IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NOS. 43 & 50 OF 2014

BETWEEN

BONAYA TUTU IPU……..……..……..……..……..……..1ST APPELLANT

NOEL BUYA KAMALE……..2ND APPELLANT

AND

REPUBLIC.……..……..……..……RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Meoli, J.) dated 3rd March 2014

in

H.C.CR.A. NO. 23 OF 2014)

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JUDGMENT OF THE COURT

This appeal turns solely on the question whether the appellants, ***Bonaya Tutu Ipu*** and ***Noel Buya Kamale***, caused the death of ***Mathew Moya Komora*** **(the deceased)** with malice aforethought. The appellants were convicted and sentenced to death by the High Court, ***(Meoli, J.)*** on 3rd March 2014, for the murder of the deceased contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. Aggrieved by the conviction and sentence, they have appealed to this Court, contending through their learned counsel ***Ms. Chepkwony,*** that the prosecution did not prove beyond reasonable doubt that they unlawfully caused the death of the deceased with malice aforethought. ***Mr. Musyoki***, learned ***Senior Principal Prosecution Counsel***, concedes, that in the circumstances of this appeal, the appellants ought to have been convicted of manslaughter rather than murder.

The background to this appeal is as follows. The appellants are cousins. At the material time, the ***1st appellant, Bonaya Tutu Ipu***, was living with his stepmother, ***Lorna Ndisa Abagerera (PW1)*** at ***Ngao Location*** of ***Tana Delta District*** in ***Tana River County***. The ***2nd appellant, Noel Buya Kamale*** lived at his father's home in the same neighbourhood, about 10 to 30 meters away. On 20th September 2011, at about 11.00 pm, the deceased, who it is common ground was drunk, strayed into PW1's homestead claiming that he had lost his way. PW1, who was already in bed, requested the 1st appellant to escort the

deceased to his home.

Outside the house, the 1st appellant summoned the 2nd appellant and they had an argument with the deceased. The appellants then assaulted the deceased, slapping and kicking him, and accusing him of being a witch. The deceased's screams drew PW1 and other neighbours, among them ***Esther Megi Benjamin (PW4), Morris Kamale Boya (PW5)*** and ***Musanzu Joachim Sulubu (PW6)*** to the scene, where with the aid of electric lighting from a neighbour's house, some of them witnessed the assault. The deceased ultimately fell down, unable to walk. He was assisted by neighbours to ***Ngao District Hospital*** and later transferred to ***Malindi Hospital*** where he succumbed to his injuries on 23rd September 2011.

The cause of death of the deceased, according to the postmortem report prepared by ***Dr. Tayabali*** and produced in evidence by ***Dr. Mumin, (PW10)***, was a raptured spleen leading to internal bleeding.

Both appellants gave unsworn evidence in their defence and did not call any witness. While the 1st appellant admitted his presence and that of the drunken deceased at their home on the material day and time, his evidence was that he had safely escorted the deceased away and only learnt the next day that the deceased was hospitalized. He denied having assaulted the deceased. On his part, the 2nd appellant's defence was that when he heard commotion at PW1's home on the material night, he went to inquire what was happening and found the deceased lying on the ground. Thereafter, with the 1st appellant, they escorted the deceased, who kept falling down, away from PW1's home. It was only later that he learnt that the deceased had died after allegedly being assaulted. He also denied having assaulted the deceased.

Arguing their appeal, Ms. Chepkwony, submitted that whilst the prosecution had proved that the death of the deceased was caused by injuries sustained following assault by the appellants, the prosecution did not prove that the appellants caused the death of the deceased with malice aforethought. It was contended that the appellants were provoked by the intrusion of the deceased in PW1's home late at night and that they had not used any weapon to assault the deceased. It was also argued that according to the evidence of the investigating officer, ***Erastus Njonjo (PW9),*** the appellants thought that the deceased had gone to PW1's home to commit an offence because her home had previously been raided by thugs.

On the authority of the decisions of this Court in ***PATRICK KAILIKIA M'KAIBI V. REPUBLIC, CR APP NO. 45 OF 2012 (NYERI)*** and ***JOSEPH KIMANI NJAU V. REPUBLIC, CR APP NO. 375 OF 2011 (NYERI)***, among others, we were urged to quash the conviction for murder and substitute the same with conviction for manslaughter and also to set aside the death sentence imposed by the High Court and substitute it with sentence for the period already served.

As we have already stated, the prosecution does not support the conviction for murder. Mr. Musyoki, learned counsel submitted that the evidence disclosed the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code because malice aforethought on the part of the appellants was not proved. As regards the sentence, counsel submitted that while the appellants were entitled to use reasonable force, the force that they had used to eject the deceased from PW1's home was excessive and as a result a human life was lost. Noting that the maximum prescribed sentence for manslaughter is life imprisonment, counsel urged us to impose a severe sentence commensurate with the offence.

We have duly considered the record, the one ground of appeal, the submissions of both learned counsel and the authorities cited. Notwithstanding the position taken by the respondent in this appeal, we are enjoined to consider the appeal and make our own independent finding whether or not the evidence adduced before the trial court supports the conviction of the appellants for the offence or murder. In ***PATRICK OMIKUNDA OMUNG'ALA V. REPUBLIC, CR APP. NO. 195 OF 2012 (KISUMU)*** this Court expressed itself thus on the issue:

> ***"While it is the right of the respondent to oppose or concede a criminal appeal, that in itself does not bind this Court. The decision of this Court turns on whether, based on the evidence on record and the law, the conclusions of the first appellate court are proper. The respondent's opposition of an appeal does not invariably lead to a dismissal of the appeal; conversely the***

respondent's concession of an appeal cannot lead to its automatic success."

In this appeal, it cannot be and it is not disputed that the death of the deceased was caused by the unlawful action of the appellants. The real question is whether the appellants caused the death with malice aforethought so as to constitute the offence of murder under section 203 of the Penal Code. ***"Malice aforethought"*** is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amount to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (See ***MORRIS ALUOCH V. REPUBLIC*** **CR. APP. No 47 of 1996).**

Section 206 of the Penal Code provides as follows regarding malice aforethought:

> ***"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –***
>
> ***(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".***

As far as this appeal is concerned, to convict the appellants for the offence of murder, the prosecution had to prove beyond reasonable doubt any of the circumstances under section 206(a) or (b). In concluding that malice aforethought had been proved beyond reasonable doubt, the learned trial judge merely quoted the above section 206 and concluded thus:

> ***"The accused were apparently angered by the intrusion of the deceased on PW1's home on the material night. They together accused him of being a witch. They assaulted him viciously. Their intention to cause him grievous harm is manifested in the viciousness of the attack. Reviewing all the evidence tendered before me, I am satisfied that the prosecution has proved its case against the two accused beyond reasonable doubt. I find them guilty as charged and convict them." (Emphasis added].***

It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of ***CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004,*** the ***Court of Appeal of Uganda*** stated that in determining in 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. Earlier in ***REX V. TUBERE S/O OCHEN (1945) 12 EACA 63***, the former Court of Appeal for Eastern Africa stated thus on the issue:

> ***"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…"***

In this case the assault of the appellant appears to have been on the spur of the moment without any premeditation. All the prosecution witnesses were agreed that none of the appellants used any form of

weapon to assault the deceased and no weapon was ever produced as an exhibit. The evidence on record indicates that the appellants kicked and slapped the deceased, but ultimately the attack turned out to be fatal. The cause of death was a raptured spleen, which is consistent with a kick in the abdomen. The attack took place close to midnight on a drunken person. There was nothing remiss about the conduct of the appellants after the incident; they did not attempt to flee. Instead they continued staying in their village from where they were arrested by the police. We are satisfied that the learned judge did not consider all the surrounding circumstances before concluding that malice aforethought on the part of the appellants was proved beyond reasonable doubt. In particular there was no evidence that the appellants had any knowledge, as required by section 206 (b) of the Penal Code that their action would probably cause the death or grievous harm to the deceased. We are satisfied that on the facts of this appeal, such knowledge cannot be readily inferred, particular as the appellants did not use any form of weapons on the deceased.

Having carefully considered the evidence adduced before the trial court, there is clear and lingering doubt whether the death of the deceased was a natural consequence of the actions of the appellants and if they foresaw death as a natural consequence of their acts. The appellants were entitled to the benefit of that doubt. We would accordingly allow the appeal, quash the appellant's conviction for murder and substitute therefor conviction for manslaughter.

As regards the sentence, the maximum sentence for manslaughter prescribed by ***section 205*** of the Penal Code is life imprisonment. Taking into account the manner and the circumstances under which the offence was committed, and the fact that the appellants have been in custody since their arrest in September 2011, we are satisfied that a sentence of 10 years imprisonment is commensurate with the offence for which the appellants now stand convicted. Accordingly we set aside the sentence of death imposed upon the appellants and substitute therefor a sentence of ten years imprisonment for each appellant, with effect from the date of the judgment of the High Court. It is so ordered.

Dated and delivered at Mombasa this16th day of October,2015

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