IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 336 of 2006

BETWEEN

ROBERT SIMIYU …….…… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Apondi, J.) dated 24th November, 2006

in

H. C. CR. C. No. 7 of 2003)
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JUDGMENT OF THE COURT

Robert Simiyu, the appellant herein, was tried before Muga Apondi, J sitting with assessors, on an Information that charged him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the information were that on the 26th February, 2002 at Lelongo village, North Enkare in Narok District of the Rift Valley Province he unlawfully murdered Dickson Wafula.

In support of the charge, the prosecution called a total of nine witnesses at the end of which the appellant was found to have a case to answer and put on his defence. The appellant gave sworn evidence and at the end of it all, the learned trial judge summed-up the case for the two assessors (one of them having been discharged previously) who unanimously returned a verdict of not guilty against the appellant. However, by his judgment dated and delivered on 24th November, 2006, the learned Judge found the appellant guilty of murder and duly sentenced him to death. The appellant now appeals to this Court against the conviction and sentence and drew up his own memorandum of appeal outlining nine grounds. Mr. N. Bichanga, learned counsel instructed to argue the appeal before the Court, filed supplementary grounds of appeal, and chose to confine his submissions mainly on the issue of malice aforethought. He argued that all that the learned Judge was concerned with was that the appellant was at the scene; that he was found holding a blood-stained panga and, consequently, the appellant was guilty of murder. Mr. Bichanga submitted that the learned Judge did not say a single word to the assessors about the vital issue of malice aforethought which is an essential ingredient of a charge of murder.

On our own evaluation of the evidence on record, we are ourselves satisfied that this complaint is valid.

The deceased person was found lying down with blood all over him. Apparently, there had been a fight, and witnesses who heard noise rushed to the scene and found five people, including the appellant, standing around the deceased person. The appellant was the only one with the blood-stained panga. In convicting the appellant, the learned trial Judge expressed himself thus:

"In this particular case, the witnesses heard noise from the scene and on rushing there, they found the deceased lying down and he could not talk. On the other hand, they found the accused with a blood-stained panga at the scene. In addition to the above, the medical evidence by Dr. Abakalwa clearly show that the probable weapon used was a sharp object or a blunt object that had an edge on one of the sides. Given the above overwhelming evidence, the court hereby finds that it was actually the accused who had attacked the deceased viciously. Thereafter, the injuries sustained led to the death of the deceased. I hereby reject the defence of the accused which does not right (sic) ***true at all. In addition to the above, the***

accused never impressed me to be somebody who has any respect for the truth. The upshot is that the prosecution have proved their case beyond any reasonable doubt."

In his sworn evidence the appellant denied the offence and claimed that he was himself the victim of a robbery, hence the injuries on his body.

As the learned Judge noted in his judgment, there were no eye-witnesses to this incident. However, there were at least three witnesses who arrived at the scene promptly upon hearing noise. All of them saw the appellant present there, among four other people. He was the only one with a blood-stained panga, with blood also on his clothes, which were partly torn. That evidence was obviously believed by the trial Judge, and we are ourselves satisfied that the same was credible.

However, the question still remains what the appellant's intention was when assaulting the deceased. On this, the learned Judge told the assessors nothing and said absolutely nothing about it in his short judgment. Indeed, the learned Judge was only concerned with the participation of the appellant in the assault upon the deceased. We think it was the learned Judge's duty to direct the assessors on the question of whether the acts of the appellant constituted malice aforethought as set out in ***section 206*** of the Penal Code. Indeed, even without such a direction, the assessors returned a verdict of "not guilty". We do not know what the decision of the assessors would have been if the trial Judge had directed them on this point. We do not know if the Judge himself would have come to the conclusion that the appellant was guilty of murder had the Judge directed himself on the issue of malice aforethought. We must give the benefit of that doubt to the appellant. The doubt, however, is not whether the appellant assaulted the deceased; he clearly did. The doubt is with regard to whether he was guilty of murder or guilty of manslaughter.

Accordingly, we allow the appeal to the extent that we set aside the conviction for murder and substitute it with a conviction for manslaughter under ***section 202*** of the Penal Code. We also set aside the sentence of death and substitute it with a sentence of 10 years imprisonment to run from 24th November, 2006 when the appellant was convicted by the trial Judge. Those shall be our orders in the appeal.

Dated and delivered at Nakuru this 28th day of May, 2010.
P. K. TUNOI

……..……..
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