IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 45 OF 2012

BETWEEN

PATRICK KAILIKIA M'KAIBI …..……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesit, J.)

dated 10th November, 2011

in

H.C.CR.C No. 15 of 2010)

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JUDGMENT OF THE COURT

1. The appeal before us is against the decision of the High Court wherein the appellant was convicted for the offence of murder. The appellant was charged with murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** in the High Court at Meru. The particulars of the offence were that on 17th March, 2010 at Kiurine Village, Mucuune Sub-Location, Kitheo Location in Meru North District within the then Eastern Province, the appellant murdered Samson Mugambi N'kumbuku (deceased).
2. During the plea taking the appellant stated that he did not intend to kill the deceased hence the trial court entered a plea of not guilty. The prosecution called a total of six witnesses. It was the prosecution's case that the appellant was the deceased's brother in law; he is married to the deceased's sister one Martha Kalotia (Martha). On 17th March, 2010 at around 9:00 p.m. the deceased was with PW1, Sisto Kithinji (Sisto), PW3, Norman Gitonga (Norman), PW4, Patrick Kinyua (Patrick) and Norman Kanyere at a kiosk which was near his father's house. While the deceased and his companions were taking tea at the kiosk they heard screams coming from the deceased's father's home. Suspecting that his ailing father's condition had deteriorated, the appellant requested Sisto, Norman and Patrick to accompany him to the house in case he needed help to rush his father to hospital.

3. PW2, Grace Gatumua (Grace), the deceased's sister, who lived 50 meters away from her father's house also heard the screams and immediately recognized Martha's voice. She ran to her father's house wherein Martha informed her that the appellant had been there causing trouble.
4. Meanwhile Sisto and the deceased walked ahead of the others; the deceased met the appellant near his father's compound and according to Sisto, the two begun quarrelling and fighting. Sisto was able to recognize the appellant with the aid of the moonlight which he described as being bright. Sisto testified that he heard the appellant say that he would kill somebody two times. The two continued fighting while heading towards an avocado tree that was nearby. When Sisto got to the said avocado tree the appellant stabbed him on his hand; Sisto screamed causing the appellant to run away. Thereafter, Sisto noticed that the deceased was lying on the ground.
5. However, Norman and Patrick maintained that they did not see the deceased and appellant fight. According to them, the appellant just suddenly attacked the deceased and stabbed him on his chest. They also gave evidence that they were able to recognize the appellant with the aid of the moonlight.
6. Thereafter, Sisto and the deceased were rushed to the hospital. Unfortunately, the deceased died the following day. PW5, PC Ronald Chemoges (PC Ronald), testified that the incident was reported on the same day; the appellant also came to the station on the same day at around midnight and reported that he had been assaulted. PC Ronald noticed that the appellant had injuries on his forehead and right hand. After establishing that the appellant was connected to the incident that had been reported earlier PC Ronald arrested him.
7. It was the prosecution's case that the appellant and his wife had marital problems; on several occasions the appellant's wife deserted her marital home and went back to her father's house; the appellant blamed the deceased for his marital problems. Subsequently, the appellant was arraigned in court and charged with the offence of murder.
8. In his defence, the appellant gave a sworn statement. He testified that on the material day his wife Martha informed him that her father was unwell; he went to see his father in law in his house at around 4:00 p.m.; he stayed with his father in law until 9:00 p.m. While on his way home he met a man who had worn a mask; the man ordered him to stop but he refused to do so. Suddenly, the masked man cut him on his face. The appellant ran screaming back towards his father in law's house. About three meters from where he was attacked he saw another masked man who hit him with a stick. The two assailants cornered him and stole Kshs. 2,500/= from him. The assailants ordered the appellant to kneel down and demanded for more money. Sensing that his life was in danger, the appellant struggled with the assailants and in the process managed to snatch the knife from one of the assailants. It was during the struggle that the appellant stabbed one of the assailants who he later learnt was the appellant. He maintained that he had no intention to harm anyone on the material day and that his actions were in self defence. The appellant denied having any grudge against the deceased.
9. By a judgment dated 10th November, 2011 the trial court convicted and sentenced the appellant to death. It is that decision that has provoked this appeal based on the following grounds:-

- ***The trial Judge erred in law and fact by convicting the appellant of the offence of murder whereas the ingredients of malice aforethought as set out in Section 206 of the Penal Code were not proved.***

- ***The prevailing conditions were not favourable for a proper account of how the deceased met his death.***

- ***There were glaring contradictions and inconsistencies in the prosecution's case.***

- ***The trial court erred in law and fact by failing to warn itself on the dangers of relying on circumstantial evidence.***

10. Mr. Muriuki, learned counsel for the appellant, submitted that the trial court erred in holding that malice aforethought had been proved against the appellant. He argued that the prosecution had not demonstrated that the appellant had motive to kill the deceased. According to the evidence of PW1 (Sisto), the appellant and the deceased were involved in a fight. The evidence showed that the

appellant had also sustained injuries on his forehead and hands. He urged that the deceased was killed in unclear circumstances. Placing reliance on this Court's decision in ***Peter Kiambi Muriuki –vs- Republic – Criminal Appeal No. 321 of 2011,*** Mr. Muriuki submitted that the offence that was proved was manslaughter and not murder.

11. Mr. Muriuki argued that the prosecution's case was full of inconsistencies. He stated that PW1 (Sisto) testified that at the material time the appellant was not armed while PW3 (Norman) testified that the appellant was armed with a sword. He further submitted that Sisto testified that the appellant and the deceased fought while Norman and PW4 (Patrick) testified that the appellant and the deceased never fought; the appellant just emerged from the bushes and stabbed the deceased. According to him, Norman and Patrick were not credible witnesses. He urged this Court to allow the appeal.
12. Mr. Mungai, Senior Prosecution Counsel, in opposing the appeal, maintained that the evidence against the appellant was overwhelming and supported a conviction for the offence of murder. He submitted that the appellant was placed at the scene of crime by Sisto, Norman and Francis; there was proper recognition; there was also voice recognition. According to him, the issue that arose for consideration is who between the appellant and the deceased caused the fight in question? He urged that the appellant had marital problems with his wife who happened to be the deceased's sister; when the appellant went to his father in law's house he had the intention to cause trouble. Mr. Mungai maintained that malice aforethought had been proved against the appellant.
13. In brief reply Mr. Muriuki submitted that the existence of marital differences could not prove the requisite motive for murder. He maintained that if the appellant had the motive to kill he would not have gone on the material day to visit his ailing father in law.
14. We have anxiously considered the record, the grounds of appeal, submissions by counsel and the law. This Court in ***Dickson Mwangi Munene & Another –vs- Republic – Criminal Appeal No. 314 of 2011*** expressed itself as follows:-

> ***"This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."***
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> See ***Mwangi –vs- Republic (2002) 2 KLR 28***.

15. There are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See ***Nyambura & Others-vs-Republic, [2001] KLR 355)***.
16. From the evidence on record it is not in dispute that the appellant stabbed the deceased with a knife on his chest and as a result of the injuries the deceased died. On one hand, the prosecution's case was that the appellant had the intention to kill or cause grievous harm to the deceased while on the other hand, the appellant maintained that he stabbed the deceased in self defence. The issue that fell for consideration before the trial court was whether malice aforethought was established against the appellant. On the aforementioned issue the trial court in its judgment expressed itself as follows:-

> ***"I find from my analysis and evaluation of the entire evidence by both sides that it was the accused who waylaid the deceased. I am satisfied that the prosecution has proved beyond any reasonable doubt that the deceased had armed himself with a sharp object and lay an ambush against the deceased and attacked him, and fatally wounded him as he went home on the material evening. The prosecution has therefore proved that the accused had formed the necessary malice aforethought to either cause grievous harm or the death of the deceased."***

The appeal before us turns on one issue of whether the foregoing findings by the trial court were supported by evidence.

17. Instances when malice aforethought is established are provided for in ***Section 206*** of the ***Penal Code***:-

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-***

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 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."***

See ***Nzuki –vs- Republic – (1993) KLR 171.***

18. In this case, there two different accounts given by the prosecution of how the incident in question occurred. One account was given by PW1 (Sisto) who testified that upon arriving near the deceased's father's home, the deceased met the appellant and the two begun fighting each other. While fighting, the deceased and the appellant moved towards an avocado tree that was nearby; when they arrived at the avocado tree Sisto could not see or hear them anymore. The other account was given by PW3 (Norman) and PW4 (Patrick) who testified that the appellant emerged from a bush and stabbed the deceased. They maintained that the appellant and the deceased did not fight at the material time. We cannot help but note that the trial court did not make any finding in respect of the said conflicting evidence.
19. In ***Lukas Okinyi Soki –vs- Republic- Criminal Appeal No.26 of 2004*** this Court held,

> ***"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."***

We are of the considered view that the version given by PW1 (Sisto) is more credible. This is because firstly, Sisto and the deceased walked ahead of the others. Therefore, Sisto was better placed to see what happened. Secondly, PW5 (PC Ronald) gave uncontroverted evidence that on the material day the appellant went to the police station and reported he had been assaulted; the appellant had injuries on his forehead and hands. The evidence of the injuries on the appellant was consistent with Sisto's evidence that the appellant and deceased had fought. Thirdly, PW6, SGT. Habil Omuka (SGT Habil) produced the P3 form in respect of the appellant which indicated that the appellant had a deep cut between the thumb and index finger and a cut on the forehead. SGT Habil also testified that when he went to the scene he observed signs of struggle.

20. Having expressed ourselves as herein above, we ask ourselves whether the prosecution proved malice aforethought on the part of the appellant. In this case there was no evidence in respect of what caused the fight or who instigated the same. We also cannot help but note that there was no evidence showing where the weapon used came from. Did it come from the appellant or the deceased or was it at the scene? The answers to the above questions were imperative in determining whether the appellant had the requisite *mens rea* for the offence of murder. The fact that the appellant had marital problems with the deceased's sister was not sufficient to establish

motive to kill the deceased on his part. Without being able to establish the foregoing we find that malice aforethought had not been proved against the appellant.

21. This Court in ***Peter Kiambi Muriuki –vs- Republic – Criminal Appeal No. 321 of 2011*** observed:-

> "In ***Nzuki –vs- Republic (1993) KLR 171 the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What however, was unnerving is that there was no evidence as to there having been any exchange of word between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. ….. The court in substituting Nzuki's charge of murder with manslaughter observed:-***
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> ***"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 unstainable. His killing of the deceased only amounted to manslaughter."***

Consequently, we are of the considered view that the prosecution did not prove the appellant killed the deceased with malice aforethought. Therefore, the evidence on record established an offence of manslaughter and not murder.

22. The upshot of the foregoing is that we find that the appeal herein has merit to the extent we set aside the appellant's, conviction for murder and substitute it with a conviction of manslaughter. We also set aside the death sentence meted to him by the trial court. We sentence the appellant to 15 years imprisonment to run from 10th November, 2011 when the appellant was convicted and sentenced by the High Court.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR