IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KIAGE & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 82 OF 2011

BETWEEN

RACHO KUNO HAMESO …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court at Nairobi (Lesiit, J) dated 25th February, 2011

in

HCCR.C NO. 32 OF 2009)

****

JUDGMENT OF THE COURT

RACHO KUNO HAMESO the appellant herein, was charged in the High Court at Nairobi (the trial court) with the offence of murder contrary to ***Section 203 as read with section 204 of the Penal Code***. The particulars of the offence are that on the 14th day of March, 2009, at Mororo Shopping Centre in Tana River District within the Coast Province, murdered ***ABDI OSMAN KUMBI***. The prosecution called a total of eight [8] witnesses.

The prosecution case was as follows. Osman Kumbi Dabala, (PWI) the father of the deceased testified that he was constructing a mosque when the appellant approached PW1's home. On reaching there the deceased was inside the construction site and was actively involved in the construction of the mosque. Upon arrival the appellant called out the deceased but the deceased did not come out of the mosque immediately. The appellant seemed to be infuriated by the delayed response by the deceased thus prompting him to take offence and asked the deceased why he had not responded and yet it was *"Racho"* calling.

PW1 further stated that the moment the deceased came to the door of the mosque, the appellant hit him with an axe on the left side of the head and the left shoulder. There were some neighbours who chased after the appellant but the appellant ran away with the axe and entered the forest. Thereafter, PW1 reported the incident both to the Chief and the police station. The police went to the scene of the crime and took the deceased to the hospital as he was severely injured, but he died two days later while undergoing treatment.

Tunu Dadi, (PW2), testified that on the 14th day of March, 2009, she was at her house resting when the appellant who is her neighbour came carrying an axe in his hand. The appellant went to where PW1 was resting. The deceased told the appellant to leave PW1 alone and not quarrel with him. In anger, the appellant hit the deceased with an axe on his head. The deceased fell down unconscious bleeding profusely from the head. The appellant ran away with the axe.

Halima Halake, (PW3), testified that she was the wife of the deceased. She was in the house at the time of the attack. She heard people shouting *"he has been killed"*. That is when she decided to come out of the house. On coming out she found her husband lying on the ground with a gaping wound on the left side of the head, bleeding profusely.

Mohammed Kumbi, (PW4) a brother to the deceased was on the 14th March, 2009 in Madogo Division when at about 4.30 p.m. he received a call from his neighbour, one *"Julius"* who told him that his brother, the deceased, had been hit with an axe and was in serious condition and PW4 should go home as fast as possible. PW4 urgently proceeded home and on reaching there he was informed that the deceased had been rushed to hospital due to the severity of the injuries he had sustained. PW4 proceeded to Garissa General Hospital where he [PW4] found the deceased unable to speak or to recognize him. The deceased had a very big injury on the left side of his head. PW4 stayed with his brother in the hospital until he died, two days after the incident. Omar Dullo, (PW5) and Cpl. Phillip Rutto, (PW7), arrested the appellant on the 23rd March, 2009 after tracking him down for nine days after the incident.

Dr. Abdinoor Abdi Mohamed, (PW8), testified that on 16th March, 2009 at around 5.30p.m., he examined the deceased's body. The postmortem result showed that the deceased had linear fracture of the front to middle of the head on the left side. The doctor formed the opinion that the cause of death was increased intra cranial pressure due to head injury by a sharp object. He produced a P3 form that had been filled in respect of the appellant by Dr. Tanuira. PW8 identified the signature on the P3 form as that of his colleague with whom he had worked at Garissa Hospital.

The appellant herein gave sworn evidence, in his defence. He did not deny the charges. His defence was that on the material date he was on his way to his farm. He had to pass at the rear part of PW1's home. On reaching PW1's farm he was abused by PW1 who called him a dog and rubbish. PW1 further alleged that the appellant wanted to steal. PW1 told him that if he wanted a fight, he should fight with his son who was his age mate. It was the appellant's testimony that PW1 called out to the deceased. The deceased came and asked PW1 what the problem was. PW1 told the deceased that the appellant wanted to fight PW1. The appellant told the deceased that he had not quarreled and there was no need for a fight. The deceased went back to the construction site. Shortly thereafter, the deceased returned with a *panga* and told the appellant that he would not live beyond that day. The deceased cut him on his right leg prompting the appellant to fight back.

In a judgment delivered on the 25th day of February, 2011, the learned trial Judge ***Lesiit J*** delivered herself inter alia that:-

> ***"Having considered the facts of the case, I am satisfied that the accused had the knowledge that by hitting the deceased on the head with the axe would cause grievous harm or death to the deceased. The accused should have known that the pulling out of the axe from the head would only serve to worsen the injury he had already caused to the deceased.***
>
> ***I find that the prosecution has proved that the accused had formed the necessary malice aforethought to cause grievous harm or death to the deceased. I find the offence charged proved beyond any reasonable doubt. I find the accused guilty of murder and convict him accordingly"***

The appellant was aggrieved by that decision. He proffered the appeal subject of this judgment citing four (4) grounds of appeal a "petition of appeal" filed on 3rd of March, 2011. Of these, learned Counsel ***Mr. Mogikoyo*** appearing for the appellant abandoned grounds 2 and 3. He elected to argue grounds 1 and 4

only. These are:-

1. ***The Honourable trial Judge erred in law and facts when she convicted the appellant in this case without considering that it was a fight between the appellant and the deceased.***

   The Honourable trial Judge erred in law and fact when she convicted the appellant while rejecting his defence without explaining the proper reasons for rejecting thus violating the law, Section 169 of Civil Procedure Code.

At the hearing of the appeal, ***Mr A.O Mogikoyo,*** submitted that the appellant was attacked on the same day as the deceased was attacked; that the appellant gave a sworn defence in which he stated that he fought with the deceased who had a *panga*; that in the course of the fight, the appellant overpowered the deceased and hit him using a *panga*. Hence there was no element of *mens rea*. He said this was a case of self defence.

Learned counsel submitted further that by PW1 stating in his testimony that there was no quarrel between the appellant and the deceased, PW1 wanted the court to believe that there was no provocation. To learned counsel, there was provocation caused by PW1 calling the appellant a dog and a thief, thus provoking the appellant to hit back at the deceased in self defence.

Mr. Mogikoyo further contended that since the murder weapon was never recovered, it is not clear whether it was an axe or a *panga that caused the deceased fatal injury. Mr. Mogikoyo* also added that it was not also clear whether the deceased was attacked at the entrance of the mosque as was stated by PW1 or elsewhere.

Lastly, Mr. Mogikoyo stated that this Court being the 1st appellate court, has a duty to re-evaluate and analyze the record and if it does so, it will discover that the appellant was telling the truth, while the prosecution was suppressing the truth. On that account learned counsel urged us to find that if any offence was committed by the appellant, then on the facts on the record as they are presently before us, the appellant was guilty of manslaughter and not murder.

Learned Senior Principal Prosecution Counsel, ***Mr V.S Monda,*** in opposing the appeal submitted that the offence of murder was proved as laid out; that it is clear that the appellant in his defence was raising the defence of self defence and provocation. ***Mr. Monda*** submitted further that taking into account the totality of the evidence and the surrounding circumstances, it cannot be reasonably concluded that the appellant did not act with malice aforethought in causing the death of the deceased.

On the issue of *mens rea,* learned counsel ***Mr. Monda*** stated that the trial court went to great lengths to determine whether there was *mens rea* or not and arrived at the correct finding that there was *mens rea.* He urged us to uphold the findings of the High Court and accordingly dismiss the appeal.

Mr Mogikoyo in response to the respondent's submission reiterated that although the trial court found an injury on the appellant, it made no finding on what caused the injury. Neither was there a determination as to whether it was caused by a *panga* or an axe. To Mr. Mogikoyo, the mere fact that the deceased was armed and had threatened the life of the appellant was enough to warrant the defence of provocation. Lastly that if the deceased had a *panga* and the defence of the appellant was that he had no way of escape, then the defence of self defence was available to the appellant.

This being a first appeal, this Court is obligated to re-evaluate and analyze the facts and evidence that resulted in the decision in the High Court and then arrive at its own decision. See

Okeno versus Republic [1972] EA.32 which stated:-

> ***"The first appellate Court must itself weigh conflicting evidence and drew its own conclusion (Shantilal M. Ruwala versus Republic [1957] EA 57). 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 courts findings and conclusions; it must make its own findings and drew its own conclusion only then can it decide whether the Magistrates 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 witness."

We have revisited the record as was before the learned trial judge and as has been placed before us. We have considered its content in the light of the rival arguments fronted by either side. It is our considered view that the issues that arise for our determination are as follows:-

i. ***Whether on the facts before us the defence of provocation and self defence were available to the appellant.***

ii. ***Whether these were given sufficient weight by the learned trial Judge.***

iii. ***Whether malice aforethought was established by the prosecution.***

With regard to the defences of provocation and self defence, ***Mr. Mogikoyo*** submitted on behalf of the appellant that these two defences were available to the appellant and they should have been accepted by the learned trial Judge; that had this been done, it would have had an impact on the outcome and the trial Court would have returned a verdict of guilty for manslaughter and not murder.

We note from the record, that the learned trial Judge was alive to these two defences. This is borne out by the following observation:-

"….I wish to decide whether self defence and provocation are available to the accused as he put forward that defence"

This was followed by the learned Judge setting out the content of Sections 208 and 17 of the Penal Code on provocation and self defence respectively and drew inspiration from the decision in the case of ***Mungai Versus Republic [1984] KLR 85)*** in which both defences of provocation and self defence were exhaustively discussed. Applying the extracted principles of law to the facts before her, the learned Judge went on to make the following observations:

"The facts of this case according to the accused are that, he was verbally abused before the deceased went for him with a panga. PW8 produced the P3 form filled for the accused. The accused was found with a superficial cut on the right leg which was twelve (12) days old and which was caused by a sharp object. Since the examination was done on 31st March. Considering the accused defence that the deceased cut him on the leg, the Doctor finding seem to offer corroboration at least to the injury. It may be that the accused was defending himself.

The question which begs an answer is whether the threat of attack on the accused was near enough and serious enough to the accused the defence of self defence. I have considered the fact that the injury the accused suffered was a superficial one to the leg. Provocation does not arise. As for self defence, it is my view that the nature of the injury the accused inflected on the deceased, and the area he hit and the weapon he used are a clear indication that the accused used excessive force and handed his weapon at the most vulnerable part of the body. There was evidence from PW2 that after the accused hit the deceased, he spent time forcefully pulling out the axe from the deceased head"

On our own, we are satisfied as was the learned trial Judge that in order for the defences of provocation and self defence to hold, these must satisfy the ingredients set by both Sections 208 and 17 of the Penal Code respectively. Section 208 of the Penal Code provides;-

"208(1) the term "provocation" means and includes except provocation defined as herein after stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary

person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stems in a conjugal, parental, facial or fraternal or servant, to deprive him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

2. ***When such an act or insult is done or offered by one person to another or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relations as aforesaid, the former is said to give to the latter provocation for an assault.***

3. ***A lawful act is not provocation to any person for an assault.***

4. ***An act which a person does in consequence of incitement given by another person in order to undue him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***

5. ***An arrest which is unlawful is not necessary provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality"***

In ***Elphas Fwamba Toil versus Republic [2009] eKLR*** this Court stated inter alia that:-

> ***"In our view once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga….. we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims and we feel the learned Judge in coming to that conclusion was clearly in error"***

In the case of ***Mabonga versus Republic [1974] EA176*** the predecessor of this Court, the Court of Appeal for Eastern Africa made observation at page 178 paragraph H-I.

> ***"The Judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the cow was in the particular circumstances of this case provocation sufficient to have reduced the offence from murder to manslaughter. His failure to direct himself or the assessors to this issue was a serious misdirection. In the circumstances, we think it will be unsafe to allow the conviction for murder to stand, as an evidence, provocation cannot be ruled out. We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefor a conviction for manslaughter. We have on our own revisited the content of Section 208 Penal Code and construed it. To us content of provocation means any wrongful act or insult of such a nature as to be likely when done to an ordinary person…. To deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered"***

From the appellant's own testimony, the first party to direct insults at him was PW1 the father of the deceased, who allegedly called him a dog and a thief who intended to steal. If it is true that the appellant's visit to the scene was innocent, then upon realizing that PW1s utterances were offensive to him and since he says he had no other motive, then what a reasonable person would have done in the circumstances displayed would have been for him (appellant) to go away.

It is on record that after PW1 called out to the deceased and the deceased came and upon hearing what his father (PW1) had to say to him the deceased even took the trouble of inquiring from the appellant what the trouble was. Upon the appellant telling him that there was no quarrel between him appellant, and PW1, nothing prevented the appellant from going away.

It is alleged that the deceased came out with a *panga* and cut the appellant. There is no mention of the appellant attempting to flee to avoid confrontation. We therefore agree with the finding of the learned trial Judge that the defence of provocation does not hold.

As for the defence of self defence the parameters for such a defence to hold are those set by common law principles on the defence of person or property. These are that the force must not be excessive. The learned trial Judge ruled out self defence on account of the nature of the injury the appellant inflicted on the deceased and the area he hit and the weapon he used. To the learned Judge, these were a clear indication that the appellant used excessive force and landed his weapon at the most vulnerable part of the body – that is the head and then he, the appellant, spent time forcefully pulling out the axe from the deceased's head. We entirely agree with the learned trial Judge that the excessive force used on the deceased by the appellant went to negate the defence of self defence.

Turning to malice aforethought, we are alive to the fact that it is now trite that for the offence of murder to hold, there are three elements of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. These are: (a) Demonstration and or proof of existence of the death of the deceased and the cause of that death. (b) Proof that the accused committed the unlawful act which caused the death of the deceased and (c) proof that the accused had malice aforethought (***See Nyambura & Others versus Republic***

[2001] KLR 355.

15 In the case before us the learned trial Judge quoted with approval a passage from the decision in ***Mungal versus Republic [1984] KLR85*** thus:-

> "***The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is rear enough and serious enough to cause loss of control than the inference of malice is rebutted and the offence will be manslaughter***"

The learned Judge then went on to observe thus:-

> "***There was evidence from PW2 that after the accused hit the deceased he spent time forcefully pulling out the axe from the deceased head. That act fortifies the finding that the totality of the accused conduct on the material day was actuated by malice and that the accused was desirous of causing the maximum pain and injury on the deceased"***

The learned trial Judge correctly appreciated the content of Section 206 of the Penal **Code**. This is the provision of law which sets out what constitutes or does not constitute malice aforethought. We find it prudent to reproduce the same as hereunder:

> ***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."*

From the above content, the law recognizes express, implied and constructive malice. It also appears that 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. However when it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery); or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought. See ***REPUBLIC V STEPHEN KIPROTICH LETING & 3 OTHERS, [2009] eKLR High Court at Nakuru Criminal Case No. 34 of 2008.***

Applying the above ingredients to the facts before her, the learned trial Judge made the following observation:-

> ***"Having considered the facts of the case, I am satisfied that the accused had the knowledge that by hitting the deceased on the head with the axe would cause grievous harm or death to the deceased. The accused should have known that the pulling out of the axe from the head would only serve to worsen the injury he had already caused to the deceased.***
>
> ***I find that the prosecution has proved that the accused had formed the necessary malice aforethought to cause grievous harm or death to the deceased. I find the offence charged proved beyond any reasonable doubt. I find the accused guilty of murder and convict him accordingly"***

On our own we find that it is not in dispute that the deceased died as a result of the events that took place on 14th March, 2009, in which the appellant was involved. ***Dr Abdinoor Abdi*** Mohamed stated in evidence and it was also in the post mortem report that the deceased died as a result of increased *intra-cranial* pressure secondary to severe injury to the brain.

Mr. Mogikoyo learned counsel for the appellant urged us not to lose sight of the fact that there was variation in the testimony of PW1 and PW2 as to what transpired before the attack; secondly that the murder weapon was never recovered and thirdly that it was not clear as to whether the deceased was attacked at the entrance of the Mosque or elsewhere.

We have given due consideration to the rival arguments on the above issues and we are in agreement with the learned counsel's arguments that there was a slight variation in the testimony of PW1 and PW2 as to what transpired just before the attack, whether the attack was at the entrance of the mosque or slightly a distance from it. We also agree that indeed the murder weapon was never recovered.

Our response to the above arguments is that the slight variation in the testimony of PW1and PW2 as regards what transpired immediately before the attack is minor and not a remote expectation of witnesses who were not anticipating any attack, witnesses who were suddenly drawn to the episode, and perceived it differently. They were therefore entitled to give a different or interpretation of what was unfolding before them. This finding not withstanding, we are also in agreement that the disagreement is not fatal to the prosecutions case. Of importance here was that both witnesses agreed that it was the appellant who inflicted the fatal injury to the deceased. The two also agreed that the weapon used by the appellant to inflict the injury and which they saw with their own eyes was an axe.

The crucial issue for determination before the learned trial Judge was who caused the fatal injury to the deceased and not as to how the person who caused that fatal injury to the deceased approached the scene. The learned trial Judge was therefore entitled in treating that issue as inconsequential to the core issue for determination before her and made no determination on it. What was material was that the deceased was fatally attacked on the material day. A fact the appellant does not himself deny save that he alleged the attack was provoked and in self defence.

As for the non-recovery of the murder weapon, it is undisputed that the prosecution case was that

appellant disappeared from the scene soon after the incident and only resurfaced nine days later on the date of his arrest. That was sufficient time for the murder weapon to be disposed of.

From the way he gave evidence in his defence, the appellant was possessed of sufficient intelligence to know what he was talking about. A person who was in proper control of his mental faculties as was the appellant could not certainly make a mistake of engaging in a self infliction incrimination act by parading the alleged murder weapon and in the process making it available for forensic examination.

Issue was also raised as to whether the injury was caused by an axe or a *panga.* Indeed the witnesses mentioned an axe. It was the appellant who introduced the issue of the *panga.* Of importance to the case was whether the items mentioned were capable of causing the type of injury noted by the Doctor. To us we take judicial notice that both of these weapons have sharp blades capable of causing the type of injury that was noted by the Doctor. However the most likely one to have caused the fatal injury was the axe because that is what witnesses saw. Its non-recovery notwithstanding the prosecution evidence on the cause of the fatal injury remained unshaken. It mattered not that it was not recovered. We do not accept that the prosecution can be penalized for its non production in the absence of any basis for concluding that they deliberately failed to produce it.

Turning to self defence, it is our considered view that even if it were accepted that the appellant truthfully stated in his defence that the deceased had a *panga*, thus provoking the appellant to kill the deceased in self defence; in our view the trial court was right in concluding that the appellant had the knowledge that hitting the deceased on the head with the axe would cause grievous harm or death to the deceased. To us and on the face of the facts before us, it can safely be concluded that when the appellant walked to the deceased's home, with an axe, he had the intention of causing harm as no explanation was given as to why the appellant was so armed. By saying that no explanation was given as to why the appellant was so armed with an axe, we do not in any way invite the appellant to prove his innocence and thereby shift the legal burden of proof on to him. We are only expressing the obvious that in an instance where an explanation is given by the appellant for his presence at the scene, expectation of a reasonable explanation as to why he was so armed is a normal expectation of any reasonable man and would not be so remote as to make it extra ordinary. We also find that he also knew that harm would be caused if he used it on anybody. Therefore it is right for us to conclude as did the trial court that malice aforethought was established.

In conclusion, we find as did the learned trial judge that the fatal blow to the deceased was excessive and was out of proportion compared to the superficial injury allegedly caused by the deceased. This is fortified by the following observation by the learned Judge;

> ***"The facts of this case according to the accused are that he was verbally abused before the deceased went for him with a* panga*. PW8 produced the P3 form filled for the accused. The accused was found with a superficial cut on the right leg which was 12 days old and which was caused by a sharp object. Since the examination was done on 31st March 2009, it was probably caused on the 20th March considering the accused defence that the deceased cut him on the leg, the doctor's finding seems to offer corroboration at least to the injury it may be that the accused was defending himself."***

From the above facts, we find as did the learned trial judge, that the appellant had malice aforethought and hit the deceased with the intention of causing harm or death. His further action of removing the axe when he ought to have known that the act of removing the axe from the head would cause further injury is also evidence that he intended to cause maximum injury to the deceased. This conduct on the part of the appellant negates the defence of provocation. We reiterate as stated earlier on herein that this defence is not available to the appellant. We also find that from the evidence on record, he appears not to have been provoked to such an extent so as to be excused from culpability for causing death to the deceased.

Further, we also find that the defence of self defence is also not available to the appellant. Our reason for saying so is that the appellant's defence even if taken to be true, clearly shows that the appellant only suffered a superficial injury on his leg. We reiterate our earlier stand that the force used by the appellant

in reaction to the alleged attack by the deceased which allegedly caused a superficial injury on his leg was inordinate, excessive and disproportionate to the force used by the deceased. We are keenly aware that no witness alluded to its infliction on the appellant by the deceased. Accordingly, we find that the trial court rightly convicted the appellant with the offence of murder. In the result, we uphold the conviction and sentence for murder and dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 24th day of October, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR