REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 108 of 2006

NYAMAI MWENGEA.....APPELLANT

AND

REPUBLIC OF KENYA.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Machakos (Wendoh, J.) dated 31st March, 2006

in

H.C.CR.A. NO. 24 OF 2006)

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JUDGMENT OF THE COURT

This is a first appeal. The appellant *Nyamai Mwengea (hereinafter referred as the appellant)* was, in an information dated 30th day of January 2004 charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the charge were that:-

"*On the 15th day of February 2001 at Mwangeni Market Kituti sub-location, Athi location in Kitui District of the Eastern Province, murdered Paul Mwendwa Kisangi."*

He pleaded not guilty but after trial with the aid of assessors (as the law then provide), the superior court (Wendoh J.) found him guilty as charged, convicted him and sentenced him to death. He was dissatisfied with that conviction and sentence and hence this appeal before us. He had earlier on filed six grounds of appeal in person, but when his advocates took over the conduct of the appeal, the firm of advocates filed supplementary memorandum of appeal citing four grounds which are as follows:-

"***1. The learned Judge erred in law by convicting the appellant on a charge of murder while the evidence on record supports a lesser charge of manslaughter.***

2. The learned Judge erred in law and unprocedurally convicted the appellant without the 3rd assessor's verdict, have denied the appellant the right to the assessor's representation at the trial.

3. The learned Judge erred in law by disregarding the evidence of prosecution witness number 3

without taking into consideration the fact that the procedure to disregard a witness evidence had not been properly followed.

4. The learned trial Judge erred in law by not adhering to the Criminal Procedure Act in a murder trial and convicted the appellant without consideration of the error committed on her part while taking her proceedings in court."

The brief facts giving rise to this appeal were fairly straight forward. The record shows that the appellant and the deceased Mwendwa Kisangi were, prior to the incident living in the same village. Both were young men. Ruth Mutio Kisangi (PW1) (Ruth) was the mother of the deceased. On 11th February 2001, at 8.00 p.m. the deceased asked Ruth for the key to his house. She gave him the key and the deceased went to his house. After a short while the deceased returned to Ruth and asked her if she had taken his radio and solar. Ruth denied having taken both and the deceased made a further search for those items, which search revealed that a window had been broken. He searched everywhere but those items were not recovered. At about 10.00 p.m. in the night, chicken were stolen from a neighbour's house. The alleged thieves left a sandal which on enquiries raised the suspicion that the appellant and one Peter Kyenze were the likely thieves of the chicken and of deceased's radio and solar. The matter was reported to the police post at Athi and Peter Kyenze was arrested on 14th February 2001 while the appellant ran away. This was after Ruth and Paul had made several enquiries at the police post on the matter. On 15th February 2001 at 6.00 p.m. Kyeva Muasya (PW2) (Kyeva), a cousin of the deceased and who was brought up together with the deceased and the appellant in the same village, were together with the deceased. They had gone to Athi together with the deceased's mother. On their return home, they found that food was not yet ready, and so he, the deceased together with one Mutie went to Mwangeni market to collect a bicycle which had been left there at Peter Nguni's shop. Kyeva's evidence was that they arrived there at 7.30 p.m. He went to Peter's hotel *(at times referred to as kiosks)* to take water. Mutie and deceased remained outside at the door but later Mutie joined Kyeva inside Peter's hotel. While drinking water, Kyeva heard noises of people fighting. He saw the appellant and the deceased holding each other. He rushed to the two and when he was only two paces to the two, the deceased said the appellant had stabbed him. The appellant ran away despite attempts by Kyeva and others to get hold of him. The appellant was holding a long knife according to Kyeva. Kyeva ran to a nearby Doctor- Dr. Muchiri, to attend to the deceased whereas Mutie went to call deceased's mother. Kyeva was firm, despite vigorous cross examination, that it was the appellant who stabbed the deceased with a long knife. There was moonlight and two lanterns on a nearby table as well as a lamp hanged at the door of the hotel or kiosk that aided him to identify the appellant by recognition as the person with whom the deceased was fighting and to whom the deceased referred as having stabbed him during that alleged fight. Mutie Kisangi (PW8) (Mutie) met Kyeva and the deceased at Athi police post where the two had gone to report the theft of the deceased's radio and solar. He accompanied them home. He further accompanied the two back to Mwangeni market to collect their father's bicycle. He went to take water leaving the deceased outside. While inside the hotel, he also heard noises outside. Kyeva went outside ahead of him but on joining those outside, the deceased called him and said he (deceased) was stabbed with a knife on the left side of his chest. The deceased held his hand at the place he alleged he was stabbed. The deceased said he was stabbed by Nyamai Mwengea. He asked the deceased what the problem was and deceased told him the appellant was claiming that the deceased had said the appellant stole from him (the deceased). He saw the appellant running away. There was bright moonlight and there was a lamp outside that hotel or kiosk which enabled him to identify the appellant whom he knew and identified as the person who was running away from the scene. According to this witness, the doctor who was asked to attend to the deceased immediately after the incident refused to attend to the deceased. They called Ruth who went to the scene only to find her son was already dead.
We observe at this point that Mutie's evidence was not considered by the trial court as it was not subjected to cross-examination. We too have to ignore it on that score. Ruth reported the incident to Athi police post. On that same evening, at 8.00 p.m. Daniel Mutua Mwengea (PW3) (Daniel) was at his home. The appellant who is his step brother went to his home and asked if Daniel had a torch. On being told that there was none, the appellant invited Daniel to go to the house so that he could show Daniel something. Daniel obliged. Appellant showed Daniel the knife which had blood stains. He said he had met a wild beast and stabbed it. As the appellant was going away, he called Daniel and changed his story, this time saying he had stabbed Paul Kisangi and ran off. Meanwhile, the report that Ruth made at Athi police post was relayed to PC Julius Muchiri (PW6) (PC Muchiri) who was working at Mutomo police

post. He received the report on 16th February 2001 and he visited the scene with two other police officers and IP Thuli. They found the body of the deceased near a kiosk in the market. This was after the police officers from a nearby police patrol base had visited the scene. PC Muchiri took the body to Kitui District Mortuary. On 21st February 2001, the body was identified to Dr. Maundu by Ezekiel Kisangi (PW4) the father of the deceased who was accompanied to the hospital by Matuku Kisangi (PW7). Dr. Maundu performed post mortem on the body of the deceased and prepared a report which was produced in court by Dr. John Lugedi (PW9). According to the report, the body of the deceased had deep penetrating wound above the left clavicle that resulted in the collapse of the respiratory system as plura was pierced between lungs and ribs. The cause of death was due to cardio pulmonary arrest due to excessive bleeding due to penetrating wound into the chest and large blood vessels. On 22nd February 2001 Cpl Obed Kiio (PW5), (Cpl Obed) who was then attached to Makindu police post received a note from Athi Police base asking him to arrest the appellant who was allegedly residing in Makindu area. As a result of further information he received he, together with two other police officers, PC Magut and PC Paul Ngei, Cpl Obed went to the house of the appellant's sister one Jane where they arrested the appellant from a nearby farm. He was escorted to Makindu police post from where one Cpl Ndungo collected him and took him to Mutumo police station where PC Muchiri re-arrested him. The appellant offered to show police the murder weapon. He took them to Mwangeni, at Malinga dam where he showed them a thicket from where a kitchen knife was recovered.

As we have stated, the appellant pleaded not guilty to the charge of murder contained in the information that was before the court. At his trial he gave sworn evidence in which he admitted that he was at the scene and stated that he was attacked by the deceased together with two others but he denied having a knife at the time of the brawl and denied killing the deceased. He stated at pertinent parts of his evidence as follows:-

"***At Mwangeni market I went to a hotel. When standing a person held my collar from the back I did not know him (sic). They were 3 people. Fight broke out and one had something. I ran off home. I did not know that anybody was injured. I was alone at home. I went to the hotel at 7.30 p.m., I later knew the people who attacked me. One was Mwendwa Kisangi, Kyeva Mutisya, and his younger brother. The one who got hold of me is Paul Mwendwa Kisangi. I knew why they attacked me. I had sold my radio to a certain lady because I needed money to take my child to hospital. He alleged I took his radio but later it was found. It was not his radio. I was not carrying anything when I went to the market. I was not carrying a knife. One had a club and one had something but I cannot tell what it was. I had gone to buy paraffin. I had not intention of fighting with anyone. I did not murder Paul Kisangi. I have never planned to kill Paul Kisangi. I had no enemity with Paul. He was my friend."***

In cross-examination he stated inter alia:-

"***I was arrested along with the lady I sold a radio to. I was arrested on 23rd, when I was arrested I was told I stole a radio. I had not known why the 3 people got hold of me. There was a little fight from inside the shop. I was at the door. One came from inside. He is the one I knew. I knew Kyeva Muasya.***

After I was held from the back he came and hit me first with a club. He hit me on the forehead. ……..

I had last seen Paul on 14th at Mwangeni market when he got hold of me. He is one of those 3 who held me.

Paul first held me and Muasya came from the hotel. I later heard that Paul died after the struggle that we had. I do not know who killed him."

It is upon the above entire evidence that the appellant was found guilty, convicted and sentenced to death. In her summing up to the assessors, the learned Judge of the superior court, having found that the question of identity did not arise, stated inter alia as follows:-

"***The issue is whether the deceased met his death as per prosecution evidence or it was a fight. Consider whether the death arose after a fight or not.***

Once again, I urge you assessors to consider all the evidence in its totality. If your verdict is that he committed the offence, then you should go ahead and decide whether he was guilty as charged or not. If it was a fight, consider whether the offence disclosed is manslaughter."

The assessors who gave their opinion were each of the view that the lesser offence of manslaughter was committed and not that of murder. They held that opinion on grounds that death resulted from a fight between the appellant and deceased.

However, in her judgment, the learned Judge was of a different view and in convicting the appellant she stated in her judgment in pertinent parts as follows:-

"***I have no doubt in my finding that after due consideration of both the prosecution and defence cases, I come to the inevitable conclusion that it is accused who attacked the deceased. The motive for the attack was due to suspicion of theft and a report had been made about it to the police. Accused was aware of the suspicion. I dismiss the accused's defence as a total lie and an afterthought.***

The assessors found that the accused and deceased fought and that the offence committed is one of manslaughter. However, I am of a different view. PW2 had just left the deceased outside the kiosk. Deceased did not anticipate attack. Accused came around with a kitchen knife and suddenly attacked the deceased. The alleged fight did not take long. Accused never showed any sign of an injury. Accused armed himself and set out on a mission. The mission was to attack the deceased and he did attack while armed with a dangerous weapon which he used on deceased by stabbing him on a very vital part of the body thus inflicting a deep penetrating wound. I find that malice aforethought does flow from the nature of the attack and injuries sustained and I find that accused set out to cause grievous harm on the deceased the motive being the suspicion over theft."

In her submission to us, Ms Gulenywa, the learned counsel for the appellant urged us to find that the offence of murder contrary to ***section 203*** as read with ***section 204*** was not proved but that the evidence on record points to the lesser offence of manslaughter. She contended that the evidence of Kyeva Muasya was not fully considered by the trial court as Kyeva's evidence was that there was a fight between the deceased and the appellant. She felt the conclusion by the trial court that it was the appellant who attacked the deceased was not borne out by evidence on record. She also stated that Mutie's evidence should not have been ignored but that the court should have allowed the appellant's counsel to cross examine Mutie before the prosecution closed its case. She finally urged us to allow the appeal and substitute the conviction for murder with that of manslaughter as the two assessors had done. Mr. Kaigai, the learned Principal State Counsel conceded the appeal to the extent that in his view the conviction for the offence of manslaughter should have been entered in place of that of murder as the evidence of Kyeva which was the main evidence relied on by the court was that at the time he saw the appellant and the deceased, the two were fighting and the appellant also admitted that there was a fight between him and the deceased together with others.

This is a first appeal as we have stated. We are enjoined in law to revisit the evidence on record a fresh, analyse it, evaluate it, and come to our own independent conclusion provided we are aware that the trial court had the advantage of seeing, and hearing the witnesses and we give allowance for that - see ***Okeno vs. Republic*** *(1972) EA 32.* The appellant admitted in his sworn statement that he was at the scene of the incident and was involved in a fight. His version is however that the fight was started by the deceased who grabbed him by the collar from the back. He was then attacked by three people. Those people had something but he did not know what it was. He said he had nothing when he was attacked. That part of the evidence that he had nothing with him during the fight was rightly rejected by the trial court as the evidence of Daniel was clear that soon after the fight the appellant went to the former's house and showed Daniel a blood stained knife and told Daniel he had stabbed the deceased. However, even with the rejection of that part of his defence, the fact still remained that in his defence, he took part in a fight which according to him was sparked off by the deceased who grabbed his collar from the back. The

prosecution's case, as stated by Kyeva is that when the three of them, namely the deceased, Mutie and Kyeva reached a kiosk or a hotel as it was sometimes called, he entered inside the kiosk to drink water. Mutie followed him inside the kiosk while the deceased remained outside the kiosk. It was as he was drinking water that he heard noises of people fighting. When he dashed outside, he saw the deceased and the appellant holding each other. The deceased then told him the appellant had stabbed him. Kyeva repeated this version several times in his evidence in chief and in his evidence on cross-examination. Unfortunately he was not asked as to who started the fight. Perhaps this was because his evidence was that by the time he was aware of the fight the two were already holding each other. Evidence of Mutie could have thrown some light on this aspect but for some reason that evidence was ignored by the court as it was not subjected to cross-examination. Whereas we find it unfair that the court, which had the duty to manage the trial did not find it necessary to allow time for cross-examination of Mutie, nonetheless, with that evidence ignored for lack of cross-examination, all that remained as evidence of the incident resulting into deceased's death was the evidence of Kyeva who did not know how the fight started and who attacked who first against the sworn statement of appellant to the effect that it was the deceased who attacked him. The learned trial Judge found that the appellant is the one who attacked the deceased with a knife and that the appellant did so with malice aforethought and having made that finding, she settled for murder and rejected the assessors' opinion. On full consideration of the matters, we do not find it easy to appreciate her finding on that issue. We see no basis for finding that the appellant is the one who armed himself with a knife and attacked the deceased. That was not in evidence and could only have been arrived at through canvassing of extraneous matters. That is not proper – see case of ***Okethi Okale v. Republic*** *(1965) EA page 555***.** The court can only decide on issues raised in the evidence before it and not on its own propositions not canvassed in evidence. There was no evidence that the appellant knew that the deceased, Kyeva and Mutie would be at the kiosk at that relevant time? There is no evidence that he was trailing the three from Athi police post to the deceased's home and back to Mwangeni market. This aspect was important because the deceased's visit to the market to collect a bicycle at that time was only prompted by the fact that when they reached home from Athi police post, food was not ready and so they made that decision may be to buy time so that by their return home from the market perhaps food would be ready. That decision could have only been known to a person who was trailing them. Short of that, the meeting at the market between the two could have been coincidental. That being a possibility, could it be said that the appellant armed himself with a knife purposely to attack the deceased? It must be considered that the fight took place immediately on arrival where the deceased was at the kiosk and just as Kyeva and Mutie went to drink water at the kiosk. There was thus hardly time to prepare an attack. The evidence that the appellant had a knife at the time of the fight which was accepted by the trial court and which we also accept, could not per se be evidence of preparedness to commit murder, when it is noted that it was already late in the evening and the appellant was away from home. He might have carried a knife for security purposes or for other purposes. It would, in our view be reading too much into it without any further relevant evidence to indicate that it was solely for purposes of attacking the deceased.

In the case of ***Mabonga v. 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 coat was in the particular circumstances of the case provocation sufficient to have reduced 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 therefor a conviction for manslaughter and a sentence of ten years imprisonment."***

From what we have stated above, it is clear that we are of the opinion that though the learned Judge of the superior court was alive to the possibility that the conviction for the offence of manslaughter was available and she rightly advised the assessors in her summing up to them that they would consider the same, she nonetheless misdirected herself in her judgment in differing with the assessors on grounds that the appellant armed himself, planned to attack the deceased and was the first to attack the deceased resulting in his killing the deceased. In our view there was no evidence that it was the appellant who attacked the deceased first. It was possible that the deceased held the appellant by his collar from the

back as the appellant said in his evidence. That possibility could not be ruled out and hence the appellant was entitled to the benefit of doubt on that important aspect of the case. That being our view of the matter, we cannot rule out the possibility that the deceased provoked the appellant and a fight ensued in which the deceased lost his life. We do with respect agree with Ms Gulenywa, and Mr. Kaigai that the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code was not proved beyond reasonable doubt. Giving the benefit of doubt to the appellant as we must do in the circumstances of this case, we come to the same conclusion as the two learned counsel and the assessors that the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code was proved.

In the result, we quash the conviction for murder and set aside the sentence of death imposed by the superior court. We substitute therefor a conviction for manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. Considering the circumstances of this case, the most appropriate sentence is an imprisonment term of fifteen (15) years to run from 31st March 2006.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR