IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 311 OF 2011

BETWEEN

JOSEPH MWONGERA RUKARIA.....APELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru

(Lesiit, J.) dated 24th November, 2011

in

H.C.CR No. 30 OF 2009)

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JUDGMENT OF THE COURT

1. Joseph Mwongera Rukaria was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, **Cap 63** of the **Laws of Kenya.** The Information is that on the 12th day of March, 2009 at Maitei Village in Maitei sub-location, Buuri Division Meru Central District within the Eastern Province murdered Benjamin Mwiti Rukaria. The appellant was tried and found guilty by the High Court. He was sentenced to death as provided by law. The deceased was a brother to the appellant and **PW 1 Samuel Jack Rukaria.**
2. The learned Judge in convicting the appellant expressed herself:

> ***"PW1, like PW 2, 3 and 4 testified that the accused cut the deceased on the neck from behind, causing blood to jut into the air from the deceased neck.... I find that the accused cut the deceased on the neck severing the major blood vessels and the throat and trachea and dislocating the bones on the neck area. Malice aforethought can be inferred from the circumstances of the case".***

3. Aggrieved by the conviction and sentence passed by the learned Judge, the appellant has moved to this court citing various grounds of appeal as per the supplementary memorandum of appeal. The

grounds can be itemised as:

i. ***The learned judge erred in law and fact in convicting the appellant for murder when the facts and evidence on record favour a lesser offence of manslaughter under Section 202 as read with Section 205 of the Penal Code.***

ii. ***The learned trial judge erred in law by failing to make a proper resolution of the disputed murder weapon which was not properly and sufficiently identified as the actual murder weapon.***

iii. ***That the trial judge erred in not finding that vital witnesses were not called to testified.***

iv. ***The trial court erred in rejecting the appellant's duly sworn defence.***

v. ***The trial judge erred in not finding that there was provocation and self defence on the part of the appellant.***

vi. ***The honourable judge erred in sentencing the appellant to death which sentence is unconstitutional and contravenes international law.***

4. At the hearing of appeal, learned counsel **Charles Kariuki** appeared for the appellant while Senior Prosecuting Counsel **J. Motende** appeared for the State**.** Counsel for the appellant elaborated the grounds of appeal and submitted that the key subject is the twin issues of provocation and self defence.
5. This is a first appeal and we are obligated to remind ourselves of our primary role namely to re-evaluate, re-asses and re-analyse the evidence that was before the learned trial judge and then arrive at our own conclusions giving reasons for the same***. In <u>OKENO V R.,</u> [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (<u>PANDYA V. R.</u> [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. (<u>SHANTILEL M. RUWAL V. R.</u> [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 <u>PETERS -V- SUNDAY POST</u> [1958] EA 424."***

6. We have considered the grounds of appeal and submissions by counsel. We have examined, considered and re-evaluated the evidence afresh.
7. **PW 1 Samuel Jack Rukaria** testified that on 12th March, 2009, he, together with the appellant and Stephen Maingi Rukaria (PW 2), Edward Mburugu, Henry Mutega and David Dauti were at home. On this day, Benjamin Mwiti Rukaria *(the deceased)* told the appellant to leave his fence. The appellant then cut the deceased on the back of the neck and when PW 1saw what happened, he ran away. PW 1 recalled that in 1992, the deceased stabbed the appellant with a spear.
8. **PW 2 Stephen Maingi Rukaria** also a brother to the appellant testified that on the material day of 12th March, 2009, he was called by David Gachiata who is a neighbour to go to the home of David Kriinya. That he went there and found David Kiriinyaa, Henry Mutega, M'Ikunyua M'Irungu and Samwel Jack in one place. That nearby was Benjamin Mwiti *(deceased)* and the appellant and they were quarrelling over the boundary of the shamba. They resolved to call the sub-chief to survey and resolve the dispute but the appellant refused. The appellant went away and came back with a panga. He cut the deceased on the back of the neck. The appellant went to the deceased's home and cut the neck of one cow which died. When the appellant flashed out the panga from his jacket, PW 2 testified that they all scattered. The cut on the neck was very serious

as the neck was hanging on a piece of skin. PW 2testified that the appellant and deceased had problems and long ago, the deceased had cut the appellant and the case went to court.

9. **PW 3 M'Ikinyua M'Iringu alias Edward Mburugu** testified that he was present on the material day and saw the appellant cut the deceased on the back side of the neck and he saw blood jutting upward. He had no time to see what weapon was used. **PW 4 David Muthomi** testified that he saw the appellant cut the deceased on the back side of the neck. That he was aware the appellant and the deceased used to quarrel.
10. We have evaluated the evidence on record and there is no doubt that the appellant did indeed cut the deceased on the back side of the neck. The identity of the person who cut the deceased is not in dispute, this is a case of recognition. In ***Anjononi & Others vs Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held:

> ***"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

11. The main issue for our consideration is whether the appellant cut the deceased with malice aforethought. We shall also consider and evaluate if provocation or self defence is disclosed by the evidence on record. In **Daniel Muthee – v- R CA No. 218 of 2005 (UR)**, Bosire, O'Kubasu and Onyango Otieno JJA 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."***

12. We are cognisant of the statement by the learned Justices of Appeal made in the **Daniel Muthee** case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm. PW 2 testified the neck was severed and was hanging by a piece of the skin. The question that we now pose is whether there is any evidence of provocation or self defence.
13. PW1, PW2, PW 3 and PW4 all testified that the appellant and the deceased used to quarrel and they had problems over the shamba. Of significance, PW 1 stated that in 1992, the deceased had cut the appellant with a spear. He testified that on the material day, the deceased said "*tell that huge person (appellant) to move away from there and tell him today is his last day*." PW 2 stated that the appellant and the deceased often quarrelled over the shamba and noted that on the material day the deceased was carrying a stick. The issue for our consideration is whether the events from 1992, the constant quarrels between the deceased and the appellant, and the events of the material day amount to cumulative provocation that negatives *mens rea* for murder and sufficient to reduce the charge to manslaughter.
14. Provocation is defined in **Section 208** of the Penal Code as follows:

> ***208 (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person, who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

15. In the case of ***Stephen Kipkeror Cheboi – v- R, Criminal Appeal No. 50 of 1991***, this court stated

if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self-control an act of killing resulting from such striking could amount to manslaughter rather than murder.

16. In the instant case, there is evidence that the appellant and the deceased were brothers and they have had quarrels over the shamba for some time. The evidence also shows that in 1992, the deceased stabbed the appellant with a spear. On the material day the evidence shows that the deceased and the appellant were quarrelling and the deceased had intimated that today was the last day for the appellant and he was carrying a stick. The question is whether the quarrel on the material date became the proverbial last straw which broke the camel's back and led his temper to snap as to cause him to carry out the ghastly crime? Could it be murder? Can it be said that if the trial court had given sufficient consideration to the appellant's subjective state of mind when the deceased told him to get out of his fence he would have come to the conclusion that the appellant was provoked enough to render the crime to be manslaughter rather than murder? We pose this question as it appears the trial judge did not consider the appellant's subjective state of mind at that crucial moment. Had he done so, it is probable that he would have found sufficient provocation. We must look at the whole scenario from the point of view of an ordinary person and not necessarily a reasonable person. We adopt the dicta in ***R – V- Humphreys, (1954) 4 All ER 1008,*** where it was held that in a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter, the judge ought to give consideration for this and appreciate its potential significance. It is our considered view that the trial court did not consider the cumulative effect of the problems between the appellant and the deceased.

17. The upshot of the foregoing is that we find that there was sufficient evidence of recognition that the appellant was the perpetrator of the offence. We find that malice aforethought was not proved. There is adequate evidence of cumulative provocation. The trial Judge erred in not considering the cumulative provocation and to determine whether the appellant had the requisite *mens rea* for the offence. In our view, the benefit of doubt as to whether the appellant was provoked as to negative the intent to kill or cause grievous harm goes to the appellant. The offence of manslaughter was established. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The appellant is sentenced to serve a sentence of 20 years with effect from 25th March, when he was first arraigned before court.

Dated and delivered at Nyeri this 28th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR