REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CRIMINAL APPEAL NO. 190 OF 2010
(CORAM: BOSIRE, WAKI & VISRAM, JJ.A)
BETWEEN
HAMIDA DARA ……..APPELLANT
AND
REPUBLIC ……..RESPUBLIC

(An appeal from a conviction and sentence of the High Court of Kenya at Malindi (Omondi, J.) dated 12th May, 2010

in

H.C.CR.C. NO. 10 OF 2008)
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JUDGMENT OF THE COURT

Following her trial before the High Court in Malindi (Omondi J), the appellant herein ***Hamida Dara***, was on 12th May, 2010 convicted for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, and was sentenced to suffer death. The appellant is now before us on this first, and probably not the last, appeal to challenge both conviction and sentence on seven grounds listed in a memorandum of appeal drawn and filed in person, and a supplementary memorandum of appeal filed by his advocate Mr. Hamza Adan Omar. Mr. Omar, however, consolidated those grounds into two main grounds which we shall examine shortly.

The Information filed by the Attorney General on 28th April, 2008 stated that the appellant on 17th day of April, 2008 at Nyumba Tano area in Malindi Township within Malindi District of Coast Province murdered ***Emmanueli Dino***. The prosecution called twelve witnesses to prove the charge and the appellant gave an unsworn statement in her defence. As this is a first appeal it is our duty to re-examine the evidence on record and re-evaluate it before reaching our own conclusion thereon but always remembering, and allowing for it, that the trial court had the added advantage of seeing and hearing the witnesses and was therefore a better judge on the credibility of those witnesses.

The appellant was a 25 year-old girl from Garsen. The deceased was a 67 year old pensioner of Italian origin living in Malindi, popularly known as '*Dino*' to his friends. The two were introduced to each other by the deceased's best friend, ***Abdul Mohammed Sadique*** (PW4) (Sadique) who had known the deceased for 9 years. Within a short while the deceased and the appellant went before the Kadhi in Malindi and were married on 7th March, 2008. After their marriage, Sadique, stayed with them in their matrimonial home in Malindi for about one month before moving out about two days before the fateful day. The reason given by Sadique for staying with them was to facilitate interpretation of language since the appellant did not understand Italian and only spoke Kiswahili, while the deceased spoke only Italian. Sadique's wife and children were also staying away from Malindi. The matrimonial home was one among a cluster of five fenced units in Nyumba Tano area of Malindi, where the appellant and the

deceased stayed alone.

At about 11 a.m. on 17th April, 2008, ***Maarifa Olive Katana*** (Maarifa) (PW1) a 14 year-old student was reading a book under a tree outside their house which neighbours the deceased's. She then heard the appellant whom she had known for one month, calling out Chengo. She knew the appellant's soft voice but did not see her. ***Macdonald Chengo Shaha*** (PW2) (Chengo) was a shamba boy who was working in the third house from the appellant's house. He was at the time cutting the fence when Maarifa called him to tell him that the appellant was calling him and that there were noises coming from the deceased's house.

Chengo had known the deceased for five years as a resident in the same estate. He rushed to the deceased's house and found "*a lot of noise*". The appellant had fallen on the verandah of the sitting room and was crying while the deceased was also in the sitting room lying on his back with his intestines hanging out. He looked dead. The appellant was crying saying thugs entered their home, one white man and two blacks. Chengo did not speak to her but rushed back to his employer's house and pressed the alarm to summon G4 Security Guards who came to the scene. The security guards also summoned Malindi Police Officers.

The other person who heard screams or noises coming from the deceased's house was ***Kalume Kahindi*** (PW3) who was a shamba boy in another neighbour's house separated by a road from the deceased's. He went to the scene as G4 security arrived and heard the appellant say that thugs had come to their home. Kahindi however did not see any thugs enter the deceased's compound.

The police arrived at the scene at about 11.30 a.m. led by ***Spt. John Nderitu Kariuki*** (PW8) who was in-charge of criminal investigations in the District (DCIO) and the investigating officer in the case. The OCS Malindi and the OCPD were present, as well as ***Cpl. Boniface Kiilu*** (PW5) of CID Malindi and other junior officers. They found the body of the deceased, dressed only in shorts, lying on its back in the sitting room with blood all over. It had stab wounds on the chest and stomach and the intestines were protruding. Spt. Kariuki saw no signs of disturbance in the house. The officers interviewed the appellant who was in a state of shock and who stuck to the explanation that three people had invaded their house and killed the deceased. The assailants who had arrived in a tuk tuk demanded money, she said, and when the deceased refused to give them they killed him and stole the deceased's mobile phone as well as hers. She also explained that she had quarreled with the deceased that morning because he was not happy about the arrangement of his clothes. After their quarrel she had gone to the kitchen to prepare lunch before the robbers struck. To Cpl. Kiilu, that explanation did not add up. He looked at the appellant and saw her blood soaked dress and she explained that it was soaked when she tried to pick the deceased's mobile phone. He also noticed that the appellant had a fresh cut on her left thumb. Spt. Kariuki and Cpl. Kiilu enquired from the neighbours, Chengo, Maarifa and Kahindi, whether they heard any noise or sound of a tuk tuk but none of them confirmed it. They decided to go round the house in search of exhibits and immediately Cpl. Kiilu saw a piece of a half cut onion not far from the deceased's body. He looked beyond the fence of the compound about 6 – 7 metres from the house and saw some two long kitchen knives. They went to the spot and found two mobile phones lying beside the knives, a Samsung and Nokia phones. There was also a smaller knife and the officers noticed that the two kitchen knives were blood stained and one was bent. Spt. Kariuki called scenes of Crime personnel who arrived at the scene led by ***Cpl. Robinson Maina*** (PW9).

Cpl. Maina found the house was 200metres from Malindi/Lamu Road. It had four rooms, sitting room: bedroom, bathroom and kitchen. There was an entrance door and a rear door through the kitchen. No tyre marks or footmarks were noticed round the murram compound of the house. The nearest neighbouring house was about 10 metres away. He took various impressions of photos of the house and the body of the deceased. It had a stab wound on the chest and another through which the intestines protruded. There was blood all over the sitting room and part of the wall. He also took photos of the three knives, the two phones and a piece of onion, all of which had been thrown over the fence to the neighbouring compound. The photos were produced in evidence.

Supt. Kariuki and Cpl. Kiilu collected the two long blood-stained knives, the blood sample of the

deceased, blood sample of the appellant, the bloodstained dress of the appellant, and the pair of shorts worn by the deceased and submitted them to the Government Chemist for forensic examination. They also collected finger print impressions of the appellant and the deceased. Other exhibits collected included two other long kitchen knives for control purposes, the small knife and the two phones, which were all produced in evidence.

The body of the deceased was removed to Malindi District Hospital Mortuary where a postmortem was subsequently carried out by ***Dr. Ali Hussein*** on 21st June, 2008 after identification by the Italian Consul at the time, ***Castellino Tommaso*** (PW10). The report was produced in evidence by ***Dr. Sofia Mwinyi***, (PW11) since Dr. Hussein had left for further studies abroad, and the report showed that the deceased had multiple stab wounds at the epigastrium (a perforated stomach), the left anterior chest and right anterior clavical region, left shoulder and lumbar regions. Internally the subclavicular vessels were damaged as a result of the stab wounds. The cause of death in the opinion of the doctor was hemorrhagic shock due to excessive bleeding from the stab wounds. The body was given back to the Italian Consul and was flown out for burial in Italy.

The items which were forwarded to the Government Chemist were examined by the Government Chemist, ***Stephen Matinde Joel Oibe*** (PW7) who had 9 years experience in identification and grouping of blood. He made findings that the blood stains on the knives, the pair of shorts and dress matched with the blood group of the deceased. His opinion was that they could have come from the deceased upon injury.

The appellant was arrested at the scene on suspicion that she had killed the deceased. She recorded a statement before Spt. Kariuki who interrogated her at length before deciding to charge her with the offence of murder. His conclusions may be reproduced verbatim: -

"(1) Nobody heard the noise of the tuk tuk and some neighbours were still outside the houses which were very close to the house where deceased lived.

(2) Although there was an allegation of robbery, I was not able to find out what was robbed in the house and Hamida Dara could not explain where she was during the robbery or her position.

(3) By looking at the way the house was, there were no intruders from the way things were arranged in the house.

(4) I could not understand how killers had come to the house without weapons as the ones which I found outside 7 – 8 meters from deceased's house and compared them to the other knives in the kitchen, I had no doubt that they had come from the same kitchen.

(5) Having seen the sharp cuts on Hamida's palm, I concluded there was a struggle between her and the deceased and that is why her clothes were also stained with blood.

(6) One knife which was bent, appeared to have been as a result of the struggle between accused and deceased and it's the one which caused the sharp injuries on accused's left palm."

The appellant was also taken to Malindi District Hospital where a Registered Clinical Officer (RCO), ***Samow Ibrahim*** (PW6) confirmed that she had a cut wound about 3 cm in diameter below her left thumb, a cut wound about 2 cm in diameter on her distal aspect of left mid finger, and a cut wound on the lateral aspect of the left palm about 3 cm in diameter. They were not deep wounds and were caused by a sharp object. The psychiatric report which certified that she was fit to plead was produced by ***Cpl. George Ogola*** (PW12).

In her unsworn statement in defence, the appellant stated that on the material day, the deceased woke up at 7 am and went to town but returned at 8 a.m. She went to the kitchen to prepare lunch at about 10 a.m. and shortly after, the deceased was going towards the kitchen when suddenly, she saw three strangers entering their house from the two different outer doors. They grabbed the deceased and one of them took

a kitchen knife and stabbed him on the stomach. She rushed to try to help him by snatching the knife from the assailant but she was overpowered and collapsed on top of her husband who had fallen down, and bloodied her dress. It was in the process of snatching the knife that she was cut on her thumb. She screamed and rushed to the sitting room to look for her phone to make a call but one of the men snatched it from her and the gang left. She called out Chengo as she tried to shake the deceased only to find he was dead. Soon after Chengo and other neighbours converged in the house, the police came and later arrested her and charged her with the offence of murder despite her explanation.

The trial court (Omondi, J) considered the totality of the evidence on record and made a finding, correct in our view, that the case rested on circumstantial evidence as there was no eyewitness to the killing of the deceased. The learned judge further found as a fact that the appellant and the deceased were together when he was killed and dismissed the theory advanced by the appellant that there were three gangsters who raided the residence and killed the deceased. The Judge was satisfied that it was the appellant and no one else who caused the death of the deceased and that she did so of malice aforethought despite a further finding that the two had quarreled. The court delivered itself as follows: -

"The duty of this court is to consider the circumstances as described to the court and make a finding from that as to whether it points to the person/persons who inflicted the fatal stab wounds on the deceased. I find as a fact that at the time when deceased was killed, accused was with him inside the house. Did she inflict the injuries or was this the work of three stealth men who were neither seen nor heard by anyone else. The evidence is basically circumstantial evidence and the guiding case on that Kipkering Arap Koske and others v R (1949) EACA, 135 which stated that:

"In order to justify on circumstantial evidence, the evidence of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

So far the evidence led does not show that accused and deceased had a third party inside the house. Her claims about three gangsters are dented clearly by the well analysed reasoning and thorough investigations carried out by Supt. Kariuki such that there is no room for speculation and possibilities – the only possible explanation is that the accused inflicted the injuries in a fit of rage following a disagreement with the deceased over some unironed clothes – that was the reason for her reaction and that was the source of the noises PW1 and PW2 referred to.

It cannot be sheer coincidence that not a single person – not even Marifa who was outside saw or heard a tuk tuk arrive or leave Nyumba Tano area. It cannot be a coincidence that Sadique (PW4) gave details of the deceased's bouts of tempers over petty issues and the same is what emerges as having triggered a disagreement between the accused and the deceased.

There seems to be a lot of truth in what PW4 said that deceased was in the habit of quarrelling with the accused and it was the last statement from her. Her reaction would have been excused as provocation, except that the number of times with which the stab wounds were inflicted on the deceased clearly indicated an intention to injure grievously and this resulted in his death. I am persuaded that it is the accused who killed the deceased and not some mysterious three men as alleged by the accused."

Upon convicting the appellant, the trial court meted out the death sentence stating: -

"Since there is no mitigation and the law provides for only one sentence, I now sentence the accused to suffer death as provided by the law."

It is from those findings and sentence that the appellant through learned counsel Mr. Omar appeals.

The first ground of appeal put forward by Mr. Omar was based on a misreading of the evidence of Chengo which in the typed record of appeal quoted him as stating: - "*Deceased said thugs attacked him*". If that had been said by the deceased, it would, of course, confirm the version of events as narrated by the appellant and therefore exonerate her. But those words were stated by the appellant as was confirmed from the original handwritten record. Chengo found the deceased dead and therefore no words could have been uttered by him. We find no substance in that ground of appeal. Mr. Omar nevertheless faulted the trial court for failing to appreciate sufficiently or at all that the appellant's assertion to the prosecution witnesses and in her defence, that they were attacked by a gang of three was plausible. There was evidence, he submitted, that three knives were recovered two of which were bloodstained and therefore the probability that the offence was committed by more than one person. He further faulted the dismissal of the evidence that the assailants were brought to the scene by a tuk tuk when that assertion was not disproved by the prosecution. None of the prosecution witnesses said they could see a tuk tuk from their vantage points nor was there evidence of noise levels of tuk tuks. In his view, the learned Judge simply accepted the theory put forward by the investigating officer and shut her mind from considering the defence case.

On the second ground Mr. Omar faulted the trial court for imposing the death sentence as mandatory without giving any opportunity to the appellant to mitigate. There were mitigating circumstances, he submitted, that the appellant was new in her marriage and if the motive of the crime arose from a quarrel on un-ironed clothes, then a different kind of sentence ought to have been considered.

The appeal was opposed by learned Assistant Director of Public Prosecutions Mr. Ondari who submitted that all the circumstantial evidence pointed towards the appellant and there was no credible evidence of a third party committing the offence and leaving the premises. The circumstances included the injuries on the appellant's hands, the deceased's blood on her dress, and recovery of bloody knives similar to the ones she had in the kitchen. As for sentence, he submitted that there was no mitigation tendered and therefore the death sentence was appropriate in the circumstances.

We have considered the evidence on record as we must on a first appeal, together with submissions of counsel on the appeal and have made the following findings of our own. We find as proved beyond doubt that the deceased died and that he died from a stab wound on his stomach with a kitchen knife resulting in protrusion of his intestines and excessive bleeding. We find that the deceased died in the presence of the appellant who was his wife of one month or so. The critical question to answer is, who caused the fatal wound?

The appellant maintained throughout that some three men arrived on a tuk tuk, invaded their residence, and inflicted the fatal wound on the deceased. She was neither believed by the investigating officers nor the trial court. We do not believe her either. The fact that the appellant repeated the same story to every person who cared to hear her out including Chengo Kahindi, Cpl. Kiilu and Spt. Kariuki, was evidence of consistency but not the veracity of her story. The story was displaced by credible circumstantial evidence which irresistibly pointed at the appellant as the cause of the stab wound that killed the deceased: the finding of the killer knife, not far from the deceased's body; the recovery of phones which the appellant had stated were stolen by the invaders; the bloodstained dress of the appellant; the fresh cut wounds on the appellant's hands, the absence of any evidence of tuk tuk tyre marks at the scene; and the proximity of neighbours who heard no noise of a tuk tuk. The evidence on that chain of circumstances came from prosecution witnesses Maarifa, Chengo, Kahindi, Cpl. Kiilu, Spt. Kariuki, and Stephen Oibe. The evidence of those witnesses turned mainly on their credibility and the trial court believed that they were truthful in what they stated. As stated earlier, that court was better placed to assess credibility as it saw and heard those witnesses. We have critically examined their evidence and we find no reason to differ from the trial court. We confirm the finding that the death of the deceased was caused by the appellant. Did she have the necessary *mens rea* to establish the offence of murder? We find some difficulty in reaching the conclusion that she did.

The trial court made a finding, and correctly so, that there was a domestic quarrel between the deceased and the appellant. There was evidence to that effect from Maarifa, Chengo, the investigating officer, Spt. Kariuki, Dr. Mwinyishe, and from the appellant herself. In all probability the quarrel was provoked by the

deceased and on this we have the evidence of Sadique (PW4) who knew the deceased well and stated as follows: -

"I knew deceased very well. He never consumed alcohol or used hard drugs – he only smoked cigarettes. He was hypertensive. He told me he had a wife back in Italy but that they had disagreed and he did not want to know about her. He used to show me photographs of one child. He visited Italy 2 - 3 times during his stay in Kenya. He had many girlfriends. He was not gay and never looked for male partners. He did not have gay tendencies. I never looked for girlfriends for him in the past. I had occasion to spend nights at Dino's home even before I got accused for him.
……..
I never really disagreed with deceased, he would disagree with his wife because of being hypertensive. Sometimes he would get upset over small things and even with me, like if he found the dishes were not clean and I had taken out another set. I would not get upset with him because I knew it was due to his hypertensive condition. He never threw tantrums or objects when in a fit of anger. I got information about his death from Chengo at about 3.00 p.m. on the very day Dino died. He called me through Gertrude's number. I know Gertrude's number. I told police it was Chengo who gave me the information."

The investigating officer, Spt. Kariuki went further and confirmed this conclusion stating -

"I learnt the deceased was very bad tempered. From the evidence I gathered, there was a quarrel between accused and deceased which was a bit petty i.e that some clothes were not properly ironed."

In assessing the circumstances surrounding the death, the learned trial Judge was guided by and cited the ***Kipkering arap Koske*** case (supra) to satisfy herself that the inculpatory facts were incompatible with the innocence of the appellant. Apparently the learned Judge went no further and it is not clear to us that she was aware that the doctrine pronounced in that case more than sixty years ago was subsequently modified in latter cases. We allude specifically to cases like **Simoni Musoke v R [1958] EA 715**, and **Mwangi v R [1983] KLR 522**, where the court approved the further principle stated by the Privy Council in **Teper v R [1952] A.C. 480**, at page 489 thus:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

It is not clear from the record that the trial court directed its mind to that principle and we cannot say what finding it would have made if it did. The record nevertheless shows that a finding of fact was made that there was a quarrel between the appellant and the deceased and that Sadique (PW4) was a truthful witness who established that fact. That finding was in our view well founded. The learned Judge went further and found that there was a possibility that the appellant was provoked in her reaction, and again we agree with that finding. However, the learned Judge discounted the provocation on the basis that the appellant inflicted more than one wound on the appellant and therefore the offence of murder was established. With respect, the learned Judge fell in error in so finding. This Court had occasion to consider similar circumstances in the case of **Elphas Fwamba Toili v Republic [2009] eKLR (Criminal Appeal No. 305/2008)** where the court stated:

"We find it difficult to appreciate why the learned Judge of the superior court came to a conclusion that a man provoked and acting on the spur of the moment cannot inflict several severe injuries upon his victim. In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case, several injuries can be inflicted within a very short time particularly if one has a panga. There is no evidence as to how long the incident took but Kevin who left when the ordeal had began and went to call Masibo a short distance away returned only to find the appellant had ran away. We cannot agree that whether a person is acting on provocation or not would depend on the number of

injuries inflicted on the victim and we feel the learned Judge, in coming to that conclusion was clearly in error."

The deceased in this case had a major wound on his stomach through which his intestines protruded. He also had other wounds on his body but there is no evidence on how they were inflicted. The prosecution evidence accepted by the trial court, which we also accept, is that they were inflicted in circumstances of provocation of the appellant. It follows therefore that the necessary *mens rea* for murder was not proved by the prosecution and the offence proved was unlawful killing.

Accordingly we allow the appeal against conviction for the offence of murder which is hereby quashed. In substitution therefor we convict the appellant for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. As there were no mitigating circumstances offered despite the opportunity to do so being availed to counsel for the appellant at the trial, we take into consideration that the appellant was aged 25 years and had only been into her marriage for about one month. In all the circumstances the sentence that commends itself to us is a term of imprisonment for 18 years, which we now impose to take effect from the date of her conviction by the High Court on 12th May, 2010.

It is so ordered.

Dated and delivered at Mombasa this 6th day of October, 2011.

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR