IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 152 OF 2015

BETWEEN

VICTOR OWICH MBOGO………..............................APPELLANT

AND

REPUBLIC …...RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Migori (Majanja, J,) dated 26th August 2015

in

HCCRA No. 11 of 2012)

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JUDGMENT OF THE COURT

This appeal involves the murder of Julius Odhiambo Odande, the deceased by Victor Owich Mbogo, the appellant, contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. The particulars as set out in the information before the High Court at Migori were that on 21st March 2010 at Nyambicha Village, Rongo District, within the former Nyanza Province the appellant murdered the deceased. He denied the charges.

In determining the case, the learned judge (Majanja, J.) was satisfied that the prosecution had proved the offence to the required standard that the appellant murdered the deceased. He was subsequently convicted and sentenced to death as by law prescribed.

The appellant was aggrieved with the decision of the trial court and has appealed to this Court on grounds that the learned judge failed to appreciate that the prosecution did not prove its case to the required standard, and failed to demonstrate that the circumstantial evidence sufficiently proved that the appellant committed the murder; that the trial court relied on an illegal confession, and also failed to take into account the glaring contradictions in the witness evidence leading to doubt; that the trial court wholly relied on the prosecution witness evidence and disregarded the appellant's defence; and finally that the trial court did not consider the appellant's mitigation, and in so doing imposed a harsh and excessive sentence upon him.

Learned counsel, Mr. Wangoda, filed written submissions on behalf of the appellant which he chose not to highlight. The submissions were to the effect that the prosecution did not prove that all the ingredients of the offence were present when the deceased was killed. It was asserted that the circumstantial evidence that led to the conviction was based primarily on the testimony

of Moses Odhiambo Odari PW1, whose suspicion was insufficient to reach a finding that the appellant was responsible for the deceased's demise; that furthermore, the evidence that Deborah Anyango Odhiambo (PW 2), (Deborah), the deceased's wife who saw the appellant pass by their gate on his way to the trading centre was also not sufficient to place the appellant at the locus in quo; that added to the aforegoing, the panga alleged to have been recovered from the appellant's house with the deceased's blood was not taken for forensic examination to ascertain whether the blood on it belonged to the deceased; that the appellant denied taking the Assistant Chief and Inspector Richard Siamo, PW 9, to his house to recover the panga, especially since he did not have a home in Nyambicha village. It was further argued that malice aforethought was not also proved.

The appellant also submitted that the learned judge wrongly relied on a confession which was made to the Assistant Chief and Inspector Richard Siamo, contrary to the stipulations of ***section 25 A (1)*** of the ***Evidence Act***; and his having shown them where the panga was also hidden was also inadmissible as it was not taken in accordance with the law.

Further, it was submitted, there were numerous glaring contradictions in the evidence which the trial court failed to take into account. Firstly, there was the evidence of PW4 who stated that he reached the scene at 8 p.m. with his friend, and were the first to arrive at the scene where the lifeless body of the deceased lay, which evidence contradicted the evidence of John Otieno PW 5 (John) and Deborah who claimed to have heard screams from people and rushed to the scene at 7.30 p.m. Then, there was the evidence of Charles Ochuka Orwa PW3 (Charles) who claimed to have left the deceased with one Wilkista Anyango at around 7.30 p.m. and yet, that was the time the deceased was murdered. Wilkister did not testify as a witness. It was pointed out that, one Timon Awich who shouted that somebody had killed the deceased also did not testify. It was argued that on account of the gaps and contradictions in the evidence, the prosecution did not prove its case to the required standard.

Finally, it was submitted that in terms of the decision in ***Francis Karioko Muruatetu & Another vs Republic & 4 others, SC Pet. No. 16 of 2015*** which had declared the mandatory death sentence to be unconstitutional, this Court should review the appellant's sentence.

On behalf of the respondent Mr. Kakoi, learned Principal Prosecution Counsel, opposed the appeal. Counsel filed written submissions which he relied on. It was asserted that the prosecution demonstrated that malice aforethought was established from the circumstances of the case, together with the injuries the deceased sustained. Dr. Aggrey Idagiza, (PW8) the doctor who conducted the postmortem, produced a report which specified that the cause of death was "severe hemorrhage and spinal cord lacerations" caused by a sharp object; that though no one saw the appellant kill the deceased, the Assistant Chief suspected that the appellant was responsible for the death after he disappeared soon after the deceased died; that in addition, the appellant showed them where the blood stained panga used to kill the deceased was hidden.

It was further asserted that there was bad blood between the appellant and the deceased, and therefore there was a motive behind the deceased's killing; that the evidence showed that the appellant was the last person to have been seen with the deceased, which evidence the appellant did not rebut. Counsel concluded that, the totality of the witness evidence pointed to the appellant as being responsible for the deceased's death.

We have considered the evidence that was before the trial court, the judgment of the court below, the grounds of appeal and the submissions of the parties. This is a first appeal and consequently it is our duty to reevaluate the evidence afresh and thereafter to reach our own conclusions. In this regard, we must also bear in mind that unlike the trial judge, we did not have the benefit of hearing or seeing the witnesses testify. See ***Okeno vs Republic [1972] EA 32; Njoroge vs Republic [1982-88] 1 KAR 1134*** and ***Mwangi vs Republic [2004] 2 KLR 28***.

Bearing the above in mind, we consider that the issues for our consideration are whether the prosecution established its case beyond reasonable doubt; whether the learned judge was entitled to rely on the confession; and information as to the recovery of the murder weapon, whether the prosecution's case was dominated by discrepancies and contradictions, which the trial court failed to take into account; and whether the trial court failed to take the appellant's defence into account.

In determining whether the prosecution proved its case beyond reasonable doubt, it is essential that the ingredients for murder as specified under ***section 203*** as read with ***section 204*** of the ***Penal Code*** are satisfied. To this end, the prosecution should demonstrate that the deceased died, that it was the appellant's unlawful act that led to his death, and that the murder was carried out with malice aforethought.

As to whether the deceased died, there is no question that he died on 21st March 2010. On the evening of the material day, Deborah, John and the Assistant Chief found his lifeless body lying beside the footpath. He had been severely injured and had blood all over his shirt. Dr. Idagiza conducted the post mortem on the deceased's body and prepared the postmortem report which indicated that there was a deep cut of about 6 inches long on the right shoulder, a fracture of the neck and the humerus. There was another cut wound on the right cheek that was 11 inches long, another one on the posterior neck. Other cuts were visible on the upper cervical of the vertebra and spinal cord, and at the back of the head. A stab wound was also visible at the right sub- mandibular region. The doctor concluded that;

"On internal examination, the cardiovascular system had collapsed due to right carotids. This is the artery on the neck. The spinal cord was cut as vertebra No. 1. The cause of death was due to severe hemorrhage and spinal cord laceration. The injuries must have been caused by a sharp object."

In other words, the deceased's death was as a result of severe injuries to the head and the neck caused by a sharp object.

Was the appellant responsible for the deceased's death" As none of the witnesses saw the appellant kill the deceased, the prosecution's case was primarily based on circumstantial evidence that sought to connect the appellant to the death of the deceased. In this regard, the learned judge stated;

"18. The deceased's movements on the material day were accounted for and detailed by the testimonies of PW 2 and PW 3, PW 5 and PW 7 who were with the deceased the entire day. My understanding of the testimonies of the said witnesses rules out the possibility that they could have committed the murder. The evidence of PW 4 and the accused's brother, PW 6, excludes the possibility that PW 6 would have committed the murder.

19. On the other hand, I find that it is only the accused who had the opportunity and means to commit the murder. His defence that he was in Nyatike and had not been home for a long time was clearly undermined by the testimony of the prosecution witnesses particularly his own brother, PW 6. He is the only one who could have done so with the murder weapon he furnished the police with. Although motive is not necessary for proof of murder, PW 9 testified about a grudge between the accused and the deceased when asked in cross-examination by counsel for the accused. He stated that the deceased owed the accused Kshs. 1,500/- incurred as a result of the accused harvesting the deceased's cane. PW 2 also alluded to some bad blood between the accused and the deceased when the accused implication the deceased in the accused's brother's death."

To secure a conviction based on circumstantial evidence the circumstances surrounding the death should be cogent and well established, so that when all the evidence is considered in totality, it points to the accused's guilt. The circumstances should form a chain so tight that the inescapable conclusion is that the appellant caused the deceased's death.

In the ***R V Taylor, Weaver and Donovan*** ***1928 (Cr 21 Cr. Appl R2)***, the principles applicable to circumstantial evidence was enunciated in these words,

"Circumstantial evidence is very often the best evidence. It is the evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial".

And in the case of ***Mwangi vs Republic*** ***[2004] 2 KLR 28*** this Court said:-

"It may be asked: why is the Court of Appeal looking at each circumstance separately" The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rex vs Kipkering Arap Koskei & Another (1949) 16 EACA 135."

Whether the circumstances surrounding the deceased's death formed an unbroken chain of events requires that we reexamine the evidence afresh. Deborah, the deceased's wife's evidence was that, on the morning of 21st March 2010, the deceased left the house with John, a friend who was staying with them to assist plough the deceased's field with oxen. ***Paul Okech Owour PW7*** (Paul,)

testified that the deceased called him and told him to meet him at Rongo. Thereafter the deceased spoke to another friend, Charles, and told him to meet them at Riosiri. The four friends met in Riosiri where they roasted and ate meat together.

They later returned to Rongo where they watched a football match in Annexe Bar from 4 p.m. At about 6 p.m. the deceased, John and Paul commenced their journey back to their respective homes. Paul and John rode on one motor bike, leaving the deceased to await another passenger so that the second motor bike could depart from Riosiri. He soon followed them, and on reaching Ringa, the friends disembarked to walk the remaining distance home. Paul and the deceased walked a short distance, but they soon parted, and each went their own way. John reached home first at about 7.30 p.m, and on arrival informed Deborah that the deceased was behind coming on another motorbike. Shortly thereafter, Deborah and John heard screams coming from the footpath, and rushed to see what was happening. About 300 metres from their home they found the deceased lying dead beside the footpath. ***Zacharia Omolo Achieng, PW4, and Awidhi Timon Mbogo, PW6***, who were both returning from Ringa at about that time also found the deceased lying dead by the footpath.

The Assistant Chief, who was called arrived at the scene, at about 9.30 p.m. On arrival he called Awendo Police Station, where one of the officers was Inspector the investigating officer, who arrived at the scene at 12.30 a.m. He found the deceased's body still lying beside the footpath with physical injuries on the back of the head, the neck and the ear. Bloodstains were visible on his clothes.

The next day, the Assistant Chief convened a meeting of all the deceased's relatives, and only the appellant was noticeably absent. This caused the Assistant Chief to form the opinion that the appellant was responsible for killing the deceased. On the same day, Inspector Siamo recorded witness statements from Charles, John and Paul, as well as from the Assistant Chief. He also recorded Deborah's statement, where she stated that she had seen the appellant in the vicinity of their home on the material evening.

On 25th March 2010, the Assistant Chief had the appellant arrested in Nyatike, upon receiving information that the appellant's sister had informed her mother that the appellant had arrived in Nyatike very early on the day following the deceased's death. He was brought to Awendo after which, he accompanied the Assistant Chief, and Inspector Siamo to his home. Once there, the appellant showed them where the murder weapon was hidden. Inspector Siamo then recovered a blood stained panga from underneath a cupboard. It was at that moment that the appellant confessed that he had used it to kill the deceased.

The appellant's defence was that he did not recall the events of 21st March, 2010 but, on 27th March 2010 he recalled going to sell mandazis at a shop in Muhuru Bay. On his way he met two police officers who informed him that they were looking for him. They then took him to Nyatike Police Station. The appellant stated that he had worked at Muhuru Bay for 6 years and was residing at Muhuru town. He claimed that the last time he had seen the deceased was in April 2008 when he came home to see his father; that he had not built a house at home, and that whenever he went home, he slept in his brother's house. He denied taking the Assistant Chief and Inspector Siamo to his house or showing them where the killer weapon was hidden. He also denied having a grudge with anyone including the deceased and Deborah since he did not reside in Nyambicha.

On the meeting convened by the Assistant Chief, he contended that he could not have known about it as he was in Muhuru and did not have a phone contact.

An analysis of the evidence shows that the deceased was with Charles, John and Paul for most of the afternoon and into the evening of 21st March 2010. The deceased separated from Paul about 300 metres from his home, and it was after they parted that the deceased was murdered. Deborah's evidence was that the appellant had been seen in the vicinity earlier that evening. He had been hiding near their fence. After the deceased was killed, the Assistant Chief called a meeting of the deceased's relatives, where the appellant was distinctly absent. He later received information that the appellant had arrived at his sister's home in Kadum very early the following morning.

This evidence would infer that the appellant was lurking near the deceased's home, and when he found the deceased walking home alone, he attacked and killed him. Immediately thereafter he ran away to hide in Nyatike.

The evidence is further buttressed by the testimony of Inspector Siamo and the Assistant Chief, which showed that after the appellant was arrested he was taken to his home, and he showed them where he had hidden a blood stained panga underneath a cupboard. The appellant admitted that he had used it to kill the deceased.

The appellant's counsel has argued that both the appellant's confession and the evidence of the hidden panga were inadmissible, as it was taken in a manner that was contrary to the strictures of ***section 25 A (1)*** of the ***Evidence Act.*** The provision specifies that;

"i) A confession or any admission of a fact tending to prove guilt of an accused person is generally inadmissible.

ii) Only confessions and admissions made in court before a judge or magistrate or made before a police officer (not the investigating office) of the rank higher than Chief Inspector and a third party of the accused person's choice is admissible."

In the recent case of ***Republic vs Ahmad Abolfathi Mohammed & Another [2019] eKLR*** the Supreme Court distinguished between confessions and admissions contemplated by ***section 25A*** thus;

"We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects' commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that "information from an accused person leading to 14 discovery of evidence is not admissible outside a confession….", the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession."

In this case the facts point to an admission in the sense that the appellant led the police to where blood stained panga was recovered hidden under a cupboard in his house.

We do not agree that the recovery of the panga from under the cupboard in the appellant's house was inadmissible evidence. This is because by virtue of ***Republic vs Ahmad Abolfathi Mohammed (supra),*** his having shown Inspector Siamo where the panga was hidden amounted to an admission, which was admissible and not a confession. Although he did not recall the events of 21st March, 2010, and denied telling the police where to find the murder weapon, or informing them of where it was hidden, the evidence of the Assistant Chief and Inspector Siamo uncontrovertibly shows that the appellant disclosed where the murder weapon was hidden which weapon, was subsequently recovered from his home.

In view of the above, we are satisfied that, the recovery of the bloodstained panga which was used to murder the deceased, was admissible evidence, and once corroborated with other evidence, the court below was entitled to rely on it to arrive at a conviction.

Concerning the appellant's denial that he did not live in the home where the panga was recovered, the learned judge had this to say;

"The accused assertion that he was not in Nyatike was contradicted by PW6 who testified that the accused was married with a wife and children and that he lived in his own house in his parent's compound…"

The trial court found as a fact that the appellant had been weeding week, and concluded that appellant was residing and working in Nyambicha village at the time of the murder.

In the case of ***Ogeto vs R [2004] 2KLR*** pg 14 this Court cautioned that;

"…a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or a misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision: Chemagong vs Republic [1984] KLR 611; Kiarie vs Republic [1984] KLR 739"

Based on the evidence, we have no reason to interfere with the finding of fact by the trial court that the appellant was at the locus in

quo at the time of the murder. This evidence is further fortified by Deborah who saw the appellant in the vicinity of the deceased's home lurking by their fence on the material evening.

Consequently, when the evidence placing him at the locus in quo, is placed together with the recovery from his home of the panga used to kill the deceased, and positioned alongside the injuries the deceased sustained that were caused by a sharp object, and taking into account his hurried flight to Nyatike soon after the death of the deceased, a clear and unbroken chain of events in the circumstantial evidence emerges, the totality of which all point to the appellant as being responsible for the deceased's death. As rightly observed by the learned judge*, "…the accused had the opportunity and the means to commit the murder"*. And was, *"…the only one who could have done so with the murder weapon he furnished the police with"*.

On the question of whether the appellant had the intent to kill with malice aforethought, ***section 206*** of the ***Penal Code*** defines the circumstances that constitute malice aforethought as;

"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) …;

(d) …."

In the case of ***R vs Tubere S/O Ochen*** ***(1945) 12 EACA 63*** the Court set out the perquisites for establishing malice aforethought thus;

"To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident".

And in the case of ***Nzuki vs Republic*** ***[1993] KLR 171*** this Court specified the basis upon which malice aforethought is established when it stated thus;

"a) Intention to cause death;

b) Intention to cause grievous bodily harm;

c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."

No doubt malice aforethought was established in the present case when the appellant viciously struck the deceased's on his neck and head with a panga thereby severing his spinal cord at the neck. By so doing, he must have known that he would grievously injure the deceased or worse still, kill him. As such, we are indeed satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the appellant, conclusively established malice afore thought.

Concerning the claim that there were discrepancies and contradictions in the prosecution's case, we have interrogated each allegation and find that they largely center on inaccuracies in the time when various witnesses claim to have come upon the body of

the deceased lying beside the foot path.

In addressing this contestation, we reiterate the holding in ***Erick Onyango Ondeng' vs R*, Criminal Appeal No. 5 of 2013**, in which the Uganda Court of Appeal decision in ***Twehangane Alfred vs Uganda*, Crim. App. No 139 of 2001, [2001, [2003] UGCA, 6** was cited with approval, that;

"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."

In our view the discrepancies in the timing are immaterial and in any event are curable under ***section 328*** of the ***Evidence Act***. We also do not agree that the High Court failed to take the appellant's defence into consideration. We say this because, the appellant's defence mainly centered on his testimony that he was not in Nyambicha when the deceased was murdered. In analyzing the issue, the learned judge found this to be a lie as the evidence of the Assistant Chief, Deborah and ***Timon Awidhi Mbogo PW6*** demonstrated that the appellant lived and worked in Nyambicha, and was in the locality on the evening that the deceased was murdered. On this basis the two grounds therefore fail. As did the High Court, we have come to the conclusion that the prosecution proved its case against the appellant beyond reasonable doubt and to the required standard and that the learned judge was right in finding that the appellant murdered the deceased. As such, the appeal against the conviction is unmerited.

Lastly, we turn to consider the sentence. Since the delivery of the judgment of the High Court, the Supreme Court case of ***Francis Karioko Muruatetu & Another vs Republic*, (supra)** has found that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** to be unconstitutional. It is for this reason that the appellant has sought for a review of the death sentence imposed on him. In the circumstances, we set aside the death sentence imposed by the High Court and substitute therefore a custodial sentence of imprisonment for a term to be determined by the High Court. As the appellant was not provided an opportunity to mitigate, we refer the case back to the High Court for resentencing.

For the avoidance of doubt, save for the appeal against the sentence which has succeeded, the appeal against conviction is without merit and is accordingly dismissed. It is so ordered.

Dated and delivered at Kisumu this 31st day of January, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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