IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CRIMINAL APPEAL NO 4 OF 2016

BETWEEN

STEPHEN ODHIAMBO ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Migori (Majanja, J.) dated 16th November 2015

in

H.C.CR.C No. 32 of 2009)

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JUDGMENT OF THE COURT

[1] On the evening of 25th January, 2013 ***John Keririo***, (deceased) was perhaps looking forward to a happy rendezvous when he, in the company of a friend and a relative converged for drinks at Rock Bon Bar in Kehancha Township in Migori County. That was not to be as, by a twist of fate, the night and the drinking spree turned tragic. The deceased was injured after an altercation in the bar, he lost consciousness and on being rushed to hospital, he was pronounced dead.

[2] Following the said death, ***Stephen Odhiambo Onyango*** (appellant) was 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 26th January, 2013 at about 2am, at Kehancha Township in Kuria West within Migori County the appellant murdered ***John Kerario***.

[3] The appellant pleaded not guilty to the charge, and the prosecution called a total of nine (9) witnesses who testified in support of the charge. Upon considering the prosecution's evidence, the learned trial Judge found the appellant had a case to answer. On being placed on his defence, he gave an unsworn statement and did not call any witness. At the close of trial, the appellant was found guilty as charged and was sentenced to suffer death.

[4] That is the conviction and sentence that has provoked the instant appeal which is centred on some five (5) grounds of appeal. The judgment is faulted on the grounds that the learned Judge erred in law and fact by failing to: scrutinize the evidence of identification; to analyse the evidence; disregarding the defence evidence that was otherwise credible; convicting the appellant on

evidence that was inconsistent and fell short of proving the charge beyond reasonable doubt.

[5] During the plenary hearing of this appeal, ***Mr.Omondi*** learned counsel for the appellant relied on his written submissions and made some oral highlights. Counsel for the appellant faulted the trial court for relying on the evidence of identification which was not fool proof as the circumstances prevailing were not conducive. The offence happened at night outside a crowded bar.***Cpl. Joseph Wangwe (PW6)*** who said he saw the appellant hit the deceased with a G3 riffle said there was only one source of light whose intensity was not tested or subjected to an evaluation. Counsel cited the cases of **Wamunga vs. Republic [1989] KLR 424** and **R vs. Turnbull, [1977] OB 224** among others to emphasize the principle that evidence of visual identification should be examined carefully to minimize the danger of mistaken identity. On the evaluation of evidence, counsel submitted that the Judge failed to analyse the evidence of ***PW6,*** who was also drunk, against the evidence of the other APs who said that when they walked out of the bar they found the deceased lying down having already been injured.

[6] Counsel further submitted that the evidence provided did not establish that there was any motive on the part of the appellant to cause the death or serious bodily harm of the deceased. ***Section 206*** was cited as well as the case of **Nzuki vs. R [1993] KLR** atpage 171 to advance the argument that there was no proof of malice aforethought which was a necessary ingredient for a safe conviction of a murder charge; that it was not shown that the appellant had premeditated the death of the deceased. Moreover the only eye witness was **PW6** whose evidence was not corroborated as the other witnesses said by the time they came out to the scene of crime the deceased had been injured and they did not see the perpetrator. Counsel urged us to find that the death of the deceased was as a result of a fight that took place inside a bar where there were many people who were involved in the melee which should have been treated as an unfortunate bar brawl involving the deceased who was acting in a drunken stupor. Accordingly, and in the alternative, the evidence could only have amounted to an offence of manslaughter as urged by counsel for the appellant.

[7] Opposing the appeal was ***Mr. Peter Muia***, learned Prosecution Counsel for the respondent. Counsel relied on his written submissions and made some oral highlights stating that the conviction was solidly backed by the evidence of many witnesses who saw the appellant engage in an altercation with the deceased. He singled out ***Mwita George Mbosiro*****(PW1)** and **(PW6)** who were eye witnesses. A post-mortem on the deceased's body was carried out by ***Dr Joseph Otieno*****(PW7)** and the report showed that the death of the deceased was due to severe haemorrhage as a result of an assault caused by a sharp object on the left temporal side of the head. Counsel sited the provisions of ***Section 206*** of the Penal Code which defines malice aforethought to include an intention to do grievous harm which otherwise causes the death as in this case.

[8] On the death sentence, counsel submitted that nowadays with the Supreme Court decision in the case of **Francis KariokoMuruatetu& Another vs. Republic– Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** *(Muruatetu's case)* the mandatory death sentence was declared unconstitutional. Counsel urged us to consider the circumstances under which this offence was committed. The appellant was a police officer to boot who misused the power and authority bestowed on him to safeguard life and took the law into his hands. Further to consider the appellant did not appear remorseful and maintain the sentence meted by the trial Judge.

[8] This being a first appeal, we are required to re-analyse and re-evaluate the evidence adduced before the trial court and come up with our own conclusion while at the same time bearing in mind that we did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. See ***Sir Kenneth OÇonnor, P*** in the case of ***Peters -vs- Sunday Post*****[1958] E.A. 424:-**

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

[9] As captured in the above summary, the direct eye witness evidence was only given by **PW1**who testified that on the night of 25th January, 2013 at about 11pm, he was with the deceased and ***Cpl. Joseph Wangwe*** (**PW6**) at Rocks Bar, where they were drinking alcohol. There were four armed and uniformed Administration Police Officers (APs) who were drinking at same bar and the said officers were seated at a table close to them. After a while, one of the APs who was later identified as the appellant, went and sat at the far end of the bar. He was joined by the deceased and soon, as they were talking an argument ensued and the appellant pushed the deceased and he fell on the table. There was some commotion in the bar and that is when **PW6 i**ntroduced himself as a police officer working in Nyeri and said he held the rank of a corporal. He urged the patrons to calm down. After about 10 minutes,

PW6 offered to escort the deceased home and he took him outside the bar through the back door. However as he was trying to call for a taxi to carry the deceased home, the appellant emerged from the back door.

[10] According to **PW6** the appellant who had had a scuffle with the deceased asked in Swahili "***yuko wapi yule alikuwa akibishana nasisi***" before **PW6** could say anything, the appellant held the rifle with both hands and forcefully knocked the deceased on the head. **PW6** got hold of the appellant and asked him what he had done, to which he responded in Kiswahili that ***"sijali hata nikienda kufungwa"***. **PW6** went back to the bar and informed **PW1** what had happened. He also called ***Jones RobiMarwa*(PW4)**a taxi driver to carry the deceased to the hospital. **PW4** arrived at about midnight, they assisted the deceased to the vehicle, by that time he was breathing and to ***PW4*** he did not appear to have visible injuries. They took him to Kehancha Hopsital where he was pronounced dead on arrival.

[11] The matter was reported at Kehancha Police Station on the 26th January, 2013; it was investigated by ***Charles Kipchumba***, an Assistant Superintendent of Police **(PW9)**; he interviewed the people who were at the bar, and recovered the G3 riffle that had been issued to the appellant according to the firearm movement register. After interviewing the witnesses, he established that the appellant hit the deceased after they had quarrelled inside the bar. The body of the deceased was identified by his brother ***Peter Chacha Kerario*** **(PW2)** and the post-mortem examination was carried out by **PW7**. The doctor found a blood stain on the left temporal region, a swelling on the same spot and a stab wound on the same spot extending deep into the head. When he opened the head, he found a depressed skull fracture measuring about 1 cm in diameter. There was haemorrhage into the brain, he formed the opinion that the cause of death was severe haemorrhage due to sever assault with a sharp object on the left temporal of the head.

[12] There was also evidence by ***Harrison Waisiko Muherai*** **(PW3)** He was at the same bar drinking alcohol when four (4) AP officers came in and demanded that the bar be closed but the deceased asked the APs why they were in a bar in uniform. An argument ensued between the deceased and the appellant but they calmed them down and the deceased was taken out. However the deceased returned to finish his drink and announced that the APs wanted to go with him, but he was taken out where there was a further commotion. When **PW3** went out he saw the deceased lying down with blood oozing from the head although he did not see any visible injuries. Both ***APC. Geofrey Tanui*** **(PW5)** and ***Cpl. Anthony Masya*** **(PW8)** told the trial court that they were on duty on the material day patrolling Kehancha town and at about 1.40 am they heard some commotion in a bar where they found people drinking and fighting. They identified the deceased as the one who was quarrelling with a bar maid and that the deceased tried to throw a bottle at the bar maid but the appellant blocked it. As a result the deceased abused the appellant; thus the deceased was taken out by **PW6**to calm him down; that the appellant followed them outside but both witnesses said they remained inside the bar to ensure that it was closed down. By the time they went outside they found the deceased lying down and they were told by **PW6** that the appellant hit him with the butt of the gun.

[13] Put on his defence, the appellant opted to give an unsworn statement. He denied having had anything to do with the offence of murder that he was charged with. He testified that on 26th January, 2013, members of public came to the AP camp complaining that a person had been killed. He was taken to the DCIO offices where he was interrogated by ***Sgt. Mugandi***; he told him that he was on patrol the previous night with his colleagues who went to a bar to quell some commotion. While inside the bar the deceased insulted him for intercepting to protect a bar maid that the deceased wanted to attack. The deceased was taken outside, he and his colleagues ensured the bar was closed and they proceeded to their Camp.

[14] After considering all the evidence and submissions by both counsel for the State and the defence, the learned trial judge was satisfied that the prosecution discharged the burden of proof. In doing so the Judge posited as follows in a pertinent paragraph of the judgement;-

"The accused aimed the butt of the gun at the deceased's head with such force which resulted in a skull fracture. This implies that the accused had, "knowledge that the act or harm causing death will probably cause the death (sic) of or grievous harm to the person" within the meaning of section 206 (b) of the Penal Code. I find the prosecution proved malice aforethought"

Consequently the appellant was convicted and in what appears to have been the mitigation, counsel for the appellant stated that the appellant was a first offender while reiterating that death sentence was the only one provided. The appellant was therefore sentenced to death with the Judge emphasizing its mandatory nature.

[15] On our part and as stated above, we have considered the record of appeal, the submissions by counsel as we have endeavoured

to summarize. The issues that turn out for determination is whether the evidence before the Judge proved beyond reasonable doubt that it was the appellant who murdered the deceased, whether the identification of the appellant was free from error and whether there was proof of malice aforethought.

[16] It is apparent from the record that it was only **PW6** who saw the appellant hit the deceased with the butt of a riffle. This was tied together with undisputed evidence that the appellant was at the bar at the material time; he was involved in an altercation with the deceased; he was armed with a G3 Riffle and he followed the deceased outside. This coupled with the fact that the evidence from the post mortem report that the deceased did die from brain haemorrhage caused by a severe injury, led the Judge to conclude that it was the appellant who caused the death of the deceased. This is how the Judge captured this aspect of the evidence on page 6 of the impugned judgement;-

"The prosecution witnesses; PW1, PW3, PW5 PW6 and PW8 all confirm that the accused was present at the bar and he had some form of altercation with the deceased before they left together to go outside. Further, PW9 confirmed that the accused was issued with and was in possession of a G3 Riffle on the material night which he used to assault the deceased. I therefore find from the totality of the evidence that the accused was present at Rocks Bar and that he assaulted the deceased with the butt of the gun on his head on the material night"

[17] We have re-evaluated this evidence, especially on the issue of identification. Regarding this issue, it is the trial Judge who saw and heard **PW6** testify and having found no fault with his evidence which was taken together with other portions of evidence that pointed to the appellant as quoted above, we have no reason to upset that finding. In the case of ***Maitanyi vs. R (1986) KLR*** page 198 the following words were recited by this Court from the decision of ***Abdallah Bin Wendo& Another vs. Reg [1953] 20 EACA***:

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is recorded is other evidence whether it be circumstantial or direct, pointing to guilt; from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness; can sufficiently be accepted as from the possibility of error."

[18] Was the appellant provoked" This was pointed out by the defence counsel during cross-examination of **PW6**; it was suggested that the deceased tried to grab the gun from the appellant and therefore the appellant injured the deceased in self-defence. Nonetheless the appellant did not advance this line of defence. Moreover, the trial Judge found that the deceased had been removed from the bar where there was tension to be taken home and therefore the appellant was not under any threat of force by the deceased. We also agree that the defence advanced by the appellant that no such incident happened could not stand, granted that it was sharply discounted by the evidence of **PW1, PW3, PW5, PW6** and **PW8** who placed the appellant at the *locus in quo* as we have explained elsewhere in this judgement.

[19] On the question of malice aforethought, the court is entitled, in determining its presence or absence, to take into account among other things, factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased. (See ***Rex vs.Tubere s/oOchen (1945) 12 EACA 63***, and ***Chesakit vs. Uganda, Cr. App. No. 95 of 2004***). In this case, the appellant a trained police officer to boot used the butt of the gun and targeted the head of the deceased. The head injuries, inflicted with a dangerous G3 riffle resulted in hemorrhage in the head which, as found by the trial Judge, was consistent with the unlawful killing of the deceased actuated by malice aforethought. (See ***Section 206***, Penal Code).

[18] Turning to what the appellant's contend to be inconsistencies in the prosecution evidence, having carefully reviewed the entire record, we are satisfied that there are no inconsistencies or contradictions in the evidence adduced by the prosecution that would warrant, on their own, interference with the findings of the trial court. For example, looking at the totality of the evidence that was adduced by both the prosecution and the defence, there is no dispute that the offence was committed in the early morning hours of 26th January, 2013 between midnight and 1.40 am. That is also the time frame that was mentioned by the appellant in his defence as the time they went to the bar. The reference to the date of 19th January, 2013 by **PW5** is clearly a typographical error and **PW1's** evidence refers to the 25th January, 2013 which logically continued to the 26th as they were in the bar beyond midnight. We would reiterate as correct what the Court of Appeal of Uganda stated in ***Twehangane Alfred vs. Uganda, Cr. App. No. 139 of 2001*** regarding how we should treat inconsistencies in evidence:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

[20] We think we have said enough to demonstrate that the learned Judge cannot be faulted in the conclusions that she made in convicting the appellant. However, on the death sentence, we are persuaded that the appellant should benefit from the *ratio decidendi* in the ***Muruatetu's case*** (supra). The appellants in the said case were sentenced to death for the offence of murder contrary to ***Section 203***as read with ***Section 204*** of the Penal Code. ***Section 204*** of the Penal Code provides:

"Any person convicted for murder shall be sentenced to death."

After their appeals were dismissed by the Court of Appeal, they appealed to the Supreme Court. The main issue canvassed in the appeal was whether or not the mandatory death penalty is unconstitutional. The Supreme Court said at paragraph 48 that:

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article* 25 *of the Constitution; an absolute right"

At **paragraph 52**, the Supreme Court again said:-

"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed."

In our view the substance of that judgment was summarized at **paragraph 69** where the Supreme Court stated:

"Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

[21] The mitigation which was rancorously done before the trial court while bearing in mind that the death sentence was mandatory simply stated that the appellant was a first offender. We have taken that into account and the fact that he was a police officer whose duty it was to safeguard life. In the circumstances we dismiss the appeal on conviction but substitute the death sentence with a term of twenty five (25) years imprisonment with effect from 10th December, 2015.

Dated and delivered at Kisumu this 24th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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