IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 312 OF 2009

BETWEEN

JUMA ONYANGO IBRAHIM ..... APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu, (Warsame, J) dated 11th October 2011

in

HCCRC NO. 45 OF 2003)

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JUDGEMENT OF THE COURT

This is an appeal from the judgement of the High Court of Kenya at Kisumu (Warsame, J. – (as he then was) delivered on 11th October 2005 where the appellant, Juma Onyango Ibrahim was convicted of the offence of murder and sentenced to death. According to the information, on 18th November, 2002 at ***[particulars withheld]*** Mosque in Nyawita Sub – Location of Kisumu the appellant murdered M I A ("the deceased"). Being a first appeal we have a responsibility to re-evaluate the evidence and make our own conclusions remembering always that we have not had the advantage of hearing witnesses and observing their demeanour as the judge hearing the case did – In the case of **Okeno v Republic[1972] EA 32** it was held:-

> **"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld …."**

The prosecution case was through the evidence of 8 witnesses and it can be summarized as follows:-

On 18th November, 2002 at about 7:15 p.m., being the holy month of Ramadhan, Ibrahim Otoyo Salim (PW2) (Salim), Bilali Aida Ismael (PW3) (Ismael) and H I O (PW4) (H) were amongst many people who had attended evening prayers at the said mosque. A Meal was served and the organizing committee at the

mosque had arranged the setting such that 4 people and above were sharing a plate of food. The deceased and one Hassan Odhiambo were however at odds with the arrangement as they were the only two eating from one plate. Salim was sitting near them and testified that the appellant was unhappy with the deceased and the said other person who were not sharing a plate of food in the numbers recommended by the said committee. The appellant started a quarrel that led to a fight with the deceased. The fight was stopped by various people including Salim. The appellant even fought Salim. Upon the fight being stopped the appellant left the mosque shouting that he would do something to somebody that day. He returned within 3 minutes and according to Ismael the appellant pinched the deceased who raised his hand probably to defend himself and it was then that the appellant produced a hither to concealed knife which he used to stab the deceased in the ribs. The deceased collapsed and died. Both Salim and Ismael further stated that although there was a blackout the whole event took place in an open area of the mosque illuminated by moonlight and candles and that the appellant, upon his return, had a torch which he used to identify the deceased.

Isamel testified further that the appellant was angered by the fact that the deceased and the said other person did not usually observe the fast in accordance with Islamic teachings but attended the mosque in the evening to partake of the food that was freely donated by worshipers and would be drunk on such occassions.

When the appellant stabbed the deceased he was wrestled to the ground by Ismael as others scampered to safety because of the knife. The appellant attempted to escape but was cornered near the gate of the mosque and apprehended by Ismael who handed him over to No. 36380 Corporal Pascal Oluti (PW7) for formal arrest.

The above version was supported by H, a 12 year old boy, who witnessed the whole incident that culminated in the death of the deceased who was his brother. He ran home and informed relatives including his grandmother M A I (PW1) who went to the mosque and found the body of the deceased still at the scene.

Dr. Margaret Oduor (PW8) performed a post-mortem examination and gave cause of death as bleeding as a result of a ruptured spleen.

That was the prosecution case which the appellant was called upon to answer.

In an unsworn statement the appellant confirmed that he was indeed at the mosque on the material day when the deceased and another person sat next to him. They had drank changaa which he could not stand and he asked them to move away. The deceased was displeased and started fighting the appellant. The appellant ran away and upon reaching the gate he saw people scattering and it was then that he noticed one person fall down. He walked back and found that the deceased had died. He decided to report the matter to the police but upon reaching the police station he was arrested.

The trial judge evaluated the evidence and found that the charge facing the appellant had been proved beyond reasonable doubt. That led to the results already adverted to and provoked this appeal.

In the Memorandum of Appeal the appellant has taken 6 grounds of appeal as follows:-

> "1. **The learned Judge erred in fact and law by holding that there existed malice afore-thought and premeditation, supporting a verdict of murder.**
>
> **2. The learned Judge erred in fact and law by relying upon evidence that was never canvassed nor adduced at the hearing.**
>
> **3. The learned Judge erred in fact by holding that medical evidence existed to the effect that the deceased's death was resultant from a stab wound.**
>
> **4. The learned Judge erred in fact and law in convicting upon circumstantial evidence**

when the inference of the appellants guilt was capable of explanation upon other reasonable hypothesis than that of his guilt.

5. The learned Judge erred in law by failing to sum up to the assessor nor give reasons for his departure from the opinions expressed by two assessors.

6. The learned Judge convicted against the weight of the evidence."

When the appeal came up for hearing before us the appellant was represented by learned counsel Mr. P. Ochieng Ochieng while the respondent was represented by the learned Assistant Director of Public Prosecutions Mr. C. A. Abele Counsel for the appellant abandoned ground 6 of the appeal and concentrated the argument on lack of summing up by the judge to assessors, arguing that judges' rejection of the assessors findings; the evidence of the minor and whether there was malice aforethought.

The learned State Counsel supported conviction arguing that the appellant prepared and did commit murder. By engaging in a fight, leaving the scene and returning moments later armed with a knife and actually using the knife malice aforethought had been established, so argued the State Counsel. He submitted further that the appellant had been properly identified by prosecution witnesses who were at the scene and there was sufficient moonlight and candle light.

There was no summing up by the judge to the assessors and that the judge erred in departing from the assessors findings without assigning a reason for such departure.

The trial took place before the relevant provisions of the Criminal Procedure Code requiring trial in certain cases with the aid of assessors were replealed. The replealed provisions required that trials in the High Court be by aid of 3 assessors who were required to attend court throughout the trial at the end of which they were to give an opinion to the trial judge on their findings of fact which opinion was however not binding on the judge. The principles that surrounded and supported the institution of assessors were succinctly discussed by this court in **Kinuthia v Republic [1988] KLR 699** where the court made the following observation:-

"If the Judge is not bound by the opinion of the assessors, yet the trial is to be conducted with their aid, what form should this aid take? The purpose of the Assessors is to make sure that, as far as possible in the most serious cases which are tried by the High Court, the decisions of fact have a broad base conforming with the notions of that part of society to which the Accused person belongs. The Assessors are of special value in determining what action amounts to provocation. They are also of great importance in assessing contradictory stories of what occurred in a particular case, and they may be able to guide a Court as to the manners and customs, and so to the truth of what the witness have said. It is therefore right and proper that the trial should be with the aid of assessors, in the full sense; they should be allowed to ask the witnesses questions; they should have exhibits and reports shown and explained to them; and they should give their opinions in general and on special points as the circumstances of a case require.

Take for instance, R v Paulo Lwevola Mupere (1943) EACA 63 a decision which perhaps would not attract modern approval. The modern assessor would have found provocation almost certainly. But to get to a decision which of several acts might be provocative, this Court's predecessor doubted the wisdom of merely allowing a general opinion or verdict to be recorded.

"It is observed that the assessors merely said :I find

accused guilty of murder."

It is often desirable for the Court of Appeal to know

not only the assessor's opinions but also their reasons

for their opinions. With regard to the judgement we

should have liked a fuller judgment and we attract the

attention of the learned Judge to Section 168 of the

Criminal Procedure Code".

That is to say, the judgement ought to be based on reasons given for the decision. In that case, the assessors agreed with the Judge. Here the assessors disagreed. It is therefore fundamental that the Court gives its reasons for disagreeing with the Assessors. Now of course in the case of a general opinion the Court will hardly be able to do so. The value of Paulo Lwevola's case is that it established that decisions are to be taken with reasons, which can be seen to prevent arbitrary measures.

Later on in 1956, Mohamed Bachu vs Rg. Was decided (23EACA 399). The issue was whether the trial was a nullity because the specific opinions of the Assessors had not been taken, as to whether the evidence showed sufficient provocation to cause an ordinary person of the appellant's community to lose his power of self-control. In considering what might be meant by the phrase "a trial with the aid of assessors," the forerunner of the present section 322 was set out-they are in identical terms -, and the Court of Appeal commented that the Code did not specify that the opinions of the Assessors should be taken on every question that arises in a case. The conclusion however at p. 401 was:-

"We can well imagine cases in which it would be proper

and indeed advisable for the trial Judge to obtain a

specific opinion from the assessors on a certain point

in addition to their opinions on the case as a whole. In

fact it is often done, but the Kenya Criminal Procedure

Code does not specifically require it to be done in all

cases and the interference by this Court solely on the

ground that the Court had not required an opinion from

the Assessors upon a particular point as well as upon

the case as a whole could only be justified if it were

shown that it was unfair to the accused or contrary to

the principles of natural justice".

The problem in Bachu's case seemed to the Court of Appeal to be resolved as a straight-forward case of mere vulgar abuse exchanged between the Deceased and the Appellant, with no basis for provocation. Consequently no interference was justified. In the present case it appears to us that specific opinions should have been called for and we would specifically apply the test of unfairness to the accused and natural justice. The

Criminal Procedure Code provides that a judgement must contain the points for decisions and reasoned decisions on those points. That is required so that justice may be seen to be done, especially in the serious cases that the High Court deals with."

It was specifically held in the Kinuthia case (supra) that in a case involving controversial evidence which might be decided either way it would be a strong action of a Judge to overrule the unanimous opinion of the assessors on some points. It was therefore fundamental that a court gives reasons for disagreeing with assessors.

In the instant matter the record shows that the matter was in court on 19th May 2005 when submissions were made. What follows in the typed record is that the trial judge ordered that summing up to assessors would take place on 30th May, 2005. On that day the assessors gave their verdict where 2 assessors returned a verdict of not guilty while the 3rd assessor disagreed, returning a guilty verdict. When we perused the original record we found a summing up comprising 8 handwritten pages in the same hand as the other notes in the High Court file. The same are signed by the learned judge.

We ask ourselves – would the assessors have given a verdict without the Judge summing up to them? On what would they have based their verdict? Although the record does not indicate clearly that summing up was done it is logical to conclude, as we do, that the learned Judge did sum up but omitted to indicate so in the record. It is on the basis of the summing up that the assessors were able to give their verdict.

Counsel for the appellant has taken as an issue in respect of the Judges rejection of the assessors finding, without, according to counsel, giving reasons for such rejection. As we have indicated 2 assessors returned a verdict of not guilty while the 3rd assessor thought the appellant was guilty.

This is the way the learned Judge expressed himself in the judgement on this aspect of the matter:-

"... The two assessors who returned a verdict of not guilty are completely wrong and did not address their mind to the facts and the law. I therefore disagree with them for their opinion was not supported by the evidence on record and the applicable law. In any case their decision is not binding on me and having elevated (sic) the whole evidence, it is my position that the prosecution has moved (sic) each and every element of the charge..."

In the Kinuthia case which we have quoted in detail above the court was of the opinion that it would be a strong action on the part of a judge to overrule the unanimous opinion of assessors in a case involving controversial evidence.

In the instant case the evidence of identification was very strong as the offence was committed in a mosque compound with many witnesses who testified to the facts of the case. Salim, Ismael and H were all present at the scene. Ismael even fought with the appellant and in the later incident where the appellant returned with a knife he (Ismael) is the person who wrestled the appellant to the ground after the stabbing incident.

The facts of the case were very strong against the appellant. The verdict of the assessors were in any event not unanimous and were not binding on the learned Judge. The Judge considered the facts of the case and the assessors verdict and gave reasons as shown in the passage we have quoted as to why he disagreed with the assessors.

Learned counsel for the appellant also submitted that the judge relied on evidence of a child of tender years without warning himself of the danger of doing so. He relied on this court's decision in **Johnson Muiruri v Republic [1983]KLR 445** where it was held inter alia:

"...the failure by the judge to direct himself and the assessors on the danger of relying on uncorroborated evidence of a child of tender years and the reliability of such evidence

was a fatal error and conviction could not stand..."

The evidence complained of is that of H I (PW4) who was 12 years old when he gave evidence. He testified to his being in the mosque, witnessing the incident that led to the death of his brother and the action he took in the premises. The record shows that the judge conducted a voire dire before evidence of H was taken and determined that the witness was intelligent and understood the purposes of his evidence. He thereafter gave unsworn evidence and was cross – examined at length by counsel for the accused.

The learned Judge in expressing himself in the judgement on evidence of a minor said:-

"...PW4 H I was an eye witness and he stated that he saw the accused person stab the deceased person with a knife. That was the evidence of a minor, which needed corroboration and it is my view that there was such corroboration in all material particulars. The evidence of PW2 was important for he gave an overview of the whole incident before and after the incident..."

