IN THE COURT OF APPEAL
AT MOMBASA

CORAM: TUNOI, AGANYANYA & VISRAM, JJ.A.

CRIMINAL APPEAL NO. 176 OF 2008

BETWEEN

WATHOME MALUKI ……..……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Malindi (Ouko, J.) dated 2nd November, 2006

in

H.C.CR.C. NO. 11 OF 2006)
****

JUDGMENT OF THE COURT

WATHOME MALUKI, the appellant, was after trial convicted of murder and sentenced to death.

According to the information filed by the Attorney General, the appellant and another not before the court murdered ***Kalama Kakondo*** (the deceased) on the night of 27th/28th April, 2005 at Kaptuku Village in Mariakani.

The prosecution presented the following facts before the trial court. During the night in question at about 9 .00 p.m. while in his house, Omar Kazungu (PW1) heard noises outside. On going to the scene, he saw two people who he identified as the appellant and his brother Juma Maluki attacking the deceased. However, he did not bother much as those people were neighbours and relatives. He returned to sleep. That very night Muisya Wathome (PW3) a step brother to the appellant was alerted by his wife that the deceased was outside their house having breathing problems. On inquiring from the deceased what had befallen him, the latter explained that he had been attacked by the appellant and his brother, Juma, when he went to their home in search of palm wine. Unfortunately, the deceased's condition worsened during the night and by morning he had to be taken to hospital. He was visited at the hospital by the local assistant chief, Harrison Katama Konde (PW4) to whom he reiterated that it was the appellant and his brother who had beaten him. Within two days, the deceased succumbed to his injuries and died.

According to Dr. K. N. Mandalya who conducted post mortem examination on the deceased person's body, he observed that there was a brain clot which in his opinion was the probable cause of death.

During the trial, the appellant in an unsworn statement narrated how he was confronted by the

police as he and workmates were walking home from work. They were arrested but his colleagues were released while he remained in police cells for one month before being charged with the murder of the deceased. He maintained that he knew nothing about this matter. He could only attribute his woes to the bad blood between PW3 and himself emanating from his refusal to sell his land and share the proceeds with PW3. From that time, PW3 who was an employee at the assistant chief's office resorted to harassing the appellant by using the administration police officers from the assistant chief's office. He stated so. That constitutes the entire evidence adduced by both the prosecution witnesses and the appellant.

Upon this evidence, the learned trial Judge Ouko, J. held:

"In the dying declaration the deceased told Muisya and the assistant chief that Juma head-butted him. The head injuries were in my estimation due to the attack on his head. The accused and his brother, Juma, still at large attacked the deceased causing him the injuries from which he died.

The two acted in concert with common intention. They repeatedly attacked the deceased. From the nature of injuries he sustained, there can only be one conclusion. That they intended to cause the deceased grievous harm or even death. The deceased ran away but they followed him.

The assessors returned a unanimous opinion of guilty. The defence of alibi has been dislodged by the overwhelming evidence of identification. I concur with finding of the assessors that the accused is guilty of murder. I find him guilty and convict him accordingly.

He is sentenced to suffer death in accordance with the law".

The appellant through his learned counsel Mr. Kadima has advanced before us various grounds of appeal allegedly faulting the learned trial judge on a variety of issues but mainly factual.

The records laid before us do not show that the learned trial judge appreciated, as was forcibly argued before us by Mr. Kadima, that the appellant, his brother, the deceased and others had partaken of palm wine drinks for a considerable length of time before they were all engaged in a brawl which led to the deceased being assaulted. In view of this, there was, possibly, an issue of drunkenness which ought to have been put to the assessors and considered by the learned judge himself.

It is not open to this Court to speculate on what conclusion would have been reached by the assessors and the learned trial judge had they considered the issue of drunkenness. See ***OKWANY & ANOTHER VS. REPUBLIC [2005] 1 KLR 833***.

In our view, the omission by the learned trial judge to direct himself and the assessors on the issue of drunkenness and the brawl, whose cause no one for sure knows, which occurred before the killing, was a serious misdirection and the conviction for murder could not stand in the particular circumstances of this case.

We have on our part, carefully considered the entire evidence tendered during the trial. We think that the conviction for murder cannot be sustained.

In the result, we allow this appeal, quash the conviction for murder and set aside the sentence of death passed on the appellant.

We find the appellant guilty of manslaughter contrary to ***Section 205 of the Penal Code*** and convict him accordingly. Taking into account all the circumstances of the case, we sentence the appellant to ten (10) years imprisonment.

The sentence shall run from 2nd November, 2006, the date he was convicted of murder by the High Court of Kenya at Malindi.

It is so ordered.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

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

DEPUTY REGISTRAR