



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 650 OF 2010**

**BETWEEN**

**PATRICK BULUMA ONDILO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a Judgment and decree of the High Court of Kenya at*

*Busia (F N. Muchemi, J) dated 4<sup>th</sup> November, 2009*

**in**

**HCCRA NO. 12 OF 2006)**

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**JUDGEMENT OF THE COURT**

This is an appeal from the judgement of the High Court (F. N. Muchemi, J) where the appellant, Patrick Buluma Ondilo was charged, tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and was sentenced to death. The particulars of the offence were that the appellant did on 12<sup>th</sup> July 2006 at S,V , S,Sub – location, N location in Busia District of Western Province murdered F A.

The prosecution case was through the evidence of eight (8) witnesses and can be summarized thus:

On 26<sup>th</sup> July, 2006 P.B.A (PW2) (“P”) was at home with his sister in law F A (“the deceased”). He said the deceased informed P that the appellant had raped her (the deceased) and assaulted her when she tried to resist thus inflicting serious injuries on her. The deceased was in critical condition during this conversation and died two (2) days later. Before the death of the deceased P and other relatives including C B M (PW3) (“C”) went to the home of the appellant and informed him of the deceaseds' illness. The appellant bought some medication for the deceased and after her death wrote an undertaking that he would take care of all funeral expenses.

C in addition to the evidence of P testified that the appellant even begged for forgiveness upon learning of the deceaseds' death.

A B (PW4) ("A") was informed by relatives of the assault against the deceased who was his auntie. He travelled to Mumias to inform and fetch M N (PW5) ("M"), a nephew of the deceased. M received from the appellant the note undertaking to meet funeral expenses.

Post mortem was conducted by Dr. Zakaria Githinji Njau (PW1) who formed the opinion that the deceased died due to intercranial injury secondary to penetrating injury and the haemorrhage was leaking. The deceased's body was identified for post mortem examination by F.E (PW6), a brother.

The appellant was arrested by No. 54324 P. C. Mathew Mugambi (PW7) and investigations were conducted by No. 218770 I P Moses Waliaula (PW8).

The case was heard by three (3) different judges due to transfers and was finally completed on 8<sup>th</sup> October, 2009 with the findings already adverted to. Provisions of the law as relate to taking over a matter partly heard by another judge were duly complied with.

Put on his defence the appellant elected to give sworn testimony where he denied the charge and even denied knowing the deceased. He testified that he did not employ the deceased and that on 31<sup>st</sup> July, 2006 P went to his house to inform him of illness in P home. They went to the home where the appellant saw a body of a person he did not know. He (the appellant) advised P and other relatives of the importance of carrying out a post mortem examination and informing the police. The appellant as a civic leader then felt compelled to report the whole matter to the police but upon arrival at Nambale Police Post where he found P and A he was arrested and charged with the offence which he knew nothing about.

It will be noted that the evidence presented by the prosecution witnesses confirm that the deceased was attacked on 26<sup>th</sup> July, 2006. This does not conform with the date in the charge sheet where the offence is stated as having been committed on 12<sup>th</sup> July, 2006. This would ordinarily be a matter of concern. But this issue was not raised by either side before the trial judge. It was also not raised before us. It is common ground that the deceased died. We shall make no further comment on the discrepancy in the date of the commission of the offence.

We have set out the evidence presented before the High Court in some detail because this is a first appeal and it is our duty as the first appellate court to subject the evidence adduced to a fresh and thorough scrutiny so that we can draw our own conclusions on the evidence – See **Kinyua v R [2003] KLR 301** where this court stated:

**“... This being the first (and last) appeal it is our duty to subject the evidence adduced to a fresh and exhaustive scrutiny so that we can draw our own conclusion on the conflicting evidence. In Okeno v R [1972] (sic) EA the predecessor of this Court made the following observation as regards the function of the first Appellate Court: “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] EA 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. (Shantilel M Ruwal v R [1957] EA 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] EA 424”.**

In the home-made Petition of Appeal the appellant cited 12 grounds of appeal. However, when the appeal came before us for hearing on 27<sup>th</sup> May, 2013 Mr. Ipapu, the learned Counsel for the appellant abandoned most of the grounds leaving only grounds 5, 7 and 8. These relate to reliance on a dying declaration, that the evidence did not support the charge and that the judge erred in finding a love affair between the appellant and the deceased when there was no evidence to support the same. Learned counsel appeared to shift gears in his submissions because he later in his submissions admitted a love affair as existing

between the deceased and the appellant but used this in an attempt to show that there could not be malice afterthought to lead to a conviction for murder.

Mr. Abele, learned Assistant Deputy Public Prosecutor, did not support conviction for murder and the resultant death sentence. He submitted that although the appellant was responsible for death of the deceased there was no pre-meditated killing. Counsel submitted further that circumstantial evidence was present and included the admission by the appellant and asking for forgiveness. There was however evidence that the appellant bought medicine to treat the deceased and intended to take the deceased to hospital which, counsel submitted, could not be evidence to support malice aforethought.

We have considered all the evidence and the submissions by counsel.

P testified in detail of the conversation he had with the deceased who related to him of a rape ordeal, attempted escape as the deceased resisted the appellants advances and the vicious attack the deceased was subjected to as a result. P said:

**“...She told me that the accused person had raped her and when she decided to run away, the accused had attacked her and hit her on her left knee and on her head. It appeared like a metal had been used to inflict those wounds. She died after 2 days....”**

P further testified that even before the deceased died he (P) and other relatives visited the house of the deceased and discussed the incident. The appellant offered to purchase medication to treat the deceased and also wrote a note or letter. The note or letter was produced as evidence and it reads:

**“AGREEMENT TO TAKE CARE OF TRANSPORTATION AND OTHER EXPENSES INVOLVING THE DEATH OF FATUMA AKECHI I PB ID ( particulars withheld) hereby agree that I will take care of transportation expenses, coffin and 20 gons (sic) of maize towards the funeral of the late F A who passed away on 28<sup>th</sup> July 2006. The late will be transported from S sub location to M in Mumias. The late was epileptic and she died after colapsing and injuring herself while working for me. This agreement was made in the presence of:-**

**SIGNED: 1. P B. ID (particulars withheld) signed**

**2. M NA ID( particulars withheld)signed**

**3. P J N ID( particulars withheld) signed**

**4P N ID ( particulars withheld)**

**Sister to the late 5. C B P2**

**Liguru of Area 6. PAO Id ( particulars withheld) signed.”**

There was also the evidence of C and A. They testified that the deceased had informed them that she and the appellant were friends. The deceased had visited the appellant, a disagreement occurred and the deceased was assaulted by the appellant. C visited the appellant and upon informing him of the deceaseds' illness resulting from the attack the appellant gave C money to purchase medicine. The appellant also informed this witness that he would get money and take the deceased to hospital. Material also, in the evidence of these witnesses is the fact that the appellant asked for forgiveness upon learning of the deceaseds' death and undertook to meet funeral expenses.

P, C and A' evidence of the attack upon the deceased by the appellant is corroborated by medical evidence through Dr. Njau showing that the deceased died of intracranial haemorrhage due to severe head injury. The deceased had also suffered a penetrating injury which was leaking.

Going through the evidence of P, C and A there cannot be any doubt that these witnesses and the

appellant were known to each other and resided in the same neighbourhood or locality. The witnesses knew the goings-on around them and they knew that their relative, the deceased, was a girlfriend of the appellant. The deceased used to visit the appellant at his home under the guise of seeking casual employment when, indeed, the actual purpose was in furtherance of their relationship. On the material day the deceased after visiting the appellant at his home opposed his sexual advances. This angered the appellant who attacked the deceased.

We agree with the learned Judge that the defence offered by the appellant had no basis in light of the strong circumstantial evidence presented by the prosecution. We also agree with the learned Judge that it was in order to admit the dying declaration by the deceased. Circumstances in which a dying declaration is admissible in evidence are well covered in Section 33 of the Evidence Act and the circumstances in this case fell well within that provision.

Having found that the deceased died as a result of an attack by the appellant, was the learned Judge right in convicting the appellant for the offence of murder?

We are grateful to learned ADPP who readily conceded that the circumstances obtaining in the matter called for a more careful examination on whether the act leading to the death of the deceased was accompanied by motive necessary to establish the offence of murder.

The appellant and the deceased were lovers. The deceased visited the appellant at his home. The appellant and the deceased either engaged in sex or at the very least the appellant attempted to have sex with the deceased. This was resisted for unknown reasons. Resistance angered the appellant who attacked the deceased inflicting serious injuries on her. She fell ill as a result and the appellant purchased medicine by giving money to the deceased's relatives. He further offered to take the deceased to hospital but the deceased died before he could do so. Upon learning of the deceased's death he asked for forgiveness and offered to meet all funeral expenses.

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

- (i) the death of the deceased and the cause thereof**
- (ii) that the accused committed the unlawful act and such act caused the death of the deceased; and**
- (iii) that the accused had the malice aforethought.**

This is what this court has held in many cases, for instance in **Isaack Kimathi Kanuachobi v R (ur) Nyeri Criminal Appeal No. 97 of 2007; Nyambura & Others v Republic [2001]KLR 355**

In **Elphas Fwamba Toili v R (ur) Eldoret Criminal Appeal No. 305 of 2008** the appellant, after a quarrel with his inherited wife, picked a panga and proceeded to cut her head. She died from the injuries. The appellant was convicted of murder and sentenced to death. On appeal the judges expressed themselves thus:

**“We find it difficult to appreciate why the learned Judge of the superior court came to a conclusion that a man provoked and acting on the spur of the moment cannot inflict several severe injuries upon his victim. In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals”.**

The charge was reduced to manslaughter.

See also the judgement of the predecessor of this court in **Rex v Ngoilale s/o Lenjaro (1951)Vol. XVIII EACA 164.**

We have come to the conclusion in the circumstances of the facts we have reconsidered and re-evaluated in this appeal that although the appellant inflicted the injuries that caused the death of the deceased the essential element of malice aforethought was lacking and was indeed not proved beyond reasonable doubt. The relationship between the appellant and the deceased and the appellants actions after he learnt of the deceaseds' illness after attack and thereafter upon her death do not point to a mind actuated with malice. The appellant should in the event have been convicted of manslaughter but not murder. That being so this appeal succeeds to the extent that the conviction for murder is quashed and sentence of death is hereby set aside. We substitute therefore a conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

We are of the respectful opinion that in the circumstances of this case a sentence of 15 years imprisonment from the date of conviction is a fair sentence. We therefore set aside the sentence of death and in lieu thereof sentence the appellant to 15 years imprisonment from the date of conviction.

*Dated and Delivered at Kisumu this 12<sup>th</sup> day of July 2013*

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**