IN THE COURT OF APPEAL

AT NYERI

SITTING IN MERU

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 36 OF 2015

HENRY KAINDIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court at Meru (Lesiit J.) dated 24th November 2011

in

H.C.Cr. A. No. 52 of 2007)

****

JUDGMENT OF THE COURT

Henry Kaindio ('the appellant') was charged, by way of information dated 18th September, 2006 with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code (Cap 63 Laws of Kenya).**

The particulars of the offence are that the appellant on 20th May, 2006 at Karama location in Meru North District within Eastern Province, murdered **Mark Kaberia** ('the deceased'). The High Court (Lesiit J.), after hearing the evidence of six witnesses, and the appellant's unsworn statement of defence, convicted the appellant of the offence of murder, and sentenced him to death. Aggrieved by the said conviction and sentence, the appellant came to this Court by way of the appeal now before us.

The background of this matter as per the evidence adduced before the High Court is as follows:-

The Appellant and the deceased were brothers. **PW1**, **Jeniffer Nambue,** was their mother. On 6th May 2006, while at her home (**PW1**), was alerted by two of her other children that a fight had broken out. Hurrying to the scene she found the deceased on the ground bleeding from a head wound and the appellant standing there holding a spade in his hand. PW1 noticed some injuries on the appellant's hands and on enquiring what had happened to him, the appellant explained that the deceased had attacked him. It seemed to PW1 that the appellant was in pain.

PW1's cries of alarm alerted the attention of two of her other sons; **David Manyara** (now deceased) and

Peter Mwiti (**PW2**). PW2 explained that together with his brother David Manyara, they found the appellant on top of the deceased holding a spade. They wrestled the spade away from the appellant before tying him up. Neither of them saw what had actually happened and on asking PW1 whether it was the appellant who had hit the deceased, PW1 was also unable to answer saying that she had also arrived after the fact. PW2 and his brother took both the appellant and the deceased to the police station. During cross-examination PW1 told the court that the spade was also taken to the police by her sons on the same day. David Manyara remained with the appellant at the station and the deceased was taken to Tigania Mission Hospital for treatment as he was bleeding profusely.

The deceased was treated and admitted overnight and discharged the following day with an appointment given for 12th May, 2006 in order for his stitches to be removed. On 14th May 2006 the deceased started to complain of headaches. He was taken back to Tigania Mission hospital but they were advised to take him to Meru General Hospital. He was admitted on 15th May, 2006 and an x-ray taken on 16th May, 2006. The doctor advised them that the deceased required an operation. Unfortunately, the deceased died three days later on 19th May, 2006.

During cross-examination PW2 explained that on 6th May, 2006 there was a family meeting and both the appellant and the deceased were in attendance. He told the court that on the previous day, the appellant and the deceased had quarrelled and the matter was to be discussed by the family. The exact nature of the disagreement was uncertain. PW1 told PW2 that the appellant had quarrelled with her over land; whereas the appellant had told PW2 that the disagreement was over miraa.

James Muriungi (**PW3**), uncle to the deceased, and **James Mbaabu** (**PW4**) neighbour to the deceased, identified his body for the post-mortem examination. **Cpl Katulo Ali** (**PW5**) charged the appellant with the offence of assault on 9th May 2006 in Tigania court and awaited news of the deceased's recovery. PW5 later got a report from a relative that the deceased had died on 19th May, 2006 at Meru District Hospital while undergoing surgery. Consequently, on 23rd May, 2006 the assault charge was withdrawn and substituted with the murder charge. According to PW5, on 25th May, 2006 he went to the appellant's home from where he recovered the spade which he found in a cow shed. He told the court that the spade was identified by David Manyara as the one that the appellant had used to hit the deceased with.

Dr. Isaac Macharia (PW6), based at Meru District Hospital, performed the post-mortem on the deceased on 23rd May, 2006. PW6's examination revealed a compound fracture of the left parietal bone of the skull and bleeding in the brain on the same side of the fracture. PW6 concluded that the cause of death was the head injury. PW6 defended the treatment given to the deceased at Tigania Mission Hospital explaining that in the circumstances stitching up the deceased was proper. After close of the prosecution case, the court (Kasango J.) found that the appellant had a case to answer and placed him on his defence.

In his defence, the appellant told the court that on 6th May, 2006 he was on safari from Maua where he used to work. At around 2:00 p.m he headed for the stage to get a vehicle home but was unable to since there was a matatu strike. He admitted to being arrested on 6th May, 2006 and placed in police custody. He said that on 17th May, 2006, his mother, PW1, was brought to the station and forced to record a statement. He told the court that he was detained in police custody for 4 months, before being taken to court for plea on 3rd October, 2006. The appellant insisted that the case against him was a fabrication.

After the hearing and consideration of the entire evidence and submissions by parties, the court, (Lesiit J.) found that although the prosecution case was purely predicated on circumstantial evidence as adduced by PW1 and PW2, the prosecution had proved the case against the appellant beyond reasonable doubt as by law required.

According to the learned Judge, the principles to be established before a conviction based on circumstantial evidence can be made, as set out by this Court in the case of **Abanga alias Onyango v R, Criminal Appeal No. 32 of 1990** had been satisfied. The learned Judge therefore made a finding that the prosecution had established that it was the appellant who had caused the injuries that led to the death of

the deceased. According to the learned Judge, the appellant did not deny this when he was taken to the police station by PW2 and his late brother. The learned Judge dismissed the appellant's defence of alibi as mere denial noting that there was overwhelming evidence that the appellant was the only one near the deceased at the time the deceased suffered the fatal injuries. The court was convinced that the prosecution evidence rebutted the defence of alibi put forward and convicted the appellant of the offence of murder as charged.

Aggrieved, the appellant filed the Memorandum of Appeal dated 12th November, 2013 in which he raised three homemade grounds. Later, on 18th May, 2016, Ms Thibaru, court appointed learned counsel who represented the appellant in this appeal, filed supplementary grounds of appeal and abandoned the grounds filed by the appellant. These grounds were to the effect that the trial court erred in law and fact *by convicting and sentencing the accused for the offence of murder which was not proved beyond reasonable doubt; and by relying on the prosecution's evidence that was full of contradictions and inconsistencies.*

It was learned counsel's submission that the evidence on record was not sufficient to support the charge of murder. Counsel submitted that PW1 admitted that she did not see the attack on the deceased, and further that the appellant had told her that it was the deceased who had attacked him. Counsel further submitted that the learned Judge concocted evidence when she stated that the appellant was found on top of the deceased. Counsel pointed out inconsistencies in evidence, such as, when it was reported that the spade was recovered nineteen (19) days after the incident when previously PW1 had stated that it had been taken together with the appellant to the police station. Counsel argued that the learned Judge seemingly relied on evidence that was not on record.

Counsel urged that even if it was concluded that it was the appellant who caused injuries to the deceased which subsequently led to his death, it was clear from the evidence that it was as a result of a fight and the appellant could only be convicted for manslaughter and not murder.

The appeal was opposed by Mr. A. Musyoka, learned counsel appearing for the State. He reiterated that the evidence by PW1, PW2 and PW5 was cogent and that the appellant was found holding a spade while the deceased was on the ground bleeding. On the recovery of the spade, counsel argued that though PW1 and PW2 stated that the spade was taken to the police station together with the appellant, it was not stated that the same was received. This was done nineteen (19) days later. Counsel urged the Court to find that the circumstantial evidence on record led to only one conclusion, that of the appellant's guilt.

Counsel argued that the spade being a dangerous weapon, the appellant should have known that a blow to the head would be fatal. Further that instead of offering the defence of self-defence he had offered one of alibi. Counsel argued that his conduct pointed to committing murder and urged the Court to uphold the conviction and sentence and dismiss the appeal.

Being a first appeal, this Court is duty bound to re-analyse and re-evaluate the evidence on record and come to its own conclusion, bearing in mind that the trial court had the advantage of seeing the witnesses' demeanour and hearing their evidence. See: **Okeno vs. Republic [1972] EA 32**.

We have, in loyalty to this duty, rehashed the evidence adduced before the trial court above. What we need to do next is to re-evaluate the same and reconsider it afresh and draw a conclusive finding as to whether the said evidence can support a conviction on the charge of murder.

We start with the primary but very important issue of whether *actus reus,* or the physical act of killing the deceased was proved against the appellant. It is not disputed that none of the witnesses who testified saw the appellant actually hit the deceased. We note however that his own mother told the court that when she rushed to the scene, she found the appellant standing there holding the spade as the deceased lay on the ground next to him with an injury on his head. This scene was also described by the two brothers of the deceased who rushed to the scene following their mother's screams.

There was nobody else at the scene who could have caused the fatal injury on the deceased's head.

Indeed, according to PW1, the appellant himself had injuries on his hands and when asked what had happened, he told PW1 that it was the deceased who had injured him. It was clear therefore, beyond peradventure that the appellant and the deceased were involved in a scuffle that left the deceased with the injury on his head, and the appellant with the injuries on his hands.

The law on circumstantial evidence is well settled. The predecessor of this Court set the pace in several decisions from which we have not deviated to date. For instance, in **Simon Musoke v R [1958] E.A. 715** the Court pronounced itself as follows:

> ***"In a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

The circumstances prevailing must also be such that there was no opportunity for anyone else to commit the act complained of. In this case, there was nobody else at the scene; the appellant was found holding a spade; the deceased was lying there with the injury that was to later on claim his life; the appellant had injuries on his hands and on being asked what had happened to him, he explained that it was the deceased who had caused them.

From these circumstances, it is evident that the two were engaged in a scuffle, as a result of which the deceased suffered the fatal injury on his head. We are satisfied that *actus reus* was proved through the circumstantial evidence on record. We find that it was the appellant who killed the deceased.

This brings us to the next issue as to whether the killing was with malice aforethought *(mens rea).* Malice aforethought is defined in **Section 206 of the Penal Code** as an intention to cause death of or to do grievous harm, to any person. It also includes possession of knowledge that the act causing death will probably cause the death of or grievous bodily harm to that person. Malice aforethought, which is a very important ingredient in a charge of murder, was succinctly discussed in the decision of this Court in the case of **Nzuki v R [1993] KLR 171** at page 175 para 34 as follows:-

> *"**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 these 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. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see Hyman – v - Director of Public Prosecutions, [1975] AC 55." (emphasis added).***

In this case, we must ask ourselves whether there was sufficient evidence on record to establish that the appellant intended to cause the death of the deceased, or cause him grievous bodily harm. Admittedly, none of the witnesses witnessed the actual blow landing on the deceased's head. Nobody could tell the circumstances that preceded the scuffle between the two. The Court can only surmise or make its own logical deductions as to what happened. This however cannot be done in the abstract. Other relevant factors must come into play. For instance, in the case of **Bonaya Tutut Ipu & Another V R, Criminal Appeal Nos. 43 & 50 of 2014 [2015] eKLR** this Court cited with approval the persuasive authority of

the Ugandan Court of Appeal case of **Chesakit V UG, Criminal Appeal 95 of 2004** where that Court held:-

> "***In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.***"

The court also drew inspiration from a decision of the predecessor of this Court in **Rex vs Tuper S/O Ocher [1945] 12 EACA 63** wherein, it was ruled:

> ***"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."***

From the circumstances of the case before us, are we able to draw a conclusion that the appellant had the intent to kill the deceased or cause him grievous bodily harm? It is possible that the injury on the deceased's head was caused using the shovel. The injury was also on the head, which needless to say, is a very sensitive part of the body. We cannot however tell how the injury was inflicted. There is evidence that the appellant had injuries on his hands. Nobody could tell how these were occasioned. Was the appellant injured as he tried to wrestle the spade from the deceased? Is it the deceased who got into the path of the spade? These were important questions to which we have no answers. Whereas the blow to the deceased's head was evidently forceful, we cannot say whether the appellant actually aimed the blow specifically at the deceased's head, or what exactly happened. Where such doubt exists, it gets into the way of the prosecution's duty to discharge the burden of proof, and renders a fatal blow to the prosecution case. This case is in our view not dissimilar to the Nzuki case (supra), where in substituting Nzuki's charge of murder with manslaughter, the Court observed:-

> ***"There was complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause grievous harm, the superior court did not direct itself that the onus of proof that the necessary intent was throughout on the prosecution and that the same had been discharged to its satisfaction in view of the circumstances under which the offence in question was committed. Having not done so, and having regard to the environment in which the offence preferred against the appellant was committed as is mentioned above, we are uncertain whether or not malice aforethought, a necessary ingredient of the offence of murder, was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder was unsustainable. His killing of the deceased only amounted to manslaughter.***" (Emphasis added).

In the instant case, we are inclined to find that the trial Court did not address its mind properly on the issue of *mens rea* before convicting the appellant. From the evidence it seems to us that there was a fight between the brothers (the appellant and the deceased) which resulted in the death of the deceased. PW1 had told the court that she had been alerted by her younger children to a fight. Her own observations showed that the appellant was injured and appeared to be in pain. Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within **Section 206 of the Penal Code** on what malice aforethought is. The use of the spade appears to have been a weapon of opportunity as opposed to a weapon of calculated murder. In the words of this Court in **Mugoma & another v Republic, Criminal Appeal No 83 of 2003 [2003] eKLR** whose words we adopt here:-

> "***The actual circumstances of the death of the deceased are not known. In our view, the burden was on the prosecution to prove malice aforethought and that burden has not been discharged***."

There is no doubt in our minds that the appellant caused the death of the deceased, and that it was unlawful. We are not in any doubt either that the alibi defence proffered by the appellant was a concoction of lies. The Court cannot however lose sight of the fact that the burden of proof lay squarely on the shoulders of the prosecution and never shifted to the appellant.

The evidence before the court was sufficient to prove the '*actus reus*' element of the charge but not '*mens rea*'. The *mens rea* having not been adequately established and proved to the required standard, it is our firm view that the charge of murder was not proved. On the other hand however, we are satisfied that the evidence on record discloses a lesser charge of manslaughter.

In the circumstances, this appeal partially succeeds to the extent that we set aside the conviction and sentence on the charge of murder, and substitute therefor a conviction on the charge of Manslaughter contrary to Section 202 as read with **Section 205 of the Penal Code.**

Having considered the mitigation offered by the appellant through his counsel, we sentence the appellant to fifteen (15) years imprisonment. The sentence shall run from the date of conviction by the trial court.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR