IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & KIAGE, JJ.A.)

CRIMINAL APPEAL NO.153 OF 2012

Between

PHILIPH KENEI…….....1ST APPELLANT

ANTONY NDEREMBA……..……..……..…….2ND APPELLANT

RONALD ORARO……...……...…3RD APPELLANT

AND

REPUBLIC ……...…….....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Machakos (Makhandia, J.) dated 23rd March, 2012

in

H.C.CR.C. NO.63 of 2008)

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JUDGMENT OF THE COURT

The three appellants herein, ***Philip Kenei***, ***Antony Nderemba*** and ***Ronald Oraro***, have appealed against the conviction and sentence at Machakos High Court (Makhandia, J. as he then was) in the judgment delivered), on 23rd March, 2012. The trio was charged with the offence of Murder under Section 203 of the Penal Code as read with Section 204, that on 22nd January, 2008 at Pond Area, Machakos District with others not before court, they jointly murdered ***Andrew Ndeti Muia***.

Mr. D. Konya, learned counsel represented all the 3 appellants at the High Court and filed 3 separate memoranda of appeal in this Court. At the time of hearing the appeal Mr. Kiprono Advocate, represented the first appellant ***Philip Kenei***, while Mr. Konya Advocate, appeared for the 2nd appellant (Anthony Nderemba) and 3rd appellant (Ronald Oraro) respectively. Mr. K. Kamula, learned Senior Assistant Director of Public Prosecutions represented the respondent.

Mr. Kiprono argued grounds 1 to 8 together, abandoning ground 1 on behalf of the 1st appellant. Mr. Konya adopted a similar approach.

Mr. Kiprono relying on the case of ***Okeno vs Republic*** ***[1972] EA 32*** reminded us to re-evaluate all the evidence on record in order to come to our own conclusions. He posited that our conclusions would definitely differ from those arrived at by the learned trial judge, taking in regard especially what were termed many contradictions in the evidence tendered by the prosecution.

Beginning with the evidence of ***Benson Njeru Munene*** (PW1) and that of ***Joseph Ndambuki*** (PW2), counsel told us that the two arrived at the scene where the appellants were allegedly assaulting the deceased (***Andrew Ndeti Muia***) using slashers, and simis yet neither told the learned judge which of the appellants was using what weapon and the specific act that the 1st appellant did in the said attack. PW2 said in his evidence that one Ismail, said to be still at large, caused the death. The witness said that the 1st appellant was found with a panga and yet he did not know what happened with the assault weapons which PW1 had earlier said were not recovered.

Moving to PW3, ***Ernest Kemboi***, we were told that on his part he knew PW1 and PW2 but he did not see them at the scene.

Turning to ground two, Mr. Kiprono claimed that the learned trial judge missed what was vital in the case. It was in error to rely on the evidence of PW1, PW2 and PW3 who testified that pangas, slashers and simis were weapons of assault yet PW3 had stated also that the 1st appellant was not at the scene. That it was also wrong on the part of the trial judge to describe the discrepancies in the evidence as minor when in fact they were major and ought to have been resolved in the 1st appellant's favour. Such discrepancies included evidence by one witness that the deceased was already lying on the ground when he arrived while the other said that he arrived when the assault on the deceased was just beginning. On the issue of conflicting evidence, the case of ***Okethi Okale & others vs Republic*** ***[1965] CA 55*** was cited to us.

Further, counsel submitted that it was wrong for the learned trial judge to conclude that ***Ismail,*** said to be still at large, started the attack on the deceased and called the appellants to join in which they willingly did. The 1st appellant did not join in willingly, or at all, it was submitted.

Mr. Konya, for the 2nd and 3rd appellants supported the arguments and propositions made by Mr. Kiprono in arguing this appeal. Learned counsel told us that there was no evidence corroborating that of PW1 and PW2 as to the implication of the 3rd appellant in the whole case. Asked by the Court whether in this case the evidence of those two witnesses required legal corroboration, Mr. Konya maintained that it did because the charge against his client was very serious. Lastly, learned counsel, quoting from the High Court judgment told us that the evidence relied on to convict was neither credible, nor reliable nor worth believing. The contradictions therein mitigated against that and that the cases of ***Yusito Onguti S/O Oyoo vs Republic*** ***[1957] 134*** and ***Ndung'u Kimanyi vs the Republic*** ***Cr. A. No.22 of 1979***, said just that.

Mr. Kamula, opposed the appeal on the basis that all the evidence by the eye-witnesses (PW1, PW2 and PW3) pointed to the appellants assaulting the deceased. All these were workmates who lived in the same camp and therefore knew each other well. There were no grudges between them. They may not have told the trial judge which weapon each of the appellants had or what particular act was done by who during the assault, but all the 3 witnesses arrived at the scene and found the appellants assaulting the deceased. PW1 tried to intervene but his attempt was thwarted when ***Ismail*** (still at large) faced him with a knife. The witnesses testified on what they saw. That was sufficient evidence to convict and minor variations were bound to occur from each witness' personal account. They were not serious enough to dent the prosecution case. The appellants assaulted the deceased with weapons. He died as a result and medical evidence stated so. The three principal witnesses had no reason to mislead the learned trial judge and they did nothing of the sort. Both Mr. Kiprono and Mr. Konya rounded up in reply and we were left to consider our decision.

This being a first appeal we are conscious of our duty – to evaluate all the material on record whether on fact or law and make our own conclusions. In ***Okeno vs Republic*** ***[1972] EA 32*** the predecessor of this Court said:

"It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions whether the judgment of the trial court should be upheld."

To do the above, we will begin by setting out the evidence on record in light of the trial judge's decision to see if we should uphold it or not.

Benson Njeru Munene (PW1) recalled that on 22nd January, 2008 at about 10.30 a.m. he was at work when he heard noises from their living quarters. He rushed there and found a man being beaten. Four men were engaged in the assault and PW1 pointed to the three accused persons in court, the present appellants, by their names. They were using a slasher and a simi. PW1 could not recall who had what weapon. The witness knew these 3 well – all workmates living in the same camp. The 4th assailant, ***Ismail***, was not in court. PW1 observed that the deceased, whose name he could not recall, was seriously injured on the head and hands. The appellants told PW1 that the deceased had stolen a phone and money from Ismail. When PW1 tried to intervene the four assailants turned on him. The witness went away and reported the incident to a security officer called ***Mwanzia***. The police arrived and found the assaulted man having already died. PW1 gave this report to the police mentioning the four assailants including the 3 appellants. While 1st and 2nd appellants were arrested on the same day, the 3rd appellant was arrested the following day while Ismail remained at large. Relatives of the deceased, in anger, set ablaze a nearby forest.

In cross-examination the learned judge heard that when PW1 went to the scene, it was not a crowd assaulting the deceased. It was the appellants with another, while some 5 or so people stood by watching. PW1 could not tell which assailant had which weapon even if no murder weapon was recovered. The 2nd appellant (accused 2) was arrested by one ***Mutinda*** in the presence of the witness. The 1st appellant (accused 1) was arrested from the ceiling of a house. When 3rd appellant (accused 3) was arrested the following day again PW1 was present. Ismail was the main suspect. He started the attack on the deceased and then called others to join in.

Joseph Ndambuki (PW2) was next in the witness box. He heard screams at about 11.30 a.m. from their living camp. With PW1 they went to the scene. They found a man bleeding. PW2 recognized him as ***Andrew Ndeti*** whom he had seen earlier. When this witness tried to stop the assault, Ismail, turned to assault PW2 with a panga and knife. He, like PW1, testified that the four assailants used a slasher and pangas but he could not remember who held what weapon. Some people stood by watching. Ismail appeared more incensed than the other 3 assailants – these appellants. PW3 called some security officers (***Were***, ***Mutinda***) and reported the incident. He went to close his office. On his return, he found the assaulted man dead. He too lived with the 4 assailants in one camp and they were security officers at EPZ where PW2 was also a worker. The relatives of the deceased, in anger, raided the camp. The residents ran into a nearby forest which the relatives set ablaze.

PW2 was cross-examined. He said that he, with PW1, got to the scene together, and found the appellants, whose names he put in his statement to the police, assaulting the deceased. It was Ismail who caused the death with the help of the three appellants. PW2 saw Ismail assault the deceased. There were about 3 people at the scene. The deceased was not beaten by a mob. Although PW2 could not say which act each appellant did during the assault on the deceased, he was firm that the appellants were involved in it. 2nd appellant cut the deceased with a slasher, while the 3rd appellant held his leg. He named all the appellants in his police statement adding that ***Nderemba,*** the 2nd appellant, had a slasher.

It was the turn of ***Ernest Kemboi*** (PW3) to testify. At 10.30 a.m. on the material day, ***Philip Kenei***, (1st appellant) a workmate, was called by ***Ismail Osiemo*** on the phone. He went. PW2 remained at work until 12.00 p.m. when he returned to their camp with another workmate (***Ambisia***). They found the deceased sitting down, bleeding on the hand. There were about 20 people. There also was ***Philip Kenei*** (1st appellant) and ***Nderemba*** (2nd appellant). Ismail was demanding his phone from the bleeding man while threatening him with burning using petrol. PW3 walked away and later learned that that man died. All the appellants were there. The relatives of the deceased burnt a nearby forest in anger.

In cross-examination, PW3 said that he knew PW1 and PW2 but he did not see them at the scene. He did not witness the assault on the deceased. PW3 did not know him.

The evidence of ***Mathew Oyiechi Were***, (PW4) a supervisor at EPZ, was brief. At 3.00 p.m. on the material day he got a phone call from ***Kenei*** (1st appellant) and one ***Mwanzia*** that there had been an attack at the camp. Someone had been caught there and had died. PW2 proceeded to see the dead person and brokered a truce between the fighting people. A nearby forest had been set on fire. Police removed the body.

Richard Ngetich (PW5) a Field Security Supervisor at EPZ, got a phone call on 22nd January, 2008 from ***Kenei*** (1st appellant) that a man had been injured at the camp and had been apprehended. PW5 did not visit the scene.

C.I.P Regina Mbithi (PW6) was in charge of crime at Athi River Police Station in January, 2008. On 22nd January, 2008 at 2.00 p.m. she got a call from the local assistant chief that a body was lying at EPZ Ponds Camp. She, in the company of two colleagues, proceeded to the gate of the camp where they found a man lying on the ground with injuries on the left chest and head. ***Ndambuki*** (PW2?) gave the report that the appellants, ***Kenei*** and ***Ademba*** (***it must be Nderemba***) whose names he gave PW6 and one ***Osiemo***, had attacked the deceased on the grounds that he stole a phone. The suspects were not at the scene, having fled from the angry crowd. That night ***Kenei*** and ***Nderemba*** (1st appellant and 2nd appellant) went to the police station and were arrested. The 3rd suspect was brought the following day. PW6 recorded statements and later had the suspects charged. She recovered no weapons. The deceased bore 2 injuries likely inflicted by a sharp weapon. The suspects were four – ***Kenei***, ***Nderemba***, ***Osiemo*** and another. ***Osiemo*** remained at large. The attack on the deceased was not by a mob. The case was properly investigated.

Benson Ndunda (PW7) identified the body of the deceased at Machakos General Hospital on 28th January, 2008 for a post mortem. The post mortem on the body of the deceased was performed by ***Dr. John Mutunga*** (PW8). The body had a traumatic amputation of the right arm, a wound on the anterior chest. There was a swelling on the left side of the head. Internally, the doctor noted a skull haemotema on the left side and a sub-dural of haematoma. In his view the cause of death was the head and chest injuries. That closed the prosecution case before Lenaola J. Makhandia J took over at that stage and after due compliance with Section 200 of the Criminal Procedure Code, the appellants were heard in defence.

In his unsworn statement 1st appellant said that he reported on duty with the co-appellants/co-workers and worked until noon when one ***Ismail Osiemo*** called him on telephone, telling him to proceed to his camp. He got to a place where there was a large crowd surrounding someone lying on the ground, injured. On inquiry, this appellant learnt that it was ***Ismail Osiemo*** who had inflicted the injuries. He left the scene and called for assistance from the office and also reported the incident. Armed people from the deceased's village then raided his camp. The appellant decided to hide to keep out of harm's way. His superiors called him and directed the appellant to go and record a statement. He was then detained and would remain so until Ismail was found. Later he was charged. The evidence against him was a pack of lies. He was never in possession of a panga.

Similarly, ***Antony Nderemba*** (2nd appellant) spoke from the dock. On that day he went on duty - as security guard at EPZ. He met the 1st appellant. He worked up to 12.30 p.m. then proceeded to their camp. There he found a group of people around one person who was injured. It was said that the injured person had stolen Ismail's phone. The 1st appellant, who was present, contacted their office to report the incident. Then angry armed villagers attacked the camp and this appellant ran, with other co-workers, into a neighbour's house for safety. A superior officer, ***Were***, telephoned and found the appellant safe. ***Were*** sent a motor vehicle to collect him. He was taken to the police station and later charged. He did not assault the deceased. The case was brought against him because of his work.

Finally it was the turn of the 3rd appellant, Ronald Oraro. He was a security guard with EPZ and on

22nd January, 2008 he went on duty until 1.00 p.m. On returning to their camp for lunch, this appellant found a crowd of people with an injured person seated on the ground. The 1st appellant was in the crowd and he informed the appellant that one ***Ismael*** (or Ismail) had claimed that the injured man had stolen. While in his house, an angry crowd raided the village, threw stones and lit a fire. The appellant remained indoors and contacted his superior officer ***Were***. Later he wrote a statement at Athi River Police Station. This appellant knew nothing that led to the charge against him. Witnesses told lies against him.

In this appeal we will begin by finding out whether a person was killed on 22nd January, 2008, by whom and whether the death was a murder.

It is not in doubt that from all the evidence, and both sides are agreed on this, that ***Andrew Ndeti Muia*** was the person who was assaulted and died in EPZ's Ponds's Camp. ***Dr. J. Mutunga*** (PW8) examined his body and found that injuries to the head and chest caused the death. In his report (Exh.P1) the good doctor did not state the likely weapon used. However evidence had it that the deceased was beaten on the head, hand and chest. He sustained a traumatic amputation of the right hand. The post mortem was done some six days after the attack. So there was a death – the death of ***Andrew Ndeti Muia***.

And who inflicted injuries that caused this death? To us the direct evidence came from ***Benson Munene*** (PW1) and ***Joseph Ndambuki*** (PW2). As for ***Earnest Kemboi*** (PW3), he did not see anybody hitting the deceased. There was a crowd of about 20 people. He did not see PW1 and PW2 at the scene. But that does not mean that they were not there. PW3 was not asked if he looked for them in the crowd.

We have assessed the evidence of PW1 and PW2 carefully. These were workmates of the appellants. They lived in the same camp. The incident took place in broad daylight. While PW1 spoke of 10.30 a.m., PW2 gave his time as 11.30 a.m. This is a minor variation in time. Nobody could expect that if those 2 witnesses had watches, they were looking at them to be exact of the time they arrived at the scene. If this be one of the contradictions raised before us, then we have disposed of it in that manner. What remained all through is that the witnesses got to the scene. They saw the 3 appellants, with another not before court, assaulting the deceased with the reasons advanced by that other (***Ismael/Ismail***), that the deceased stole his phone. The witnesses, especially PW1, could not say which weapon each appellant had or what particular act he performed in assaulting the deceased. But they assaulted him by hitting him on the head, chest and arm. The right arm was amputated in the assault. These witnesses had no grudges with the assailants in order to frame them up. Indeed, when they tried to stop the beating, Ismail threatened the witnesses with a panga and knife - to attack them. The 2 witnesses said that the appellants were executing a common purpose. The 3 or 5 people around were just watching. The deceased was not assaulted by a mob. And when they gave their statements to the police, they gave the names of the attackers. PW1 was present when 1st and 2nd appellant were arrested on the same day, while 3rd appellant was arrested the following day.

Even the appellants themselves say that they were at the scene, except that they denied assaulting the deceased. They explained in their defences that they left the scene and went into hiding to keep away from the angry villagers, relatives of the deceased, who descended on the camp and burned the nearby forest. A probable explanation but not satisfactory. All the camp dwellers did not flee to safety and even ***Were*** (PW3), whom these appellants contacted to report the incident, was on hand to broker a truce between the fighting groups. Viewed in its totality, the evidence of these two witnesses as to the actual assault, was credible and believable as seen in the context of the defences.

For 1st appellant, he called ***Were*** (PW3) to the scene. ***Were*** came. The appellant then went to hide but he did not wait to brief ***Were*** on what report he had. He remained in hiding until his superior officers, including ***Were,*** summoned him and directed him to go and report. He did not do so on his own in the circumstances.

And for the 2nd appellant, he told the court that:

"I am being set up in this case because of my work."

He did not elaborate as to who was setting him up and on what aspect of his work and why. And for the 3rd appellant, he said that he remained at his house and called ***Were*** who told him to go and record a statement.

If indeed these appellants had nothing to do with the assault on the deceased, it was their civil duty to go by themselves to report this serious incident to the police – not to wait until their superiors directed them to do so. Accordingly, we conclude that these appellants with Ismail still at large, assaulted the deceased with the claim that he had stolen from ***Ismail***. The injuries inflicted caused his death.

The next issue is whether the three appellants committed murder. Under the Penal Code these are the applicable provisions for murder, beginning with the definition:

> ***"203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

And malice aforethought is defined as follows:

> ***"206. Malice aforethought shall be deemed to be established by evidence proving any one of the following circumstances –***
>
> a. ***an intention to cause the death of any person, whether the 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 intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony."***

In our view the appellants intended to commit murder and malice aforethought was manifested by first accusing the deceased of theft, then armed themselves with slashers and pangas and went to look for him. They got the deceased and set upon him injuring him on the head, chest and cutting off his arm. And even when PW1 and PW2 tried to stop them, they continued in the assault with Ismail threatening to beat up or cut the witnesses. The appellants were definitely bent on killing the deceased and they did just that. All for nothing more than a suspicion that he had stolen the phone and money from Ismail. Our finding is that they committed murder, the result of their use of weapons which they knew could either occasion grievous harm or death.

For the two grounds argued before us, namely, the claimed contradictions in the evidence of PW1, PW2 and PW3 and that the learned trial judge missed out on the case when appreciating evidence on the murder weapons, and that he held that the discrepancies were minor, we think we have covered all that and more. The difference in times given by PW1 and PW2 were not major. Whoever held which weapon and did what, did not appear to us to be of such a significance as to cause a reasonable doubt in the prosecution case. The totality of the evidence pointed to the guilt of the appellants. We think that these appellants acted in concert and thereby the provisions of section 20 of the Penal Code come to play.

The learned trial judge, began by finding that the deceased died of the injuries PW8 found on the post mortem. Putting together evidence of prosecution witnesses especially PW1, PW2 and PW3 he concluded:

> ***"The totality of all these is that indeed the deceased passed on."***

Then turning to this act of murder as constituted in Section 206 of the Penal Code (reproduced above) the trial judge said:

> ***"I do not for a moment think that from the evidence on record whoever inflicted those injuries***

did not intend to kill the deceased. To my mind, whoever inflicted the injuries had the necessary malice aforethought. The slicing off of the deceased right arm is an act of grievous harm as well as commission of a felony."

And the judge concluded that those who inflicted the injuries intended the death of the deceased. While the learned judge took one course to establish malice aforethought – causing grievous injury which could and did kill, we on our part, in addition, saw that the appellants formed the necessary intention to cause the death of the deceased. They did this beginning with the claim that he had stolen ***Ismail's*** property, and proceeding to assault him with pangas and simis, without even heeding the interventions of PW1 and PW2. By either route, and in this case, the outcome was causing the death of ***Andrew Ndeti***. It was murder.

The learned judge saw no case of framing up the appellants.

"To my mind, the evidence of these witnesses is so detailed and corroborative so that no possibility of these cases against the accused being a frame-up is a long shot.(sic) ***What witnesses say, observed and testified upon must be true."***

We have arrived at a similar conclusion (above). And as regards the alleged contradictions, the judge said, with justification as follows:

"The accused have sought to discredit the evidence of these witnesses on account of contradictions in their testimonies with regard to the time they arrived at the scene, weapons used in the attack and who among the accused had what weapon, the number of persons at the scene and the issue of death of the deceased. To my mind these are minor discrepancies that do not go to the root of the prosecution case. They can be ignored. After all people observe things differently."

The judge then dismissed the contention that because of those discrepancies the witnesses were therefore dishonest, not candid and not worth of belief by the court. As for the time, the trial judge said, as we have, that the witnesses could not be expected to have looked at their watches in order to say exactly at what time they arrived at the scene.

On our part we have similarly found that the minor discrepancies were not capable of raising reasonable doubt as to the cogency of the prosecution evidence.

The trial court also delved in the respective defences and could not see them making any dent in the prosecution case. We too have found so.

In the result we find no reason to disturb the judgment of the trial judge and accordingly dismiss this appeal in its entirety.

Delivered and dated at Nairobi this 18th day of October, 2013

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

A true copy of the original

DEPUTY REGISTRAR

/jkc