IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 2 OF 2016

BETWEEN

MOSES KADENGE DADU ……APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Meoli, J.)

dated 4th April, 2013

in

***H.C.CR.C No. 3 of 2010*)**

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JUDGMENT OF THE COURT

1. On 12th January, 2010 at about 6:00 a.m. Jumwa Dadi (PW1) and her husband, Mwakamshi Mwabega (PW2) woke up and found an argument between Moses Kadenge Daudu (appellant) and his younger brother namely, Simon Makamsha (PW3). No sooner had they gotten out of their house, than the appellant pushed his mother, Jumwa aside and stormed into the house. After a short period the appellant came out of that house and went to his elder brother's house which was within the same homestead. Meanwhile, Jumwa's granddaughter, S H (deceased) then 3 years old, who was asleep in her grandparents' house was startled by the commotion and she began crying. Jumwa picked her up and carried her outside. What happened next was like a scene from a horror movie.

2. The appellant came out of his brother's house with a panga and snatched the deceased from Jumwa. He then threw her to the ground and begun slashing her with a panga. No one was able to act immediately because of the speed with which the attack took place. Nonetheless, Jumwa tried to protect the child but she ended up being cut herself on her right forearm. By then Mwakamshi who watched in bewilderment had raised an alarm and neighbours came to their aid. As a result, the appellant fled into a nearby forest. Unfortunately, the deceased died almost immediately. The appellant was arrested on the same day and he led the police to where he had dumped the panga.

3. He was later arraigned and charged in the High Court at Malindi 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 12th January, 2010 at Migondomane area within Ganze District within the then Coast Province, the appellant murdered the deceased.

4. In his defence the appellant testified that on the material day a quarrel arose because Simon had hidden his panga. The quarrel escalated to a physical brawl when Simon pushed him. His mother tried to separate them whilst carrying the deceased. At the same time Mwakamishi started hitting him with a rungu he had and in a knee jerk reaction he raised the panga to use it as a shield from the rungu. Unfortunately, the deceased was cut in the process. He was forced to run away because Mwakamishi chased him with the rungu.

5. Ultimately, the trial Judge (Meoli, J.) in a judgment dated 4th April, 2013 found that the appellant had killed the deceased with malice aforethought and convicted him for offence of murder which carries a mandatory sentence of the death penalty. It is that decision that has provoked the appeal before us which is anchored on the grounds that the learned Judge erred in law and fact by:-

a. Failing to inform the appellant of his rights under Section 200 of the Criminal Procedure Code.

b. Finding that the prosecution established malice aforethought without sufficient evidence.

c. Shifting the burden of proof to the appellant.

6. Mr. Kimani, learned counsel for the appellant, submitted that the appellant had advanced provocation as a defence; his actions were triggered by the conduct of both his mother and father. In any event, the appellant in his defence explained that at the material time he was angry and acted in a feat of rage. He argued that the trial court had not complied with the provisions of ***Section 200*** of the ***Criminal Procedure Code***. Elaborating further, he contended that despite the trial being conducted by two different Judges, the appellant was never informed of his right to recall witnesses who had testified before the earlier Judge. He maintained that the appellant ought to have been informed of this right by the trial court regardless of the fact that he was represented by an advocate. Failure to do so invalidated the proceedings at the trial court.

7. Mr. Kimani added that the prosecution failed to call crucial witnesses to testify namely, the investigation officer and the trial court ought to have drawn a negative inference arising from such failure. He also criticized the sentence issued as being illegal. For the reason that the trial court should have taken into account the prevailing circumstances which depicted the offence of manslaughter. He urged us to consider the time spent by the appellant in jail and grant an appropriate sentence.

8. Mr. Monda, Senior Assistant Director of Public Prosecutions, in opposing the appeal stated that the defence of provocation was never raised at the trial court. Furthermore, the trial Judge found the appellant's defence was an afterthought. While conceding that the appellant was not informed of the implication of ***Section 200*** of the ***Criminal Procedure Code***, Mr. Monda contended that he suffered no prejudice since he was represented by an advocate throughout the trial. According to him, eye witnesses testified hence the failure to call the investigating officer did not prejudice the appellant. Last but not least, Mr. Monda submitted that this was not a case of manslaughter; malice afterthought on the part of the appellant could be discerned from the nature of the attack and serious injuries on the deceased.

9. We have considered the record, submissions by counsel as well as the law. Before us is a first appeal against the appellant's conviction and sentence for the offence of murder. As such we are cognizant that

a first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. We are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion. See ***Kiilu & Another vs. Republic [2005] KLR 174.***

10. Our perusal of the record reveals that the prosecution's case was heard by Omondi, J. and the defence by Meoli, J. Similarly, we note that there is an indication on record that when Meoli, J. took over the matter, the appellant's advocate was given an opportunity to decide on the manner in which he wished to proceed under ***Section 200*** of the ***Criminal Procedure Code***. However, there is no mention on the record as to the direction he opted for or what happened thereafter. As aptly put by this Court in ***Abdi Adan Mohamed vs. R [2017] eKLR***:-

"The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly."

11. Owing to the importance of having a trial conducted from commencement to conclusion by the same magistrate or Judge, ***Section 200(4)*** of the ***Criminal Procedure Code*** provides that:-

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial." Emphasis added.

We find that the appellant did not suffer any prejudice more so because he was represented by an advocate at the trial. Consequently, there is no reason to set aside the trial.

12. Section 203 of the ***Penal Code*** spells out clearly that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellants committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See ***Nyambura & others vs. Republic [2001] KLR 355***).

13. It is not in dispute that the deceased was killed by the appellant. What is in issue is whether the appellant killed her with malice aforethought. The significance of establishing malice aforethought was underscored by this Court in ***Bonaya Tutut Ipu & Another vs. R [2015] eKLR*** thus:-

"Malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter."

14. As to what constitutes malice aforethought is set out under ***Section 206*** of the ***Penal Code*** -

"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."

15. Was malice aforethought established in this case" We take note that the prosecution's witnesses were categorical that prior to the incident there was no dispute between the appellant and the deceased's parents or the deceased herself. Be that as it may, motive is not necessary to establish malice aforethought. This much was appreciated by this Court in ***John Mutuma Gatobu vs. R [2015] eKLR*** while discussing ***Section 206*** of the ***Penal Code*** that:-

"There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

16. We agree with Mr. Monda's submission that malice aforethought could be deduced from the weapon used and the nature of the injuries inflicted on the deceased. In finding so, we are guided by predecessor of this Court in ***Rex vs. Tuper S/O Ocher [1945] 12EACA63*** wherein, it was ruled thus:-

"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

17. We also concur with the following findings of the trial court:

"The injuries described are severe and multiple. They could not have been sustained in the kind of scenario painted by the accused. One deflecting blow with panga could not possibly inflict so many severe injuries on the child. The ferocity of the attacks reveals the mental state of the assailant.

…

The accused claims he was very angry at the time of the incident. If that be the case the source of his irritation could only have been the adults with whom he exchanged words but not the four year old child. His attack on the child was deliberate and calculated to cause the severest harm if not to kill. The child's skull was open and the neck literally truncated in the attack."

18. All the above points to one conclusion only, in inflicting those injuries to the deceased the appellant had an intention to cause grievous harm or to kill, both of which are elements of malice aforethought as defined in ***Section 206*** of the ***Penal Code***. We therefore agree with the findings of the learned trial Judge that the prosecution had established malice aforethought beyond reasonable doubt.

19. Moreover, the defence of provocation can only arise where it is shown that the circumstances were such that an accused was deprived of self-control or was acting under diminished responsibility. The applicable test was set out by the House of Lords in ***Director of Public Prosecutions vs Camplin [1978] 2 All ER***:-

"Whether the provocation was sufficient to make a reasonable man in like circumstances act as the defendant did. Not a reasonable boy or a reasonable lad; it was an objective test – a reasonable man"

In our view, there was no evidence that the appellant had been provoked in any manner prior to the incident. Even if we were to find that he was, as he alleges, we are satisfied that his reaction was out of proportion and reckless that he did not care about the life of the deceased.

20. On the issue of witnesses, we are alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. See ***Section 143 of Evidence Act***. Accordingly, we find that the failure of the prosecution to call the investigating officer to testify did not prejudice the appellant. This is because his evidence would have been a replication of what the eyewitnesses stated.

21. Based on the foregoing we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Malindi this 7th day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR