**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CRIMINAL APPEAL NOs. 27 AND 28 OF 2015**

**BETWEEN**

**DENNIS MGUTE KAFANI……..……..1ST APPELLANT**

**NGOLO KONZI MGUTE …….....…..……2ND APPELLANT**

**AND**

**REPUBLIC …….....…….……...RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 14th March, 2014*

*in*

*H.C.Cr. Case. No.7 OF 2012)*

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**JUDGMENT OF THE COURT**

**Charo Mgute Lugo** "*deceased*", **Dennis Mgute Kafani** and **Ngolo Konza Mgute** "*the 1st and 2nd appellants*" are members of the same family. Indeed the deceased was a paternal uncle to the appellants. On the night of 11th February, 2012 at about 9.30 p.m. the deceased was asleep in his house in Jibana Location, of Kilifi County in the company of his young son **Kennedy Udzite** (PW 2) when the door to his house was suddenly forced open. Two intruders entered the house whilst armed with a panga and metal bar. They pulled the deceased from his bed and immediately set upon him cutting and hitting him. The deceased screamed for help and PW 2 who was asleep in the next room came out and saw the intruders as they assaulted his father, the deceased. He joined the deceased in screaming for help. The intruders were also armed with a powerful torch and through the bright light emitted by it, PW 2 was able to recognize the intruders as his cousins, the appellants. He noted that whereas the 1st appellant was armed with a panga, the 2nd appellant on the other hand was armed with the metal bar. The screams attracted the attention of the deceased's other son, **Stanley Udzite** (PW 1) who was in his house but within the same compound as that of the deceased.

PW 1 rushed to the house and found the door open. He was armed with a torch and upon entering the house, he saw the two intruders armed with a panga and metal bar assaulting the deceased who was by

then lying on the ground. He recognized the one armed with a panga as the 1st appellant and the other armed with a metal bar as the 2nd appellant. They were both his cousins. He recognized them when he flashed his torch light towards them as he entered the house. On realizing that they had been recognized, the appellants rushed out of the house and in the process dropped the metal bar as well as the torch.

With the assistance of other members of the family and neighbours, and in particular **Douglas Kafani Ngolo** (PW 3), **Munga Ngunzele** (PW 4), **Joseline Zawadi Mgute** (PW 5), **Pole Charo** (PW 6) and **Ngolo Mvoi** (PW 7), they made arrangements and took the deceased to Coast General Hospital where he passed on the following day whilst undergoing treatment. According to **Dr. Francis Otieno** (PW 9) who carried out the postmortem examination of the deceased on 11th February, 2012, he found that the deceased had suffered deep cut wounds on the left ear as well as upper chest. Internally, he had sustained skull fractures on the left side of the head and back. He formed the opinion that the death was due to head injury following repeated assaults on the head.

When their father passed on as aforesaid, PW 1 and PW 2 proceeded to Kaloleni Police Station and reported the incident and gave out the names of the appellants as the culprits. They also handed over the torch and the metal bar left behind by the appellants as they escaped. **I.P Julius Mbate** (PW 8) took up the case. Accompanied by the two witnesses and other members of the family, they proceeded to the house of the 1st appellant which was pointed out to him by PW1. They found him in the house and arrested him. However, efforts to arrest the 2nd appellant did not immediately yield fruit. It was not until 22nd July, 2012 that he was arrested in Msambweni, Kwale County. An information charging them with murder contrary to **Section 203** as read with **Section 204** of the Penal Code was subsequently laid against them. It was alleged that the appellants on the 11th February 2012, at Tsungani Village, Jibana Location in Kaloleni Sub County, within Kilifi County, jointly murdered **Charo Mgute Lugo**.

In defending themselves through unsworn *alibi* statements and without calling any witnesses, both appellants asserted that they were nowhere near the scene of crime. They all claimed that they were in their respective houses when they received information that their uncle had been killed. They proceeded to the scene and found the deceased unconscious. They took him for treatment at Coast General Hospital and when he was admitted, they left the deceased, his wife and other relatives at the hospital and went home. When the deceased passed on, they were arrested and charged for an offence they knew nothing about.

