



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, KARANJA & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 355 OF 2007

BETWEEN

CHARLES KIBET ROTICH.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kericho (Koome, J) dated 15th October 2007

in

H.C.CR.C. NO.26 OF 2005)

JUDGMENT OF THE COURT

1. The appellant **Charles Kibet Rotich** was arraigned before the High Court and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that the on the 16th day of July 2005 at Kibolgong village in Buret District, he murdered **Agnes Kerubo Chepkwony** (hereafter referred to as the deceased). During the trial held with the assistance of assessors, a total of seven witnesses testified for the prosecution while the appellant gave unsworn evidence in his defence.

2. In a nutshell, the prosecution case was that the appellant who is a son to the deceased had previously quarreled with the deceased claiming he was given little food. The appellant threw the food at the deceased, took the deceased clothes and tore them into pieces, and threatened to harm the deceased. The deceased reported the matter to the chief who arrested the appellant and handed him over to the police. While at the police station the appellant pleaded for forgiveness and he was released. On the 16th July 2005 at about 8.00 p.m., the appellant went back home and accosted the deceased whom he hit and kicked on the abdomen and the deceased fell down unconscious.

3. **Kiptorich Arap Chepkwony** (PW1) the appellant's father who was in the bedroom, heard and recognized the appellant's voice, before the appellant hit his mother. **Chepkwony** got up to intervene but he was also hit by the appellant who tried to strangle him. The appellant's brother, **John Rotich** (PW2) found the appellant beating and kicking his mother on the stomach. Upon inquiring what was going on,

the appellant stabbed his brother on the leg. Another brother to the appellant, **Geoffrey Kipng'eno Rotich** heard the commotion and upon running to his father's house found the appellant struggling with his father. **Kipng'eno** picked a panga and cut the appellant on the hand, the appellant then ran into a maize plantation.

4. In the meantime, **Peter Kipkoech Rotich** who had heard the commotion went to the scene and found that the deceased had died. He went and reported the matter to the area chief, who in turn reported the matter to the police and the appellant was apprehended. **PC David Mwene** (PW7), an officer attached to Litein police station, and other police officers proceeded to the scene and took the body of the deceased to Kapkatet District Hospital. The body was later examined by **Dr. Cheruiyot**, who carried out a postmortem examination and noted that the cause of death was severe hemorrhagic shock, resulting from blunt abdominal trauma.

5. In his unsworn statement, the appellant explained that he heard commotion when he was fifty metres away. He started walking and met his brother **Kipng'eno** whom he asked what was happening at his parent's home. The brother did not respond but instead cut the appellant, and the appellant fell down unconscious. The appellant regained consciousness while at the hospital. He was then taken away by police officers and was subsequently charged with the murder which he knew nothing about.

6. One of the assessors died during the course of the trial. Following summing up to the two remaining assessors, they returned a unanimous opinion that the appellant was guilty of murder as charged. In her judgment, the trial Judge convicted the appellant and sentenced him to death. The following extract from the judgment sums up the finding of the trial Judge:

"I find the evidence on record is clear that the accused person premeditated and executed his evil designs when he threatened the deceased with dire consequences after the deceased reported him to the authorities. I also find that the accused person did not care about the life the deceased, his own mother and this is a case of extreme violence within a family set up where members of the family would expect peace and utmost safety. I have also considered the defence by the accused person which is a mere sham taken in the context of the evidence by the prosecution's witnesses. The postmortem examination confirm that the deceased's death was a result of severe heamoperitoneum (hemorrhagic shock) resulting from blunt abdominal trauma. This is in line with the evidence that the accused was found kicking the deceased on the stomach.

I find the evidence of the prosecution's witnesses is credible, reliable and free from doubt that the accused person caused the death of the deceased. I find that the prosecution has been able to prove their case to the required standard."

7. The appellant has now lodged an appeal which was argued before us by learned counsel **Mr. Maragia**. In arguing the appeal, **Mr. Maragia** relied on the supplementary memorandum of appeal lodged on 1st August, 2012. The memorandum raises six grounds as follows:

(i) That the learned appellate trial judge erred in law and in fact in holding that the prosecution evidence was direct irrespective of the glaring testimonies from all the prosecution witnesses that they did not witness the actual hitting of the deceased by the accused.

(ii) That the learned trial judge erred in law in fact failing to note and consider that the evidence presented by prosecution witnesses revolved around circumstances which resulted to their retaliation (herein referred to as mob justice) to the appellant (the then accused) and ought to have received the said evidence with caution.

(iii) That the learned trial judge erred in law and in fact in failing to note and consider that the scene of the crime was marred with darkness and circumstances that could not have enabled them identify the person who caused the deceased death.

(iv) That the learned trial judge erred in law and in fact in failing to note and consider that the

prosecution evidence was shrouded with inconsistencies bleached [sic] the credibility of the prosecution.

(v) That the learned trial Judge erred in law in fact in failing to note that the circumstantial evidence presented by the prosecution did not irresistibly point to the accused to the exclusion of any other person.

(vi) That the learned trial judge erred in law in fact in shifting the burden of proof from the prosecution to the accused.

8. **Mr. Maragia** submitted that the incident happened when it was dark and that the appellant's father did not see what the appellant was holding. He also noted that the evidence of the witnesses was inconsistent. **Mr. Maragia** pointed out that the evidence of **Kipng'eno** (PW4), was not supported by the evidence of other witnesses while the evidence of the appellant's father and that of **Kipkoech Rotich**, that the appellant had threatened the deceased, was not corroborated by the evidence of the Chief or the production of any OB or statements confirming that the appellant had been booked for breach of peace. Further, that the postmortem examination report was incomplete as no culture was done, nor did the doctor state that he overruled other causes of death.

9. **Mr. Omwenga**, Principal State Counsel supported the conviction maintaining that the appellant was recognized by his father through his voice, and that the evidence of **John Rotich** and his father was clear that they both found the appellant hitting the deceased. **Mr. Omwenga** argued that the post mortem report was clear on the cause of the death of the deceased, and that the cause of death is consistent with the evidence of the eye witnesses. He urged the court to find that the defence of the appellant was properly rejected and the appellant properly convicted. Finally, **Mr. Omwenga** submitted that the sentence meted out was fair, given the injuries inflicted upon the deceased.

10. We have carefully considered and re-evaluated the evidence as we are expected to do in this first appeal. Although the incident happened at 8.00 p.m. when it was dark, the appellant was properly identified through his voice by his father who knew him well. The appellant not only attacked the deceased but also attacked his father and his brother, **John Rotich**. It is evident that the appellant was only repulsed by another brother **Kipng'eno** who cut him with a panga. The evidence of **Dr. Chebor** (PW3), who examined the appellant a few days after the incident, was consistent with that of the eye witnesses as the doctor confirmed that the appellant had a cut wound.

11. We appreciate that neither the chief nor the police officer who testified stated anything about the earlier incident when the appellant was alleged to have threatened the deceased, and caused damage to her property. Nonetheless, we have no reason to doubt the evidence of the appellant's father, and that of PW5 **Kipkoech Rotich**, that the incident occurred. We are satisfied that there was overwhelming evidence confirming that the appellant assaulted his mother until she collapsed.

12. As regards the cause of death, the postmortem report was clear that the cause of death was cardio-respiratory arrest due to severe haemoperitoneum (hemorrhagic shock), resulting from blunt abdominal trauma, and this was consistent with the eye witness account, that the appellant hit the deceased and kicked her on the stomach. Given his previous conduct and his response to the deceased, "it is me Kibet whom you sent to prison", it is apparent that the appellant had a grudge and the intention to kill or cause harm to the deceased. Thus, malice aforethought was established and we find that the appellant's conviction was sound. As regards the sentence, the circumstances in which the offence was committed clearly merited the sentence meted out. We find no merit in this appeal. Therefore, we uphold the conviction and dismiss the appeal in its entirety.

Dated and delivered at Nakuru this 27th day of September 2012.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL