REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 97 of 2007

ISAACK KIMANTHI KANUACHOBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Being an appeal against the conviction and sentence of the High Court of Kenya at Embu by (Khaminwa, J.) dated 26th February, 2007*

in
H.C.CR.C. NO. 10 OF 2003)
****

JUDGMENT OF THE COURT

The appellant herein **ISAACK KIMANTHI KANUACHOBI** appeals against the conviction and sentence for murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** by the High Court of Kenya at Embu.

The particulars of the charge are that on the 11th day of February, 2003 at Ishiara market within Mbeere District of the Eastern Province, he murdered Wilson Ngari. Upon his plea of not guilty, the appellant was tried with the aid of three assessors and was thereafter convicted and sentenced to death. At the hearing the prosecution called a total of nine (9) witnesses. In his defence, the appellant tendered unsworn evidence.

The brief facts of the case are that, on 11th February, 2003 ***Samuel Ngari Kiura (PW1) (Samuel)***, a matatu driver, heard some noises at the stage and on looking he found that the appellant had stabbed one **Ngari** (hereinafter referred to as the ***deceased***) on the left front side of the shoulder. He testified that he had seen the appellant running while holding a knife smeared with blood but he did not see the appellant stab the deceased. ***John Njue David (PW2)***, who was driving a motor vehicle nearby, testified that he saw the deceased standing somewhere at the market drinking a soda. He said that he saw the appellant who was standing behind the deceased touch him on his shoulder and when the deceased turned to see who had touched him, the appellant stabbed him on the front side of the upper chest. He further testified that he and some other members of public picked the deceased and took him to hospital where he succumbed to the injuries. ***Johnson Muriuki Ringera (PW3)***, a vegetable seller at Ishiara market who was a1so the appellant's employer told the court that he was on his way to the bus stage on the date and at the time in question when he met the appellant running from the bus stage. He said that he heard the appellant say that he had stabbed somebody. He rushed to the bus stage and found the deceased being taken to the hospital.

Doctor Nicholas A. Odero (PW7) testified that he performed a postmortem examination on the deceased

and completed the post mortem form which he produced before the trial court as exhibit. He found the deceased with a stab injury on the right top front chest. His conclusion was that the cause of death was a stab injury on the right artery and vein that resulted into shock from severe bleeding or hemorrhage. The appellant was arrested later by ***Inspector Julius Ndirangu (PW8)*** who was in charge of the Siakago police post and taken to the police station where he was charged with the offence of murder after ***Doctor Ibraham Gatanyi (PW9)*** a psychiatrist had confirmed that he was normal physically and mentally and thus fit to stand trial.

In his unsworn statement of defence, the appellant told the court that on the material day, he was at Ishiara market in the company of one Kirie and Wilson Muriuki. He thereafter left the market and went to his house to do some house chores. At about 3.00 p.m he answered to a knock by a police officer who asked him whether he was of the Meru tribe; searched his house and arrested him. He was later charged with the offence of murder. He stated that, PW1 and PW2 had a grudge against him, especially PW2 who was against the said Waweru from bringing WaMeru into his business.

The case was summed up for the assessors who after deliberating on the same returned a unanimous verdict of 'guilty' of the charge of murder. The learned Judge of the High Court also arrived at the same decision, convicted the appellant and meted the death sentence.

Dissatisfied with the decision of the High Court the appellant filed a memorandum of appeal on 23rd March, 2007. He later filed supplementary grounds of appeal on 17th March, 2012 and 17th October, 2012.

At the hearing of the appeal, the appellant was represented by learned counsel Ms Mwai who relied on the supplementary grounds of appeal filed on 17th October, 2012 and abandoned the others. The said grounds are as hereunder:

"1. The learned trial judge erred in law in convicting the appellant for the offence of murder, while in fact the offence disclosed by the evidence on record is one of manslaughter.

2. The learned trial Judge further erred in law and in fact in failing to guide the assesors on the law applicable while summing up the case for them, thereby making the proceedings a nullity.

3. The learned trial judge erred in law in failing to give the appellant an opportunity to offer mitigation that would have assisted the court in meting out the appropriate sentence.

4. The learned trial Judge failed to appreciate that the fundamental rights of the appellant under section 72 and 77 of the then constitution of Kenya were violated as the appellant had been arrested on 12th February, 2003, and was not brought to court until the 1st of September, 2003 leading to a miscarriage of justice that entitled the appellant to an acquittal."

She urged the first three grounds and withdrew the fourth ground. We shall therefore proceed to consider these three grounds vis-à-vis the evidence we have analysed above.

On grounds one and two, which she urged together, learned counsel argued that malice aforethought had not been established. It was not disputed that the appellant was at the scene, had a quarrel with the deceased and that he stabbed the appellant. She further urged that the appellant stabbed the deceased on impulse using a pen-knife which men are known to carry and that the stabbing was not pre-meditated. Moreover, malice aforethought was not established as it was not stated how early in the morning the quarrel between the deceased and the appellant had taken place raising the question whether there was time to cool off and or premeditate the attack on the deceased.

Secondly, she argued that the proceedings were a nullity because the trial judge had failed to explain the meaning of malice aforethought to the assessors when summing up the case for their opinion. On this ground however, we hasten to note that at ***page 47 of the record of appeal***, the learned trial Judge did indeed explain the meaning of malice aforethought to the assessors in the following words.

".....the accused acted with malice aforethought. That he considered and planned and executed the act. Or that he did an act which he knew would cause death."

The trial Judge further explained the difference between murder and manslaughter giving the assessors the three possible options i.e to make a finding on murder, manslaughter or to acquit.

Thirdly, learned counsel raised the issue of denial of an opportunity for the appellant to mitigate before sentence. This Court has in several decisions held that mitigation and recording of mitigating factors at trial is paramount for various reasons that may have an impact on the sentence later. For instance, in **AMOS CHANGALWA JUMA V REPUBLIC [2009] eKLR** the court pronounced itself thus:

"Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We have reproduced the concluding paragraph of the learned Judge's judgment and it is clear that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was clearly improper. As we have stated previously in other judgments, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person (or his counsel) before sentencing him/her. This obtains even in the cases where death penalty is mandatory. The reasons for requirement are clear in that when the matter goes to appeal as this matter has come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing appropriate sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal, or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly, matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be recorded even in cases of mandatory death row sentence."

Also In ***JOHN MUOKI MBATHA V. R.*** – *Criminal Appeal No. 72 of 2002* (unreported) this Court said:-

"***As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered."***

Similar sentiments were expressed in the more recent case of *ELPHAS FWAMBA TOILI v REPUBLIC [2009] eKLR* where this court stated:-

"Before we proceed to sentence the appellant we note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously and we repeat here, after the judgment is read out and in case of a conviction, the Court must take down mitigating circumstances from the accused person before sentencing him. This obtains even in the cases where death penalty is mandatory and the reasons for the same requirement are clear…."

We believe we have said enough on this ground and only reiterate that an accused person has a right to mitigate even in cases that attract minimum mandatory sentences and even in cases which attract the death penalty. As rightly submitted by learned counsel for the state, the appellant ought to have been allowed to mitigate before the sentence was pronounced. Failure to mitigate does not however in our view ipso facto vitiate a conviction. It is clear from the foregoing analysis that grounds two and three must fall by the wayside and the only pertinent ground of appeal left for our consideration is ground one which is on the issue of malice aforethought.

On his part, Mr. Kaigai, learned acting assistant deputy public prosecutor, opposed the appeal but conceded that the evidence on record disclosed the offence of manslaughter and not murder and that the

learned Judge ought therefore to have convicted the appellant for the offence of manslaughter and not murder.

In our considered view, this appeal singularly revolves around the issue of malice aforethought. Was malice aforethought proved before the trial court?

For the offence of murder to be proved, there are three essential elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: -

(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.

(See **Nyambura & Others-Vs-Republic, [2001] KLR 355).**

Instances when malice aforethought is established are provided for in **Section 206** of the **Penal Code** which provides;

"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."

There is express, implied and constructive malice. 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. 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 34 of 2008).**

In view of the law and facts in the appeal before us, it cannot be established that the appellant had premeditated his reaction towards the deceased. In summing up the issues for the assessors, on page 47 of the record of appeal, it is evident that the High Court drew from the facts on behalf of the assessors by stating:-

"In this case it is clear there was a quarrel. Therefore the stabbing of deceased was sudden and on impulse."

Having arrived at this conclusive finding, it is not clear how or why the learned Judge proceeded to convict the appellant for the offence of murder. It is clear that malice aforethought was not proved in this case and the appellant should have been convicted for manslaughter and not murder. That being the case, this appeal succeeds to the extent that the conviction quashed and the death sentence for the offence of

murder is hereby set aside. We substitute therefor a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

Although, the appellant did not mitigate, given all the circumstances of the case, we are of the view that a sentence of 10 years imprisonment from the date of conviction is a fair and well deserved sentence. We therefore set aside the death sentence and in lieu thereof impose the sentence of 10 years imprisonment.

Dated and delivered at Nyeri this 6th day of February, 2013.
J.W. ONYANGO OTIENO
….....
JUDGE OF APPEAL

W. KARANJA
….....
JUDGE OF APPEAL

D. K. MARAGA
….....
JUDGE OF APPEAL
I certify that this is a
True copy of the original.

DEPUTY REGISTRAR