IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 87 OF 2014

BETWEEN

JEVAN MWANJAU

JEREMIAH KIMIGHO HASSAN ……………………………………………APPELLANTS

AND

REPUBLIC ……………………………………………………..…………RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Malindi

(Odero,J.) dated 8th May, 2013

in

H.C.Cr.A. No. 8 of 2011)

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JUDGMENT OF THE COURT

The deceased, a young man aged only 17 years joined other teenagers at a video kiosk in Bura Ndogo trading centre, Taveta Township on 6th February, 2011 at 7 p.m. to watch a live televised football match between Liverpool and Chelsea football clubs. After the match, at about 8 p.m. the deceased, in the company of Martin Juma (PW1) Asenga Mwachira (PW2) and Paul Masomo (PW3) were homebound when the latter stopped at a shop to buy some items as the rest walked ahead. The three were accosted by a group of three other young men armed with an iron rod, *rungu* (club) and stones. When the group attacked, PW1 and PW2 took to their heels leaving the deceased behind after falling down as the assailants continued beating him. PW2 reached PW3 and told him what they had encountered. PW3 rushed to the scene and found the deceased being beaten by the three young men who he straight away recognized with the help of electric light from a nearby shop. The three were from his village. He got hold of one of them by the name Lovena but was hit on the hand and had to let him go. The attackers then escaped. The deceased who was in a critical condition was taken to Taveta Hospital. As his condition did not seem to improve he was taken to a hospital across the border, to Moshi, Tanzania. The attack was reported to the police and with the assistance of PW3 a man-hunt for the three attackers was

launched in the village. The three appellants were ultimately arrested and charged initially with assault causing grievous harm. Four days after the incident the deceased succumbed to the injuries inflicted during the attack and died on 10th February, 2011. The appellants were then charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. At some point the third suspect escaped and had not been traced by the time the trial concluded.

The 1st appellant denied involvement in the crime and raised a defence of *alibi*, that he was in his house with his nephew on the night of the attack; that the next day he was confronted by a group of people who demanded from him a list of the youth in the area; that they beat him up in the process; that he was arrested and taken to a place where other arrested youth were being detained; and that he did not know PW3 or the deceased.

The 2nd appellant also relied on an *alibi* defence that he had travelled to Moshi to visit his sick mother in hospital; that he was in Moshi on the night in question; and that infact it was on 6th February, 2011 that he left Moshi to return to Taveta.

He arrived at 9 p.m. and went to his house. The next morning while in his house a group of people descended upon him and, beat him up, claiming he had beaten and killed the deceased. He denied any involvement and stated that he did not know the deceased, or PW3.

The trial Court (**Odero, J.)** considered the evidence presented by both sides and correctly directed herself that the evidence against the appellants was a testimony of a single identifying witness. She warned herself, thus, relying on the famous decision in **Maitanyi** v **R** (1968) KLR 198:

> ***"As a court I am quite mindful of the fact that great care must be taken in relying on the identification by a single witness… I do hereby warn myself of the dangers of relying on the evidence of a single witness on identification."***

After noting that the incident occurred at night she explained that the area was well-lit by electric light; that PW2 recognized the appellants and the third accomplice; that as a result there was no need for an identification parade; that PW3 gave the names of the appellants, hence the appellants were positively identified as the persons who inflicted the fatal injuries on the deceased. The learned Judge concluded that, by using crude weapons to bash the deceased person's head the appellants acted with malice aforethought. She rejected the appellants' *alibi* defence and upon conviction sentenced each one to 25 years imprisonment.

The appellants now challenge the decision in this appeal contending that the offence of murder was not proved in view of the contradictions and inconsistences of the evidence, for example, who was at the scene of the attack?; that the post-mortem report was signed on 14th February, 2011 which should be the date the post-mortem was conducted, yet PW6 told the court he attended the post-mortem on 16th February, 2011. It was further submitted that it was not clear where the murder weapon (*rungu*) was found; that the source of light, its nature and distance from the scene was doubtful; that identification was flawed as PW3, a part from being the only witness could not claim to have identified the suspects who were running away with their backs to him at night; and that malice aforethought was not proved for the reason that, according to the evidence the deceased was not the target of the attack hence, if any offence was proved at all, it could only be manslaughter.

Finally it was submitted that the learned Judge erred, in the face of evidence that the appellants were minors, for trying them and sentencing them like adults. For these reasons Miss Otieno and Mr.Gicharu, learned counsel for the appellants urged us to overturn the decision of the trial court and set the appellants at liberty.

Mr.Monda, learned Assistant Director of Public Prosecutions, in opposing the appeal submitted that the learned Judge had jurisdiction to try the case and did not in any way misdirect herself in trying the appellant in the manner she did; that she was well within the provisions of **sections 73(b)** and **184**(1)

(a) of the Children's Act; and that the charge of murder against the appellants was proved beyond reasonable doubt, following their recognition by PW3 under favourable conditions. In view of the nature of injuries inflicted on the deceased, targeting vital parts of the body, the learned Judge properly found that malice aforethought was proved. She also properly rejected the appellants' sworn defences as they were mere denials, learned counsel urged.

Regarding the age of the 1st appellant, Mr.Monda conceded that the learned Judge erred in subjecting him to a custodial sentence instead of ordering that he be held during the President's pleasure on account of his age, being a child.

When the hearing of this appeal commenced, despite several adjournments to ascertain the age of the 2nd appellant, Miss Otieno suddenly unleashed a copy of his birth certificate purportedly issued on 6th March, 2015, intended to prove that the 2nd appellant was born on 21st January, 1994 which puts his age at 17 years at the time he was tried. For four reasons we reject this evidence on the age of the 2nd appellant but observe first that the issue was never before the trial court even though the appellants had an advocate, and was only raised for the first time in this Court. The birth certificate being in a photocopy form was not authenticated by a certificate that it was made from the original. In mitigation the 2nd appellant's age was given as 21 years, an age assessment report prepared by Dr.Ranzhat Adamjee on 25th May, 2015 and filed in this Court's file on 27th May, 2015 stated that the 2nd appellant was "*over eighteen years of age*" and, finally it is strange as it is perplexing that the 2nd appellant had all along had the birth certificate even as the court adjourned the appeal on 27th October, 2014, 25th February 2015 and 6th May, 2015 for the sole purpose of ascertaining his age and that of the 1st appellant. It is also unusual that, like here, the birth certificate will contain only one name, Kimigho.

Turning to the substance of the appeal, we remind ourselves the appellants on a first appeal expect this Court to subject the evidence as a whole to fresh examination in order for the Court itself to draw its own conclusions, bearing in mind that it has not heard or seen the witnesses. See **Okeno** v **R** (1972) EA 32.

The attack, though not sudden happened at night. The deceased in his death bed confirmed to his mother, PW4, Judith Sembo that he did not know the people who assaulted him. PW1 who was with the deceased and PW2 at the time of the assault too was explicit that although he saw the attackers he did not know them. PW2 on the other hand insisted that he recognized the third suspect, Lovena, but not the others. That leaves only the evidence of PW3. He was not at the scene at the time of the attack, having remained behind at a certain shop. He was however called by PW2 and was able to get to the scene in time to witness the assault. He maintained that this was right outside a shop which had electric right with which he was able to see the assailants who he recognized as persons from his village. He also got close to them and indeed engaged them in a scuffle, in the course of which he got hold of Lovena and only let go of him when he was hit on the hand by a suspect he identified as the 1st appellant. He added that, as a matter of fact he had seen the three appellants earlier on in the day consuming *mnazi* (traditional brew). Immediately the suspects fled the scene he told PW2 that the suspects were "Jey", Lovena and Mwanjau. The Investigating Officer, PW9, CPL David Kithinji confirmed that, in his statement to the police, PW3 recorded that he knew those he found assaulting the deceased.

Under **section 143** of the Evidence Act, in the absence of any provision of law to the contrary, no particular number of witnesses is required to prove a fact. It follows that there is no legal impediment in convicting on the sole testimony of a single witness. The time-honoured principle is that evidence has to be weighed and not counted, that is, whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise as opposed to whether there is a multiplicity or plurality of witnesses. It is therefore open to a competent court to fully rely on the evidence of a solitary witness and record a conviction. Conversely, it is equally true that the court may acquit a suspect inspite of testimony of several witnesses if it is not satisfied about the quality of evidence. The court must, however, where the evidence of a solitary witness relates to identification of a suspect in a criminal case, exercise extreme caution.

In **Maitanyi** (supra) this Court laid the law that;

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the great care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult."***

Some of the considerations in weighing the evidence of a single witness, relevant to the matter before us include;

a. The lighting conditions under which the witness made his or her observation.
b. The distance between the witness and the suspect.
c. Whether the witness had an unobstructed view of the suspect.
d. Whether the witness had opportunity to see and remember the facial features and clothing of the suspect.
e. How long did the witness observe the suspect and which direction was the latter facing?
f. Whether the witness gave a description of the suspect and whether it matched the suspect.
g. The mental, physical and emotional state of the witness before, during and after the observation, and
h. Whether the witness ever saw the suspect prior to the occasion in question.

See ***R*** v **Turnbull** (1976) 3 AII ER 549.

We cannot question the learned trial judge's observation of PW3, that he; *"…gave his evidence in a clear and concise manner and remained unshaken under cross-examination…"* because she had the opportunity which we ourselves lack, of seeing the demenour of the witness. But from his recorded evidence we clearly can see that PW3 was indeed consistent. He recognized the appellants who were his village-mates and who he met from time to time in social places including that very day at a *mnazi*-drinking place. In the course of struggling with Lovena and being hit by the 1st appellant, he got another chance of seeing the appellants at close proximity. He was enabled by electric light, the existence of which was confirmed by the Investigating Officer. Immediately the appellants escaped he told PW2 who they were and later recorded that fact in his statement with the police. In the premise we find that the learned Judge properly directed her mind and correctly found that the appellants were properly identified. What has been identified as contradictions in the prosecution evidence are so minor and insignificant that we do not wish to spend any time on them.

The offence of murder is committed when a person who, with malice aforethought causes death of another person by an unlawful act or omission. Legally stated, malice aforethought is the *mens rea* element of murder or as defined under **section 106** of the **Penal Code**, and paraphrased, it is the suspect's knowledge that his act or omission is likely to cause death or do grievous harm to some person, irrespective of whether or not the person is the one actually killed, or the intention of causing grievous harm to the person attacked, or an intention to commit a felony, or an intention to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. For our purpose, did the attack amount to knowledge on the part of the appellants that the deceased would thereby die?. Did they know that by the manner they attacked him he would suffer grievous harm?. The learned Judge found that the appellants, using crude weapons, aimed and concentrated their blows to the deceased person's head, with the result of death clearly anticipated. The knowledge or intention of a suspect, when considering whether what was done was with malice aforethought, can be inferred from the external circumstances surrounding the act or omission causing death, or from words uttered and the general conduct of the suspect before, at or after the time of the act or omission causing death.

The appellants were armed with a metal rod, *rungu* fitted with a metal (nut) head and large stones. The eye witnesses testified to the ferocious attack with the deceased person's head being the target. Dr.Pwanga Hesborn, PW5 observed that the deceased suffered a depressed skull fracture at the right temporal aspect, depressed skull fracture parietal aspect, a fracture line extending from parietal region of the skull to the frontal aspect of the skull and two fracture lines originating from the temporal

right skull and joining the first fracture. The brain tissue was exposed due to these fractures.

By repeatedly directing the blows and targeting the deceased person's head using a metal rod, *rungu* and stones, the consequences intended by the appellants could only be either death or grievous harm to the deceased. The former resulted. According to the Investigating Officer, from his investigations he learnt that the appellants did not, infact intend to attack the deceased but someone else. In terms of section 206 (b) of the Penal Code, that intention is irrelevant as long as a person was killed. Overall we find no fault in the finding by the learned Judge that the deceased person's death was caused by the appellants with malice aforethought.

We, however think the learned Judge went off track in passing the sentence of 25 years after finding that the offence of murder was proved beyond any reasonable doubt. The State, properly, in our view filed a notice to enhance the sentence. Despite the warning to the appellants by the court of the consequences on the sentence should the appeal be dismissed as the sentence was illegal, the appellants elected, nonetheless to go on with the appeal.

The second aspect of the sentence relates to the 1st appellant's age. We reiterate that the issue was not before the trial court. As a matter of fact in mitigation his age was given as 19 years. By **section 184(1)** of the Children Act, only the High Court and not the Children's Court could try the 1st appellant because he was facing a murder charge and also because he was charged jointly with an adult. Had the learned Judge's attention been drawn to the fact of the 1st respondent's age of minority she would not have imposed an imprisonment term sentence due to the following restrictions under **section 190** of the Children Act;

> ***"190. (1) No child shall be ordered to imprisonment or to be placed in a detention camp.***
>
> ***(2) No child shall be sentence to death."***

Similarly **section 25(2)** of the **Penal Code** provides that;

> ***"(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.***
>
> ***(3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make."***

Having found no merit in this appeal we accordingly dismiss it against conviction. We, however, for the reasons we have explained allow it against sentence of 25 years imposed on the two appellants and substitute it with death sentence with respect to the 2nd appellant. We order that the 1st appellant be detained during the President's pleasure and direct that a report in terms of **section 25(3)** aforesaid be forwarded to His Excellency the President.

Dated and delivered at Malindi this 11th day of December, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR