IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 321 OF 2011

BETWEEN

PETER KIAMBI MURIUKI .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court at Meru (Lesit J.)

dated 19th October, 2011

in

H.C.CR.C NO. 17 OF 2006)

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JUDGMENT OF THE COURT

1. The disheartening part of this case is that the deceased (John Mutembei Kimotho) met his death when he intervened to stop a fight between two people. The appellant was fighting with one Justus Mutegi Mwambia and when the deceased intervened, Mutegi who had been pinned down managed to escape and the appellant turned his wrath against the deceased and hit him with a stick on the forehead- and the head cracked immediately. When the deceased fell down, the appellant continued hitting him on the head. The wife of the deceased came to the rescue of her husband whereupon the appellant hit her on the left hand. One of the grounds of appeal is that Justus Mutegi Mwambia did not give evidence at the trial. We shall deal with this issue later in the judgement.
2. The Information against the appellant was that on 22nd January 2006 at Irari Village Kaare sub-location Meru South District within Eastern Province murdered John Mutembei Kimotho contrary to **section 203** as read with **section 204 of the Penal Code.**
3. PW1 Charity Galjii Kimotho testified that the deceased John Mutembei Kimotho was her son and she knew the appellant as her neighbour. That on 12th January 2006 at about 6.00 pm, she went to pluck and get vegetables from the deceased shamba; that after she had plucked one hand size vegetables, she heard screams at the deceased's home; she took one step and peeped to see who was fighting; she saw one person pinned to the ground by another; she could not identify who was on the ground; but for the one on top, the deceased asked "who have come to fight at my gate?"

That is when I realized it was the appellant who was the one on top who had pinned down the other man, who turned out to be Justus Mutegi Mwambia. The deceased walked towards the two and managed to separate them and Mutegi was able to escape. The appellant turned against the deceased and hit him on the forehead and the deceased's head cracked immediately and he fell down; he was hit once more when he fell down, PW 1 screamed. The first person to come was PW2, Pasqualina Kanyaki John who is wife to the deceased; the appellant turned against her and tried to hit her on the head but she blocked the stick which hit her on the left elbow. The appellant then ran away towards his home.

4. PW2 testified that on the material date, together with her now deceased husband, at about 6.00 pm they heard screams and her husband said he would go and check; some four minutes later, she heard screams from her mother in law and she went to check. She found the appellant hitting her deceased husband on the head with a stick; she inquired why the appellant was hitting her husband and he turned and hit her on the left hand. Together with PW1 they continued screaming and people came; as it was late they could not get a vehicle to take him to hospital, they took the deceased home and the next day got a vehicle to take him to hospital but he died on the way.
5. In his sworn defence testimony, the appellant raised an alibi that he was a cattle trader and on the material day of 22nd January 2006, he went to see his co-trader at a place known as Kirangari where he reached at 4.00 pm and spent two nights of 22nd and 23rd January 2006. He denied committing the offence as charged and denied knowing Mutegi and stated he did not fight anyone on 22nd January 2006.
6. The trial court convicted the appellant and sentenced him to death as by law prescribed. Aggrieved by the judgement, this appeal was lodged citing two grounds:

i. **That the learned Judge erred on a point of law in convicting the appellant for the offence of murder when the evidence as tendered by the prosecution did not prove the ingredients of murder.**
ii. **That the learned Judge erred on a point of law in failing to take into account that the prosecution did not avail a vital witness one Justus Mutegi who had earlier testified before the commencement of the hearing of the case afresh hence the court arrived at unbalanced view in regard to the circumstances under which the offence as committed.**

7. At the hearing of the appeal, learned counsel Ms Ntarangwi appeared for the appellant while the Assistant Director of Public Prosecution Mr. Kaigai appeared for the state.
8. Counsel for the appellant elaborated on the grounds of appeal emphasizing that the charge of murder was not proved as the evidence tendered did not prove malice aforethought. It was submitted that the trial Judge introduced the concept of transferred malice and this was inadequate to prove malice aforethought. Counsel cited the case of **Joseph Cheboi Kabon – v- R Nakuru Criminal Appeal No. 86 of 1999** in support of that submission. The appellant further submitted that the evidence showed the deceased met his death when he intervened to separate the appellant who was fighting with Mr. Mutegi. It was submitted that Mutegi was not called as witness and this was fatal to the prosecution case as the motive and circumstances that led to the fight were not proved. The state through the Assistant Director of Public Prosecution supported the conviction but for the lesser charge of manslaughter.
9. This is a first appeal and we are obliged to consider and analyse all the evidence on record and make our own findings without overlooking the findings of the trial court and bearing in mind that we did not have the advantage of seeing and hearing the witnesses testify. The evidence on record is one of recognition and we are persuaded that the alibi raised by the appellant in his defence is not convincing. Both PW1 and PW2 were well known to the appellant who was their neighbour. We are satisfied as to the identity of the appellant as the perpetrator of the crime. In **Anjononi & others -vs- Republic (1976-80) 1 KLR 1566**, this Court held at page 1568,