The learned Judge did not say very much on the issue of need for corroboration for evidence of a minor. We have reviewed the whole matter in respect of the issues of corroboration and like the learned Judge we have come to the conclusion that the evidence of the minor was corroborated in all material particulars by the evidence of PW2 and PW3.

We now come to the last and probably most difficult issue in this appeal: was murder accompanied by the requisite malice aforethought?

Counsel for the appellant submitted that even if there was a fight leading to the death of the deceased the circumstances did not show that the appellant could have intended to cause grievous harm. In any event the time span between the first and the second fight was not clear and the appellant did not have sufficient time to plan murder, submitted counsel.

Mr. Abele, in opposition, thought there was malice aforethought. The appellant engaged in a fight which was stopped; he went away and returned later with a concealed knife which he used to stab the appellant leading to fatal consequences.

The learned Judge held that by going away and returning armed with a knife the appellant had the time and opportunity to address or assess the consequences of the act or omission he was about to undertake. And by going ahead to injure the deceased the judge held that aggravated malice aforethought to cause the death of the deceased existed.

We have agonized over this matter and considered all aspect of the case including the conclusions of the learned Judge.

There can be no doubt that the incident that led to the stabbing and killing of the deceased was most unfortunate happening as it did in a mosque, a place of prayer and worship, where worshipers had congregated to pray and share, a meal as is their custom. Instead of behaving in orderly conduct as was expected of him the appellant engaged in unruly and disorderly conduct that led to very serious consequences.

There is however evidence that the deceased may have himself provoked the situation that arose because, according to the evidence, the committee that had organized evening prayers and a meal had arranged it in such a way that a plate of food was shared by four people or more. It is not clear why this was so but it is possible that there were insufficient plates to go around. The deceased and his friend breached this protocol by refusing to share their plate with others and as held by the learned Judge:

"...he has failed to control his insatiable hunger for food...."

This apparent gluttony angered the appellant leading to the first fight which was successfully stopped.

The appellant then left the scene returning moments later still angry and engaged in the second confrontation. Could it therefore be said that malice aforethought was proved in the circumstances of the case?

For the offence of murder to be proved there are 3 essential elements which the prosecution must prove beyond reasonable doubt to secure a conviction. They are:-

(i) death of the deceased and cause of that death;

ii. **the accused committed the unlawful act which caused the death of the deceased;**

and

(iii) that the accused had malice aforethought.

See **Nyambura & others v Republic [2001] KLR 355**

In **Isaack Kimanthi Kanuachobi v R (Nyeri) Criminal Appeal No. 96 of 2007 (ur)** this Court expressed itself thus on the issues of malice aforethought in terms of Section 206 of the Penal Code:

> **"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 lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic v Stephen Kiprotich Leting & 3 others [2009] e KLR High Court at Nakuru Criminal case 34 of 2008)".**

In the circumstances of the case where there was a fight involving the appellant and others in a place of worship leading to another fight moments later where the appellant stabbed the deceased with fatal consequences we do not think there was malice aforethought at all. The appellant should not have been convicted for murder but should have been convicted for manslaughter. This appeal is allowed therefore to the extent that we quash the conviction and set aside the sentence for the offence of murder substituting thereof conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Before we conclude there is an aspect of the appeal which was not taken by counsel but which it is proper for us to address. The record shows that upon being convicted the appellant was sentenced to death without being asked to address the court in any way at all in mitigating. This was an error on the part of the learned judge. This Court has stated in many cases that sentences in murder cases should be reserved and pronounced only after mitigation factors are known. It was held in **John Muoki Mbatha v Republic Criminal Appeal No. 72 of 2002 (ur):**

> **"As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgement. Sentencing should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered".**

See also **Elphas Fwamba Toili v Republic [2009] e KLR (ur)**

We have not had the benefit of the appellants mitigation but in the circumstances of this case we are of the view that a sentence of 15 years imprisonment from the date of conviction is reasonable.

Sentence of death is hereby set aside and wee sentence the appellant to 15 years imprisonment.

Dated and Delivered at Kisumu this 4th day of October 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRARA