



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 305 OF 2008

ELPHAS FWAMBA TOILIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Bungoma (Mr. Justice J. K. Sergon) dated 14th September, 2006

in

H.C.CR.C. NO. 23 OF 2003)

JUDGMENT OF THE COURT

On an information filed at the High Court at Bungoma, by the Attorney General, the appellant **Elphas Fwamba Toili** was arraigned before that superior court with the offence of murder, contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that:-

“On the night of 18th and 19th August, 2003 at Busio (B) village in Kisawayi sublocation, Mukwa Location within Bungoma District of Western Province murdered Linet (Judith) Nabwire.”

He pleaded not guilty but after full trial with the aid of assessors, he was found guilty as charged, convicted and sentenced to death. The assessors also returned an opinion that the appellant was guilty of murder after the learned Judge of the superior court (Sergon J.) summarized the entire case to them. The appellant felt dissatisfied with that verdict and hence this appeal. The original memorandum of appeal was filed by the appellant in person. However, the appeal was taken over by Mrs. Kosgei who filed and relied on the supplementary memorandum of appeal filed on 7th April, 2009 in which the grounds raised were that the learned Judge failed to hold that the evidence tendered by the state was inconsistent; that he failed to hold that the state witnesses were not credible witnesses; that the consequences of uncorroborated evidence of the state witnesses were not considered; that failure by prosecution to call an eye witness was not considered; that the state did not prove its case against the appellant beyond

reasonable doubt as the evidence adduced was insufficient; that the learned Judge erred in law and in fact by rejecting the appellant's defence of provocation without any justifiable grounds and that the learned Judge of the superior court erred in fact and in law in holding that malice aforethought actuated the appellant to kill the deceased.

In her submissions before us, Miss Kosgei as we have stated, abandoned the homemade grounds filed by the appellant in person and relied on the main grounds cited above, urging mainly that as there was no motive adduced by the prosecution for the alleged murder of the deceased by the appellant, the appellant's defence that he killed the deceased out of provocation, deserved full hearing and the assessors should have been informed during the summing up to them that the opinion that the appellant committed a lesser offence of manslaughter was available for them. Mr. Chirchir, the learned Senior State Counsel, on the other hand, was of the view that there was no evidence of provocation and that the learned trial Judge was in his view right in rejecting that proposition. We will consider the above submissions together with the record, the summing up to the assessors, the judgment and the law, but first, the facts of the case as can be deciphered from the record before us.

The deceased was originally the wife of one Martin Kibuyi who was a brother to the appellant. Martin Kibuyi passed on leaving the deceased a widow. The appellant re-married her or inherited her as is known in the local nomenclature. They lived as man and wife under that status for about nine months. On the night of 18th/19th April 2003 the two slept in their house. Kevin Kibui (PW1) (Kevin) a young boy aged 11 years and who was deceased's son sired by her former husband was sleeping in the same house only separated from the two by a curtain which separated the bedroom from the rest of the house. Sometime in the early hours of the morning of 19th April 2003, Kevin who gave unsworn testimony and was not cross-examined on his evidence stated that he heard the deceased, and the appellant speaking in low tones as the two were in their bedroom. Apparently he did not hear what they were talking about and if he heard, the same was not availed in evidence. Whatever it was they were talking about, Kevin testified that the appellant took a panga and cut the throat of his mother while holding her head. The appellant then sent him to go and call David Masibo Toili (PW5) (Masibo) who was Kevin's uncle. When Kevin returned to the scene, the appellant had fled with the panga which he hid along the fence. Kevin said that he saw the appellant cut the deceased's throat and other parts of the body as well. When he returned, his mother was already dead. Kevin called David Masibo and his brother Collins Kibuyi (PW2) (Collins). Daniel Waswa Mukoba, (PW3) (Daniel), a village elder got information about the same time from Kevin's step brother and visited the house of the deceased. He verified that the deceased had been killed and the body was still there, but the appellant had escaped to unknown destination. Daniel and Collins reported the matter to Malakisi Police station. At the same time Kevin was calling Masibo and Collins, and the entire village was waking to the bad news. Robert Maina Simiyu (PW6) (Robert) who was at his house nearby, said, that the appellant went to him at 5.00 a.m. and asked him to lend him (the appellant) a bicycle as the appellant was going to Chwele market. He gave the appellant the bicycle. Robert then left his house to the house of Godwin Khisa to do some construction, but on the way he met people from the deceased's house who told him the deceased was killed. He went to the deceased's house and confirmed that her throat had been cut and she was dead. He went to report to the village elder only to find that the village elder Daniel was already on the know and had gone to the Police station. Cpl. Vincent Juma (PW8) (Cpl. Juma) was on duty at Malakisi Police station on 19th August, 2003 when Daniel and another reported to him the incident. He, together with Deputy OCS IP Daniel Cheruiyot, in company of the reportee visited the scene of the incident. They found the body of the deceased lying on a mattress. He observed deep cut wounds on the head and neck. They took the body to the mortuary at Bungoma District Hospital. On 21st August, 2003, two days later, he received a report that the appellant had been arrested at Kimaeti Police post. They re-arrested him from there. On 29th August 2003 after interrogation, the appellant led them to where he had hidden the murder weapon, which was about 1 kilometre away from the scene and was in a bush. It was a panga. Dr. Wanjala performed post mortem on the deceased's body and prepared a report which was produced in court at the trial by Doctor John Juma (PW7) (Dr. Juma). According to the report, the deceased's left finger was severed; it had multiple cut wounds on the head, deep cuts on the parietal frontal bone, and deep cut wound on the neck. The cause of death was cardio-pulmonary arrest due to excessive bleeding.

The appellant was thereafter charged as stated hereinabove. In his defence he did not dispute having killed the deceased. His defence which was short, was as follows:-

“I was living in Busio village before I was arrested I knew the deceased as my wife. On 18.8.2003, I told deceased to give me back a sum of Ksh.9,000/= which I had given her to keep. At about 4.00 a.m. I told her to give me the money but she refused to give me the money. She gave me a receipt showing that she gave the money to Anthony Nyongesa as a friendly loan. I knew he was a man friend of my wife. I got shocked because I though (sic) she had left Anthony Nyongesa. I got annoyed that I acted spontaneously, I did not plan to kill.”

It is upon the above evidence that the learned Judge of the superior court found the appellant guilty of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, convicted him and sentenced him to death. The main thrust of his appeal is that the learned Judge did not give proper and full consideration to the fact that the evidence as is on record fell short of establishing the offence of murder but rather pointed to the reduced charge of manslaughter. This was because of provocation which was not given adequate consideration. He contends, through his learned counsel that at least the assessors should have been advised that the offence of manslaughter could be considered on grounds of provocation.

This is a first appeal. The law enjoins us to revisit the evidence afresh and to analyse it, evaluate it, and come to our own conclusion but always putting in mind that the trial court saw, and heard the witnesses and giving allowance for that - see the case of ***Okeno vs. Republic*** (1972) EA 32.

It is not in dispute that the deceased died and that she died as a result of the injuries inflicted by the appellant. That conclusion would have been difficult to arrive at noting that the only witness to the activities of the appellant resulting in that death and which were carried out at night was Kevin and further that Kevin the only witness to that incident was a child of tender years who did not know the meaning of giving evidence on oath and who gave unsworn evidence which was not subjected to cross-examination. However, the work of ascertaining the truth that the appellant caused the death of the deceased was made much easier by the statement of the appellant who in his defence which we have reproduced above readily admitted that he killed the deceased. That leaves only one main hurdle to surmount and that is whether he killed the deceased with malice aforethought or whether he acted spontaneously upon being provoked as he said in his defence.

In convicting the appellant the learned Judge of the superior court had this to say in his summing up to the assessors:-

“Mrs. Mumalasi further urged this Court to find that there was cumulative provocation on the accused by the deceased. The learned defence counsel urged this Court to hold that the accused acted at the spur (sic) of the moment hence he is not guilty of murder.

At this stage the law enjoins me to seek your oral opinion n (sic) this matter. The case against the accused heavily depends on the evidence of PW1, a child of tender age. The law under section 124 of the Evidence Act requires that such evidence must be corroborated. Are you satisfied that there was corroboration in the evidence of PW1.

If the answer is yes, are you satisfied that mens rea was established or not. What is your opinion on the accused’s defence of cumulative provocation.”

It is the above summing up to the assessors that offends the appellant and in our considered opinion we cannot fault the defence counsel on her submission on that issue. The learned Judge of the superior court had a duty to explain to the assessors what amounted to provocation as relates to facts as adduced in evidence. He had a duty to inform the assessors that if they believed those facts including the defence of the appellant established that there was provocation then they could return opinions of guilty of the lesser offence of manslaughter. He did not do so with the probable result that the assessors, not knowing that that verdict of guilty for the offence of manslaughter was available did not consider it and hence that

unanimous opinion that the appellant was guilty of murder. The learned Judge stated in his summing up to the assessors that Kevin said he heard the appellant and the deceased talk in low tones and thereafter the appellant cut the deceased with a panga. He also summed up the appellant's defence to the assessors. Unfortunately having done that, he did not relate that talk in low tones to the appellant's defence together with an answer given in cross-examination by Masibo that he would feel bad if his wife gave out his money to her boyfriend and that he would obviously quarrel with her to the question of provocation in his summing up to the assessors. In our view, had he done that and had he told the assessors that they were at liberty to return opinion of guilty of manslaughter, it is possible the assessors would have returned that verdict.

In his judgment, the learned Judge concentrated on finding corroboration of Kevin's evidence and having found that Kevin's evidence was indeed corroborated by several other pieces of evidence including admission by the appellant that he killed the deceased, he then considered whether the appellant did so with malice aforethought and concluded:-

“PW1 said he heard the deceased and the accused talk in low tones before the accused slaughtered the deceased. There was no evidence that the duo had quarreled before going to bed. After careful consideration, I am satisfied that the accused was actuated by malice to kill the deceased. A close look at the post mortem report prepared by Dr. Wanjala and produced by Doctor John Ouma Juma (PW7) will reveal that the deceased had multiple cut wounds. Such injuries cannot be said to have been inflicted by a person who acted at the spur of the moment. The accused must have planned and intended to phase out the deceased out of this planet. Consequently I find him guilty of murder.”

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 record shows that Kevin, a boy of 11 years and who was the central figure in the entire case said that before the killing, he heard the appellant and deceased talk in low tones. He apparently did not hear what the two were talking about as we have stated. He was not cross-examined. The appellant introduced the defence of provocation when the learned counsel for the appellant cross-examined Masibo. His answer was as we have stated that he would feel bad if his wife gave his money to her boyfriend and he would obviously quarrel with her. Clearly the question must have been what would he feel if his wife gave his money to her boyfriend and what would he do to her. Further, both Kevin and Masibo agree that the appellant sent Kevin to call Masibo who was appellant's brother. One cannot hazard why the appellant was sending for Masibo but may be he had an explanation to make over his actions. In his defence, he laid it bear that the deceased had given his money to Anthony Nyongesa whom he knew to be deceased's boyfriend previously, but whom he thought the deceased had left. Those were, in our view the matters that the learned Judge had to analyse, evaluate and explain to the assessors, before leaving the assessors to decide on whether in their view the appellant was provoked or not and provoked then he had to tell them that the opinion of guilty to manslaughter was open for them to return. He did not do so. In the case of *Mabonga vs. Republic* (1974) EA 176 this Court's predecessor stated as follows:-

“The Judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the cow was in the particular circumstances of this case provocation sufficient to have rendered the offence from murder to manslaughter. His failure to direct himself or the assessors to this issue was a serious misdirection. In the circumstances, we think it will be unsafe to allow the conviction for murder to stand, as on evidence, provocation cannot be ruled out. We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefore a conviction for manslaughter and a sentence of ten years imprisonment.”

That decision has been consistently followed by this Court – see case of **Samson Arege Lowen vs Republic** Criminal Appeal No. 259 of 2003 (unreported) and that of **William Ngimeo Kebo vs. Republic** – Criminal Appeal No. 246 of 2005 (unreported).

We are equally of the view that the learned Judge of the superior court did not give adequate consideration to provocation and its effect upon the entire case. He did not consider fully the provision of **section 207** of the Penal Code. That being the case, we also think it will be unsafe to confirm the conviction for murder as entered by the learned trial Judge. We quash the conviction for murder and set aside the sentence of death. We substitute therefore a conviction for manslaughter.

Before we proceed to sentence the appellant we note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously and we repeat here, after the judgment is read out and in case of a conviction, the Court must take down mitigating circumstances from the accused person before sentencing him. This obtains even in the cases where death penalty is mandatory and the reasons for the same requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter as is the case here or grievous harm or assault. In such circumstances, mitigating factors would be handy in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal and even if the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be rendered even if in cases of mandatory death sentence. In the case of **John Muoki Mbatha vs. Republic** – Criminal Appeal No. 72 of 2007 this Court stated:-

“As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the Court receives mitigating circumstances if any are offered.”

Having considered all aspects of this matter as appears in the record and the merciless manner in which the killing was carried out as appears in the post mortem report, and in the presence of a very young boy, the sentence that commends itself to us is that of ten (10) years imprisonment and we accordingly sentence the appellant to ten years imprisonment with effect from 14th September, 2006. Orders accordingly.

Dated and delivered at Eldoret this 29th day of May, 2009.

E. O. O’KUBASU

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR