



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CRIMINAL APPEAL NO. 366 OF 2011**

**BETWEEN**

**G.A.J..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)*

*dated 7<sup>th</sup> July, 2011*

**in**

**H.C.CR.A. NO. 57 OF 2008)**

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**JUDGMENT OF THE COURT**

1. **G.A.J**, the appellant herein, was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**, Chapter 63 Laws of Kenya in the High Court at Meru. The particulars of the charge were that on 1<sup>st</sup> December, 2008 in Moyale District within the then Eastern Province, the appellant murdered N.A.D.
2. The prosecution called a total of 7 witnesses in support of its case. It was the prosecution's case that the appellant and N.A (deceased) were husband and wife. On 1<sup>st</sup> September, 2008 at around 11:00 p.m. PW1, L.G (L) and PW2 W.M (W) while in the bedroom they shared with their father (appellant) and mother (deceased), they heard their parents arguing on the verandah. They gave evidence that the appellant accused the deceased of having an affair with one SG who was a teacher and that the deceased denied the said accusation. After a while, the appellant went back to the room and took a club which had a metal head and hit the deceased on her collar bone breaking it. PW3, N.G (N), who was then sleeping in the next room, was woken up by the deceased's screams coming from her room. When she went to the deceased's and appellant's room, the appellant chased her away. N went back to her room where she looked through her window, and saw the appellant hit the deceased's head against the wall, tie a rope around her neck and tie her hands and legs together.

3. According to L and W, who were in the same room with the deceased and the appellant, the appellant started stepping on the deceased's stomach and when Land W started crying, the appellant flashed a knife at them and threatened them with death if they screamed. The appellant took the club and continued hitting the deceased on the stomach. Thereafter, the appellant called his niece S.J (PW4) (S), using the deceased's mobile phone and told her that her aunt was a prostitute and that he would kill her; and that she should go and collect the deceased's body. The appellant then told S to speak with the deceased who she heard saying "aaah aaah". S identified the voice on the phone as her aunt's and placed the phone on her grandmother's ear who also heard the deceased writhe in pain. S called the deceased's brother, PW6, A.A (A), who was then in Isiolo, and informed him of what had happened. A called the appellant, using S phone, pleading with him not to kill the deceased, but to instead return her to them. The appellant then switched off the mobile phone.
4. W gave evidence that the appellant locked the doors during the incident and refused to open the same when one Mepaune knocked to find out what was happening. After assaulting the deceased, the appellant took her to the children's room and left her there. The following morning the appellant went to the shop and bought milk for the children. A woman who used to sell miraa and who knew the deceased went to the house that morning and upon inquiring about the deceased was told that she was sleeping. As she tried to wake her up, she realised that the deceased was dead. She screamed attracting neighbours to the house. The appellant ran away.
5. PW7, CPL Welton Kipsang Koech (CPL Welton) testified that the appellant was arrested in Ethiopia where he had fled after the incident. He also produced the post mortem report which showed that the deceased had multiple bruises on the chest, back, upper and lower limbs and around the neck and a deep cut wound on the skull. The report showed that the deceased died as a result of cardiopulmonary arrest caused by severe brain injury and strangulation of the neck.
6. The appellant, in his defence, gave a sworn statement. He testified that on 31<sup>st</sup> August, 2008 at around 11:00 p.m. he went home from work and found the door locked. Upon knocking, SG opened the door and started hitting him. He retaliated in self defence, hitting Gollo with a club. At that point the deceased came out running, and stood in between them, and got accidentally hit. She fell down, sustaining injuries. The appellant maintained that the deceased was not seriously injured and therefore there was no need to take her to hospital. He further testified that he had gone to Ethiopia to buy miraa and that he was not fleeing from arrest. The appellant contended that his children had been coached by the deceased's relatives on what to testify.
7. Being convinced that the prosecution had proved its case beyond reasonable doubt, the High Court, in its judgment dated 7<sup>th</sup> July, 2011, convicted the appellant and subsequently sentenced him to death. It is against that decision that the appellant has filed this appeal based on the following grounds:-
  - ***The learned Judge erred in law by failing to make a finding that mens rea was not established in the present case.***
  - ***The learned Judge erred in law in not observing that the evidence of PW1 and PW2 who were minors were not corroborated by any material evidence.***
  - ***The learned Judge failed in law in conducting the trial partially and irregularly.***
  - ***The learned Judge erred in flouting the provisions of section 169 (1) of the Criminal Procedure Code in dismissing the sworn defence without cogent reasons.***
  - ***The learned Judge erred in law in flouting the provisions of section 349 of the Criminal Procedure Code.***
8. Mr. H.K Ndirangu, learned counsel for the appellant, submitted that the trial court did not evaluate the evidence before it properly; that it failed to assess material contradictions in L, W and N evidence; that the locus of the crime was not properly established; that there were material contradictions in the evidence regarding locus with L testifying that the appellant and the deceased were quarrelling on the veranda while N saying that the incident occurred in the

- bedroom; Finally, Mr. Ndirangu contended that L testified that he could not see his parents quarrelling on the veranda yet he gave specific details of the incident, rendering his evidence not credible.
9. Mr. Ndirangu argued that the trial court did not adequately consider the appellant's defence and if, indeed, he had the intention to kill the deceased. He submitted that the appellant's testimony regarding the presence of SG in his house at the material time and the confrontation between the two, resulting in the accidental killing of the deceased was wrongly disregarded by the trial court. Mr. Ndirangu submitted that there was no intention on the part of the appellant to kill deceased, and at best the appellant was guilty of the offence of manslaughter and not murder. Finally, Mr. Ndirangu complained that the doctor who prepared the post mortem report did not testify, denying the appellant the opportunity to cross examine him.
  10. Mr. K.M Lugadiru, Senior Public Prosecution Counsel, in opposing the appeal, maintained that the appellant's conviction was safe. He submitted that there was no dispute that the appellant killed the deceased and therefore, it was not relevant whether the incident occurred on the veranda, or in the bedroom. He argued that the trial court was correct in inferring malice aforethought given the history of the appellant's cruel and violent behaviour towards the deceased. W and N testified that the appellant had threatened the deceased with death prior to the incident. Both S and A gave similar accounts of the telephone conversation they had had with the appellant immediately prior to the deceased's death.
  11. Mr. Lugadiru submitted that the appellant was not entitled to the defence of provocation as there was no evidence of the deceased ever having invited another man to the house. Given the excessive force used on the deceased, the defence of 'self defence' was inapplicable, argued Mr. Lugadiru. Finally, Mr. Lugadiru submitted that the trial court had correctly addressed itself on the issue of corroboration of evidence of children of tender years' as required under **Section 124 of the Evidence Act**, Chapter 80 of the Laws of Kenya. He further submitted that the appellant did not raise an objection to PCL Welton producing the post mortem report and did not ask for the doctor to be availed for cross examination.
  12. This being a 1<sup>st</sup> appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In **Okeno V. Republic [1972] E.A. 32** it was held:-

*“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.”*

13. We have considered the grounds of appeal, the record, submissions by counsel and the law. We will first deal with the issue of corroboration of the evidence tendered by L, W and N (children). **Section 124 of the Evidence Act** regarding evidence of children provides:-

*' Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him'*

In **Onserio -vs- Republic (1985) KLR 618**, this Court held,

*' An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in*

**section 124 of the Evidence Act.'**

14. In this case the eye witnesses to the incident were children. L, W and N were 10, 11 and 15 years old respectively when they testified before the trial court. Based on the provisions of **Section 124** of the **Evidence Act** we concur with the trial judge's finding that,

*' PW1 and PW2 were children of tender years at the time this offence took place. The definition section under the Children Act provides that a child of tender years is a child below the age of ten years. Being below the age of 10 years at the time of the incident, the evidence of the two children requires corroboration to sustain a conviction. I find the corroboration in the evidence of PW3 who was 13 years at the time of the incident and 15 years at the time she testified. The evidence of the children is consistent in all material particulars. The description of the events and the details of the sequence of the accused person's actions against the deceased given by these three children were consistent.'*

15. We find that the evidence of the children on the sequence of events that occurred during the material day was corroborated by S who testified that she received a call from the appellant complaining that the deceased was a prostitute and that he would kill her. Further the nature of injuries sustained by the deceased corroborated the children's evidence on how the appellant brutally assaulted the deceased.

16. The appellant's counsel also contended that there were inconsistencies in the prosecution's evidence on the locus of the crime. Mr. Ndirangu contended that L testified that the offence took place in the balcony and that N gave evidence that the incident took place in the appellant's room. We have perused the record and do not find any inconsistencies in the evidence of the children on where the incident took place. According to L his parents quarrelled on the veranda and subsequently the appellant entered the bedroom and attacked the deceased who was then in the room with a club. N corroborated L and W evidence that the appellant assaulted the deceased in the bedroom. Therefore, this ground must fail.

17. The next issue that falls for our consideration is whether the prosecution proved its case against the appellant beyond reasonable doubt. For the offence of murder, there are three 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). In this case as correctly held by the learned Judge it is not in dispute that the appellant inflicted injuries to the deceased which led to her death. The issue in question is whether the appellant had the requisite intention/ malice aforethought to kill the deceased by inflicting the said injuries.

18. Instances when malice aforethought is established is provided in **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 evidence of the children and given the nature of injuries sustained by the deceased we are of the view that the appellant's allegation that he hit the deceased only once does not hold any weight. The evidence irresistibly points to a continuous brutal attack on the deceased by the appellant. In ***Ekaita -vs- Republic***

(1994) KLR 225, this Court at page 230 held,

***'For the purposes of this appeal, where the accused knows that there is a serious risk that the death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not..'***

The appellant was aware that there was a real risk that his assault on the deceased could result in grievous harm to the deceased or lead to her death. This is quite evident by the fact that he called the deceased's niece, S and told her he would kill the deceased. We find that from the nature of injuries sustained by the deceased, the appellant viciously assaulted her with the intention of causing grievous bodily harm. We also agree with the following finding by the trial court:-

***'The accused in his defence said that he found a man at home on the material day. PW1, 2 and 3 all denied that there was ever any other person at home. I agree with their evidence. The reason I am so convinced is because when the accused called PW4, the niece of the deceased, his complaint was not that he found a man in his house.'***

19. The appellant's defence of provocation does not hold any weight. No corroborative evidence was led to prove the allegation that the deceased had an affair with one SG. There is no credible evidence that SG was with the deceased in the house when the appellant came home at 11:00 p.m. The children who testified did not mention the presence of any man in the house. Consequently, we agree with the trial court's finding that the appellant assaulted the deceased with malice aforethought.
20. Upon perusal of the record we note that the post mortem report was produced by CPL Welton without any objection from the appellant's counsel. Therefore, we find that the appellant cannot at this juncture claim he was denied the opportunity to cross examine the doctor who conducted the post mortem.
21. We see no reason to interfere with the findings of the trial court. Accordingly, the appeal herein is dismissed.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of July, 2013**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO- ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**