**Muya, J.** having considered the law and evidence and in particular the identification of the appellants by recognition, was satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. Accordingly, he convicted them on the information and upon such conviction sentenced them to death. It is this conviction and sentence that triggered this appeal.

To impugn the conviction and sentence aforesaid, the appellants advanced five grounds of appeal through **Messrs Nabwana & Nabwana & Co. Advocates**. They are that:-

> (i) the circumstances obtaining during the commission of the offence did not favour positive recognition of the appellants;
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> (ii) exhibits were tampered with;
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> (iii) the conduct of the appellants before and after the commission of the crime did not point to guilty minds;
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> (iv) common intention between the appellants to commit the crime was not established; and lastly,
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> *(v) mens rea* / malice aforethought was lacking.

Arguing the appeal, **Mr. Nabwana**, learned counsel for both appellants, submitted that PW 1 and PW 2 had testified that when the crime was committed it was at night and it was also frightening. That it was

not possible to tell whether the source of light available at the scene was sufficient. That given the circumstances, the identification of the appellant whether by visual identification or recognition was doubtful.

On the 2nd ground, counsel submitted that the two exhibits tendered in evidence namely the torch and metal bar had been tampered with prior to being handed over to PW 8. That in any event, there was no evidence that the said exhibits were recovered at the scene. That it was possible that they were recovered elsewhere.

On the conduct of the appellants before and after the commission of the alleged offence, counsel argued that given the manner of their arrest, their guilt was eliminated. That a day after the crime the 1st appellant was warming himself in his house when he was arrested. Had the 1st appellant committed the crime, counsel submitted, he could have fled from the vicinity. Counsel further submitted that the 1st appellant even went to the scene and assisted in the evacuation of the deceased to hospital. With regard to the 2nd appellant, counsel submitted that he was arrested much later because he was involved in another criminal case in Msambweni. Otherwise, he had also been involved in assisting the deceased at the scene.

On ground four, counsel submitted that no common intention to commit the crime by the appellants was proved by evidence. That it was not even stated who between the appellants if at all, delivered the fatal blow on the deceased. In the absence of such evidence, counsel maintained, the offence of murder was not proved. For this proposition, counsel relied on the decision of this Court in the case of **Peter Gachoki & Another v Republic [2002] eKLR**.

Arguing the last ground of appeal, counsel submitted that there was no *mens rea* and or malice aforethought proved against the appellants to make the information stick. In the absence of any evidence in this regard, counsel maintained, the offence was not proved. In support of these submissions, counsel relied on the following authorities: - **Blackstone's Criminal Practice, 2015**, R **v Nedrick [1986] 3ALL ER 1**, **Reg v Woolin [1999] 1 AC 82** and **Bukenya & Others v Uganda [1972] E.A. 549**.

Opposing the appeal, **Mr. Ayodo**, learned Senior Principal Prosecution Counsel, submitted that the identification of the appellants was by way of recognition. That though it was at night, PW 1 was armed with a torch which assisted him in recognizing the appellants. Similarly, the appellants were armed with the torch which they kept flashing in the house which enabled PW 2 to see them sufficiently to be able to recognize them. In the premises, the recognition of the appellants could not be faulted. On *mens rea* / malice aforethought, counsel submitted that the appellants were armed and had intentions to kill the deceased. Indeed, they broke into the house of the deceased and were found hitting and cutting him. With regard to the exhibits, counsel denied that they were tampered with prior to being handed over to PW 8. In any event, counsel submitted, the issue was never raised during the trial. Finally, counsel submitted that by hitting and cutting the deceased repeatedly the appellants were acting in concert, hence common intention could be inferred. It did not matter who delivered the fatal blow.

On first appeal, we are bound to re-evaluate the evidence and reach our own conclusions and as we do so, we must keep in mind that we have to test the evidence for and against each appellant, of course remembering that we did not see or hear the witnesses or the appellants during the trial. We must therefore respect the findings of the trial court on the credibility of witnesses unless there was no basis for such assessment or the assessment was plainly wrong.

The conviction of the appellants turned only on one issue, identification. Indeed, this is the only issue that was pursued by the appellants all through the trial by their learned counsel **Miss Odhiang** and **Mr. Mushelle**. Therefore, the complaints regarding tampering with exhibits, the conduct of the appellants before, during and after the commission of the offence, common intention and *mens rea*/malice aforethought were grounds of defence that were never canvassed by the appellants in the court below. We therefore do not have the benefit of the trial court's take on them. They are being raised for the first time in this appeal. However, as a first appellate court with jurisdiction to subject the evidence taken by

the trial court to fresh and exhaustive re-evaluation, we have to entertain them.

As already stated, the deceased, the appellants, PW 1 and PW 2 are members of the same family. The deceased was a paternal uncle to the appellants. PW 1 and PW 2 were the sons of the deceased. They are therefore cousins to the appellants. Both PW 1 and PW 2 knew the appellants very well. The appellants indeed concede that fact as much. They were therefore very familiar with each other. It is common ground that the offence was committed at night. The evidence of PW 1 is that he heard commotion and screams emanating from the deceased's house. The house of the deceased was in the same compound as his. He armed himself with a torch and went to the rescue of the deceased. On entering the house, he flashed his torch, and saw the appellants. He was emphatic that his torch emitted bright light which enabled him to see the appellants clearly. With the aid of the same light he was able to see which appellant was armed with what weapon that was being used to attack the deceased. He noticed that the 1st appellant was armed with a panga whereas the 2nd appellant was holding a metal bar. He also noticed that the deceased was being attacked whilst lying on the ground. It is also instructive that on the same night PW1 told those who had gathered at the scene immediately after the incident and in particular PW 3 and PW 7, and further, that it was the appellants who were responsible for the assault on the deceased. Under cross-examination by the appellants' counsel, PW 1 and indeed many other witnesses particularly those related to the deceased in one way or another, confirmed that no grudge existed between this witness and the appellants as would have caused him to bear false testimony against them.

With regard to PW 2, he was sleeping in the same house as the deceased when the attack was launched. He actually witnessed the attack first hand. Apparently, the appellants were armed with a powerful torch. As they beat up and cut the deceased on the ground, they were flashing the torch in the house. This enabled PW2 to see them and determine who was armed with what as they attacked the deceased.

The appellants have claimed that given the time and brazen nature of the attack, the two witnesses could not have recognized the attackers. Both the appellants, PW1 and PW2 were at the time in the same house and more so in the bedroom. They were thus in close proximity. The appellants were not disguised at all as to make their recognition difficult. There was light in the room provided by the torches the appellants and PW1 had. They are, as already stated, members of the same family. Given these circumstances, we doubt whether the identification by way of recognition of the appellants by these two witnesses would have been difficult. Of course we bear in mind the fact that: "….*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other*…."See **Anjononi & others v Republic [1980] KLR 59.** However, we are also keenly aware of the warning in **R vs Turnbull [1976] 3ALL ER 549** that:-

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

Given what we have stated, we are nonetheless satisfied just like the trial court that PW 1 and PW 2 clearly and positively recognized the appellants as the persons who caused fatal injuries to the deceased.

With regard to the alleged tampering with exhibits, the appellants did not point out to us the manner and nature of the alleged tampering. All that they submitted was the fact that the exhibits were collected from the scene by PW 1 and PW 2 and then handed to PW 8 at Kaloleni Police Station. To the appellants, that *per se*, amounted to tampering. To our mind, the mere fact that the two witnesses took the exhibits to the police station does not *prima facie* amount to tampering. It is not out of ordinary for victims or witnesses to come across exhibits which they take to police stations. We would be concerned if there was evidence that during the attack, the appellants were not armed at all and out of nowhere, PW 1 and PW 2 concocted exhibits and availed them to the police for the sole purpose of implicating the appellants. All the witnesses who came to the scene that night confirmed seeing the torch and the metal bar which PW 1 and PW 2 testified had been left behind by the appellants as they retreated under the cover of darkness. There was very little or no time at all for PW 1 and PW 2 to have planted those items at the scene. Accordingly, we reject this ground of appeal as well.

Next is the conduct of the appellants during and after the incident. To the appellants the fact that they went to the scene and assisted in the evacuation of the deceased to hospital and after the death did not run away from the village eliminated their guilt. It is instructive however to note that the 1st appellant was arrested a day after the incident. The 2nd appellant on the other hand disappeared from the village and was only arrested in Msambweni five months later. Yes, they may have gone to the scene but that fact alone is no proofs of their innocence. It may well have been calculated to cover their backs. In any event, their being at the scene is not borne out by the evidence. None of the witnesses who went to the scene in answer to the screams ever testified to seeing them at the scene. Nor did the appellants pursue that line in cross-examination of any of the witnesses. The issue of them going to the scene only came through their defences. If the evidence of PW 6, the wife of the deceased is anything to go by, it is doubtful if indeed the 2nd appellant went to the scene. According to her, on her way home, she heard screams and as she rushed home, she met with the 2nd appellant on the way. She was from the direction of her home and when she asked him what had happened, he told her to go and sleep and parted ways. If indeed the 2nd appellant came back to the scene or was at the scene, could this witness have failed to see him?

Further, the 2nd appellant gave the reason for his late arrest as being involved in a criminal case in Msambweni. That may well be true but details were wanting. On the whole we are not satisfied that the conduct of the appellants was anything but innocent.

Regarding common intention, there can be no doubt that the appellants acted in concert. They were both armed with crude weapons and accessed the deceased house forcefully. Upon entry they set upon the deceased and repeatedly hit and cut him. The result of the vicious attack was the death of the deceased. Given these circumstances can the appellants be heard to say that there was no common intention between them to commit the crime? We think not. It does not matter who delivered the fatal blow. The case of **Peter Gachoki** (*supra*) relied on by the appellants to advance the argument for the need to identify the appellant who delivered the fatal blow is clearly distinguishable on the facts with this case. In that case, the deceased was assaulted by various people at various places and times. The beatings continued for a long time involving many people. At times he was assaulted by whips, slaps, panga, and laid bare in the sun. Eventually, the deceased was saved by his relatives and taken to hospital where he died four days later. It was in those circumstances that the court raised the question of common intention and who among the various people who had assaulted the deceased over time, in different manners and places had delivered the fatal blow. This is not the case here. In any event we think that these were joint offenders in the prosecution of common purpose as contemplated by **Section 21** of the Penal Code which is in terms that:-

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

We now turn to deal with the last ground of appeal which is *mens rea*/malice aforethought. The contention by the appellants that it was not proved in this case to warrant their conviction for the offence of murder is not sustainable at all. Malice aforethought is defined and deemed to be established by evidence proving any or more of the following circumstances:-

> **"206.**
>
> **(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;**
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> **(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) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

This being the case, we do not think that the several English authorities cited by the appellants in pursuit of this point are helpful.

In the present case there is overwhelming evidence that the appellants attacked the deceased with a panga and a metal bar. He was repeatedly cut and hit on head. From the evidence of PW 9 who conducted the post mortem on the deceased, the deceased suffered deep cut wound on the head leading to the skull fracture; deep cut wound on the left upper chest and cut wound on the left elbow joint. According to PW 9, death was due to the head injury following repeated assaults on it. These massive wounds inflicted on the head of the deceased were clearly with intent that the deceased should die or suffer grievous harm. Therein lies the *mens rea*/malice aforethought.

The inevitable conclusion we have thus come to is that this appeal lacks merit and is accordingly dismissed.

**Dated and delivered at Malindi this 15th day of July, 2016**

**ASIKE- MAKHANDIA**

**…….**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

**K. M'INOTI**

**…….**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**