IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 271 OF 2012

BETWEEN

JMM..... APPELLANT

AND

REPUBLIC..... RESPONDENT

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

dated 28th July, 2011

in

H.C.CR.C. NO. 72 OF 2006)

****

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Lesiit, J.) dated 28th July, 2011, wherein the appellant was convicted for the offence of murder and subsequently sentenced to death. The brief background of this matter is that the appellant was charged 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**, in the High Court at Meru. The particulars of the offence were that on 21st November, 2006 in Meru Central District of the then Eastern Province he murdered Samuel Muthama Nguku (deceased).

2. After the appellant underwent a mental examination and was declared mentally fit to stand trial, he was arraigned in court and pleaded not guilty to the charge of murder. The prosecution called a total of 8 witnesses in support of its case against the appellant. It was the prosecution's case that the appellant and the deceased were neighbours; they were also somewhat related as they belonged to the same clan. The deceased also used to occasionally employ the appellant to perform casual jobs for him.

3. On 19th November, 2006 the appellant left his son, JG who was then 3 ½ years, in the care of NW (PW1) (N) the wife of the deceased, and he went to ***[Particulars Withheld]*** market. According to N, it was normal for the appellant to leave his son in their house where he used to play with her children. That evening because it was late and the appellant had not come to pick his son up, N decided to let the appellant's son spend the night at her house.

4. At around 8:00 p.m. as N was in the bedroom preparing a bed for the appellant's son, she heard the appellant knocking at the door and saying he had come to pick up his son. She maintained that she was able to recognize the appellants' voice whom she had known for a period of seven years. N also heard her husband, the deceased, who was seated in the sitting room open the door and two minutes thereafter she heard him shout, ***"Mama Gacheri I have died***." She rushed to the sitting room which was next to the bedroom and found the deceased on the ground. N saw someone running away. She noticed a knife protruding from her husband's left side ribs. She screamed and DMN (PW2) (David), and J M (PW4) (Jane) came to the scene.

5. David, the deceased's younger brother lived in the same compound with the deceased. As David was going to the deceased's house to find out what was going on, he saw the appellant who was about 30 metres away from him running away. David maintained he knew the appellant very well and was able to identify him using the spot light he was carrying and the moonlight. When both David and Jane arrived, they found the deceased seated on the coffee table and he told them that it was the appellant who had stabbed him. Thereafter, they rushed the deceased to hospital where he died the following day.

6. HKM (PW5), (Hanold), gave evidence that on the 20th November, 2006 he was informed at around 10:00 a.m. that the appellant had stabbed the deceased. As he was heading to the deceased's home, he met the appellant along the road; the appellant was looking wet and was trembling. The appellant told Hanold that he had been hiding in the river as he feared being subjected to mob justice for stabbing the deceased. It was Hanold's evidence that the appellant told him he wanted to surrender himself to ***[Particulars Witheld]*** police station and he escorted the appellant to PW3 SMG (Stephen's) house, who was then the area assistant chief. Stephen testified that the appellant told him he had stabbed the deceased and wished to surrender himself to the police. Stephen accompanied the appellant to Kariene police station where he was arrested and subsequently charged with the offence of murder.

7. Dr. Catherine Mwende Mutuku (PW7), produced the post mortem report which had been prepared by her colleague, a Dr. Macharia. According to the report the cause of the deceased's death was cardio respiratory arrest due to penetrating chest injury.

8. The appellant in his defence gave a sworn statement, he narrated how on the material day at around 1:30 p.m while he was in his house eating lunch with his son the deceased came. The deceased told him that he was from drinking with a friend. The appellant gave him food which he ate. Since he wanted to go to Githongo to buy shoes for his son and a water pipe, he helped the deceased who was drunk to the deceased's house. He testified that after being convinced by N, he left his son with her as he went to Githongo. After purchasing the items he wanted, he met one Stephen Kabitu who was his friend. They decided to go and drink at a local alcohol den. The appellant stated that he got drunk and headed home slowly.

9. Upon arriving at the deceased's home he knocked and called out to N informing her he had come to pick his son. The deceased opened the door and he seemed angry. The appellant testified that the deceased asked him if that was the time he was going to collect his son and called him a dog. The deceased later hit the appellant with a metal object on the head causing him to fall down. The appellant realised that the deceased had a knife, which cut him on his thumb. He stated that a struggle ensued and in the process the deceased told him he had been stabbed. He then called N who came out with a lantern lamp. They checked and saw that the deceased had a stab wound on the left side of his chest. The appellant used his t-shirt to try and stop the bleeding and he sent Nancy to call for help. Thereafter, the appellant heard people approaching the scene and he heard one of them say that if one was stabbed they would kill the other. Fearing for his life he fled and hid in the river. He maintained that he had no intention to kill the deceased.

10. The trial court being convinced that the prosecution had proved its case, convicted the appellant and sentenced him to death. Aggrieved with the said decision, the appellant has filed this current appeal based on the following grounds:-

1. ***The learned Judge misdirected herself on the essential ingredients of the offence of murder.***

2. ***The trial Judge misdirected herself in drawing inference of malice aforethought without any evidence to support the said inference.***

3. ***The trial Judge misdirected herself by failing to inquire into the full circumstances leading to the death of the deceased.***

4. ***The trial Judge erred in law and in fact by relying on the evidence of the prosecution witnesses which was not credible and is of a contradictory nature.***

5. ***The trial Judge erred in failing to give proper consideration to the evidence of the accused by balancing it against that of the prosecution.***

6. ***The trial Judge erred in law and in fact in arriving at the conclusion that the accused went to the deceased's home while armed with a panga when there was no such evidence.***

7. ***The trial was a nullity having proceeded without the aid of assessors at some stage in the proceedings.***

8. ***There was a fundamental departure from the rules of procedure as a result of which the rights of the accused were infringed.***

11. During the hearing of the appeal, and in her address to us, M/s Jacqueline Nelima, learned counsel for the appellant, submitted that malice aforethought on the part of the appellant was not proved. She contended that none of the prosecution's witnesses saw what transpired between the appellant and the deceased; that Nancy and David went to the scene after the incident. Counsel contended that the trial Judge erred in advancing her own theory of what transpired between the deceased and the appellant. She maintained that the learned Judge erroneously concluded that the appellant was armed with the knife that stabbed the deceased while there was no evidence to that effect.

12. M/s Nelima further maintained that the ingredients of the offence of murder were not proved. She submitted that there was no intention on the part of the appellant to kill the deceased; the entirety of the evidence showed that the appellant went to the deceased's home to pick his son. She pointed out that both Nancy and David testified that there was no quarrel or grudge between the deceased and the appellant. Therefore there was no motive on the part of the appellant to kill the deceased. On the evidence tendered in court, counsel for the appellant contended that the evidence relating to the date of when the offence was committed is inconsistent. On one hand, Nancy testified that the incident took place on 18th November, 2006 while David stated that the incident occurred on 19th November, 2006. On the other hand, the charge sheet indicated that the incident took place on 21st November, 2006. She submitted that the learned Judge was selective by failing to weigh the evidence of the defence as a whole. Had the learned Judge properly considered the entire evidence she would have come to a different conclusion regarding the guilt of the appellant. She urged us to allow the appeal.

13. Mr. K.M Lugadiru, Senior Public Prosecuting Counsel, in opposing the appeal submitted that *actus reus* on the part of the appellant was proved; that the appellant had stabbed the deceased. He maintained that the learned Judge correctly addressed herself on the issue of malice aforethought. According to Mr. Lugadiru the appellant was armed with the knife that stabbed the deceased; therefore, the appellant had the necessary intention to cause death or grievous harm to the deceased. He further submitted that the appellant did not prove his defence of intoxication as required by **section 111** of the **Evidence Act**, Chapter 80 of the Laws of Kenya.

14. From the foregoing summary of the evidence that was before the Judge, we have to address ourselves to two issues; firstly whether the evidence before the court proved beyond reasonable doubt that the appellant murdered the deceased. Secondly what was effect of the appellants' defence that alluded to provocation, self defence or accidental death?

15. This being a 1st appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence that 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."***

16. To prove an offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. These 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:-

> ***"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."***

17. 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 ***Nzuki -vs- Republic (1993) KLR 171***.)

18. In this case none of the witnesses gave evidence as to any bad blood or quarrel between the appellant and the deceased, none of them saw what transpired between the appellant and the deceased. Further the learned Judge's finding that the appellant was armed with the knife that stabbed the deceased was not supported by the evidence tendered before the trial court. Nonetheless, the appellant admitted in his defence that a scuffle ensued between him and the deceased. Both of them were drunk and in the course of it he stabbed the deceased, he ran away fearing mob justice but he surrendered himself to the police. Based on the above, it is uncertain whether or not malice aforethought a necessary ingredient of the offence of murder was proved against the appellant. Therefore, the conviction of murder cannot be sustained. See ***Nzuki -vs- Republic (supra)***, this Court at page 176 held,

> ***"No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on proper***

direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt."

20. The appellant herein also contended that his conviction was based on the dying declaration of the deceased and that the same was not corroborated. On this issue, it is not in doubt even from the appellant's own evidence that he caused the death of the deceased and that the said killing was unlawful but given the totality of the evidence, that Nancy heard the appellant and deceased struggle, the appellant was seen running from the scene by David and then he surrendered himself the following day to the police, it is not clear that the appellant stabbed the deceased with the necessary intention of murder.

21. Counsel for the appellant also raised issues regarding the inconsistencies in the prosecution's case and we find it appropriate to respond to those issues as well. We agree that from the prosecution's witnesses, Nancy testified that the incident occurred on 18th November, 2006 and that the deceased passed away the following morning; while David testified that the incident occurred on 19th November, 2006; and the charge sheet indicates that the deceased was murdered on 21st November, 2006. We agree there are discrepancies on the evidence relating to the actual date that the deceased was stabbed. However this Court has decided, time without number that discrepancy as to the date of the arrest and or offence is not considered material in a case if it does not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence. It is also considered curable under **Section 382** of the **Criminal Procedure Code**, **Cap 75**, **Laws of Kenya** which provides*;*

"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

Also see the case of; ***Joseph Maina Mwangi -vs- Republic- Criminal Appeal No. 73 of 1993 Tunoi, Lakha*** *and* ***Bosire JJA***, held:-

"***In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

In view of the foregoing, the contradictions regarding the date of the offence is a matter of minute detail and do not affect the tenor and the substance of the prosecution's case.

22. From the foregoing analysis of the evidence, we are of the view that the evidence on record did not establish that the appellant caused the death of the deceased with malice aforethought. Had the learned Judge considered the evidence in its entirety, especially the fact that none of the witnesses saw the appellant stab the deceased, both were drunk, they had not quarrelled or nursed a grudge against each other, the appellant was going to pick up his son, the Judge would have convicted the appellant with a lesser cognate offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. That is the totality of the evidence.

Accordingly we allow the appeal; quash the conviction of murder and substitute it with a conviction of

manslaughter. Noting the mitigation that was offered, the appellant will serve **fifteen (15) years** imprisonment from the time he was charged with the offence.

Dated and delivered at Nyeri this 25th day of July, 2013.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR