IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 218 of 2005

DANIEL MUTHEE ……..……..……..…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of Kenya at

Meru (Justice Sitati) dated 28th July, 2005

in

H.C.CR. NO. 7 OF 1998)

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JUDGMENT OF THE COURT

The appellant herein, ***Daniel Muthee***, was arraigned before the High Court at Meru where he was charged with two counts of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence in the first count were that on the *9th day of November, 1996* at Kiirua Village, Naari Sub-Location Kiirua Location in Meru District within Eastern Province the appellant murdered ***Catherine Kendi Mwiti***. The particulars of the offence in the second count were that on the *9th day of November 1996* at Kiirua Village, Naari Sub-Location, Kiirua Location in Meru District within Eastern Province the appellant murdered ***Allan Gikunda Mwiti***.

The appellant pleaded *"**Not Guilty**"* on both counts on *25th June, 1998* before Juma, J. For various reasons the appellant's trial did not commence until *6th July, 2004* when the trial started before Sitati, J. The learned Judge sat with three assessors. Prosecution called nine witnesses. ***Erastus Muthaura Ngaruthi (PW1)*** testified that on the *9th November, 1996* at about 11:00 a.m. he was assisting ***Mercy Kagwiria Muthoni (PW7)*** to plant wheat. There were other people including ***John Mwiti Mungania (PW3)***, ***Gerald M'Iribi Kiogora (PW6)*** and ***Catherine Kendi Mwiti*** (the deceased in the first count). While these people were so engaged the appellant went to where they were and started talking to Catherine (the deceased in the first count). The appellant then went and sat down somewhere on the edge of the shamba. The appellant got up from where he was sitting and went home. After a short while the appellant returned to the shamba armed with a panga and made straight to where Catherine was planting wheat. According to ***Erastus (PW1),*** the appellant told Catherine to leave the shamba but within no time the appellant started cutting Catherine on the head. Catherine fell to the ground but the appellant continued cutting her. The appellant then started chasing the other people who were planting wheat with Catherine. After chasing these people the appellant proceeded to his home.

As to what happened at home the Court received the evidence of ***Stanley Mworia Mungania (PW2)*** who stated that on the material day he had been left at home by Catherine (deceased) to look after ***Allan Gikunda Mwiti*** (the deceased in the second count hereinafter referred to as Allan). He testified that the house of the appellant and that of ***John Mwiti Mungania (PW3)*** were in the same compound. He told the trial court that he observed all that happened. He saw the appellant go to the shamba, come back home and enter his house, emerge therefrom armed with a panga and proceed to attack Catherine. He observed how the appellant chased the other people from the shamba and he then returned home and started chasing him ***(PW2)***. The appellant then went to where the young Allan was and cut him across the face. After this the appellant ran away and disappeared in the forest.

The incidents in the shamba and at home were witnessed by ***Mungania (PW3) Gerald M'Iribi Kiogora (PW6), Mercy Kagwiria Muthoni (PW7)*** and ***Police Constable Joseph Kombo (PW4)*** who had been sent by his superior to visit the shamba as a result of an earlier report which had been made by ***Mercy Kagwiria Muthoni (PW7)***. The incidents were reported to ***Chief Inspector Soita Mwanja (PW5)*** who immediately proceeded to the scene where he found that Catherine had been taken to hospital but died on arrival, while Allan was still fighting for his life. Later Allan died.

Dr. Gitonga Mwenda (PW8) produced the postmortem reports in respect of the two deceased persons – *Catherine* and *Allan*. According to the post mortem reports the cause of death of each of these two deceased persons was cardio-respiratory arrest due to head injuries caused by cut wounds.

The last witness to testify was ***Police Constable Kainyu Nyaga (PW9)*** whose evidence was to the effect that on *9th November, 1996* at about 7:30 p.m. while on duty at Meru Police Station the appellant surrendered himself to her alleging that his life was in danger. When PW9 called Kiirua Police Station she was informed that the appellant had killed two people. After receiving that information, she placed the appellant in cells after which the appellant was handed over to Kiirua Police Station the following day. He was subsequently charged with the two counts of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.

When put to his defence, the appellant elected to make an unsworn statement. In his unsworn statement he did not deny killing the two deceased persons. His version of what happened on the material day was that at about 10:00 a.m. he decided to go round his shamba where he had planted wheat and to check whether the wheat had germinated. He was armed with a panga which he intended to use to cut grass for his cattle. He went on to state that before he went to the shamba he saw some people working on the same portion that he had planted wheat. On seeing those people he decided to go and see what was happening. When he got to the shamba he told them to stop planting but instead of complying with that request ***Mwiti (PW3)*** the husband of *Catherine* hit him with a stone on the left eye. The appellant struggled with Mwiti who wanted to cut him with a panga. At that point Catherine joined in the fight and the appellant accidentally cut her. The appellant went on to state that after the fight, he ran towards his house being followed by Mwiti. While at home the appellant saw Allan being hit with a stone. Finally, the appellant concluded his defence by stating that as he was being pursued by Mwiti and two other men he ran towards the forest, went to see his advocate who took him to Meru Police Station where he was locked up.

It was the appellant's plea that he regretted the deaths of the deceased persons which, in his view, occurred accidentally.

The learned Judge summed up the evidence and the law applicable to the three assessors, who considered the matter and returned the following findings:-

Assessor Geoffrey Mburugu stated:-

*"**My verdict is that prosecution has proved case beyond any reasonable doubt on both counts – so that accused is guilty on both counts as charged."***

Assessor Fredrick Mwenda stated:-

"***I find the accused guilty of manslaughter in case of 1st count and find him guilty of murder on second count."***

Assessor Alexander Kirimi stated:-

"***I find accused guilty of manslaughter on count 1 and murder on the second count."***

The learned Judge then reserved her judgment which she eventually delivered on *28th July, 2005.*

In a carefully written judgment, the learned Judge considered the evidence adduced before her, the applicable law, the submissions by counsel appearing and in the end came to the conclusion that the appellant was guilty on the two counts. She accordingly sentenced the appellant to suffer death as by law provided on both counts but ordered the sentence on the second count to remain suspended pending the execution of the death sentence on the first count.

In her judgment, the learned Judge considered all that had been urged before her and concluded her judgment thus:-

"***In the present case, I have no doubt in my mind that there was malice aforethought in the killing of the 2nd deceased person and that the accused intended to finish both the 2nd deceased and his mother.***

In the circumstances of this case, and on the evidence adduced before this court and applying the principles enunciated above, I am satisfied and I do find that the prosecution has proved its case against the accused person beyond any reasonable doubt on each of the two counts of murder. Accordingly, I find the accused guilty on each count of murder as charged and convict him accordingly."

Being aggrieved by the conviction and sentence, the appellant now comes to this Court by way of first appeal. He set out eight grounds which were adopted by his counsel Mr. Muriithi when the appeal came up for hearing before us on *31st October, 2006*. In his submissions, Mr. Muriithi stated that there was insufficient evidence and that malice aforethought was not established. He further submitted that there was provocation in that the appellant lost self control. As regards the death of Allan, it was Mr. Muriithi's submission that the deceased was hit by a stone.

Finally Mr. Muriithi submitted that credibility of ***PW2, PW3*** and ***PW7*** was questionable and that the learned Judge ought to have convicted the appellant on a lesser offence of manslaughter on both counts.

The learned Senior State Counsel, Mr. Orinda, urged us to dismiss this appeal. He pointed out that the learned Judge had two versions and that she rightly disbelieved the defence and upheld the prosecution's story.

This being a first appeal it is our duty to re-evaluate the evidence and make our own conclusions. In the now well known case of ***Okeno V. R [1972] E.A. 32*** at ***p. 36*** this Court's predecessor stated:-

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination*** *(Pandya v. R.* ***[1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (****Shantilal M. Ruwala v. R.****, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

It is pursuant to the foregoing that we set out the evidence of the prosecution witnesses and what the

appellant stated in his defence in his trial before the superior court and finally, the findings and conclusions of the learned Judge. What emerges from the evidence on record is that on the morning of *9th November, 1996* the appellant went to what he claimed to be his shamba and found people planting wheat on an area where he had already planted his wheat. The appellant talked to the deceased Catherine, went to the edge of the shamba, sat down, then went back to his house. He armed himself with a panga and went back to the shamba where he went straight to Catherine and cut her to death. The appellant chased everybody from the shamba, ran back to his house still armed with the panga with which he cut Allan the son of Catherine. All this was witnessed by ***PW1, PW2, PW3, PW4, PW6 and PW7***. These six witnesses gave consistent evidence which clearly indicated that the appellant was the aggressor. Their evidence never suggested that injuries and subsequent deaths were as a result of accidental action. Postmortem reports which were produced in evidence indicated that the cause of death of the two deceased persons was cardio-respiratory arrest due to head injuries caused by cut wounds. This was consistent with the evidence of the six eye witnesses – ***PW1, PW2, PW3, PW4, PW6 and PW7***.

Having considered the evidence adduced by the prosecution and the defence by the appellant, it is our conclusion that the appellant's conviction was based on the eye witness account by six witnesses. That evidence is supported by the medical evidence in the form of post mortem reports.

It was submitted on behalf of the appellant that provocation should have been considered. In other words, it is the appellant's contention that he was provoked.

The evidence on record clearly shows that the appellant approached the deceased Catherine and talked to her before he went to the edge of the shamba. After that, the appellant went back to his house, armed himself with a panga and proceeded to where the deceased Catherine was, and without uttering a word he set upon Catherine who succumbed to the injuries instantly.

The learned Judge considered the defence of provocation but rejected it. In the course of her judgment, the learned Judge referred to the definition of provocation under ***section 208*** in the Penal Code and went on to state:-

"***The definition given above means therefore that if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self control an act of killing resulting from such striking would amount to manslaughter rather than murder. In the instant case, I find no evidence to suggest that the accused struck the 1st or 2nd deceased in the heat of the moment. The accused planned in his mind to kill the deceased persons first when after the first visit to the shamba he took time and sat down and pondered and then rose up, went home and took a panga and went straight to where the 1st deceased was and struck her down. The accused did not dispute the fact that on the second time he went to the shamba while so armed with the panga he did not give time to the 1st deceased to reply to his command to her to leave the shamba. That was the evidence of PW1. According to PW3 also, the 1st deceased, did not respond to the accused's question as to what had given them the authority to plant wheat. The accused just proceeded to cut the 1st deceased. PW6 and PW7 testified that when accused returned armed with a panga, he went to where the 1st deceased was talked briefly with her and the next thing they saw the accused cutting her.***

I also find it strange that the accused should have directed his passion at the 1st and 2nd deceased when all the evidence pointed to the fact that the shamba in dispute was owned by the husband of PW7 after the same was sold to him by Stanley Manyara Iraku. My own considered view is that the accused nursed a secret grudge against the 1st deceased and also against the 1st deceased's husband PW3, and that the occasion that fateful morning provided a perfect opportunity for the accused to do what he had always wanted to do – revenge. Although the versions vary slightly as to whether he only removed it from inside his jacket, the truth of the matter is that the accused went and armed himself before returning to the shamba where he executed his plan with precision, first on the 1st deceased and secondly on the 2nd deceased. The wheat that was being planted was not the 1st deceased's wheat; it

was for PW7 and this is the reason why I believe and find that the accused had no excuse for killing the two deceased persons. As pointed out by the learned state counsel, the accused had other options to take if he was indeed aggrieved by the goings on that morning. Ordinarily, he would have proceeded to the police station which was said to be only 150 metres away and reported the matter. He even had the opportunity to talk to a police officer that morning. What would have been easier than the accused getting the police to round up all the persons working on the shamba that morning for trespass? From the facts before me there was no or no sufficient provocation which would have led the accused to kill the two deceased persons."

We have, on our own, re-evaluated the evidence as regards the events of that fateful morning and in view of what is provided by ***section 208*** of the Penal Code, we are of the view that the defence of provocation was not available to the appellant. We are in entire agreement with the learned Judge that this was a case in which the appellant armed himself with a panga with a clear intention of either causing grievous harm or killing the deceased Catherine, and her son Allan.

It was also submitted that malice aforethought was not established. We refer to ***section 206*** of the Penal Code which provides:-

"***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of ***section 206(b)*** of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.

Accordingly, this appeal has no merits and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 13th day of February, 2007.

S.E.O. BOSIRE

……

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR