IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 46 OF 2007

BETWEEN

JOHN KIRUNJI M'RIMBERE ……..……...…….. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

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

dated 26th April, 2007

IN

H.C.CR.C No. 52 of 2001)

****

JUDGMENT OF THE COURT

This is an appeal against the appellant's conviction and sentence for the offence of murder. Being a first appeal, our primary role is to revisit the evidence that was tendered before the trial Judge, analyze the same independently and then draw conclusions bearing in mind the fact that we neither saw nor heard the witnesses, and make an allowance for that. In **OKENO -VS- R** [1972] EA 32 at p. 36 the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA-VS- R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL .M. RUWAL -VS- R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -VS- SUNDAY POST [1958] EA 424".***

The appellant was charged with one count of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The particulars were that on 15th December, 2000 at Uruku Sub-Location, Kaubao Village in Meru Central District within the then Eastern Province, he murdered Kenneth Gikunda Nkoroi (the deceased). The appellant pleaded not guilty to the charge and the prosecution called a total of 10 witnesses in support of its case.

The evidence before the trial court was that on 7th December, 2000 the deceased, who was apparently uncircumcised, visited one Mwiti, who had just been circumcised. It appears that under Meru customs that was a taboo. The version of what happened next differed between the evidence of Stephen Muthuri (PW3) and Shadrack Mutembei (PW4) on one hand, and that of Nkoroi on the other hand. The evidence by Geoffrey, Muthuri and Mutembei is that Nkoroi sent Muthuri and Mutembei to get the deceased from Mwiti's home. Nkoroi testified that when he came home from hospital on that day, he was informed that the deceased had been taken by a group of people to be circumcised. However, one thing is clear the deceased was forcefully circumcised on that day in Thingithu River.

Again, from the evidence there were different versions of how Mutembei, Muthuri and the appellant became the deceased's caretakers after his circumcision. According to Mutembei and Muthuri, Nkoroi requested them to take care of his son. However, Nkoroi testified that on 9th December, 2000 four men, who included the appellant, Mutembei and Muthuri, approached him and told him they were responsible for the deceased's circumcision and ordered him to pay a fine of Kshs. 4,000/= or they would kill him. He testified further that the three imposed themselves as the deceased's caretakers without his consent.

Thereafter, on 15th December, 2000 at around 7:00 p.m. Fredrick Muthaura (PW1) passed by Nkoroi's home to look for Muthuri. He found the deceased in his room in the company of Mwaki M'meru (PW2) and upon inquiring about the whereabouts of Muthuri, he was informed that he had gone to weigh tea leaves. Five minutes later the appellant, who had a panga, entered the room, placed his panga at the entrance and immediately sat on the deceased's legs; the deceased was then seated on the floor. He pressed a stick, which he had removed from the room, against the deceased's neck and head-butted him. The appellant then proceeded to kick the deceased on his chest several times. When Muthaura asked him what he was doing, the appellant told him he would also come for him, and he left. Mwaki also witnessed the assault on the deceased.

From the record neither Muthuri nor Mutembei, the deceased's care takers, were present during this incident. However, upon their return, the deceased complained of illness and, as they were making arrangements to take him to hospital, he passed away. The postmortem report revealed that the deceased died as a result of bleeding in the chest cavity due to chest injury.

Based on the prosecution's evidence the appellant was placed on his defence and he gave a sworn statement. He testified that on 7th December, 2000 at around 8:00p.m. while at his house, Muthuri and Mutembei called him to check on the deceased who had been circumcised. The deceased informed him he had been beaten by Mbaabu, Muthuri, Mutembei, Kaburu and Gichunge because he had entered a house of a boy who had been circumcised while he was uncircumcised. According to him, he advised Nkoroi to take the deceased for treatment since he complained of sickness all over his body. However, Nkoroi did not have money hence he left after giving Nkoroi Kshs. 500/- for the deceased's treatment. He denied assaulting the deceased and maintained that the charge against him had been fabricated. The appellant also admitted that he was present on 15th December, 2000 and he saw the deceased being punished; he was the one who cut the rope that bound the deceased's hands and set him free.

Upon considering the evidence on record the trial court by a judgment dated 26th April, 2007 convicted the appellant for the offence of murder and sentenced him to death. It is against that judgment that the appellant complains that the learned Judge erred in law and in fact by,

- ***Convicting the appellant of the offence of murder when the prosecution had not proved their case beyond reasonable doubt.***

- ***Relying on evidence which was very contradictory and inconsistent.***

Ms Thibaru, learned counsel for the appellant, submitted that the prosecution had not proved its case beyond reasonable doubt. She submitted that only PW1 & 2, out of the 10 witnesses called placed the appellant at the scene and further that they were co-suspects who had earlier been charged and released. She faulted the learned trial Judge for convicting the appellant based on their evidence despite appreciating that the same may be suspect. Ms. Thibaru submitted that other witnesses exonerated the appellant especially PW4 who testified that he was with the deceased from the time he was circumcised up to his death and at no time did he see the appellant at the scene prior to the deceased's death. She also faulted the learned Judge for relying on the allegations by PW5 that the appellant had threatened him yet he admitted that he had not recorded the threats with the police.

Ms Thibaru submitted that under Meru customs it was permitted for a newly-circumcised boy to be disciplined by beating so as to induct him into manhood. She consequently argued in the alternative that even if the appellant was at the scene, he was merely exercising a disciplinary act which is recognized under Meru customs. According to her, no malice aforethought was proved as against the appellant hence the conviction ought to be substituted with one of manslaughter. She urged us to allow the appeal.

Mr. E. O Onderi, Senior Assistant Deputy Director of Public Prosecution submitted that the State partially opposed the appeal. There was sufficient evidence that the appellant committed the offence, that is, *actus reus* was proved. PW1 categorically stated he saw the appellant assault the deceased. This evidence was corroborated by the doctor who gave evidence that the deceased had bleeding in the chest cavity. He further submitted that there was also evidence that the appellant had a panga but did not use it. In his view there was no evidence of malice aforethought since it was culturally acceptable for a freshly circumcised boy to be disciplined. Hence the injuries inflicted were not intentional. He also urged the Court to substitute the conviction with that of manslaughter.

In brief rejoinder, Ms. Thibaru urged the Court that in the event it was inclined to substitute the conviction to manslaughter to take into consideration the period the appellant has been in custody.

We have considered the record, submissions by counsel and the law. On the issue of accomplice evidence which the appellant contends was improperly acted upon, this Court in **STEPHEN KALENG MAKALALE & ANOTHER –VS- R** (2010) eKLR observed,

> ***"The position in law with regard to accomplices is this. An accomplice is a competent witness against an accused person (see S.141 of the Evidence Act, Cap 80 Laws of Kenya). However such evidence needs corroboration. In the case of UGANDA –VS- SHAH [1966] EA 30, the Court of Appeal For East Africa, in dealing with the question of accomplice evidence, rendered itself, as follows:***
>
> ***"The second and third grounds of appeal were that the learned judge had erred in holding that there was no independent evidence incriminating either the first or third respondent, corroborating the accomplice evidence against them. The facts relied on by the prosecution were the finding of the 113 ½ bags of Arabica coffee on the Busikikiri Estate where only Robusta was grown, and the expert evidence that the coffee so found was similar in quality to the stolen coffee.***
>
> ***The learned magistrate held that these facts were capable of amounting to corroboration.***
>
> **…**
>
> ***Evidence to be corroborative must be independent and it must implicate, or tend to implicate, the individual accused in the offence."***

It is clear from that authority that accomplice evidence is admissible and also that, if believed, it might be relied upon to found a conviction if corroborated by independent and admissible evidence.

In this case we find that the trial Judge correctly cautioned himself on the accomplice evidence and respectfully agree with the following sentiments;

> "***Even if one was to say that PW1, PW2, PW3 and PW4 were accomplices and their evidence was tailored to nail the accused, other evidence independently places the accused at the scene and points to him as certainly and conclusively party to the injuries sustained by the deceased and which led to his unfortunate death just as he was forcefully being ushered into manhood.***
>
> ***In reaching the above conclusions, I am quite alive to one other fact; PW10 said that the deceased died from bleeding into the chest cavity and that he had blunt injuries to the chest. The evidence on record indicates that finding in that the deceased was kicked by the accused on the chest and clearly therefore the doctor's evidence corroborates all other evidence tendered before this court."***

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 malice aforethought. See **NYAMBURA & OTHERS-VS-REPUBLIC** [2001] KLR 355.

From the foregoing it is clear that the appellant kicked the deceased on his chest repeatedly causing bleeding in the chest cavity which led ultimately to his death. The main issue is whether the prosecution had proved malice aforethought on the part of the appellant to justify his conviction for the offence of murder. Both counsel for the appellant and State are of the view that given the so called 'discipline' of freshly-circumcised boys was customarily acceptable, the same could not establish malice aforethought. The answer to this issue lies at ***Section 206*** of the ***Penal Code*** which provides in relevant in part:-

> ***"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;……***

This Court has construed this provision in numerous cases including in **EKAITA -VS- R** (1994) KLR 225, where, at page 230 it held,

> ***"For the purposes of this appeal, where the accused knows that there is a serious risk that the death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not."***

Having considered the entire record and examined the evidence as a whole minutely and exhaustively, we cannot but conclude that the appellant was aware that there was a real risk that his assault on the deceased could result to grievous harm or lead to his death. We find that from the nature of injuries sustained by the deceased that the appellant viciously assaulted him with the intention of causing at the very least, grievous bodily harm. We find and hold that in the eyes of the law the appellant assaulted the deceased with malice aforethought.

Having so found, this appeal lacks merit and is hereby dismissed.

Dated and delivered at Meru this 17th day of December 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

FATUMA SICHALE

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JUDGE OF APPEAL

I certify that this a true

copy of the original

DEPUTY REGISTRAR