



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, GATEMBU & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 61 OF 2013

BETWEEN

RAPHAEL MBUVI KIMASIAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court at Embu (Khaminwa, J.)

dated 11th June, 2008

in

H.C.CR.C. NO. 6 OF 2006)

JUDGMENT OF THE COURT

1. Raphael Mbuvi Kimasi, the appellant, was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63, Laws of Kenya. The Information is that on the 5th day of August, 2006, at Gategi Market Mbeere District the appellant murdered Lazarus Mutuku Nzau. The appellant was tried, convicted and sentenced to death by the High Court, **(Khaminwa, J.)**.

2. The prosecution's evidence against the appellant hinges on the testimony of PW 2, Agnes Muiza who testified as follows:

“On 5th August 2006 at 4.00 pm, I saw the accused. I also saw Lazarus (deceased) at 7.20 pm. Raphael (accused/appellant) came at about 7.20 pm and standing on the road and sent another person to tell Lazarus (deceased) that he is awaited by the roadside. The accused came and moved around the compound and entered the compound speaking to a one Masaku. Lazarus (deceased) was then speaking to my mother. He, Lazarus, returned to where people were drinking. When he was sitting down, he was stabbed. I saw him being stabbed by a knife. He was stabbed by the accused.... There was moonlight and it was not dark. I could see the accused dressed in jeans and a T-shirt. I ran to call my mother. I told her Raphael (accused) had stabbed Lazarus. She got out of the house and went to see Lazarus... I have known the accused well for about 4 years as he was our neighbour. I saw him stabbing the deceased on the upper left side of the chest and the deceased fell down. The stab was with

a bread knife.” (sic)

3. Aggrieved by the conviction and sentence by the trial court, the appellant lodged this appeal citing various grounds. In his supplementary memorandum of appeal, the appellant states that:

(i) *The Honourable Judge erred in law in failing to find that the prosecution had not proved its case beyond reasonable doubt.*

(ii) *That the trial judge erred in law in failing to find that the prosecution evidence was fraught with contradictions and discrepancies.*

(iii) *That the trial judge erred in law in failing to critically analyse the evidence adduced and the defence tendered and in the end, a miscarriage of justice occurred.*

(iv) *That the trial judge erred in law and fact in finding that the appellant was guilty of murder as charged yet the evidence on record did not support a charge of murder.*

(v) *That the learned trial judge erred in law in failing to sum up to the assessors and in failing to allow the assessors to give their opinion yet the suit started and proceed in the presence of the assessors.*

4. At the hearing of the appeal, the learned counsel Mr. **Muchiri Wa Gathoni** appeared for the appellant while the Assistant Director of Public Prosecution, Mr. **Job Kaigai** appeared for the State. Counsel for the appellant elaborated on the grounds in the supplementary memorandum of appeal and emphasised that the key issues in the appeal revolve around the testimony of a single identifying witness, whether the requisite *mens rea* for murder was established and whether the trial court erred in failing to sum up and record the opinion of assessors. Counsel for the appellant submitted that the learned Judge erred in failing to consider the contradictory evidence in the testimony of PW 2 who allegedly saw what had happened. It was pointed out that PW 2 testified that she was able to clearly state the colour of clothes worn by the appellant and the deceased. According to counsel, the testimony of PW 2 on this issue contradicts the testimony of PW 1 who also claims to have seen both the appellant and the deceased at the scene of crime. Counsel submitted that the credibility of PW 2 was questionable as her evidence was contradicted by PW1. It was submitted that the appellant and the deceased were all in an alcohol drinking place and if any offence was committed, the same was manslaughter and not murder. On the issue of assessors, counsel pointed out that the trial commenced with the aid of assessors but the record did not reflect any summing up to the assessors by the trial Judge. There is no record of the opinion of the assessors and this error was fatal to the prosecution case. Counsel submitted that whenever a trial court did not conduct a proper trial with the aid of assessors, a retrial was ordinarily ordered. Counsel urged this Court to find that the instant case is not proper for retrial but acquittal of the appellant who has been in custody since 2006.

5. While opposing the appeal, **Mr. Kaigai**, conceded that the trial Judge erred on the issue of assessors. It was submitted that the trial commenced with the aid of assessors and there was no record of summing up having been made to the assessors. However, despite the error, the State submitted that the evidence on record disclosed a lesser offence of manslaughter which did not require trial by assessors. Therefore, the failure to sum up for the assessors should not be considered fatal. This Court was urged to re-evaluate the evidence on record and if satisfied that the lesser offence of manslaughter was committed, the Court ought to convict and sentence the appellant for the lesser offence. The State submitted that PW 2 witnessed the offence and this was a question of recognition and there was no possibility or chance of mistaken identity. It was further submitted that the cause of death as stated in the P3 Form was a fatal stab chest wound and this was consistent with the testimony of PW 2. The State further submitted that a knife was recovered from the appellant and there was evidence that the appellant admitted fighting with the deceased. It was submitted that the appellant indicated he was drunk and this testimony revealed that the killing was unlawful hence the offence of manslaughter was disclosed.

6. This is a first appeal and we are obligated to remind ourselves of our primary role namely to re-

evaluate, re-assess and re-analyse the evidence that was before the learned trial Judge and then arrive at our own conclusions giving reasons for the same. 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 V. 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 V. 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 -V- SUNDAY POST [1958] EA 424.”

7. We have considered the grounds of appeal and submissions by counsel. We have examined, considered and re-evaluated the evidence afresh. The appellant contends that the prosecution evidence by PW1 and PW2 was contradictory. PW1 testified that on the material day, the appellant had worn a pair of blue trousers and a yellow while the deceased had worn on a brown shirt and a blue sweater. On the other hand, PW 2 testified that the appellant had worn a pair of black trousers and a blue T-shirt while the deceased had worn a red and grey sleeveless sweater top and a shirt. Having re-evaluated the evidence of both PW 1 and PW 2 we are satisfied that the contradictions in the colour of clothing worn by the appellant and the deceased at the material time were not material to prejudice the appellant. PW 2 testified that she had known the appellant as neighbour for over four years. In Joseph Maina Mwangi - vs- Republic – Criminal Appeal No. 73 of 1993 this Court held:-

“In any trial, there are bound to be discrepancies. An appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

8. The appellant's counsel in his submissions contends that the learned Judge erred in convicting the appellant based on the testimony of PW 2 as a single identifying witness. In Wamunga vs. Republic (1989) KLR 424 this Court held at page 426:

“..it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

In Abdulla Bin Wendo & Another -vs- Reg (1953) 20 EACA 166, it was held that:

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.”

See also Roria -vs- Republic (1967) EA 583 and Ogeto -vs-Republic (2004) 2 KLR 14.

9. In the instant case, PW 2 ,Agnes Muiza, testified that it was the appellant who had stabbed the deceased and that she had known the appellant for over 4 years as he was a neighbour. The issue for our consideration is whether there was enough light at the scene of crime to enable PW1 to positively recognize and identify the appellant as the perpetrator of the crime? In Maitanyi -vs- Republic (1986) KLR 198, this Court at page 201 held,

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the

complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description."

PW 1, Josephine Swai, testified that on the material day at around 7.30 pm she was at her home and there were several persons outside her house drinking alcohol. That her daughter PW 2 came into the house and informed her that the appellant had stabbed the deceased. She came out of the house and with the aid of the moonlight she saw the deceased lying down with a chest wound. The significance of PW 2's testimony for purposes of this appeal is that there was moonlight which was sufficient to enable the identification of the appellant.

10. Further, we are satisfied that the appellant was positively recognized by PW 2 as a person whom she had known for over 4 years. In ***Anjononi & Others -vs- Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held,

"...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

In ***Wamunga vs. Republic, (1989) KLR 424*** it was stated that:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

We have re-evaluated the evidence and in our judgment, we find the evidence on recognition of the appellant by PW 2 was free from error.

11. We now consider the issue of *mens rea*. It is the appellant's contention that the trial Judge erred in failing to find that *mens rea* for the offence of murder was not established. On this issue, the trial judge expressed herself thus:

"Upon examination and consideration of all evidence placed before the court in this trial, there is no doubt that the deceased was stabbed at the scene, the compound of PW 1, where native beer was being sold. The accused put himself on the scene at the material time. There is evidence from Agnes that the accused had been fighting with one of their neighbours called Maina and according to PW 2, the accused thought he was stabbing Maina only to stab Lazarus. In such circumstances, malice aforethought as defined in Section 206 (a) of the Penal Code as an intention to cause the death or to do grievous harm to any person whether that person is the person actually killed or not. I believe the evidence of PW 2 that the accused could have intended to stab another person but stabbed the deceased. All the same, Section 206 (a) of the Penal Code is relevant and I apply the same. The accused went out to stab a person an act of grievous harm and thereby killed the deceased. Malice aforethought is displayed"

12. It was PW 2, Agnes Muiza's evidence that the appellant had quarrelled with a neighbour, one Maina, who she believed the appellant intended to stab but instead stabbed the deceased. We are of the considered view that the trial Judge erred by failing to adequately analyse the evidence to determine whether the appellant had the requisite *mens rea* for the offence in view of the PW 2's testimony that he intended to stab one Maina. Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within ***paragraph (b) of Section 206*** of the ***Penal Code*** as to what constitutes malice aforethought. In the case of ***Nzuki – vs- Republic, (1993) KLR 171***, this court stated that malice aforethought is a term of art and emphasized that:

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual

accused:-

(i) *The intention to cause death;*

(ii) *The intention to cause grievous bodily harm;*

(iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (see *Hyman – v- Director of Public Prosecutions, [1975] AC 55*”.*

In *Nzuki – vs- Republic, (supra)* the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What, however, was unnerving is that there was no evidence as to there having been any exchange of words between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive, but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. (See *R –v Sharmal Singh s/o Pritam Singh, (1962) EA 13 at page 17*. The court in substituting Nzuki's charge of murder with manslaughter observed:

“There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter”.

13. Our evaluation of the evidence on record in the instant case comes within the legal principles laid out in the *Nzuki's* case and we adopt the conclusions stated therein. The prosecution evidence does not disclose the motive for the offence. Both PW 2 and PW 1 testified that the appellant had not quarrelled with the deceased at the material time and PW3, the deceased mother also gave evidence that there was no dispute between the appellant and the deceased. We find that the PW 2's evidence did not prove to the required standard that the appellant did intend to stab one Maina but instead stabbed the deceased. In the case of *Isaak Kimanthi Kanuachobi – vs- R -(Nyeri) Criminal Appeal No. 96 of 2007 (ur)*, this Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code:

*“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See *Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008*).*

In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have

been convicted of murder but should have been convicted of manslaughter.

(See Juma Onyango Ibrahim – vs- R, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu).)

14. Being persuaded by the decision in *Juma Onyango Ibrahim – vs- R (supra)* and *Nzuki – vs- Republic, (supra)* we find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The appellant is sentenced to serve 10 years with effect from 28th August, 2006, when he was first arraigned before court.

Dated and delivered at Nyeri this 21st day of January, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

GATEMBU KAIRU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR