IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 574 OF 2010

BETWEEN

BONFACE OLUNGA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega,I. Lenaola, J) dated 16th December, 2010

in

HCCRA NO. 15 OF 2007)

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JUDGEMENT OF THE COURT

The appellant **Bonface Olunga** was charged at the High Court of Kenya, Kakamega, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence were that the appellant murdered Wycliffe Olunga at Sirigoi village, Sirigoi sub-location in Kakamega between 23rd and 25th August, 2006. The trial started before G. B. M. Kariuki, J (as he then was) who took a plea; thereafter F. A. Ochieng, J took the evidence of three witnesses; then S. J. Chitembwe J, also heard three witnesses which led to closure of the prosecution case but the defence case was heard by a 4th Judge, Justice I. Lenaola, who convicted the appellant and sentenced him to death. Those findings provoked this first appeal and it is our duty to re-evaluate the evidence and make our own conclusions. In the oft- cited case of **Okeno v Republic [1972] EA 32** at 36 the predecessor of this Court stated on the duty of the Court on a first appeal such as this one:

"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] E. A. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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] E. A. 424."

This is therefore why it is necessary for us to set out the evidence of the prosecution and the defence and finally the findings of the trial court to enable us carry out that duty of re-evaluation of the evidence to reach our own conclusions always remembering, of course, that we have not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.

The prosecution case was that on 23rd August 2006 at 7:30 p.m. **Joseph Olunga Benedict (PW1) (Benedict)** who was the father of both the appellant and the deceased was at home where he had retired after spending the day herding cattle. He heard his grandchild Emily calling out to tell him that her uncle, the appellant had lit a fire which was burning the maize granary. So he turned around to verify the information and observed the appellant walking out of the homestead. He shouted at his son the appellant and asked him why he was running away but this seemed to infuriate the appellant who turned back towards Benedict and threatened him with the panga and stick he had in his hands. Benedict took to his heels to save his life and while doing so shouted to alert others of the happenings at his home. Meanwhile Wycliffe, the deceased, had run to the granary to try to put off the fire.The appellant saw this, stopped chasing after his father and went for his brother Wycliffe who he hit with the stick twice making him fall down. Wycliffe got to his feet and attempted to flee but this was cut short by the appellant who cut him on the head using the panga. Benedict had to intervene.He held the appellant around the waist but the appellant attacked him hitting him on the mouth which led to loss of a tooth. The whole commotion had happily attracted the attention of Benedict's brother **Daniel Wanjala (PW2) (Wanjala)** who lived in the neighbourhood. Together they managed to take the weapons from the appellant but the appellant escaped in the process. The panga and the deceaseds' blood stained shirt were later produced in court as part of prosecution evidence by **PW6 No. 66993 PC Patrick Mutua.** Wycliffe was taken to a local dispensary and later transferred to Kakamega General Hospital where he died on the night of 25th August, 2006.

This version of events as related by Benedict was confirmed by his brother Wanjala, by **Deberio Mwangala Wechuli (PW3) (Wechuli),** another relative, and by **Samson Juma Sambili (PW4) (Sambili),** an assistant Chief of the area.

Dr. Jason Mukonyi (PW5) conducted a post-mortem on the body of the deceased and concluded that the cause of death was a head injury caused by fracture of the skull. PC Patrick Mutua received a report on 24th November, 2006 that the appellant had been seen in Kawangware and had been arrested with the aid of relatives. Two days later on 26th November, 2006 this witness travelled to Riruta Police Station where he collected the appellant and took him to Kakamega Police Station and the appellant was later charged in court. That was as far as the prosecution case went and upon its closure it was found that a case had been made out which the appellant should answer.

In a sworn statement the appellant testified in his defence that on the material day he reached home from school and went to his father to give him a report of a sister who was sick in Nairobi. This report did not go down well with the appellants' father who picked a stick and threatened to beat the appellant. As the appellant fled to escape his fathers' wrath they ran into the deceased who had a jembe.PW2 Wanjala who had a panga approached and hit the jembe and the deceased fell down. There were unnamed women milling around and the appellant drew their attention to the fallen man. The appellant assisted in taking the deceased to hospital and also attended his funeral. He was arrested after three months for an offence he knew nothing about.

The learned trial judge considered the prosecution case and that of the defence and on believing that the case had been proved to the required standard convicted the appellant.

There are six grounds of appeal in the Memorandum of Appeal drawn by the appellants learned counsel Ms Marcella Onyango who also argued the appeal before us. These grounds are that:-

"1. The learned trial Judge erred in both law and fact in convicting and sentencing the

Appellant yet his fundamental right as guaranteed under Section 72 (2) d of the Old Constitution (Article 50 (2) d of the Constitution 2010) were violated.

2. The learned Judge erred in both law and fact in convicting the Appellant when the evidence on record clearly show (sic) that the prosecution had failed to proved their (sic) case beyond reasonable doubt.

3. The learned trial Judge erred in law and in fact in failing to make a finding that the evidence adduced by the prosecution was contradictory and inconsistent and thus not safe to convict.

4. The learned Judges (sic) erred in both law and fact by failing to critically analyze the Appellant's defence against the prosecution case to the detriment of the Appellant.

5. The learned Judges erred in both law and in fact in failing to find that the evidence on record does not support the charge.

6. The learned trial Judge erred in law and in fact in convicting the Appellant without proof of mens rea.

When the appeal came for hearing before us on 27th May, 2014 learned counsel for the appellant took the first ground on its own but consolidated all the other grounds for the purposes of the argument. The first ground related to alleged breach of fundamental constitutional rights guaranteed by Section 72 (3) of the retired Constitution. Learned counsel submitted that the appellants rights were breached because he was arrested on 24th November, 2006 but was not arraigned before court until 11th June 2007.

On the consolidated grounds learned counsel submitted that the prosecution evidence was unreliable and contradictory. Such contradictions, urged counsel, related to such matters as who had lit the fire at the maize granary; whether there was a fire at all, whether it was Benedict or Wanjala who reached the scene first . Counsel wondered why it was that the appellant attended his brothers funeral and was not arrested only being arrested some three months hence. Finally, learned counsel argued, apparently in the alternative, that the prosecution evidence would in any event support a manslaughter charge but not that of murder.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions, supported both conviction and sentence. Learned counsel agreed that on the face of it the appellants fundamental rights were violated because he was not taken to court on time but submitted that it was too late for that issue to be raised because it had not been raised before the trial court for an investigation on reasons for delay to be conducted.

Mr. Abele did not think much of the alleged contradictions submitting that they did not affect the substance of the prosecution case. Counsels' final point was that there was a valid dying declaration made by the deceased to PW3 Wechuli which went to reinforce the prosecution case.

Section 72 of the retired constitution protected the right to personal liberty and provided at Section 72 (3) (b) that:

"(3) A person who is arrested or detained-

(a) _

(b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of

his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

This right now finds protection in Articles 49 and 50 of the Constitution of Kenya 2010. Learned Counsel for the appellant submitted that the appellant was arrested on 24th November, 2006 and was not taken to court until 11th June, 2007, a period of nearly seven months. The record indeed shows through the evidence of PW6 PC Mutua that the appellant was arrested on the said date and detained at Riruta Police Station. This witness travelled there on 26th November, 2006 collected the appellant and transported him to Kakamega Police Station from where he was eventually charged in court. The record further shows that this witness was not cross – examined at all by the counsel then appearing for the appellant on the reasons that led to delay in presenting the appellant to court within the time stipulated in law.

When the appellant appeared for plea on 11th June, 2007 he was represented by an Advocate, Mr. Ondieki.The record shows that after a plea of not guilty was entered all that took place was allocation of hearing dates and an order for selection of assessors. No issue was raised by counsel for the appellant on alleged breaches of constitutional rights by the police.

The position in law is that an allegation on breach of constitutional rights must be raised at the earliest opportunity to afford the trial court an opportunity to interrogate the issue and take evidence, if any, on why there was delay in presenting the suspect within the time required in law. This court in **Ernest Shiemi & Anor v R [2013] e KLR** quoted **Dominic Mutie v R Criminal Appeal No. 217 of 2005 (ur)** where that issue had been raised and it was held:

" A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).

The section further provides that where such a person is not taken to court within either the twenty-four hours for non -capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of Section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggest that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."

See also **Martin Oduor Lango & Others R [2014] e KLR** where the same issue received the courts considerable attention and consideration.

In a case such as the one leading to this appeal where the allegation on breach of constitutional rights was not raised either at the earliest opportunity before the trial court or at all in that trial and

considering, also, that the appellant was represented during the trial we are of the considered opinion that the appellant lost the opportunity to raise the issue which issue cannot now be taken before us as we are not equipped to carry out an investigation on why the appellant was held in custody and not produced before court. This happened for nearly seven months.

The other issue taken by learned counsel for the appellant related to what she called contradictions in the prosecution case. Learned counsel raised such issues as who between two witnesses arrived first at the scene, why some witnesses did not appear to notice a fire at the maize granary if there was a fire at all and why the appellant was not arrested at the funeral of his brother.

The record shows that the case involved a killing within a family. All the players to the unfortunate drama were close family members - Benedict is father to the appellant and the deceased; Wanjala is the brother of Benedict and therefore, according to the custom, also a "**father"** of the appellant and the deceased. The whole matter took place in the family homestead where the appellant attacked his father Benedict and killed his brother the deceased. Benedict lost a tooth in the process and much more damage would have been inflicted had it not been for the intervention of Wanjala who rushed to the scene upon hearing shouts from Benedict and assisted to disarm the appellant.The murder weapon, a bloodied panga, was produced before the trial court as part of the evidence.

We agree with Mr. Abele that the minor contradictions in the prosecution evidence did not go to the root of the matter as this was a straight forward case where there was no doubt on the identity of the appellant who was the author of all the events that happened on that early evening leading to tragic results. If it was necessary to reinforce the prosecution evidence, and we think that was not necessary in this case there was the evidence of Wechuli PW3 Wechuli, also related to the principal players in the case. He visited the deceased at Ingoste dispensary and had a conversation with him after observing injuries on the deceased head. This witness testified before the trial court thus:

> **"... He was able to talk. He recognized me. I asked him what had happened. He told me that he was beaten by his brother Boniface. I know Boniface..."**

Learned counsel for the Republic submitted that this conversation amounted to a dying declaration where the deceased revealed to the witness who his attacker was.

In **Choge v R [1985] KLR 1** which case was relied on by the learned trial judge, two police officers testified that as the deceased was being taken away from the crime scene, he had pointed to the 1st appellant's farm and said words to the effect that "we have been killed by this rubbish. Two other persons testified that the deceased had stated that he had been killed by the former fourth accused who was acquitted. It was held that:-

> **"5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.**
>
> **6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.**
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> **7. The first statement of the deceased was admissible as a dying declaration under section 33 (a) of the Evidence Act (Cap 80). However, the evidential weight of this declaration was lessened by the fact that the deceased's expectation of death was not severely imminent at the time it was made, the fact that the deceased had not said to any one else other than the two police officers at the crime scene that the 1st appellant was responsible for his death and further by the fact that the dying declaration was not mentioned by a witness who had been**

at the scene of the crime."

The dying declaration was made by the deceased to his uncle PW3 Wechuli and it was to the effect that the deceased was beaten by his brother the appellant.This was, indeed, a dying declaration.

On the sentence imposed by the trial court Mrs. Onyango, the learned counsel for the appellant, urged us to find that there was no evidence of malice aforethought and submitted that the appellant should have been sentenced on a charge of manslaughter but not the preferred charge of murder.

The learned trial judge in the course of the judgement and on consideration of whether there was malice aforethought stated:-

> **"Did he have malice aforethought? I have no doubt that when a person decides to burn the family granary with maize in it, attacks his father for intervening and later mortally wounds his step-brother, all those actions would point to malice aforethought as defined in Section 206 of the Penal Code."**

Section 206 of the Penal Code which defines circumstances where malice aforethought is established provides that:-

> **"(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."**

We have set out the circumstances in the case that led to the death of the deceased. The appellant who appeared not to be on good terms with his relatives seems to have acted in an irrational manner on various occasions. This can be seen from the evidence of his father Benedict who testified inter alia that:-

> **" … He had not yet taken dowry to his wife's family. He untethered some of my cattle. I had given one of the cattle, and another was his. Both cows were in my homestead. In our tradition, if he untethered the cattle in the manner he did there was a mistake as he had not asked me or told me. He was supposed to have sought my concurrence....."**

There was also evidence that the appellant set fire to a family maize granary for no apparent reason and there is the evidence of the vicious attack by the appellant against his own father who lost a tooth and upon the deceased who died from injuries inflicted by the appellant.

There are three essential elements to be proved for the offence of murder to be established which the prosecution must prove beyond reasonable doubt. The elements are:

> **(a) the death of the deceased and the cause thereof**
>
> **(b) that the accused committed the unlawful act which caused the death the unlawful act which caused the deceased and**
>
> **(c) that the accused had the malice aforethought**

See **Isaack Kimanthi Kanuachori v R (Nyeri) Criminal Appeal No. 97 of 2007 (ur)** and **Nyambura & others v R [2001] KLR 355.**

Malice can be express, implied or constructive. Express malice is proved when an accused person is shown to have intended to kill while implied malice is proved 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 or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause actual bodily harm, he is said to have had constructive malice aforethought – See **Republic v Stephen Kiprotich Leting & 3 Others [2009] e KLR**

The learned judge in considering whether malice aforethought had been proved merely pointed out that malice had been established because the appellant burnt the family maize granary, attacked his father and then mortally wounded the deceased. Yet there was no attempt to find out why the appellants' actions were so irrational. As we have shown in this judgment the appellant even went against their traditions by taking cattle to his in laws when it was his father who should have done so. The appellant later burnt the family maize granary without provaccation and this appeared to have led to the attack upon his father and brother.

We have anxiously considered this matter and have come to the conclusion that the appellant should have been convicted for manslaughterer and not murder. Because of this finding this appeal succeeds to the extent that the conviction for murder is hereby quashed and sentence of death set aside. We substitute therefore a conviction

for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Having noted the mitigation factors offered before the learned trial judge we are of the considered view that a sentence of twenty years imprisonment from the date of conviction is a fair and well deserved sentence. We therefore set aside the sentence of death and in lieu thereof impose a sentence of twenty years imprisonment from the date of conviction.

Dated and Delivered at Kisumu this 20th day of June, 2014.

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR