IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MUSINGA, JJ.A)

CRIMINAL APPEAL NO 164 OF 2013

BETWEEN

JAMES MASOMO MBATHA……..……..…APPELLANT

AND

REPUBLIC……..……RESPONDENT

(an appeal from the conviction and sentence of the High Court of Kenya (Makhandia, J.) dated 30th July 2012

in

H.C.Cr. C No 13 of 2007)

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JUDGMENT OF THE COURT

James Masomo Mbatha, the appellant herein, was by way of an information dated 29th March 2007 charged with four counts of the offence of murder. The particulars of those charges were that the appellant, on the 19th day of March 2007, at Manza Village in Machakos District within Eastern Province, murdered Phyllis Kanini Ndundu, Elija Kasyoki Koki, Nditi Nyamai and Susan Mbute Masomo. He was charged with a fifth count of the offence of attempted murder contrary to section 220 (a) of the Penal Code, the particulars of which were that he, on the 19th day of March 2007, at Manza village in Machakos District, attempted to unlawfully cause the death of Regina Koki Mwangangi by cutting her heard with a *panga* severally.

After a full trial in which thirteen witnesses from the prosecution testified, and the appellant gave sworn testimony in his defence, the High Court found him guilty on the four counts of murder and sentenced him in accordance with the law.

The appellant is aggrieved with the convictions and sentence imposed on him. He challenged the findings of the High Court by way of grounds of appeal which he filed in person as well as a supplementary memorandum of appeal filed on his behalf by Mr Oyalo, his counsel on record. Briefly summarised, the grounds raised therein are that the trial was fundamentally flawed because it was conducted without the aid of assessors; the trial judge invoked the provisions of section 200 and 201 of the Criminal Procedure Code yet these provisions were not applicable to trials in the High Court at the time; that the medical

report on the mental state of the appellant was incomplete; that the appellant's defence was never considered; that some aspects of the evidence of PW10 were inadmissible by virtue of sections 25 and 25A of the Evidence Act; that the evidence against him was highly circumstantial and that in the circumstances, the court should have considered reducing the charge to one of manslaughter as there was no malice aforethought proved.

The evidence led by the prosecution was that the appellant was married to Jane Mumbua Francis (PW1). It seems that from December 2005, they began to have a tumultuous marriage. In January 2006, she decided to part ways with the appellant and went back to stay with her parents in Manza. She eventually returned home but due to the appellant's infidelity and lack of support, she left again in December 2006. She returned to her matrimonial home in Nairobi three weeks later, where the appellant told her that he had no money to take their child, Mutile, to school. Jane therefore chose to take the child back to her parents' home in Manza. In February 2007, Mutile returned to Nairobi but the appellant told her to go back to Manza and that she would be taken to school the following year.

On 19th March 2007, Regina Koki (PW3) was at her home in Manza, Machakos township. At around 8:00 pm, the appellant went to their home, and she welcomed him with a cup of tea. He informed Regina and Phyllis that he wanted to take his child to Nairobi; Phyllis asked him to wait until the next day, but he insisted that he would take the child that night. He then stood up and she noticed that he had a panga. He approached Regina and cut her with it on the left cheek, her head and her right shoulder. She ran outside to Francis Mutuku's (PW4) home.

Francis got a bow and arrows and a slasher and went out of the house to the scene of the incident, where he found that the house had smoke inside. He kicked the door in and saw that there was a fire in the sitting room. He called out for water and people begun to bring water and together they put out the fires in different rooms. When he went around the house, he saw his sister's body on the floor. He heard some coughing. When the police came, they opened another room where they found the appellant, unconscious on the bed, with another child who also had cuts on his body. This version of events was corroborated by Jackson Musyimi (PW5).

Dr Virginia Musau (PW6) conducted post-mortems on the deceased. In each of the deaths, she found that the cause of death was cardio pulmonary arrest secondary to head injury, that is to say that the heart and lungs stopped functioning because of the head injuries.

