IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), OUKO & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 35 OF 2011

BETWEEN

IRENE NEKESA PETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (**Lesiit, J**.) dated 25th February, 2011*

in

H.C. Cr.C. No. 32 of 2008)

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JUDGMENT OF THE COURT

1. Irene Nekesa Peter, the appellant herein, was charged on the 4th April, 2008 before the High Court at Nairobi, with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, **Chapter 63** of the Laws of Kenya. The brief particulars of the offence were thatthe appellant, on the 18th March, 2008, at Ngei II Madoya area in Nairobi within Nairobi area, murdered Scovia Nandudu.

2. The evidence led before the trial court was that on the day material to the events giving rise to this appeal, the deceased and her sister, Susan Kimolo (PW4) (Susan), and one Sarah, went to Maleba Bar in Huruma. At about 7:30 pm, while the three ladies were standing outside the bar, the appellant came to where they were. A fight begun between the appellant and the deceased. The fight continued for about 30 minutes, during which time the appellant knocked down the deceased, removed a knife that had been hidden in the waist band of her skirt, and stabbed the deceased in the neck. Susan was standing about one and a half meters away, and according to her there was sufficient light from a bulb, so she clearly saw the entire incident. As a result of the stabwound, the deceased bled to death.

3. On the material day, PC Eric Kosibei (PW7) was at his station at Huruma Police Post. At about 8:40 am, some members of the public, led by one Jamin Mugwana, brought in the appellant who they had arrested.He was informed that the appellant had stabbed a young lady to death. PC Kosibei directed them to make their report to PC Fanuel Murunga (PW5) who was at the report office of Huruma Police Post.

4. PC Fanuel Murunga testified that on the night in question, he received and recorded a report from one Jamin Mugwana which was to the effect that the appellant, who had been brought to the police station, had been fighting with the deceased when she stabbed her to death. The knife that was said to be used in the stabbing had been brought to the station, and PC Murunga noted that it had no handle and that it was blood stained. PC Murunga handed over the knife to the Officer in Charge of the post, Henry Mbogo (PW8), who then handed it over to Police Constable Joseph Kaunda (PW3).

5. After the report was recorded, PC Fanuel Murunga and PC Kosibei went to the scene of the crime; they were led by the said Jamia Mugwana. When they arrived, they found the body of the deceased lying in a pool of blood.

6. Joseph Kagunda Kimani (PW2) was at the material time a government analyst at the Government Chemist Laboratories. He received the knife from Police Constable Joseph Kaunda, as well as the blood samples taken from both the deceased and the appellant. He conducted an examination on these exhibits and filed a report which was produced before the trial court. The examination report revealed that the knife was lightly stained with human blood of blood group A, and that both the appellant and the deceased were of that blood group.

7. The appellant was examined by Dr. Zephaniah Kamau (PW6) who found him to be of sound mind. He also found that she had suffered some injuries: bruises below the left elbow and the lower part of the left forearm, as well as on both her knees. In his opinion, these injuries were inflicted by a blunt object.

8. The body of the deceased was identified by her father, Patrick Mabei, and her brother Fred Magonda, on the 31st March, 2008, when Dr. Francis Maina Ndiangui (PW9) conducted a post mortem on it. He observed that the body was of a good nutritional status, and that it had a five centimetre long stab wound on the left side of the neck. This stab wound had severed both the jugular and internal carotid arteries. From his examination, he formed the opinion that the cause of death was excessive bleeding due to the stab wound injury on the left side of the neck.

9. After receiving this evidence from the prosecution, the learned trial judge was satisfied that a *prima facie* case had been established against the appellant. The appellant was therefore placed on her defence.

10. The appellant gave an unsworn statement in which she denied being responsible for the death of the deceased. She testified that on the material day, she had gone to wait for someone at the Maleba bar. She had a beer as she waited. As she was waiting, she saw three ladies standing some distance away. One of the ladies left the bar, while the other two approached the appellant, and told her that they were looking for her. One of those who approached then asked the appellant for her phone, as well as for all the money that she had. When the appellant asked them what they wanted her phone for, the two ladies began to beat her. The appellant then stated that she got up with the intention of escaping; she got out of the bar, and found the first lady who had walked out. The appellant was kicked in the stomach, which caused her to fall down. The three ladies then pounced on her. The appellant was unable to get up, and she started screaming. The screaming attracted members of the public who rescued her. At this point, the appellant realised that she was not wearing a top, that her brassier had been cut and that her phone, which was in her skirt, was missing. The owner of Maleba bar came and took her to the nearby police post. The police told her that she could not record a statement in her state, and directed her to first seek medical treatment. As she was leaving the police post, she met with a group of people who said that one of the women with whom she had fought had been killed. The appellant was taken back to the police station and locked up for 21 days, after which she was charged with the offence of murder. The appellant stated that she knew nothing about the circumstances that led to the death of the deceased and that the body had not even been collected at the scene of the fight.

11. After conducting its evaluation on the evidence and submissions presented before it, the trial court found that there were several undisputed facts: that the appellant and the deceased were involved in a fight; that there was evidence from one eye witness to the fight, that is from Susan, the deceased's sister; and that the deceased suffered serious injuries to her neck, which led to her death.

12. The trial judge found Susan's evidence to be truthful and credible. The trial judge further formed the opinion that the appellant's version of events was unacceptable as there was no evidence that the appellant was attacked by the deceased. On this, the trial court rendered itself in the following manner:

> ***"The prosecution has shown that the accused had attacked the deceased without provocation. The prosecution has also shown the accused had a knife in her possession which she used to cut (sic) the deceased on the neck, severing the main blood vessels on the neck and causing her excessive bleeding and death."***

13. The trial judge was also satisfied that the appellant had formed an intention to cause either the grievous harm or the death of the deceased. On this the trial court stated that:

> ***"I find that the accused person attacked the deceased without any formal provocation. I also find the accused was armed with a knife beforeshe attack (sic) the deceased. That means the accused formed the necessary <u>mens rea</u> to cause the deceased injury. I have also considered the fact that the accused made a deliberate choice to severe the main blood vessels on the neck of the deceased which is further proof that the accused had formed the intention to cause either grievous harm or death of the deceased."***

14. The trial court was therefore satisfied that the prosecution had proved the charge against the appellant, convicted her of the offence as charged, and after receiving her mitigation, sentenced her to death as provided for in the law.

15. The appellant was aggrieved by this finding, and now brings this first appeal. Counsel for the appellant, Mr. Nyachoti, relied on the ground of appeal dated the 10th March, 2011 which can be briefly summarised as follows:

> ***a. That the trial judge erred by relying on the testimony of PW4 who was the only witness at the scene;***
>
> ***b. That the trial judge erred by accepting the evidence that the appellant was in possession of a knife that she used to stab the deceased;***
>
> ***c. That the said knife was taken to the government analyst for examination but it was not confirmed that the appellant was the one who inflicted injuries on the deceased;***
>
> ***d. That the appellant acted in self-defence as is evidenced by the injuries she sustained; and***
>
> ***e. That the appellant was framed for an offence she did not commit.***

16. When the appeal came up for hearing before us, Mr. Nyachoti, submitted that the appellant's conviction was unsafe as it was based on Susan's evidence yet she was the only witness present during the incident. He further faulted the trial court's reliance on the evidence of Sarah, the other person at the scene at the time of the incident, who neither recorded a statement nor testified.

17. Mr. Nyachoti further submitted that while it was not in dispute that the appellant and the deceased were involved in a fight which lasted about a half hour, at no point did the appellant admit to being in possession of the murder weapon or to stabbing the deceased. Counsel argued further that there was no DNA test done on the murder weapon, conclusively to tie the appellant to the weapon. In addition, Mr. Nyachoti urged, the blood tests done were not conclusive as the blood on the knife was found to be of blood group A, and both the appellant and the deceased were of that blood group.

18. Mr. Nyachoti therefore contended that there was doubt as to who stabbed the deceased, because even the appellant suffered injuries as a result of the fight and this was evinced by Dr. Kamau's medical examination of the appellant. Counsel further argued that Susan did not state categorically who stabbed the deceased; her testimony merely points to many people being present at the scene and thus it was not

only the appellant who had the opportunity to injure the deceased.

19. Regarding the murder weapon, Mr. Nyachoti submitted that Susan's testimony that she saw the appellant approaching the deceased with a knife which she used to stab the deceased was false, and that the appellant denied ever being in possession of it. He submitted further that since no witnesses were called to testify on the manner of recovery of the knife, it was unclear how the knife came to the possession of the police.

20. In conclusion, Mr. Nyachoti submitted that based on these shortcomings on the evidence, this Court ought to allow the appeal, and if it is not minded to doing so, then it should make a finding on the lesser charge of manslaughter.

21. The appeal was opposed by Mr. Orinda, learned counsel for the respondent. He conceded that Dr. Ndiangui's findings may not have been conclusive because the deceased and the appellant shared a blood group. Counsel however argued that Susan's evidence was sufficient. She saw the appellant and the deceased involved in a fight, and saw the appellant use a knife retrieved from the waistband of her skirt and stab the deceased. There was sufficient light and Susan was standing only a meter and a half away, meaning she could clearly see the appellant. She was a credible witness, and had no reason whatsoever to frame the appellant. This evidence was uncontroverted, and the trial court was correct to rely on it, Mr. Orinda submitted.

22. With respect to the murder weapon, learned counsel urged that the evidence was conclusive in showing that the knife produced in court was the same one that was used in the stabbing. The uncontroverted evidence was that this knife was handed over to the police by Jamin, whose statement to the police was accepted in evidence by the trial court.

23. The state's final submission was that this was not a fit case for a finding of manslaughter. In learned counsel's view, the circumstances of this case, that is the fact that the appellant was armed and that she struck the deceased in the neck, would not support a finding of manslaughter. He therefore urged us to dismiss the appeal.

24. We have considered this evidence and the submissions tendered before the trial court as well as the grounds of appeal and the submissions made by both learned counsel before us. As this is a first appeal, we are under a duty to re-examine and re-evaluate the evidence on record with the aim of reaching our own conclusions, subject to the caveat, however, that we had no advantage, as the trial court did, of seeing and hearing the witnesses. See ***Okeno vs R*** ***[1972] E.A. 32*** where the predecessor to this Court set out this duty in the following manner:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination … 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…. 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…."***

25. As was recently stated by this Court in ***Bonface Olunga vs Republic*** ***[2014] eKLR (Criminal Appeal No. 574 of 2010)***, to sustain a charge of murder, the evidence must illustrate three essential elements. These are the death of the deceased, and the cause of death; that the person accused committed the unlawful act which caused the death of the deceased, and that in committing that act, the accused acted with malice aforethought.

26. Having re-evaluated the evidence before the court, we find that there is no dispute as to the cause of death of the deceased. The evidence of Dr. Ndiangui was clear in this regard: that the deceased suffered a stab wound on her neck that severed both her jugular and internal carotid arteries, and that the cause of

death was as a result of excessive bleeding that was caused by the injury.

27. The issue that falls for our consideration next is whether it was the appellant who committed the unlawful act of stabbing the deceased. The evidence of Susan, who was present at the scene, was instrumental in this regard. Susan was an eye witness to the entire incident, and she testified that she saw the appellant retrieve a knife from the waistband of her skirt and use the knife, in the course of the struggle, to stab the deceased in the neck. The trial court accepted this evidence, and it was based on this that the conviction of the appellant was founded.

28. One issue that is central to this appeal is whether the trial court erred in relying on the evidence of the single witness, Susan, in convicting the appellant. The trial court cannot be faulted simply for relying on a single identifying witness. In ***Maitanyi vs Republic [1986] KLR 198*** this Court 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 that the conditions favouring a correct identification were difficult …."***

What is therefore of paramount importance, in our view is that the evidence of the single identifying witness was properly tested before it was accepted.

29. It is not in dispute that the incident in question occurred at night. It was Susan's testimony that she was one and a half meters from both the deceased and the appellant at the time, when the latter removed a knife and proceeded to stab the deceased without any provocation. There was a light three (3) meters from where she was standing and thus she was able to see both the deceased and the appellant clearly.

30. In our view, the evidence of this witness was credible, and the trial court was right to accept it. From the trial record, it is clear that the trial court was aware of the danger of relying on the evidence of a single witness, but was satisfied that the witness was truthful and that her evidence was worthy of belief. We find that the trial court correctly evaluated the evidence of the identifying witness to ensure she was not only honest but unmistaken about her identification of the appellant, and that her identification of the appellant was proper.

31. The appellant's version of events, that she was attacked without any provocation was wholly rejected by the trial court on the basis that it was an afterthought. In her appeal, the appellant claimed that she acted in self-defence.

32. In the case of ***Anthony Njue Njeru vs Republic [2006] eKLR (Criminal Appeal No. 77 of 2006)***, this Court stated that:

> ***"A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack."(Emphasis ours)***

33. We have re-evaluated the defence and in our estimation, there is no way the appellant could be said to have acted in self-defence. In our view, the amount of force used by the appellant on the deceased was excessive, which therefore negates her defence. We are aware of the doctor's report that showed that the appellant suffered bruises on her back and hands. However, these injuries did not warrant the use of force in retaliation – the kind that resulted with the deceased suffering a stab wound to the neck. The force used by the appellant was not reasonable, and we therefore reject the appellant's assertion that she acted in self-defence.

34. Nothing comes of the appellant's contention that the prosecution failed to prove that she was the one

who was in possession of the knife. As we have stated, the Susan's evidence was clear in this regard, that she saw the appellant retrieve a knife from the waistband of her skirt, and it is that knife that was used to murder the deceased. This is the same knife that was collected from the scene and brought to the police station by Jamin Mukhwanu, whose statement to the police was accepted into evidence by the trial court.

35. From the evidence adduced at trial, the murder weapon was handed over to the police by a member of the public, Jamin Mukhwanu, who did not testify before this court as the prosecution was unable to trace his whereabouts. However, the statement made to the police by the said Jamin was accepted into evidence by the trial court. The murder weapon was tested by Joseph Kimani who confirmed that it was stained with human blood, of blood group A, which was the same blood group of the deceased. There is therefore no doubt that the knife in question was the one that was used in the stabbing of the deceased by the appellant.

36. The appellant submitted to us that if we are not minded to allow the appeal, then we should enter a finding of manslaughter. Manslaughter is defined under ***section 202*** of the Penal Code as follows:

> ***"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter".***

37. This Court does have the authority to substitute a conviction of murder with one of manslaughter where it is satisfied that the evidence proves the lesser offence. This authority is derived from ***section 179 (2)*** of the Criminal Procedure Code which states that:

> ***"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".***

38. Our apprehension of the evidence before us is that this would not be a fit case for a finding of manslaughter. In our view, the appellant's actions had malice aforethought, which is described under ***section 206 (a)*** of the Penal Code in the following manner:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***
>
> ***(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;"***

39. It is clear from the evidence that the appellant was armed with a knife. This is evidence that she intended to use the knife and this constitutes premeditation. Further, the action of the appellant of removing the knife and stabbing the deceased in the neck is a clear indication that she intended to cause the death of, or at the very minimum, grievous harm to, the deceased. As there was malice aforethought present, the appellant's actions constitute the offence of murder.

40. We are satisfied that the appellant was properly convicted of the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.This appeal is bereft of merit and the same is accordingly dismissed.

Dated and delivered at Nairobi this *25th day of July, 2014.*

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. ***MOHAMMED***

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR