because the issue of meeting with the deceased earlier at the drinking den was never raised in the cross-examination of the witnesses. The plea of self defence was also rejected because it was linked to the above quarrel at the drinking place. The appellant's defence was thus rejected as an afterthought as it was never raised in the cross examination of the above witnesses.

As for the principles of law applicable, the learned Judge set out the offence charged, correctly found that malice aforethought as set out in **section 206** of the Penal Code was a key element of the offence. She also correctly ruled that the burden of proof lay with the prosecution.

Turning to case law, the learned Judge drew inspiration from the case of **Daniel Muthee vs. Republic Cr. Appl. No. 28 of 2005 (UR)** and **Morris Alouch vs. Republic Cr. Appeal No. 47 of 1996 (UR)** and arrived at the conclusion that the appellant had been placed at the scene of the stabbing which he had not denied in any way; that the medical report noted multiple stab wounds on the deceased body; and that the infliction of multiple stab wounds was sufficient proof of the appellant's intentions to kill. On that account the learned Judge found the appellant guilty of the offence charged, convicted him and sentenced him to death. These are the findings that the appellant has invited us to overturn on the basis of the grounds of appeal raised above which we now deal with.

On ground one (1) **Section 134** of the Evidence Act Cap 80 Laws of Kenya provides:-

> **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact."**

The record before us indicates that at the end of the proceedings on 18th December, 2012 the prosecution intimated to the court that it had four more witnesses to call. When the trial resumed on the 19th December, 2012 only one witness testified that is **Mathew,** PW4. The court was then informed that a civilian witness as well as the Doctor who had left the hospital where the post mortem was performed were being traced. When the trial resumed next, **Purity** PW5 and **P. C**. **Samuel** PW6 testified. The court was then informed that the Doctor who performed the post mortem could not be traced and requested to produce the post mortem report through **P. C. Samuel** under **section 33** and **77** of the Evidence Act. The defence had no objection and the report was so produced. The court was also informed that the investigating officer had since passed on and could therefore, not be availed to give evidence. When put to his defence the appellant only applied for the production of OB No. 21 of 11th December, 2005. He clearly indicated that he would give sworn evidence with no witness to call.

The position in law with regard to the tendering of witnesses in support of a criminal prosecution is as was stated by the predecessor of the court in the case of **Bukenya & Others vs. Uganda [1972] EA 549** wherein the court enunciated principles that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; second, the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case; and third, that where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

That decision was followed in the case of **Keter vs. Republic [2007] IEA 135** where the court stated thus**:**

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt…"**

See also the case of **Njuguna vs. Republic [2003]IEA 206** where the court upheld the failure to draw an adverse inference against the prosecutions for its failure to call one of the arresting officers.

In light of the above principles it is our finding that in the absence of the appellant pointing out the exact witness left out by the prosecution and the nature of the evidence such a witness would have tendered before court, the complaint that such intended witnesses were not called is not well founded. Second, the appellant who was represented at the trial had an opportunity to apply for such witness to be availed to him for cross examination which opportunity he never utilized. Third, the explanation given by the prosecution that the Doctor could not be traced was plausible. That is why the defence raised no objection to the production of the post mortem report through PW6.

In the circumstances there is nothing in the record to show that the prosecution withheld any material witness so as to invite an adverse inference against them. Ground one of the appeal therefore fails. It is accordingly rejected.

Turning to ground 2, the learned trial Judge correctly found that in order to succeed the prosecution had a duty to prove malice aforethought. The elements of malice aforethought are clearly set out in **section 206** of the Penal Code thus:

> **"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. **…**

Although the appellant did not deny stabbing the deceased, he denied stabbing him more than once. Second, the line of defence the appellant put up was consistent with a defence of provocation or self defence. The trial Judge had this to observe about that line of defence:-

> **"The accused in his testimony admitted to having stabbed the deceased. The accused stated that he was acting in self defence. The accused stated that they were fighting with the deceased whereupon the deceased flashed out a knife and stabbed him. The accused stated that he then took a stone and hit the deceased on the hand and the knife dropped. That he picked the knife and stabbed the deceased.**
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> **The accused stated that PW2 was with the deceased and him at an illicit brew drinking den earlier that day where they took alcohol and where he and the deceased quarreled over who would pay the bill. The accused stated that he was forced to pay. That when he met the deceased at the scene of incident, the deceased was still in the fighting mood.**
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> **I have considered the line of cross examination of PW2 by the defence. At no time was any question put to him regarding the alleged meeting at the drinking den earlier that day. No suggestion was made to the eye witnesses to the effect that the accused and the deceased were fighting when the deceased was fatally wounded. I find the accused defence that he had been with the deceased earlier that day an afterthought and untrue. I also find his defence that he was acting in self defence was also an afterthought and untrue. The prosecution's evidence is clear that the deceased was answering the call of nature when the accused who was passing by suddenly stabbed him before fleeing the scene. Even if the accused was acting in self defence which I have found is not true, the deceased had been stabbed several times which clearly shows that the accused had formed the necessary malice aforethought. The post mortem form shows that the deceased died of cardio vascular shock due to multiple stab wound.**
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> **I have carefully analyzed and evaluated the entire evidence by both sides in this case. I have no doubt that the prosecution has adduced sufficient evidence to prove that the accused without any provocation or known cause attacked the deceased causing him fatal wounds consequently I reject the accused defence. I find that the prosecution has proved the charge of murder contrary to section 203 of the Penal Code**."

In **Republic vs. Oyier [1985] KLR 553** this court held that:-

> **"The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable Tribunal could make such findings or it was shown that the trial magistrate erred in his findings or that he acted on wrong principles."**

In finding that the prosecution had proved its case to the required threshold, it was because the learned Judge found that the infliction of multiple stab wounds was a reflection of the appellant's intention to kill. The learned Judge found support in the cases of **Daniel Muthee vs. Repbulic** (supra) where the victims suffered multiple panga cuts and **Morris Oluoch vs Republic** (supra) where repeated blows caused the fatal injury.

In **Joseph Kimani Njau vs Republic [2014] eKLR** the court followed the holding in **Nzuki vs. Republic [1993] KLR 171** that malice aforethought is a term of art and 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 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."

In light of the above principles the learned trial Judge cannot be faulted on the facts set out above that the fact of multiple stab wounds inflicted without any disclosed form of provocation on the part of the deceased satisfied element (b) of the ingredients for malice aforethought as set out in **section 206** of the Penal Code.

As for ground 3, the reason for the appellant's plea that this was a case of manslaughter was anchored on the defence he put up that the quarrel had started at the illicit brew drinking den and then when they met on the road later on it was the deceased who provoked him into a fight forcing him to defend himself. As observed by the learned Judge this line of defence was never raised in the course of cross examination of those allegedly present at the drinking den namely **Saberio** and **Mathew** (PW2 and 4). It was thus correctly rejected as an afterthought. The defence could have been boosted by the testimony of Purity who saw six men at the scene with the appellant half naked. This physical condition on the part of the appellant would have fortified the appellant's version that the deceased tore off his clothes. As Purity's evidence was rejected by the trial court as untruthful and contradictory, it was not available to the appellant. The trial Judge was in a better position to observe the demeanor of the witnesses and we find no basis for interfering with the assessment of credibility.

In **Mungai vs Republic [1984] KLR 85** the court made observation on the doctrine of provocation and self defence thus:-

"However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English common law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter see *R. vs Ngoilare [supra*] and *R v Shaushi* [1951] 18 EACA 198, the latter of which was cited with approval in *Hau s/o Akonaay v. R* [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs;-

"In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self defence and provocation. This Court had already in *R v. Ngoilale* and *R. v. Shaushi s/o Miya* [1951 18 EACA 164 and 198 indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self defence and in the latter said (at page 200)

'No doubt this element of self defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter."

We have no doubt therefore that in the instant case the learned trial judge should have directed himself in accordance with the rule of Common law which we have cited. "

Applying the above to the appellant's plea of self defence as set out above, the learned Judge found that it fell short of these parameters and the offence could not be reduced to one of manslaughter. That finding was well founded in law and we uphold it.

The upshot of all the above is that we find no merit in this appeal. It 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