IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

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

CRIMINAL APPEAL NO. 79 OF 2013

NATHAN MWITO M'ITABARI …….....…….. APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(*Appeal against judgment of the High Court at Meru (Lesiit, J) dated 20th December, 2011*

in

H.C.CR. C. NO. 74 OF 2005*)*

****

JUDGMENT OF THE COURT

The appellant, **NATHAN MWITO M'IBABARI** was charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars on the information were that on 6th September, 2005 at Kabuiti village, Ngunyunyu Location in Meru North District within the Eastern Province he murdered **CHRISTINE MUKIRIA MWITO**.

The appellant denied the charge and the trial proceeded for hearing before Ouko, J (as he then was) who recorded the evidence of **WINFRED KINYA MWITO (PW1), DANIEL THURANIRA (PW2)**; and **DR. JOHN LUGEDI (PW3).** On 21st July 2009 the trial was taken over by Kasango, J, who informed the appellant of his rights under section 200(3) of the Criminal Procedure Code, and the appellant elected to have the case proceed from where it had reached. Kasango, J thereafter recorded the evidence of **CORP VINCENT KEMBOI (PW4)** and **SAMPSON MUNGATHI (PW5).** In a ruling dated 2nd October, 2009 the court found that the appellant had a case to answer. In his defence, the appellant elected to make a sworn statement of defence. He denied the offence.

On 26th September, 2011 the trial was taken over by Lesiit, J who informed the appellant of his rights under Section 200(3) (wrongly indicated as Section 201(1)) of the Criminal Procedure Code. The appellant elected not to recall any of the witnesses and the defence hearing was deferred to 31st October, 2011 when the appellant's defence was recorded.

On 8th December 2011 Lesiit, J summed up the case to the two assessors; namely **JOSEPH THURANIRA** and **MARY KATHURE,** the third assessor having been discharged. The two assessors returned opinions of guilt. Thereafter the assessors were discharged and the court proceeded to consider the matter. In a judgment dated 20th December, 2011 the appellant was found guilty of murder and sentenced to death as by law prescribed.

The appellant was dissatisfied with the conviction and sentence and he preferred this appeal. In his undated memorandum of appeal, he listed no less than 8 grounds of appeal.

However, when the matter came up for hearing before us on 4th November, 2011, Miss Thibaru, learned counsel for the appellant abandoned all the other grounds of appeal and urged ground 3 thereof. In ground 3 the appellant faulted the trial court for ***"… erring in law and facts in failing to substitute the charges of murder to a lesser charge of manslaughter."***

Counsel submitted that there was no malice aforethought as the appellant dearly loved his deceased daughter and that on the fateful day he had woken up at dawn to go and work in his shamba. As there would be nobody at home to take care of the deceased (his wife PW1had gone to condole with her family over a different death), he carried the deceased with him. He had a panga for use in the shamba. He also took with him a cooking pot for preparing food. Whilst on his way to the shamba, he slipped and the panga fell. The child fell on the panga and sustained a cut that caused her death. As he did not want his other children to witness the death of their sibling, he quickly covered the deceased with branches as he left to inform his brother (PW5). Counsel submitted that there was no express, implied or constructive malice and asked that the charge of murder be substituted with a charge of manslaughter. She relied on the authority of **J.M.M. v R Nyeri C.A. Criminal Appeal no. 271 of 2012** for her proposition that:

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

Mr. Musyoka, the learned prosecution counsel for the state opposed the appeal. He submitted that the appellant removed the deceased from where she slept with her other siblings at 3.00 a.m. and although he carried a panga, a spade and a cooking pot, he did not carry any food for cooking. He refuted the appellant's contention that the deceased fell on the panga as there were no notable bruises on the deceased; that the appellant hurriedly buried the deceased; that the appellant never made a report of what had happened until his wife (PW1) arrived and wanted to know the whereabouts of the deceased; that the appellant reported to PW5 that he had killed his wife and child as at the time the appellant left to go to PW5's place, he had left his wife for dead having cut her 6 times and he was under the impression that she had also died.

This being a first appeal we have an obligation to reconsider and re-evaluate the evidence which was adduced in the trial court and arrive at our own conclusion, whilst however bearing in mind that unlike the trial judge, we did not have the advantage of seeing and assessing the demeanor of the witnesses (See **Chemangong v Republic [1984] KLR 611).** It is against this backdrop that we have considered the memorandum of appeal, the record of appeal and rival submissions of counsel.

The evidence relied on by the prosecution was that on 5th December, 2005 PW1, the appellant's wife left for her father's home to condole her family who had lost a relative. She was escorted by her husband, the appellant. She returned to her home the following day and did not find their second last born daughter, Christine Mukiria, the deceased. Neither was the appellant at home. She inquired from her son, PW2 who informed her that he had not seen the two that morning. PW1 left to go and look for the appellant and she went towards their shamba. She met the appellant and inquired where the deceased was and the appellant asked her to accompany him to where the deceased was. They got to a place where the ground had been freshly dug as if one was preparing a seed bed. She spotted the deceased's sweater and soon thereafter the appellant began to cut her, whilst threatening to kill her. He cut her three times. She

attempted to flee but fell down. As she lay on the ground, the appellant cut her twice more and left her for dead. She was able to walk to a neighbour's place and was taken to hospital and treated.

The evidence of PW2 was that on 6th September 2005 at about 3.00 a.m., the appellant came to the house where he was sleeping with his other siblings and took away the deceased; ***"… so that she sleeps in his house."*** He found this to be "unusual" as their mother PW1 was away. When he got up in the morning, the appellant and the deceased were not there. He could not go to school with his other siblings and was left to take care of the home.

In the meantime, the appellant travelled to his brother's place (PW5) who lived a distance of about 60 miles away. He arrived there at about 11.30. pm. PW5 found the visit strange and questioned the appellant who informed him that he had killed his daughter and wife. PW5 told the trial court:

> ***"I asked him why are you coming at night. It was not usual. He replied that something happened at his home. He said he killed his child and his wife. I asked him why he did so. He said that the wife keeps company with people who he does not get on with. The child when I inquired why he killed, he said it was because of "mengisa." I did not understand what that mean. I saw as though he was mad just like other members of family who are mad. After that he sat on a stool inside the house. I went to bed. When I woke I found him still standing. At 4.00 a.m. when the cock crows I asked what did you say. He said that it was true that he did what he said. He said he had left his bloody clothes in the shamba. I sent for my brothers. I told them what accused was saying. I then confirmed what he said. One brother wanted to beat him. I persuaded him not to. We took accused to police station."***

PW3, produced the post mortem report prepared by his collegue, Dr. Mwangi of Nyambene District Hospital on 8th September, 2005. The Doctor observed that externally the deceased's body had the following:

> ***"… marked whiteness- small laceration on the chest.***
>
> - ***Deep cut though (sic) cartilage of the neck 8-10 cm high – 2cm width.***
> - ***Injury by sharp object.***
> - ***Body exhumed from grave.***
> - ***Cut through trachea- the wind pipe near voice box***
>
> ***- oesophagus was also cut though."***

The post mortem report showed that the cause of death was cardiopulmonary arrest.

On 6th September 2005, PW4 of Maua Police Station received PW1 who had suffered injuries on her hands. She reported the death of the deceased. PW4 proceeded to the scene, and had the deceased's body exhumed from a shallow grave.

In his sworn statement, the appellant told the trial court that he left his home on 6th September 2005 at about 6 a.m. As his other children were to go to school, he carried the deceased on his left shoulder. He also took with him a panga, and a cooking pot. When he got to a sloppy area, he slid and fell. The deceased fell on the panga which cut her neck. In order to protect his other children from shock, he covered the deceased's body with branches and went to report to his brother PW5 and later to the police. He denied having killed the deceased as he loved his daughter so much and he had no reason to kill her.

The fact of the death of the deceased is not disputed. It is however, the appellant's case that he should have been found guilty of manslaughter as opposed to murder as he did not intentionally kill the deceased whom he dearly loved.

In our view, the appellant's actions do not support his contention. He removed the deceased at the crack of dawn (the exact time may not be known), and went with her to the shamba. PW2, one of the deceased's children found the appellant's action 'strange' as their mother (PW2) was not at home for the appellant to take the deceased to sleep in his room. In the morning the deceased and the appellant were not at home and PW2 opted not to go to school so as to take charge of the homestead. When PW1 arrived and found the duo missing, she went to look for them and met the deceased coming from the shamba. Upon inquiry of the deceased's whereabouts, the appellant asked PW2 to follow him so that he could show her where the deceased was. She saw freshly dug ground and the appellant went for her and cut her several times. Thereafter the appellant proceeded to PW5's place and informed him of what he had done.

In our view, the death of the deceased was not accidental. The deceased sustained a ***"deep cut of the cartilage of the neck"*** as well as a ***"cut through trachea."*** Suffice to state that the cuts were 'neat' and not capable of being occasioned by an accidental fall on a panga. The cuts were not consistent with one falling on a panga.

Besides, the appellant cut PW1 severally and left her for dead. Indeed, when he travelled to PW5's place which was about 60km away and arriving there past 11.00 pm, he told PW5 that he had killed his wife and child. He did not tell his brother (PW5) that the deceased had fallen on a panga. We find that the deceased intentionally killed his daughter and that there was malice aforethought. In our view the conviction was properly founded.

The upshot of the above is that we find no merit in this appeal. It 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

…….....…

JUDGE OF APPEAL

F. SICHALE

…….....…

JUDGE OF APPEAL

I certify that this a

True copy of the original

DEPUTY REGISTRAR