To determine whether the the appellant was fit to stand trial, Dr Catherine Mutisya (PW10), then a consultant psychiatrist at Machakos General Hospital, testified that the appellant gave her his history, stating the he had had two beers, purchased a panga, a knife, some diazinon and three packets of red cat poison. He had gone to the home of his in-laws to discuss the issue of the separation from his wife. He thereafter asked to be given his child, but his sister in law blocked his way, so he slashed her twice. He similarly slashed his mother in law and then three other children. He then swallowed the poison and took the paraffin and set the house on fire. He further stated that he put the burning cushions next to his mother in law and slept while holding his daughter. This witness found the appellant to be well oriented and he explained what happened and he understood the implication of the charge. Dr Mutisya further stated that the appellant did not have a prior history of mental illness and as such, he was of normal mental state at the time of the commission of the offence. On cross examination, Dr Mutisya was categorical that the appellant was of a normal mental state at the time he committed the offence which was evinced by the planning that he undertook.

In his defence, the appellant denied committing the crimes for which he was charged. His testimony was that on the material evening, he went to respond to his wife's request that he call on her mother. He reached his mother in law's house at about 7pm, and he was given a cup of tea that he drunk. He noticed that no other members of the family drank the tea. As he continued to talk to his mother in law he blacked out and awoke to find himself in hospital. He further stated that he was taken to Mathari hospital where he was treated for a mental condition for 4 months.

Upon evaluation of this evidence, the High Court found him guilty of all the charges. The court was fully persuaded that the prosecution evidence was sufficient against the appellant and therefore convicted him.

This is a first appeal, and on the authority of the case of ***Okeno v Republic [1972] EA 32*** among other authorities on the issue, this Court is duty bound to reconsider the evidence, re-evaluate it itself and come to its own independent conclusions. The Court has to bear in mind that unlike the trial court, it did not have the advantage of seeing and hearing witnesses testify. This is more so, in this case in which the trial Court based its decision on credibility of witnesses. This duty was restated by this Court in ***Joseph Kariuki Ndungu & another v Republic [2010]*** ***eKLR (Criminal Appeal Nos. 183 & 188 of 2006)*** in which it rendered

itself in the following manner:

> ***"This being a first appeal, we have a duty to re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of***
>
> ***the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."***

Before we embark on re-evaluating the evidence as is our duty to do, we will first address two issues that took place during hearing in the High Court, which in Mr Oyalo's view rendered the trial a nullity.

Counsel for the appellant submitted that the court was not properly constituted as the provisions of Part IX of the Criminal Procedure Code were not complied with. Mr Oyalo contended that the trial ought to have been conducted with the aid of assessors, as the plea ws taken on 29th

March 2007 before the repeal of the provisions on assessors on 10th October 2007. Because this was not done, learned counsel for the appellant urged us to find that the entire trial was a nullity. Counsel referred us to ***Joseph Munyoki Kimatu v Republic [2014] eKLR (Criminal Appeal No. 130 OF 2013 (UR))*** wherein the following passage appears:

> ***"Since at the time, the trial was with the aid of assessors, the learned trial Judges should have ensured strict compliance with the erstwhile provisions of Section 263, 298 (1) of the Criminal Procedure Code, with regard to the selection and competence to sit as assessors for the assessors who participated in the trial, before the start of the trial; ensuring attendance of all assessors at all times during the trial, summing up to the assessors at the end of the trial, recording on the Court record of the oral opinions rendered by each of the assessors respectively."***

Mr Omondi for the State opposed this assertion and submitted that the provisions on assessors were at the time inapplicable. Counsel urged us to find that since the plea was taken on 30th September 2008, the provisions on assessors had already been repealed.

We have gone through the record of appeal, and found that at no point were assessors ever empanelled. The appellant first took plea on 7th

May 2007 before Sitati, J. The facts in respect of the fifth count, of attempted murder, were not ready at that time, and the prosecution requested an adjournment so that the particulars of charges could be prepared and read out to the appellant at a later date. Due to various reasons the hearing of the matter was adjourned on several occasions. Eventually, the plea was read afresh to the appellant on 30th September 2008. On this date, when the matter came up, Mr Matata who was representing the appellant indicated that the appellant wished to have the charges read out to him again. This was done, and to each of the five counts, a plea of not guilty was entered.

Section 262 and 263 of the Criminal Procedure Code required all trials to be held with the aid of assessors as follows:

> ***"262. All trials before the High Court shall be with the aid of assessors.***
>
> ***"263. When the trial is to be held with the aid of assessors, the number of assessors shall be three."***

This part of the Criminal Procedure Code was eventually amended by the Statute Law (Miscellaneous Amendments) Act No 7 of 2007 which repealed them by deletion. Those provisions, of the Amendment Act, begun to take effect on 15th October 2007. We do not accept the appellant's contention that the trial begun on the earlier date. A trial commences once the accused takes plea in full, that is having the plea read out to him, as well as requiring him to respond to the particulars of the offence read out by the prosecution; in this case, that happened on the 30th September 2008. By that time, the requirement that trials must be held with the aid of assessors had been done away with. As such, the appellant's complaint that the trial was a nullity for failure to empanel assessors is without merit.

The appellant's counsel also took issue with the fact that the trial court invoked sections 200 and 201 of the Criminal Procedure Code. Section 200 provides for ***"conviction on evidence partly recorded by one magistrate and partly by another."*** This section requires a magistrate to give directions in part heard matters and to give the accused person a chance to either opt to have the case heard de novo, or to proceed from where the preceding magistrate had stopped. The record bears out that this is the procedure that Makhandia, J. followed when he invited the appellant herein to make an election on how to proceed with his hearing. In Mr Oyalo's view, this was a fatal misdirection as those sections of the law do not apply to trials in the High Court. We however beg to differ. Section 201 (2) of the Criminal Procedure Code requires that the procedure in section 200 be applied with equal force to trials in the High Court. That section states that:

> ***"201. Rules as to taking down of evidence***
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> ***…***
>
> ***(2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court."***

This ground of appeal therefore fails.

We now turn to consider this appeal on merits, by undertaking our duty as outlined in ***Okeno v R (supra)*** and ***Joseph Kariuki Ndungu & another v Republic (supra).*** In order to sustain a charge and conviction on the offence of murder, the evidence must demonstrate three essential elements. First, is the death of the deceased, and the cause thereof; the second is that the person accused did commit the unlawful act which caused the death of the deceased, and third, that in committing that act,

the accused acted with malice aforethought. See the decision of this Court in ***Abdi Kinyua Ngeera v Republic [2014] eKLR (Criminal Appeal No. 312 of 2012)*** where the Court stated this in the following terms:

> ***"For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. 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."***

The death of the deceased persons is not a fact that is in issue. The evidence of Dr Musau, who conducted the post mortems, was conclusive in this regard, that each of the deceased persons died due to fatal head injuries that were inflicted on them.

The next issue we must consider is whether the appellant is the one who inflicted the fatal injuries on the appellant. Regina (PW3) testified that on the material night, she was home with her mother Phyllis, her son Elijah Kasyoki, her niece Susan Mbute and Evelyn Ndeti Nyamai. The appellant came to the house, where she and her mother welcomed him, and they spoke for a period of about an hour. Trouble begun when the appellant demanded that he be allowed to leave with Susan Mbute; he slashed Regina and she ran out of the house towards

Francis Mutuku's house. When Francis was called by Regina, he went to their house, and found the door locked saw that a fire had broken out in the house. Francis broke the door and put out the fire with the help of some neighbours. After the fire had been put out, they went into the house and found the bodies of

the deceased, and also found the appellant who was still unconscious in one of the beds.

The common thread that runs through the evidence of the prosecution is that the appellant first attacked Regina. She ran away to call for help. When the cavalry came, the appellant was found unconscious, in a burning house with the four deceased bodies. He was the only one who was alive, but the others had all died due to fatal head injuries. To our minds, these set of facts, circumstantial as they may be as nobody saw the appellant actually commit the crime, point to the appellant as the person who was responsible for the commission of the crime. Courts are allowed to rely on circumstantial evidence if the inferences arising of out of the evidence point clearly to the accused, or appellant in this case, as the person responsible for the commission of the crime for which he is accused. In ***Sawe v Republic*** ***[2003] KLR 364*** it was held as follows:-

> ***"1. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of***
>
> ***the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt***.
>
> ***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on."***

And in ***Mwangi & another v Republic*** ***[2004] 2 KLR 32*** the Court stated that:

> ***"It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."***

Applying these principles to the circumstances at hand, it is apparent that the chain of events would only lead to the irresistible conclusion that after Regina ran out of the house, the appellant went on to inflict the fatal injuries on the deceased persons. The evidence points irresistibly to the appellant as being the person who first attempted to murder Regina, and thereafter who actually killed the deceased.

According to Mr Oyalo, the trial court erred in relying on the evidence of Dr Mutisya in conviction of the appellant. He submitted that the court ought not to have relied on this evidence as it was highly prejudicial to the appellant, and that it was also unlawful as it does not accord with section 25A of the Evidence Act. Section 25A provides for the manner in which confessions are taken. Section 25A (1) in particular provides that:

> ***"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice."***

Clearly, this section has no bearing whatsoever on examinations conducted on accused persons for the purposes of determining if they are mentally fit to stand trial. It is the usual practice to have persons accused of murder undergo assessments as to their mental state, so as to determine if they are fit to stand trial. During his examination, the appellant gave an account of what happened on the material night. This is the information that led to the doctor's assessment that the appellant was of sound mind at the time he

committed the offences. Indeed this account shows that the appellant had carefully planned the attack. We do not consider that the evidence was highly prejudicial to the appellant. The doctor was required to give

an opinion to the court using the information that she received from the appellant. We do not see how this opinion would amount to a confession that would then fall under section 25A of the Evidence Act. Even if we were mistaken on this point, and we are not, it was correctly pointed out by Mr Omondi that the evidence of the doctor was not the only evidence that led to the conviction of the appellant.

The appellant's counsel submitted that in the circumstances, the charges of murder ought to have been reduced to manslaughter as there was no malice aforethought present.

Section 206 of the Penal Code provides for malice aforethought. It is established if there is evidence that in committing the unlawful act, the appellant has acted with an intention to cause death, to do grievous harm or to commit a felony. This section provides as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***
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> ***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***
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> ***c. an intent to commit a felony***
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> ***d. an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony."***

In the present case, the sheer force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region, which extended to the skull bones, and exposed her brain. In addition, she suffered a deep cut on her right hand, with a fracture of the right hand. She also had cuts on her legs and suffered burns. Evelyn Nditi Nyamai had deep cuts on the right elbow and several cuts on the skull. Susan Mbute also had two deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain. Surely in inflicting these wounds on the deceased, the appellant intended to cause them fatal harm.

We agree with the sentiments of the High Court when it stated as follows:

> ***"The accused had malice aforethought of the rankest (****sic****) kind. He first cut PW3 locked himself, together with the deceased's persons in the house, armed with a panga, he cut all the deceased and focusing his attacks on their heads and subsequently attempted to burn down the house. In so doing the accused only intended one result, death of the deceased either from the cuts he had inflicted upon them or from the fire burns after he set the house ablaze. There is sufficient evidence as to the accused's motive, in his previous threats, in his choice of weapon, in locking himself in the house, in the focus of his attacks, and in his attempt to burn down the house whilst his victims were* **in situ.** ***All these go towards establishing malice aforethought.***

We now turn to the question of the attempted murder of Regina. Section 220 (a) of the Penal Code provides for the offence of attempted murder as well as the sentence upon conviction:

> ***"(a) attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life"***

It came out in the evidence by Regina that the appellant attacked her with a panga, and he cut her twice on her head. Dr Patrick Litunya (PW12) examined Regina and he noted that she had a deep cut on her face, in her cheek area. The cut extended to her left ear. She also had a deep cut on her right shoulder, as well as a cut on the forehead. He assessed these injuries to constitute grievous harm. To sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of

another. In **Cheruiyot Vs Republic (1976- 1985) EA 47** it was emphasized that;

> ***"an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act".***

We find that the evidence in this case does go to show that the appellant intended to cause the Regina's death by inflicting three deep wounds on her. We find that his conviction on the last count of attempted murder was therefore fully supported by evidence.

Having considered the defence proffered by the appellant, that he had a blackout and awoke later on in the hospital, we are of the view that this was not enough to dislodge the cogent evidence led by the prosecution. In the circumstances, we find that this appeal lacks merit. We confirm the convictions on all counts, and affirm the sentences of death meted out to the appellant in respect of each of the counts of murder. We also confirm the order of the High Court that the sentences in respect of the 2nd, 3rd and 4th counts shall remain in abeyance pending the execution on the sentence of the first count.

We have noted that the trial judge did not pass sentence with respect to the final count of attempted murder. As we have stated above, the punishment for this offence is life imprisonment, and order that the appellant is hereby so sentenced, pending the execution of the sentence of death in respect of the first count.

Dated and Delivered at Nairobi this 8th day of May, 2015

P. WAKI

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JUDGE OF APPEAL

M. WARSAME

…….…….

JUDGE OF APPEAL

D. MUSINGA

……..……

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR

mwk