



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, MUSINGA & M'INO TI, JJ.A.

CRIMINAL APPEAL NO. 241 OF 2006

BETWEEN

GEORGE OCHIENG OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Rawal, J) dated 31st October, 2005

in

HCCR.A NO. 133 OF 2004)

JUDGMENT OF THE COURT

GEORGE OCHIENG OMONDI, hereinafter referred to as “*the appellant*” together with *JOEL AWUOCHE* and *JULIUS WERE*, were jointly charged with the murder of *JOSEPH OKOTH*, hereinafter referred to as “*the deceased*”.

The offence was committed on 16th March, 2003, within the precincts of St Peter’s Church, Legio Maria of African Church Mission, Dandora, Nairobi; hereinafter referred to as “*the church*”.

After a full trial before the High Court, [*Rawal, J. as she then was*], only the appellant was found guilty. He was duly convicted and sentenced to death.

Being dissatisfied with the said conviction and sentence, the appellant preferred an appeal to this Court. This being the first appellate court, it is duty bound to examine and re-evaluate the evidence on record and arrive at its own conclusion, bearing in mind, however, that unlike the trial court, it had not seen and heard the witnesses. See *OKENO V REPUBLIC*, [1972] EA 32.

The background to the commission of the said offence is a dispute that split the church into two warring factions. *Lawrence Ochieng Kalwi*, PW 8, was the Bishop in charge of the Legio Maria Church, Nairobi and the subject church herein fell under his jurisdiction. He told the trial court that sometimes in April 2001, Father Charles Dindi was transferred from the church. Initially he agreed to move out and a farewell party was held for him on 5th August, 2001. Shortly thereafter, Father Dindi changed his mind

and said he was not moving out of the church and a part of the congregation also opposed the transfer. Father Dindi was ejected out of the church and he moved to his private house.

Maurice Oduor Obuyu, PW 1, a catechist teacher at the church, testified that on 16th March, 2003, at about 7 am, he was at the church when he saw the appellant entering the church compound. Shortly thereafter, the appellant was joined by Julius Were and Joel Awuoche. The three had not been attending church since August 2002. They moved to the church and started beating altar boys. PW 1 ran to Kinyago Police Post and reported the incident. Together with the police, among them *Inspector Joseph Chesire, PW 12*, they drove to the church compound where a large crowd had gathered. The police dispersed the crowd by use of tear gas and got into the church. They found the deceased in the church, having sustained serious injuries. He was put in a vehicle to be rushed to hospital but succumbed to the injuries before arrival at the hospital.

Amos Ochieng Oyugi, PW2, had also seen the appellant and his accomplices getting into the church. He saw the appellant beating some of the congregants therein. When the witness got hold of the appellant and asked him why he was doing so, the appellant retorted: “*Leave me alone father. I want to kill them.*” PW 2 added that the deceased was assaulted by the appellant while hiding behind a door. When the witness asked the appellant why he had assaulted the young altar boy, [the deceased], the appellant threatened to kill him [PW 2] as well.

The evidence of PW 2 was corroborated in all material aspects by *Marcus Oduor Otieno, PW 3, Norah Auma Obute, PW 4, Beatrice Adhiambo, PW 5, Alice Karimi, PW 6* and *Hoseph Ouma Kabonyo, PW 7*.

The deceased’s post mortem report was produced by *Dr Jane Wasike Simiyu, PW 14*, of National Public Health Laboratory on behalf of her colleague, *Dr Maundu*, who had performed an autopsy on the body of the deceased. The cause of death was established as head injury with brain hemorrhage.

In his defence, the appellant stated that on the material day he went to the church in the morning and started praying. Shortly thereafter, one Robert Oduor came in and ordered about fifteen [15] worshippers who were there to move out. Oduor beat him up and he fell down. When he got up and went out, he saw one Lawrence Ochieng bleeding from his mouth and head. Some people started throwing stones and shortly thereafter, police officers showed up. He was arrested and taken to Buruburu Police Station. The appellant denied having murdered the deceased. The trial court held that the appellant, with malice aforethought, had caused the death of the deceased and sentenced him to death.

As stated, being dissatisfied with that conviction and sentence, the appellant preferred an appeal to this Court. *Mr Kariu*, learned counsel for the appellant, raised seven [7] grounds of appeal but argued all of them together. The grounds are as follows:

“1. *The learned judges [sic] of the High Court erred in fact and law by failing to note that in the fracas that ensured the circumstances surrounding the death of the deceased could not warrant the charges framed against the appellant herein.*

2. *The learned judges [sic] of the High Court erred in fact and law by disregarding the defence and evidence of the appellant.*

3. *The learned judges [sic] of the High Court erred in fact and law by failing to note that all the witness who testified were not neutral and independent but belonged to one faction of the mayhem.*

4. *The learned judges [sic] of the High Court erred in fact and law by upholding conviction which was uncorroborated and not proven beyond reasonable doubt.*

5. *The learned judges [sic] of the High Court erred in fact and law by failing to note [sic] the inconsistency in the evidence and to subject the evidence to evaluation as demanded by law.*

6. *The learned judges [sic] of the High Court erred in fact and law by failing to note that the*

appellant had no motive to kill the deceased.

7. *The learned judges [sic] of the High Court erred in fact and law by convicting the appellant on witness and evidence which does not corroborate the charge.”*

Counsel submitted that there were two factions in the church that were fighting and it was not clear who assaulted the deceased. Alternatively, counsel argued, if it was the appellant who had caused the fatal injuries to the deceased, considering the circumstances under which the offence was committed, the appellant should have been convicted for manslaughter as he had no malice aforethought. Mr Kariu added that the record of appeal showed that on 26th October, 2004, the appellant and his co-accused had offered to plead guilty to a charge of manslaughter, which offer was accepted by the prosecution but it was not clear what transpired thereafter.

In response, *Mr Monda*, Senior Principal Prosecution Counsel, briefly submitted that there was overwhelming evidence that the appellant, with malice aforethought, murdered the deceased. He referred to the evidence of PW 2 who told the trial court that when he asked the appellant and his accomplices why they were causing chaos in the church, the appellant told him that they wanted to kill the father in charge since they did not want him in the church.

When they realized that their target person had ran away, they were furious and it was at that time that they saw the deceased hiding behind a door. The appellant moved towards the door and the deceased ran towards the main gate of the church. He was, however, unable to get out as there was a big crowd at the church entrance. The appellant got hold of him and beat him with a big piece of

timber at the back of his head. Blood started oozing out of his eyes, nose and mouth as he lay down.

From the evidence on record, the circumstances that led to the death of the deceased are clear. The evidence reveals that the deceased was assaulted by the appellant. The deceased had not provoked the appellant at all. The deceased was an altar boy and was busy and peacefully performing his duties in the church until the appellant and his two accomplices entered in search of the father in charge. When they missed him, the appellant vented his anger on the hapless young man.

The appellant’s counsel urged this Court to find that his client acted without malice aforethought and proceed to allow the appeal. What is malice aforethought? *Section 206 of the Penal Code* states as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(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 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 intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

No doubt the appellant and his accomplices intended to cause death to some people in the church. When they entered the church and started beating congregants indiscriminately, PW 2 tried to stop them and the appellant rebuffed him saying:

“Leave me alone father. I want to kill them.”

That is a clear manifestation of intent to cause death. It cannot, therefore, be argued that the appellant had no malice aforethought.

We are satisfied that the appellant’s conviction was safe and the sentence that was handed down cannot be challenged. Consequently, this appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 8th day of November, 2013.

D. K. MARAGA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR