IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 87 OF 2011

BETWEEN

BENJAMIN SITOT LOMKERENG ……..…...….. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kitale

(M. Koome, J) dated 6th May, 2011

in

HCCRC NO. 62 OF 2004)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of Koome, J (as she then was) delivered on 6th May, 2011 in Kitale HCCRC No. 62 of 2004 in which she convicted the appellant of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced him to life imprisonment.

2. The prosecution case was that the deceased was the appellant's wife. Due to matrimonial differences, the deceased returned to her parents' home in October 2011. On 14thDecember, 2011, the appellant went to his in-laws home where his mother-in-law served him with food. After eating, he left without uttering a word. The following day, that is on 15th December, 2011 at about 8.00 a.m., as the deceased, PW1, PW2 and PW3 walked to Ortum market to do shopping, the appellant shot the deceased with an arrow and thereafter viciously cut her with a panga several times and instantly killed her.

3. Put on his defence, the appellant gave an unsworn statement in which he denied committing the offence. He stated that on 2nd December 2004, he let his wife, the deceased, go and visit her parents and return after Christmas. On the night of 14th December 2004, he was surprisingly arrested and later charged with the offence of murder which he knew nothing about.

4. After hearing the case, as we have stated, the learned Judge convicted the appellant and sentenced him to life imprisonment thus provoking this appeal.

5. In his memorandum of appeal, the appellant listed seven grounds of appeal in which he raised two main points. The first one was that the learned trial Judge erred in convicting him on insufficient, biased and contradictory evidence. The second one was that the learned Judge shifted the burden of proof to him.

6. Presenting the appeal before us, Mr Mutai, learned counsel for the appellant, submitted that when the deceased screamed upon being shot, PW1, PW2 and PW3, who were walking with her, scampered for their own safety and never turned back to see the appellant cut the deceased with a panga as the prosecution claimed. In his defence, the appellant said the police went to his home and asked for the whereabouts of another person, a clear indication that the police were in doubt of the suspect they were looking for. In the circumstances, counsel concluded, the prosecution did not prove beyond reasonable doubt that it is the appellant who killed the deceased.

7. In response, Mr Omwega, learned Assistant Director of Public Prosecutions, submitted that the appellant was convicted on overwhelming eyewitness evidence. He said PW1, PW2 and PW3 saw the appellant, whom they previously knew very well, cut the deceased with a panga. In the circumstances he urged us to dismiss this appeal.

8. We have carefully read the record of appeal and considered the submissions presented to us by learned counsel for the parties. This being a first appeal, we are obliged to exhaustively re-evaluate the evidence on record and come to our own conclusions bearing in mind, however, that having not seen the witnesses testify, we do not have the advantage the learned trial Judge had of assessing their demeanour – **Mwangi Vs Republic [2000] 2 KLR 28.**

9. To secure a conviction for the offence of murder, the prosecution has to prove that the accused, with malice aforethought, killed the deceased. In other words, the prosecution has to prove that there was a death caused by the act or omission of the accused who, at the material time, had malice aforethought.

10. In this case, death is not in dispute. The body of the deceased was identified to Dr. Juma Kibe, who performed the post mortem examination, by the deceased's father PW4 and uncle PW5. What is in dispute is the identity of the murderer.

11. Contrary to Mr Mutai's submissions that upon hearing the deceased scream, PW1, PW2 and PW3 scampered for their own safety and never saw the appellant cut the deceased, the three witnesses testified that they actually saw the appellant assault the deceased. Kama Psinen, PW1, the mother of the deceased, and Cherop Tuliareng, PW2, the deceased's younger sister, testified that they were ahead of the deceased as they walked to Ortum market. Suddenly they heard the deceased screaming. They turned back and saw the deceased with an arrow stuck to her lower abdomen running towards the river. She fell down after a few metres. They then saw the appellant emerge from a nearby bush with a panga and bow and run towards the deceased. He dropped the bow and cut the deceased with the panga several times. After that the appellant ran away and they also ran to Marich Police Station where they reported the matter.

12. Kama Chepengat Lemkow, PW3, was in the company of the deceased as well as PW1 and PW2 as they walked to Ortum market. She was herself behind the deceased. She testified that when the deceased screamed upon being shot with an arrow, she saw the appellant with a panga and bow emerge from a nearby bush and run towards the deceased. She dropped a bag of maize she was carrying and ran backwards to the river where she reported the incident to the people who were prospecting for gold. She did not herself see the appellant cutting the deceased because she ran backwards but she saw the appellant with a panga running towards the deceased.

13. Having ourselves re-evaluated the entire evidence on record, we are in no doubt at all that it is the

appellant who killed the deceased. The offence was committed in broad daylight between 8.00 and 9.00 a.m. PW1, PW2 and PW3 who witnessed its commission knew the appellant very well. So there is no question of mistaken identification. In his report, Dr, Juma Kibe who performed the autopsy on the body of the deceased stated that the body had a deep cut on the anterior aspect of the neck and another one on the tempoid region of the head which exposed the brain tissue. She had also another cut on the fore arm with fractures of the radius and ulna and a deep hole in the abdomen. All these injuries are consistent with the three witnesses' testimony that the appellant shot the deceased with an arrow in the abdomen and cut her with a panga several times.

14. We have also no doubt that the appellant had malice aforethought to murder the deceased. PW1, PW2 and PW3 testified that the deceased had left the appellant's home about two months prior to the incident of 15th December, 2004. The appellant visited the deceased's parents' home several times, the last visit being on 14th December 2004, apparently to persuade the deceased to return to their matrimonial home. Although he did not talk to the deceased on 14thDecember, 2004, this intention is clear from the testimony of his mother-in-law, PW1, whom he told on that day that his quarrels with the deceased were on minor things.

15. Although motive is not an ingredient of any crime - **Joseph Wambirwa Mwanthi –Vs- Republic, Criminal Appeal No 63 of 2005 (CA Nyeri),** we find that the appellant had a motive for assaulting the deceased. She had deserted him for about two months and rebuffed his attempts at reconciliation.

16. By shooting the deceased in the abdomen and cutting her with a panga on the neck and head, the appellant intended to cause grievous bodily harm to the deceased, if not to kill her. We are therefore satisfied that the appellant had malice aforethought as defined by **section 206** of the Penal Code. Consequently, we concur with the learned trial Judge that, with malice aforethought, the appellant killed the deceased. We accordingly find no merit in this appeal and hereby dismiss it in its entirety.

DATED and delivered at Eldoret this 25th day of June, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy