



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CRIMINAL APPEAL NO. 312 OF 2012**

**BETWEEN**

**ABDI KINYUA NGEERA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

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

*dated 24<sup>th</sup> November, 2011)*

**in**

**H.C.CR.C No. 2 of 2007)**

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**JUDGMENT OF THE COURT**

1. **Abdi Kinyua Ngeera**, the appellant, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63, laws of Kenya in the High Court of Kenya. The particulars of the offence were that on 9<sup>th</sup> September, 2006 at Bulapesa Estate, Isiolo Township in Isiolo District within the then Eastern Province murdered Amina Juma Saidi.
2. The prosecution called a total of five witnesses in support of its case. It was the prosecution’s case that the appellant and Amina Juma Saidi (deceased) cohabited as husband and wife. They lived together with three of the deceased’s children from her previous marriage. PW1, SAJ (S), the deceased’s eldest child, testified that on 9<sup>th</sup> September, 2006 , the appellant came home a few minutes before 10:00 a.m. with a head of a goat and instructed her mother, the deceased, to cut off the horns and burn the hair on the goat’s head. The appellant begun beating the deceased because she apparently cut the horns on the goat badly. He beat the deceased with a rubber bladder which he used to tie goods with on his bicycle. He beat her all over her body with the said rubber bladder. He then took an iron bar which was under the bed and hit the deceased with it twice on her legs. He continued beating her with the rubber bladder. S testified that the appellant beat the deceased from 10:00 a.m. to 5:00 p.m. During the assault the deceased was screaming. S and her siblings were also screaming and crying.

3. After the appellant stopped beating the deceased, he sent S to buy kerosene and he left to buy batteries for his radio. According to S when she left to buy the kerosene, the deceased was breathing but when she returned the deceased had stopped breathing. She tried calling the deceased but she did not respond. The appellant came back to the house and lifted the deceased who was on the floor and placed her on the bed. S gave evidence that they went to bed without eating supper. The following morning, the appellant packed his clothes in a sack and loaded it on his bicycle and left.
4. S testified that she did not seek help from their neighbors' because the appellant had forbidden them from interacting with them. S went to her grandmother's house, PW2, HJS (H), and informed her what had happened. H testified that the deceased's biological mother was of unsound mind and she took in the deceased and her siblings and raised them as her children. According to H, the relationship between the appellant and deceased was characterized with physical abuse. She stated that the appellant used to physically abuse the deceased. At one time the appellant broke the deceased's jaw and caused her to have miscarriage which resulted in the deceased being hospitalized for one month. Consequently, the appellant was imprisoned for six months. After his release he reconciled with the deceased. S also testified that both the appellant and the deceased used to drink and the appellant had beaten the deceased on several occasions.
5. H went to the deceased's house and confirmed that she was dead. She noticed that the deceased had two stab wounds on her head. The incident was reported at the Bulapesa AP Camp. PW5, CPL Danson Njagi (CPL Dason), the investigating officer, testified that on 10<sup>th</sup> September, 2009 he was requested by the OCS, Anastacia Kitari to accompany her to the murder scene. At the scene he observed that the deceased's body had multiple injuries all over. He took the iron bar and the rubber bladder which were used by the appellant and produced them in court. Thereafter, the appellant was arrested on 19<sup>th</sup> October, 2006 on a charge of defilement. He was also charged with offence of murder.
6. In his defence, the appellant gave a sworn statement. He testified that on 9<sup>th</sup> September, 2006 he left the house at around 8:00 a.m. and went to work; he returned home at around 10:00 p.m. S informed him that the deceased had come home staggering and went to bed. S informed him that they had not eaten. He tried to wake up the deceased but she didn't wake up. He left the house to drink beer with his neighbour one Kinyua. He returned at around midnight and he woke up the deceased who sat on the bed. He requested her to cook for the children but the deceased took the lantern lamp and hit him with it. He stated that the lamp cut his eyebrow. The paraffin in the lamp poured on the ground and a fire started. As he was trying to put off the fire, the deceased hit him with a stool on his back. They began fighting. After they stopped fighting they went to bed. The following morning, the appellant realized that the deceased was dead. He maintained that he did not intend to kill the deceased. He reported the incident at Isiolo Police Station. Subsequently, he was arrested on 15<sup>th</sup> September, 2006 and arraigned in court on 19<sup>th</sup> February, 2007. He testified that PW2, H, was never happy with the union between him and the deceased.
7. After considering the evidence, the trial court convicted the appellant and sentenced him to death. Aggrieved with the said decision, the appellant has filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and fact in relying entirely on exaggerated evidence of a 13 year old minor without caution or warning herself and especially while it was stated there were neighbours who were not called as witnesses. (sic)***
- ***The learned Judge erred in law and fact in holding that there was malice aforethought contrary to the evidence on record.***
- ***The learned Judge erred in law and in fact in failing to give due consideration to the appellant's unchallenged and unrebutted sworn defence.***
- ***The learned Judge erred in law and in fact in not giving regard to evidence of previous fights, drinking behavior which was a pointer to the possibilities of the accused and deceased having fought in the material day in the fashion of the defence evidence which would negate malice aforethought and thus reduce murder to manslaughter.(sic)***

8. Mr. Kariuki, learned counsel for the appellant, argued that the prosecution had not proved malice aforethought on the part of the appellant; it was a case of manslaughter. He submitted that the learned Judge (Lesiit, J.) relied entirely on the evidence of a minor who was the appellant's step daughter and failed to consider the appellant's defence. He stated that the evidence of PW1, S, was not credible because she testified that the appellant began beating the deceased from 10:00a.m to 5:00 p.m. yet no neighbor came to her rescue. Postmortem report indicated that the deceased had old and fresh wounds which corroborated the appellant's evidence that they used to fight. He argued that the appellant never intended to kill the deceased.
9. Mr. Makori, Senior Prosecution Counsel, argued that the appellant's defence of provocation was not proved. The appellant stated that the deceased hit him with a lamp and a fire started yet there was no evidence of the alleged fire. He maintained that the prosecution had proved malice aforethought and the appellant's conviction was proper. He urged us to dismiss the appeal.
10. Mr. Kariuki in response stated that the appellant was never cross examined on the issue of provocation.
11. We have considered the record, the grounds of appeal, submissions by counsel and the law. This being a first appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence that resulted in the decision of the trial court. See this Court's decision in ***Okeno -vs- Republic (1972) E.A 32.***

For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. 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 the malice aforethought. (See ***Nyambura & Others-vs- Republic, [2001] KLR 355***). In this case as correctly held by the learned Judge it is not in dispute that the appellant inflicted injuries to the deceased which led to her death. The appellant admitted to killing the deceased. The issue in question is whether the appellant had the requisite intention/malice aforethought to kill the deceased by inflicting the said injuries.

12. From the evidence on record, there are two versions of how the deceased was killed. One version of events was given by S while the other version which was based on provocation was given by the appellant. The appellant argued that the learned Judge erred in placing reliance on the evidence of S who was a minor at the material time. In ***Onserio -vs- Republic (1985) KLR 618***, this Court held,

***“An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act.”***

Having considered the evidence on record, we find that S's version of events was corroborated by PW2, H and the medical evidence. H gave evidence that the appellant had on more than one occasion physically abused the deceased occasioning her actual bodily harm. Further, the medical evidence revealed injuries on the deceased body which were consistent with rubber bladder and iron bar which S identified as the weapons used by the appellant to beat the deceased. The trial court correctly held,

***“There was medical evidence to show that in regard to the injuries inflicted on the deceased on the day she died, there were multiple lacerations, bruises and stab wounds all over her body. The doctor found evidence of whipping as well.”***

Therefore, S's evidence displaces the appellant's defence of provocation.

13. Instances when malice aforethought is established is provided ***in Section 206*** of the ***Penal Code***:

***“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;*
- 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.”*

14. From the evidence tendered by S, the appellant beat the deceased from 10:00 a.m. to 5:00 p.m. The trial court observed as follows:-

*“I did look at the postmortem report by the doctor on the body of the deceased P. Exhibit 3, produced by PW5 the investigating officer of this case. That postmortem shows the deceased had two different kinds of injuries. There were fresh wounds which included a deep stab wound on forehead, and a deep stab wound on the right cheek, multiple bruises on the neck and on the other anterior chest. Huge bruises, on the anterior chest on both shoulders, and the back inflicted by a whip. There were deep cut wounds on the right hand and superficial burns on the dorsal surface and the left gluteal region.”*

The evidence irresistibly points to a continuous brutal attack on the deceased by the appellant. *In Ekaita -vs- Republic (1994) KLR 225*, this Court at page 230 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.”*

- 15. The appellant was aware that there was a real risk that his assault on the deceased could result in grievous harm to the deceased or lead to her death. We find that from the nature of injuries sustained by the deceased that the appellant viciously assaulted her with the intention of causing grievous bodily harm. We find that the appellant assaulted the deceased with malice aforethought.
- 16. The upshot of the foregoing is that we find no reason in interfering with the findings of the trial court. Accordingly, we find that the appeal has no merit and is dismissed.

*Dated and delivered this 30<sup>th</sup> day of April, 2014.*

*ALNASHIR VISRAM*

.....

*JUDGE OF APPEAL*

*MARTHA KOOME*

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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**