> ***"Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

10. The key issue for determination in this appeal is whether malice aforethought was proved. **Section**

206 of the Penal Code sets out what constitutes malice aforethought and as far as it is material to the matter before us, paragraphs (a) and (b) of that section are important and provide as follows:

Malice aforethought is:

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 omissions 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.**

11. The facts in this matter are not generally in dispute. From the testimony of PW1 and PW2, the appellant hit the deceased with a stick on his head. The doctor's finding at post mortem established that indeed, the only injury that the deceased suffered was to the head which resulted in a fractured skull. On the issue of malice aforethought, the learned Judge expressed herself as follows:

> **"The deceased was a victim of transferred malice....Considering the circumstances of the case, I find that malice aforethought can be inferred from the facts established that the accused set upon the deceased and hit him at least twice on the head. He ought to have known that by hitting the deceased on the head as he did would cause either death or grievous harm to the deceased. The force the accused used to hit the deceased was so heavy as to cause skull fracture on the deceased head. I am satisfied the prosecution has established malice aforethought."**

12. The evidence shows that the deceased was hit when he intervened to separate the fight between the appellant and Mutegi. Was there *mens rea* for the offence of murder? The learned Judge cited the case of **Daniel Muthee – v- R CA No. 218 of 2005 (UR)**, where Justices of Appeal Bosire, O'Kubasu and Onyango Otieno while considering what constitutes malice aforethought observed as follows:

> ***"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."***

13. Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within **paragraph (b) of Section 206 of the Penal Code** as to what constitutes malice aforethought. In the case of **Nzuki – v- Republic (1993) KLR 171**, this court stated that malice aforethought is a term of art and emphasized that:

> **Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:**

i. **The intention to cause death;**
ii. **The intention to cause grievous bodily harm;**
iii. **Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a**

potential victim other than the one who succumbed. <u>The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see Hyman – v- Director of Public Prosecutions, {1975} AC 55.</u>

14. In **Nzuki – v- Republic (1993) KLR 171**, the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What however, was unnerving is that there was no evidence as to there having been any exchange of words between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive, but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. **(See R –v Sharmpal Sigh s/o Pritam Singh (1962) EA 13 at page 17 letter C.** The court in substituting Nzuki's charge of murder with manslaughter observed:

> **There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter**.

15. Our evaluation of the record in the instant case comes within the legal principles laid out in the Nzuki case and we adopt the conclusions stated therein. We find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard.
16. In **Ekaita – v- Republic {1994} KLR 225**, the appellant was charged with murder and the evidence was that he repeatedly hit the deceased with a stick which the appellant called his "Kakamega stick". The learned Judge found him guilty of murder but the Court of Appeal quashed the conviction and substituted it with manslaughter. The learned Judges of Appeal stated that the only snag in the case was the absence of positive evidence as to the size of the appellant's "Kakamega stick". Some of the witnesses referred to it as a walking stick, others called it a club; the learned Judge made no reference to its size in the judgement. In the absence of such evidence, it remained guesswork whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained attack on the deceased.
17. In the present case, there is no evidence on record as to the size of the stick or the origins thereof or how the stick came to be within the vicinity of the crime; whether the appellant was armed with the stick remains unclear. In the absence of motive, it remains a matter of guess work whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his hitting the deceased on his head, the possibility therefore that the appellant killed the deceased by an unlawful assault but without the intent necessary to constitute malice aforethought requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excluded.
18. The learned Judge also referred to transferred malice and stated that the deceased was a victim of transferred malice because of intervening in a fight between the appellant and Mutegi. What is the law on transferred malice? Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen. The intent and the act must coincide. Under the doctrine of transferred malice, where a defendant fires a gun intending to kill X, but misses and instead kills Y, he will not be able to escape liability for the murder of Y simply because it was his intention to kill X. The defendant has still committed the *actus reus* that he

intended, namely to cause the death of a human being. It is then said that the malice against X can be transferred to Y. The basis for this is the principle in **R – v- Latimer (1886) 17 QBD 359** in which the defendant struck a blow with his belt at Horace Chapple which glanced off him, severely injuring an innocent bystander, Ellen Rolston. The defendant was convicted of maliciously wounding the woman and appealed on the ground that it had never been his intention to hurt her. The court affirmed the conviction stating that the defendant committed the *actus reus* of the offence with the necessary *mens rea* i.e he had acted maliciously. In **R –v – Pembliton (1874) LR 2 CCR 119**, the defendant threw a stone at another person during an argument. The stone missed the intended victim, but instead broke a nearby window. He was charged with malicious damage to property and the court, in quashing the conviction held that the doctrine of transferred malice is inapplicable where the defendant's intention had not been to cause the type of harm that actually materialized; his intention to assault another person could not be used as the *mens rea* for the damage that he had caused to the window.

19. It is our considered view that the law on transferred malice was not properly applied in the present case; for transferred malice to exist, the intent or *mens rea* for the offence of murder must first be established. The burden was on the prosecution to prove that the appellant had malice aforethought for the offence of murder and it is only after such malice aforethought has been proved, and then the same *mens rea* could be transferred to prove the death of the deceased. The issue in this case is not whether the appellant intended to kill or cause grievous bodily harm to Mutegi and then transfer this *mens rea* to the deceased. The issue is whether the appellant intended to kill or cause grievous bodily harm to the deceased; there is no question of transferred malice in this case and the learned Judge erred in invoking to the doctrine of transferred malice. The doctrine of transferred malice would have been applicable if the facts were that the appellant intended to kill or cause grievous bodily harm to Mutegi and by mistake killed the deceased.
20. The appellant contended that Justus Mutegi was not called to testify to shed light on the circumstances that led to his fight with the appellant and this was fatal to the prosecution case. The motive or reason why the appellant was fighting with Mutegi is neither an essential ingredient for the offence of murder nor relevant to prove *mens rea* for the offence.
21. The record reveals that when the trial started *denovo*, Mutegi was scheduled to give evidence on 25th May 2011 but was not available and a warrant for his arrest was issued; the trial was re-scheduled for 30th May 2011 and he had not been traced. When the case came up for hearing on 13th June 2011, the trial court was informed that Mutegi had vanished and could not be found; the prosecution closed its case. **Section 143 of the Evidence Act** stipulates that "No particular number of witnesses shall in the absence of any provisions of law to the contrary be required for purposes of proof of any fact." In the case of **Jacob Muthee & 8 Others – v- R, Criminal appeal No. 259, 255-257, 261 of 2008,** this court adopted the decision in **Bukenya & Others –v – Uganda (1972) EA 349,** and stated "in a criminal trial, the prosecution has a duty to call or make available all witnesses necessary to establish the truth ... and is not required to call a superfluous number of witnesses."
22. In the present case, the prosecution made efforts to get Mr. Mutegi to testify and we think they did well to put before the court all evidence that was available to support its case; having done so, the prosecution made it clear to the court what its case was. The prosecution relied on the testimony of two eye witnesses whose testimony is in accord with the decision in **Ndungu Kimanyi -v- R, 1979 KLR 282** where this court stated:

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."**

23. We find that the totality of the evidence adduced by the prosecution is an account of two eye witnesses who saw the appellant hit the deceased with a stick on his head and the skull fractured. The testimony of these two witnesses, PW1 and PW2 was found to be credible and cross-examination did not shake their evidence. Their evidence was water tight as to the identity of the appellant. Their evidence did not prove *mens rea* and did not establish malice aforethought. We

find that *mens rea* for murder was not adequately established and proved to the required standard and we agree with the state that the charge of murder should be reduced to manslaughter. The upshot is that we quash the conviction for murder and set aside the death sentence and substitute in its place a conviction for manslaughter under **Section 202** as read with **Section 205 of the Penal Code** and sentence the appellant to a term of 15 years imprisonment from the date of 20th March 2006 when the plea was taken.

Dated and delivered at Nyeri this 18th 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