IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, ODEK & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 2 OF 2013

BETWEEN

JOSEPH KHATIAKALA ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega

(Chitembwe, J) dated 31st January, 2013

in

HCCRC NO. 14 OF 2008)

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DRAFT JUDGEMENT OF THE COURT

This is a first appeal and we are duty bound to revisit the evidence afresh, analyse it, evaluate it and reach our own conclusion provided that we are minded that the trial court had the advantage of seeing the demeanour of the witnesses and hearing them and thus give allowance for the same – see the oft-cited case of **Okeno v Republic [1972] EA 32** on the duty of a first appellate court. That statement of the law will also be found in our recent decision in **Raphael Isolo Echakara & Anor v Republic (Kisumu) Criminal Appeal No. 44 of 2013 (ur)** amongst many others.

The charge that faced the appellant was that of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged in the Information that on 8th February, 2008 at Lubambo village in the then Kakamega District the appellant murdered Christopher Musinzi.

The prosecution called seven witnesses and at the close of that case the trial Court found that the appellant had a case to answer. The appellant gave sworn testimony and in a considered judgement delivered on 8th November, 2012 the learned trial judge (Said J. Chitembwe, J) convicted him and sentenced him to 20 years imprisonment. Those findings provoked this appeal premised on five grounds of appeal set out in the Memorandum of Appeal drawn by learned counsel for the appellant M/s S. M. Onyango Associates, Advocates. In sum the appellant complains that the learned judge erred in finding that a charge of murder had been proved when the evidence presented did not support such finding; that

the learned judge erred in relying on evidence fraught with contradictions; that there was miscarriage of justice as the learned judge failed to critically analyse the prosecution evidence and that of the defence; that the evidence was not analysed as a whole and finally that the trial court shifted the burden of proof .

What was the case for the prosecution? It was that at about 5:00 p.m on 8th February, 2008 **Clayton Bhanja (PW1) (Bhanja),** who owned a bicycle which he operated as a "***boda boda*"** taxi was requested by a village elder one Ayisi, to take the Assistant Chief (Christopher Jumba – deceased) home. They were then at Virembe Market and the deceased home at Muleche was about 2 kilometres away. They used a rough road. On reaching a hilly patch of the road and as he continued to cycle the bicycle Bhanja saw the appellant, a person he knew well, who was walking while staggering as if he was drunk. Bhanja overtook the appellant but as he did so the deceased told him that he had been stabbed by the appellant. The deceased thus requested him to seek help and he cycled to the nearby home of **Aggrey Khalusi (PW2) (Khalusi)** but upon arrival there, and upon disembarking from the bicycle the deceased stumbled and fell. Both Bhanja and Khalusi observed that the deceased, who was in official uniform, was bleeding profusely. They carried the deceased to a motor vehicle and sped to Kakamega District Hospital but upon arrival there a doctor pronounced that the deceased had already died.

Asked, in cross examination, whether he had actually seen the appellant stab the deceased Bhanja had this to say:

> **"... The accused stabbed the assistant Chief immediately we passed him. I didn't see accused doing the stabbing. The place is hilly and I was moving slowly. I stopped immediately. There were children coming from school but were quite far. There was nobody on the road other than the three of us, Chief, myself and accused...."**

A report was made at Kakamega Police Station and the body of the deceased was taken to Kakamega Hospital Mortuary where it was identified for post mortem by **Philip Musinzi (PW3)** and **Wilson Musonye (PW6)**. A post mortem was conducted by Dr. Oreke of that hospital whose report was produced by **Dr. Dickson Mchami (PW7) (the Doctor)** who testified that the body of the deceased had a stab wound 6cm long and 0.5cm wide below the right collar bone which had severed the blood vessels under the collar bone. The 2nd right rib was fractured and both lungs had collapsed leading the Doctor to conclude that the cause of death was trapping of air in the chest due to a chest penetrating injury.

No. 42374 PC Benson Owoch (PW4) of Kakamega Police Station received report of the said incident and visited the scene with other officers but did not find the weapon used to stab the deceased. They also did not find the appellant.

The same day 8th February, 2008. **No. 79019040 I. P. Moses Kimong;** upon receiving information, visited the appellants home but did not find him. He later that night received further information and while accompanied by other officers and members of the public he went to Mukangu area where he found the appellant hiding by a river while armed with bows and arrows. He was duly arrested and charged with murder as already stated.

At the end of the prosecution case, and after being put on his defence the appellant in a sworn statement stated that he was a farmer, charcoal burner, a person who prospected in gold and also doubled as a person who lay trapsin the forest to capture animals presumably for food. He admitted knowing the deceased but denied the allegations made against him. He stated that on 8th February, 2008 he had gone to sell gold at Khayega after which he enjoyed four beers in a bar and thereafter left for home. He said that he was arrested on 9th February, 2008

Mr. H. B. Indimuli, learned counsel for the appellant, in urging the appeal before us, consolidated all the grounds of appeal and argued them as one. He submitted that there was material contradiction in the evidence of Bhanja who on the one hand testified that he had seen the appellant stab the deceased but on the other testified that it was the deceased who told him that he had been stabbed by the appellant. Counsel further submitted that the trial court erred in convicting for murder when a motive had neither

been established nor proved. For these reasons he urged us to allow the appeal.

Mr. L. K. Sirtuy, the learned Principal Prosecution Counsel, in opposing the appeal urged that the facts of the case established by circumstantial evidence that it was the appellant and no other who had stabbed the deceased to death.

We have carefully considered the record of appeal, the Memorandum of Appeal, the rival submissions made before us and the law.

The learned trial judge after analysing the evidence presented held that:

> **"The only evidence connecting the accused to the offence is that of PW1. It is the evidence of PW1 that he saw the accused walking along the road at a close distance. There was no other person other than the accused and PW1 together with the assistant chief along the road. There were some children coming from school but they were quite far. It is PW1's evidence that it was about 5:00 p.m and the chief had come out of a barasa. PW1 further testified that the place was a bit hilly and he was cycling slowly. PW1 had known the accused for a long time and knew that he used to poach animals in the forest.**
>
> **On the other hand there is the evidence of the accused person who testified that he did not see PW1 and the deceased along the road on that material day. The accused was coming from Khayega after having sold his gold. He denied having committed the offence. He took some four beers after selling his gold and walked along the road heading to Chepsonoi area.**
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> **From the evidence on record I am satisfied that it was the accused who stabbed the deceased. The offence occurred at about 5:00 p.m. and PW1 clearly saw the accused. It is PW1's further evidence that the chief told him that he had been stabbed. PW1 stopped the bicycle immediately the chief was stabbed and that was after they had passed the accused. There was no other person along the road. Although the motive is not known but I am satisfied that the accused stabbed the deceased and he had the intention to cause him grievous harm. The deceased died because of the injuries inflicted on him by the accused....."**

The learned judge proceeded to find that the appellant stabbed the deceased inflicting fatal injuries and that he was therefore guilty of murder and convicted him accordingly.

Bhanja did not see or observe the appellant stab the deceased but he testified that it was only the three of them who were at the scene and that there was nobody else who could have stabbed the deceased. Indeed his testimony went further to the effect that as soon as he overtook the appellant while slowly cycling up a gentle hill the deceased informed him immediately that he had been stabbed and they should go to hospital.

It was held by the predecessor of this Court in **Kipkering Arap Koske & Anor v R 1949 EA 135** that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis other than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. See also **Sawe v Republic [2003] e KLR** where the same proposition was made.

On our part, and upon re-analysing, as we must, the evidence on record, we are satisfied that there was sufficient evidence before the trial court to find that it was the appellant and no other who stabbed the deceased inflicting injuries on him. Bhanja had clearly seen the appellant, a person he knew very well before, walking ahead of them as he cycled the bicycle uphill. It was broad daylight and there was no

other person at the scene at all. The deceased suddenly informed Bhanja, as soon as they had overtaken the appellant, that he had been stabbed and they should go to hospital. The circumstances were such that it was the appellant, and no other, who had the opportunity to stab the deceased. The learned trial judge cannot be faulted on this aspect of the matter at all.

There is however one aspect of the matter that calls for our further consideration. As stated the appellant was charged with and was convicted of the offence of murder. The learned trial judge, after analysing the evidence placed before him stated is part of the judgment that although the motive for the attack was not known the judge was satisfied that the appellant stabbed the deceased with intention to cause him grievous harm and was thus guilty of murder.

Section 203 of the Penal Code defines the offence of murder as

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

And Section 206 of the same Code defines malice aforethought as comprising of:

> **"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;**
>
> **(b) knowledge that the act or omission causing death will probably cause the death 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."**

The learned trial Judge found that malice aforethought had been proved.

Malice aforethought is really the intention or ***mens rea*** in murder cases. It is not essential to prove motive in a murder case. We say this because Section 9 (3) of the Penal Code provides that:

> **"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."**

It may however become one of the elements to consider where the case for the prosecution, as the case which was before the learned judge, rested purely on circumstantial evidence. That issue became one of the issue for consideration in the case of **Libambula v Republic [2003] KLR 683** where this Court stated:

> **" We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of the person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove crime."**

In that sense , as was held in **Muili Tulo v Republic [2014] e KLR**, motive is not *mens rea.*

In the case before the learned Judge Bhanja testified that while cycling carrying the deceased on his bicycle:

"...I saw someone walking while staggering. I recognized him as Khatiakala...."

In cross examination the same witness stated that:

"....The accused walked as if he was drank..."

This witness also stated that he knew the appellant as a person who poached animals in the forest. Police Officer Kimong testified that upon receiving information he went to Mukangu area at 1:00a.m where he found the appellant by a river, hiding in a forest armed with a bow and arrows. The appellant himself, in sworn testimony in his own defence stated his various occupations to include laying snares for animals in the forest.

The learned trial judge established, as one of the issues calling for his consideration, whether the appellant was drunk to the extent that he did not know what he was doing. In the end the Judge found that the appellant was not intoxicated to the extent of not knowing what he was doing.

It will therefore be seen that the evidence placed before the learned judge, and which he accepted, was that the appellant could very well have taken intoxicating drinks which made him stagger as he walked on the road. It would appear that upon Bhanja overtaking him, and in a completely unprovoked attack, he proceed to stab the deceased and then disappeared from the scene only to be found many hours later by police as he hid at a river in the forest.

The circumstances of the case and the facts laid out by the prosecution do not appear to have established the necessary ***mens rea*** to found a charge of murder as provided by the said Section of the Penal Code. The appellant was armed with a sharp object which he probably used in his occupation of hunting animals in the forest.

For reasons that are not known on that particular day, and after apparently taking alcohol, the appellant attacked the deceased by stabbing him and then disappearing from the scene. We are of the respectful opinion that the circumstances appear to establish an offence of manslaughter but not that of murder which the appellant was charged and for which he was convicted.

Having come to the conclusion that the appellant was wrongly convicted for murder instead of manslaughter this appeal partially succeeds to the extent that we quash the conviction for murder and substitute thereof a conviction for maslaughter as provided by Section 202 of the Penal Code.

What is the appropriate sentence to be awarded to the appellant?

The trial judge, after convicting the appellant for the offence of murder held that the sentence of death was inhuman and degrading. He was probably persuaded in that line of thinking by the holding of this court in **Mutiso v Republic Criminal Appeal of 17 of 2008 (NAI)** where it was held inter alia that the death sentence was not the only sentence on a conviction for murder. The learned Judge therefore took into consideration the fact that the deceaseds' family had been robbed of its breadwinner and sentenced the appellant to serve 20 years imprisonment.

Upon our own consideration we think that the appellant should serve 20 years imprisonment for the offence of manslaughter. It is therefore so ordered.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER, 2014.

F. AZANGALALA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL