IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 110 OF 2007

BETWEEN

MUSA KITHONGO WAMBUA.....APPELLANT AND

V

REPUBLIC.....RESPONDENT

(An appeal from the judgment of High Court of Kenya at Mombasa (Mwera J.) dated

5th January, 2007

in

HC.Cr.A. No. 19 of 2001)

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JUDGMENT OF THE COURT

On a tranquil afternoon on 9th July, 2000 at about l pm, to be exact, in Kawala Village, Mariakani Location of Kilifi County, ***Ngalui Mbiti Katali***, "the deceased" was sitting outside the house of a neighbour, ***Mulee Makuu (PW2)*** in the company of her grand-daughter ***Gladys Katele Katsango (PW1)*** preparing vegetables for cooking. Their peace and tranquility was however abruptly shattered with fatal consequences when a neighbour's son who turned out to be the appellant according to PW1 and PW2 suddenly appeared from the maize farm whilst armed with a jembe. He went straight for the deceased and without uttering a word, hacked her twice on the head with the jembe, fatally injuring her. Fearing for her own safety and in utter shock, PW1 took off into the same maize farm screaming. In the meantime, PW2 who had briefly retired into the house to attend to her crying baby **as the appellant approached**, was attracted by PW1 's screams and on coming out found the deceased on the ground bleeding profusely. She saw the appellant running away but still holding the same jembe. Shortly thereafter PW1 re-appeared and on examining the deceased together, they both determined that she was dead. They screamed and in the process attracted neighbours.

One such neighbour was ***Joseph Wambi Karu (PW3).*** Prior to hearing the screams he had encountered, the appellant who was a son-in-law emerged from a maize farm whilst armed with a jembe walking briskly. After going past him, the appellant suddenly threw away the jembe. As he was digesting the appellant's actions, the screams from the neighbour's home intensified. He rushed there only to find

the deceased sprawled on the ground with blood oozing from the head. At the scene, he received information that in fact the author of the misfortune was none other than the son-in-law, the appellant whom he had just bumped into. He went back to his farm looked and found the jembe. Upon examining the same, he noticed that it was blood stained. At about 6pm, when the police arrived at the scene, he handed over the jembe to them.

Mulwa Ngovi Mulusi (PW4) and ***Musyoka Ngao Mukundia (PW5)*** both residents of the area, whilst at home and shamba respectively, received information regarding the death of the deceased. They went over and found the deceased on the ground bleeding from the head. Whilst at the scene, they learnt that the person behind the macabre death of the deceased was none other than the appellant who had fled the scene. With other members of the public, they launched a manhunt for him. Since he was a well-known figure, they proceeded to his home. As they approached the house, the appellant suddenly emerged therefrom and made a beeline for the bush. He was pursued and arrested as he attempted to enter another house to evade arrest. Upon arrest, he was brought back to the scene and forced to wait for the arrival of the police officers. When they eventually came, the appellant was handed over to them. They took him away together with the body of the deceased.

Prior to this, ***Mr. Harrison Katana Konde (PW7),*** the area Assistant Chief had at about 4p.m received a report of the attack on the deceased and had been given the name of the appellant as the assailant. He proceeded to the scene and found the body of the deceased on the ground covered in a blanket. He noticed a cut on the head below the neck. He decided to go and report the incident at Mariakani Police Station. On the way, he met police officers and together they came back to the scene. They found members of the public having already arrested the appellant in connection with the death of the deceased. Members of the public were baying for his blood. However, the police officers reacted quickly by re-arresting the appellant and securing his safety.

Among the police officers was ***P.C. Daniel Ndiku (PW8)***. On the very day, whilst at Mariakani Police Station, he had received information from the deceased's relatives regarding her death. In the company of ***PC Maganga***, they proceeded to the scene and found the deceased's body lying outside a house under a tree with deep cuts over the ear. He proceeded to draw a sketch plan of the scene. He then took possession of the jembe used in hacking the deceased, clothes that the appellant had worn, blood samples of both the deceased and the appellant and also re-arrested the appellant. Whereas the appellant was taken to Mariakani Police Station the body of the deceased was removed from the scene to Kilifi District Hospital Mortuary to await the postmortem.

The postmortem was conducted by ***Dr. Aluda*** on 14th July, 2000 at about 8 a.m. the body having been identified to him by ***Mwanzia Matheka (PW6)***. Subsequently, PW8 prepared an exhibit memo for the jembe, samples of the deceased and appellant's blood and clothes. The same were forwarded to the Government Chemist for analysis. ***Ali Gakweli (PW9)*** a Senior Government Chemist in his report concluded that the appellant's blood group was "B" whereas that of the deceased was "A". The appellant's jacket and long trouser had no human blood. However, the T-shirt had blood group "B" stains. He concluded that the blood stains on the jembe could have originated from the deceased while the blood stains on the T-shirt originated from the appellant.

Later having taken all the statements from the witnesses, PW8 prepared the information against the appellant charging him with murder contrary to section 203 as read with ***204*** of the Penal Code. The particulars given were that "***Musa Kithongo Wambua***, on the 9th July, 2000 at Kawala village, Mariakani Location in Kilifi District of the Coast Province murdered Ngalui Mbiti Katali. When arraigned in the High Court at Mombasa to answer to the information, the appellant returned a plea of not guilty and his trial ensued in earnest with the aid of three assessors. Put on his defence, the appellant opted to remain silent.

In a reserved judgment delivered on 5th January, 2007, ***Mwera J*** found the appellant guilty as charged, convicted and sentenced him to suffer death as prescribed by law. This conviction and sentence provoked this appeal on seven grounds; that the appellant was not properly identified; that the exhibits were mixed up; that the exhibits were not dusted for finger prints; that no postmortem report was produced in

evidence; that towards the end of the trial, the case proceeded in the absence of one assessor which was contrary to law; essential witnesses were not summoned and lastly; that the prosecution case had not been proved beyond reasonable doubt.

At the substantive hearing of the appeal before us on 10th March, 2014, ***Mr. Oduor***, learned counsel for the appellant submitted that the evidence of identification of the appellant was insufficient and in particular that of PW1 with regard to the names she attributed to the appellant which did not match or tally with those of the appellant yet she claimed to have known the appellant very well. That the mix-up of the exhibits prejudiced the appellant's case more so, when the Government analyst conceded that the exhibits he was being presented with in court were not those that he had analyzed. Counsel further submitted that it was surprising that the exhibits recovered were never subjected to dusting for finger-prints. There was failure on the part of the prosecution to avail to court the post mortem report and the maker thereof. That failure according to counsel was fatal to the prosecution's case. Though counsel conceded that the deceased had passed on, however the cause of death could only have been established through the results of the post mortem. Finally, counsel submitted that the case had not been proved beyond reasonable doubt. There were several discrepancies in the prosecution case thereby creating sufficient doubts as to the culpability of the appellant. Those doubts ought to have been resolved in favour of the appellant.

Responding, ***Mr. Jami***, learned Prosecution Counsel submitted that the appellant was a neighbour to both PW1, PW2, PW3 and PW4 who all knew him well. Their identification of the appellant was thus one of recognition. On the mix-up of the exhibits, counsel submitted that the mix-up did not occasion injustice to the appellant and was in any event curable under ***section 382*** of the Criminal Procedure Code. That said, even if the exhibits were to be ignored, there was still direct evidence linking the appellant to the crime. Counsel further submitted that failure to dust the jembe for finger prints was not fatal to the prosecution case as such undertaking was impossible considering that the jembe had been handled by many people. In any event that was not the evidence that was relied on by the prosecution. On failure to adduce the evidence of the post mortem, counsel submitted that it was not deliberate. He went on to submit that a conviction can still be entered the absence of postmortem report notwithstanding, if there was other evidence. For this proposition counsel relied on the case of **Kishanti Siololo v Republic, Criminal Appeal Number 70 of 1995 (UR)**. There was direct evidence of PW1 and PW2 who saw the appellant hack the deceased to death. On the issue of failure to call essential witnesses, counsel submitted that the appellant had not indicated who these essential witnesses were.

Over the years, there has developed a practice which has since acquired the force of law that the first appellate Court in dealing with a criminal appeal transforms itself into the trial Court. In other words as a first appellate Court in this appeal, we are expected to approach the whole of the evidence on record from a fresh perspective and open mind. We should analyze, evaluate, weigh and interrogate all the evidence on record afresh and arrive at our own independent conclusions. In doing so however, we should always bear in mind that unlike the trial Court which had the advantage of hearing, seeing and observing the witnesses as they testified and possibly assess their demeanour, we are disadvantaged in that regard as our conclusions are based on the recorded word. It is precisely for this reason that, we must accord due respect to the factual findings of the trial Court. See generally, ***Okeno v. Republic (1972) EA. 32.***

In this appeal, it is common ground that the deceased was killed. The injuries on the deceased's body could not have been self-inflicted. Further PW1 and PW2 who had been in the company of the deceased shortly before she met her death attested to what transpired. Similarly all the remaining witnesses save for PW9 and PW 10 attested to the death of the deceased. They all saw the dead body of the deceased at the scene. Indeed, the death of the deceased was instantious and is not even disputed by the appellant. In a nutshell, there was overwhelming evidence with regard to the death of the deceased. In the circumstances, whether or not the postmortem of the deceased was produced is neither here nor there. Perhaps such production would have assisted the appellant if it was being claimed or alleged that the cause of death had nothing to do with the initial attack on her, or that between the attack and death there had been *fuctus intervinniens* that could have precipitated her death. For instance, where the deceased had suffered **not so fatal injuries and is wheeled into hospital** but due to the negligence of the hospital staff in managing

the condition, death follows. That scenario may well then call into question the postmortem report as to establish the real cause of death. However, this was not the case here. The unchallenged evidence on record is that the deceased was hacked twice on the head with a jembe. She as a result collapsed on the ground and was dead in a matter of seconds. The body remained at the scene until it was collected late in the evening at about 5p.m and transferred to Kilifi District Hospital Mortuary to await postmortem. The deceased never left the scene alive. The death was therefore instantaneous. There could have been no other cause of death other than the act of her being hacked twice on the head with a jembe.

Accordingly the trial Court was right in holding that:-

> *"... yes, medical evidence is vital in situations of death to show that it occurred following the reasons ascribed to it. But in this Court's view a cause of death in an obvious case as this, medical evidence only confirms but not establish it ..."*

The importance to be attached to the evidence of a postmortem report was extensively discussed by this Court in the case of ***Kishanti Siolo/o*** (supra). The Court rendered itself thus:-

> ***"… expert evidence is not necessarily binding on the Court. However in cases of culpable homicide where a deceased person's cause of death is crucial to the conviction of an accused person in a criminal charge, medical evidence in that regard is necessary. It is onlv when such evidence is so patently obvious, as where such a deceased person's head had been decapitated, that medical evidence as to his cause of death in a criminal proceeding mav not be necessarv. although in all criminal proceedings, relating to culpable homicide, it is always prudent to tender medical evidence as to the deceased's cause of death unless such evidence is unavailable..." (emphasis provided)***

This case would appear to fall in the category of the exception to the general requirement aforesaid. The deceased died on the spot on account of fatal injuries she sustained following the attack. Prior to the attack, the deceased was in the company of PW1 and PW2 in good health going about her chores, preparing vegetables for cooking. She had not complained to PW1 and PW2 of any ailment at the time that could have precipitated her death. Therefore her death can only be attributed to the act of the attacker. Failure to produce the postmortem report in the premises cannot be said to have been fatal to the prosecution's case. In any event, the postmortem was easily available. However, Dr. Aluda who carried it out had left public service and could not be traced. The appellant could not however countenance the same being produced by any other witnesses other than the maker of the report despite the provisions of section 77 of the Evidence Act. In the result and given the foregoing scenario, we agree with the conclusion of the trial court that despite the none production of the post-mortem report, there was sufficient evidence to show that the cause of death was the grievous blow the appellant is alleged to have delivered with ajembe to the deceased's head from which she bled to death.

So then, was the appellant really the perpetrator of this heinous crime? To the prosecution, the answer was in the affirmative. This firm belief was informed by the evidence of PW1, PW2 and PW3 that placed the appellant squarely at the scene of crime at the very time that it was committed. On the other hand, the appellant's position was non-committal. His defence was to keep quiet. There is nothing wrong with such an election. He was perfectly in order to elect to keep quiet. It is allowed under the law and accordingly no adverse inference ought to be drawn from the appellant's exercise of the option. All that the appellant was saying is that I am under no obligation to prove my innocence and since you as the prosecution have charged me with the crime, please go ahead and prove my guilt beyond reasonable doubt as required by law.

Did the prosecution however discharge this heavy burden in this case? We are satisfied that they did. There was the evidence of PW1, a grand-daughter of the deceased and that of PW2, a neighbour and in whose compound the trio were when the offence was committed. They had been in the company of the deceased prior to the attack. The time was 1.00 pm, which was broad daylight. They were all preparing vegetables for cooking. They all saw the appellant approach from a path in the maize farm whilst carrying a jembe. The appellant was a neighbour whom they had known over a long period of time.

Given the foregoing, there can be no doubt that the appellant was properly identified through recognition by these two witnesses, as this was a case of recognition as opposed to visual identification of a stranger. Accordingly, the issue of mistaken identity or recognition cannot arise.

The appellant has taken issue with the names attributed to him by PW1 to buttress his argument that he was not properly identified. That PW1 referred to him as *Musa Mukite Kitongo* as opposed to *Musa Kitongo Wambua*. To our mind, nothing much turns on this. As already stated, this was not a case of visual identification of a stranger but recognition which is more satisfactory, more assuring and more reliable. See ***Anjononi vs. Republic (1980) KLR 59*** as well as ***M'Riungu vs Republic [1982] KLR 455***. In any event there is no evidence that the appellant was not also known by those names. It may well be that he was also known as Kitongo. There are cases where people are known by various names and/or aliases. It is instructive that in any event, when PW1 testified and identified him by those names and pointed him out in Court, he did not object nor did he address the issue whilst cross-examining her. Finally, even if we were to accept that because of mis-descriptions of appellant's name, PW1 had thereby been unable to identify the appellant, there is however the evidence of PW2 who referred to the appellant by the names that the appellant acknowledges and appreciates as his. PW1 and PW2 saw one and the same person, the appellant. There is no evidence that apart from the appellant, there was another person in their midst, so that the person that PW1 saw is the same person that PW2 saw, and that was the appellant.

The two witnesses all confirmed that the appellant as he approached them was armed with a jembe. However, it was only PW1, who saw the appellant hack the deceased to death. At that time, PW2 had retreated into the house to attend to a crying baby. However, that exercise did not take long because when she soon came out of the house she saw the appellant retreating but still with the jembe in his hands. By then the deceased was on the ground bleeding profusely. Infact she was already dead. As th appellant ran from the scene, he suddenly bumped into PW3. He was still armed with the jembe which he then threw away as this witness attempted to talk to him. It was then that the witness heard screams from the neighbour's home and on getting there, found the deceased on the ground fatally injured. PW1 and PW2 then informed him that the deceased was in that state because of the nefarious act of the appellant. On returning home, he retrieved the jembe and noticed blood stains on it. Those blood stains according to PW9 originated from the deceased. The evidence of this witness surely corroborates the evidence of PW1 and PW2 in so far as the appellant was armed with the jembe and with which he had assaulted the deceased.

We note that all these witnesses claimed to have been neighbours with the appellant. There is no suggestion of any existing grudge between them and the appellant as to have acted as catalyst for them to bear false testimony against the appellant. We would accept their evidence just like the trial court did as truthful and credible.

It is also instructive that upon the name of the appellant being mentioned to the members of the public by PW1 and PW2 as being responsible for the death, members of the public decided to pay him a visit. On seeing them approach, the appellant suddenly dashed from his house and into the bush. He was however pursued and arrested. This was not an innocent conduct. If indeed the appellant was innocent as he would have wanted everybody to believe, why would he run away on seeing members of the public whom he knew very well approach him? This evidence also goes a long way in buttressing the fact that the appellant had been recognized by PW1 and PW2 during the act and that immediately after the incident, PW1 and PW2 were singing his name to whoever cared to listen. This was immediately after the incident. In the premises the appellant's recognition by these witnesses cannot be faulted or impugned.

With regard to mix-up of exhibits, it is conceded that indeed there was such a mix up. However, we do not think the mix-up occasioned any prejudice or injustice to the appellant. PW8 confirmed that he recovered the jembe and clothes of the appellant, his blood and that of the deceased, prepared an exhibit memo and forwarded the items to the Government Chemist. PW9 testified and confirmed receipt of the said exhibits which he duly subjected to examination. Thereafter he prepared his report which he tendered in evidence. A perusal of that report is clear that, he indeed received the said exhibits from

PW8, on 14th July, 2000. There is no suggestion that PW8 submitted any other exhibits to PW9 on that day, nor is there evidence that the exhibits received by PW9 as aforesaid were not real. Indeed all those exhibits are noted in the report. The mix-up only came at the point of identifying them in court for purposes of tendering them in evidence as exhibits. Otherwise, the examination had already been conducted and the person who conducted the exercise was cross-examined and indeed he is the one who owned up that the exhibits in Court were not the ones he had subjected to examination. We would attribute the mix-up to human error and not a deliberate act to subvert the cause of justice.

Closely tied to this aspect, is the claim by the appellant that the exhibits were not subjected to dusting for purposes of lifting finger prints. We note though that as counsel for the appellant submitted on this aspect, he conceded that it was not possible to dust and lift finger prints from the T-shirt. Even if it was possible, whose finger prints would be lifted? They can only be for the appellant. After all this was his T-shirt, and certainly his prints will be all over it. However, he insisted that the jembe should have been dusted. But the respondent provided a valid and compelling response to that demand and with which we agree. He said that the jembe had been handled by many other people, for instance, PW3. No useful purpose would thus have been served by such an undertaking.

The appellant too has complained that the trial Court went about its business in the absence of one assessor contrary to the Provisions of ***sections 252 and 253*** of the Criminal Code. Actually it should be ***sections 261 and 262*** *(now repealed)* of the Criminal Procedure Code. It is true that the trial commenced with the aid of three assessors. They all were in attendance during the entire prosecution case. However after the last prosecution witness testified, one of the assessors **Stephen Muema**, excused himself as he was going to sit for examinations. Accordingly, on 9th September, 2006, the trial Court made an order dispensing with his further attendance. Following that dispensation, the assessor never participated further in the trial. Only the remaining two assessors rendered their opinions, one returning a verdict of guilty whereas the other took the view that the appellant was not guilty. Of course the trial Court overruled the latter and found the appellant guilty as charged. The then ***Section 271*** of the Criminal Procedure Code allowed the trial Court for reasonable cause to excuse an assessor from attendance at any particular session. This was one such occasion. Secondly, ***section 298*** of the same code provided for the excusal of an assessor. It provided *inter-alia:-*

> ***"…if in the cause of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absent himself and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors..."***

From the foregoing, it is quite evident that subsequent proceedings before the trial Court could not be faulted on account of the absence of one assessor. The Court correctly discharged one assessor on account of his sitting examinations as the Court could not enforce his attendance. Therefore the proceedings in the trial Court were not a nullity. ***(See also Stanlev Kamairo Ethangatha v Republic [2013] eKLR and Peter Ngaha Ruga v Republic, Criminal Appeal No. 42 of200 (UR).)***

The second last ground of appeal advanced by the appellant was that essential witnesses were not summoned. In his submissions before us, counsel for the appellant did not point out who these witnesses were. However, our own reading of the record would seem to suggest that the witness(s) that perhaps, the appellant was referring to is the Doctor who performed the postmortem. However, we have already addressed this issue elsewhere in this judgment.

Suffice to add that as stated in the case of ***Lemy v The King, Supreme Court of Canada [1952] 232***, Counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive. This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution, whether favourable to the accused or otherwise. At times failure to call witnesses may lead to the drawing of an adverse inference against the prosecution. However we must hasten to add that whereas it is desirable to have all the relevant witnesses on board, we think that where other evidence is available and proves the

prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of an accused. At the end of the day, however, all must depend on the circumstances of each case. After all, it is the quality and not quantity of witnesses that count. Be that as it may, our view is that the absence of the evidence of the postmortem report and the person who prepared it notwithstanding, there was other evidence that linked the appellant to the commission of the offence.

The last ground of appeal advanced by the appellant is that the whole of the prosecution case was not proved beyond reasonable doubt. We have no doubt at all that this complaint has no merit. The offence was committed in broad day-light in the presence of PW1 and PW2 who knew and recognized the appellant. There is no question of mistaken identity. The appellant soon thereafter ran into PW3 with the very weapon he had used in the mission. He behaved awkwardly when confronted by PW3. He threw away the jembe. The blood stains on the jembe matched that of the deceased. He later attempted to flee on being confronted by members of the public who were looking for him in connection with the incident. In our view, the evidence proffered by the prosecution was simply overwhelming against the appellant.

Before we take leave of this appeal, we wish to comment on one matter. Immediately after convicting the appellant, the trial judge handed down the sentence of death. This was unprocedural and irregular. Much as the sentence upon conviction for murder is obvious, still the judge was required to take down the mitigation of the appellant. In the mitigation, the appellant may have been able to demonstrate why the death sentence may not be desirable. Further such mitigation may assist the appellate Court in the event that the appeal is partly successful on account of the information being reduced from one of murder to perhaps manslaughter. Regardless of the offence and the sentence, the taking down of mitigation is a mandatory requirement and must always be observed and adhered to. In the case of **Dorcas Jebet Ketter and Anor v R. Criminal Appeal No. 10 of2012 (UR**) this Court stated:-

> ***"... The opportunity that is required to be given to an accused person to address the Court in mitigation is not only to enable the Court to consider an appropriate sentence in the circumstances of the case but also to have the mitigation on record in case of any further appeal where the accused's conviction might be set aside and substituted by a conviction for a lesser offence, for example manslaughter instead of murder. In such a case, it becomes easier for the appellate Court to decide on the Sentence if no mitigating factors are on record. Mitigation is also necessary in cases for example where clemency committee is considering a convicts case. We state that under no circumstances should a court dispense with mitigation for whatever reason. "***

In this case, and as already stated, there is no record of mitigation in relation to the appellant. However, we find that the error or omission did not occasion any prejudice to the appellant.

In the result, we are satisfied that the appellant was rightly convicted. There was ample evidence to support the conviction. Accordingly, the conviction and sentence is upheld. This appeal therefore fails and is dismissed.

Dated and delivered at Malindi this 8th day of April, 2014.

H. M. OKWENGU

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR