REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 377 OF 2006

MOHAMMED ABDALLA MAHAMOUD …………………..APPELLANT

AND

REPUBLIC……………………..……………………… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Malindi (Ouko, J) dated 15th September 2005

in

H.C.Cr.C. No. 17 of 2004

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JUDGMENT OF THE COURT

Mohamoud Abdalla Mahamoud, the appellant herein, was tried and convicted on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. Ouko, J sitting with the aid of assessors, found him guilty of the charge and duly sentenced him to death. The three assessors had unanimously agreed with the Judge that the offence of murder had been proved against the appellant. The appellant now appeals to this Court against the conviction and sentence.

The particulars of the charge on which the appellant was convicted were that on 25th June, 2004 at about 7.30 a.m. at Matondoni Area in Lamu District within the Coast Province, the appellant murdered Bwana Hamisi Helefu, "**the deceased**" hereinafter. The deceased was the brother of Mohamed Helefu (P.W5) and on the recorded evidence, it is clear to us that during the morning of the incident, the appellant and P.W5 met in the home of the deceased. The deceased was inside his house and it appears that both the appellant and P.W5 met at the door of the deceased. P.W5 appears to have been coming from the house of the deceased. The appellant had a stick with him and for some reason which was not made clear by the witnesses, the appellant attacked P.W5, hitting the latter on the side of the head with the stick he had. P.W5 demanded to know why the appellant had attacked him and the deceased, hearing the commotion outside his house, came out and asked the appellant why he had attacked P.W5. P.W5 turned back to where the deceased was talking to the appellant, but he ran to call the police. The appellant produced a knife and stabbed the deceased on the stomach. It is clear to us that Adam Said (P.W2) who was in his own house in the same compound only came out due to the commotion outside.

P.W2 said he saw the appellant attack the deceased with a knife and the obvious inference we must draw from the evidence of P.W2 was that the attack on the deceased was outside the house of the deceased. We do not see how P.W2 could have witnessed the attack on the deceased if it had been inside the house.

It was Bakari Helagu (P.W4) who said that when he arrived at the scene, he saw the appellant coming out of the deceased's house carrying a blood-stained knife. We think that this witness must have seen the appellant at the door of the deceased and assumed that the attack must have occurred inside the house. The attack clearly occurred outside the house. In his summing-up to the assessors, the Judge told them that P.W4 saw the appellant coming out of the deceased's house carrying a blood-stained knife. The learned Judge, however, did not point out to the assessors the version of P.W2 and P.W5 that the attack was outside the house. This distinction is important in the sense that if the appellant went inside the deceased's house ready with a knife and stabbed the deceased to death inside the house, malice aforethought may well be inferred. But in his judgment, the learned Judge said:-

"**I have considered the evidence adduced by prosecution witnesses and the defence of the accused person. The deceased met his death while engaged in a fight with the accused. His death was caused by knife stabs."**

So even the learned Judge accepted that there was some kind of a fight between the appellant and the deceased and that during the fighting the appellant stabbed the deceased. That is very likely, taking into account the evidence of P.W5 in particular. In those circumstances, we think the learned Judge ought to have explained to the assessors the question of whether the killing was with malice aforethought or whether the surrounding circumstances could have reduced the killing to manslaughter. But the Judge considered the matter to be simply one of murder or nothing. We think he ought to have directed himself and the assessors on the issue of the surrounding circumstances reducing the offence to one of manslaughter. We do now know the conclusion the learned Judge and the assessors would have come to had the Judge correctly directed himself and the assessors on that issue. We must give the benefit of that doubt to the appellant.

We accordingly allow the appeal to the extent that we set aside the conviction for the offence of murder under ***section 203*** as read with ***section 204***, and we substitute therefor a conviction for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. We also set aside the sentence of death and substitute therefor a sentence of fifteen (15) years imprisonment to run from 15th September 2005 when the appellant was convicted and sentenced by the Judge.

Those shall be our orders in the appeal.

Dated and delivered at Mombasa this 18th day of July 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR