IN THE COURT OF APPEAL

AT ELDORET

[CORAM: OKWENGU, ASIKE-MAKHANDIA & SICHALE, JJ.A]

CRIMINAL APPEAL NO. 379 OF 2019

BETWEEN

GODFREY WAFULA SIMIYU…….....…..... APPELLANT

AND

REPUBLIC…….....…..…..….. RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bungoma, (Aroni, J) dated 21st December 2017 in **HCRA NO. 26 OF 2011**

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JUDGMENT OF THE COURT.

Godfrey Wafula Simiyu *(the appellant herein)* was charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The particulars of the offence were that on **7th April, 2007** at about **12: 00 pm** at **Kimalewa village** in **Kuywa Location** in **Bungoma Central District** within **Bungoma County** he murdered **Eric Mutambo Situma**.

The appellant was tried and convicted of the offence and sentenced to thirty (30) years imprisonment. Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now filed this appeal before us vide what he called *"mitigation grounds of appeal"* filed in court on **24th January, 2019**.

Subsequently thereafter, the appellant through his counsel filed supplementary grounds of appeal on **27th August, 2020**, listing 14 grounds of appeal which we have considered.

The appeal was urged by way of written submissions with oral highlights by learned counsel **Mr. Oyaro** for the appellant and **Mr. Mureiithi** for the State. When the parties appeared before us for plenary hearing on **4th May, 2021**, **Mr. Oyaro** for the

appellant submitted that the appellant was not accorded a fair trial as his trial herein was subsequent to another trial arising out of the same facts in which the accused in the previous trial was acquitted, and that the record in criminal case number 16/2007 was not produced in the proceedings in the case against the appellant, despite several attempts by the appellant's advocates to have the same produced. He further submitted that the object or weapon that was used to commit the alleged offence was not recovered or produced in court and that the prosecution did not make any effort to have the object produced in court and that this therefore would make it difficult if not impossible for the court to test the degree or the extent of the damage that the object would likely cause. It was submitted that it was clear from the accounts of the witnesses that the deceased was involved in a fight with two brothers and the only witness who was wife to the deceased came in the midst of the fight, and that this presented a doubt on when exactly during the fight the deceased was hit on the head, how many times he was hit on the head and what object(s) were used. Finally, on sentence counsel urged the court if for any reason it upholds the conviction to review the sentence putting into consideration the fact that the appellant has served 3 years in prison

In a brief rejoinder Mr. **Mureiithi** for the State submitted that from the record it was clear that the appellant's brother was the accused in criminal case No. 16 of 2007 and not the appellant; that therefore it could not be said that the cases were the same; that the only reason why the appellant was not charged in criminal case No. 16 of 2007 was because he ran away after realizing the victim had died; and that he only returned 4 years later when he was arrested and charged for murder. With regard to the murder weapon used, counsel submitted that the evidence of PW1was clear that she saw the appellant hit the deceased with a bench twice at the back of his head, and that the P3 Form confirmed that the deceased died as a result of a severe head injury due to blunt trauma consistent with the injury inflicted by the appellant. With regard to the fact that only PW1 (wife to the deceased) witnessed the incident and that this raised doubts as to what exactly happened, it was submitted that the evidence of PW1 revealed that the incident happened in broad daylight; that PW1 knew the appellant as he was the deceased's friend; that she was in close proximity when the incident happened; and as such the appellant was properly identified. On sentence, it was submitted that the penalty for murder was life imprisonment and that the sentence of 30 years meted out against the appellant was lenient in the circumstances. Consequently, we were urged not to disturb the same.

We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as a 1st appellate court. This duty was well articulated by this Court in ***Erick Otieno Arum v Republic [2006] eKLR*** as follows:

"It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same"

The evidence before the superior court was as follows: **PW1 Swinny Nafula** who was the only eye witness to this incident and wife to the deceased testified that on the material day she was at the shop at Kimalewa when she heard commotion and went to the front of the shop and found people fighting with her husband and that one of the people was **Godfrey Simiyu** and **Francis Simiyu**. It was her evidence that the deceased was fighting with Evans and that when Godfrey (the appellant), saw that the deceased had overpowered Evans, he took a bench made of wood and hit the deceased at the back of his head twice whereupon he fell down and became unconscious. She further testified that she knew the appellant for a long time as he was a neighbor.

PW2 Isaac Khisa Wasike testified that on **7th April 2007**, he was at a neighbor's house when he heard screams. He rushed to the scene and found a young man having been beaten whom he knew as **Eric Mutembwe Sikuku** outside his shop and that he was in a critical condition. He then made enquiries and learnt that **Godfrey** (appellant) had beaten him. In cross examination he stated that the deceased's wife (PW1), told him that the deceased had been beaten by the appellant though he did not witness the incident.

PW3 was **Heman Dituma Matingi**. He testified that on the material day at about 5pm he was on his way from the *shamba*

when he saw people in the neighborhood and when he enquired, he was told that the deceased had been beaten to death by **Godfrey** (the appellant) and one **Evans**.

PW4 was **Joseph Wanjala**. He testified that on the material day he was at his carpenter shop when his son **Wanjala**, came and told him that that **Eric** had been beaten and taken to hospital and that later he learnt that he had died on his way to hospital. It was his further evidence that the appellant disappeared to Uganda but **Evans** was arrested and that the appellant was later on arrested on

10th April 2007.

PW5 was **Timothy Wafula Wanjala** a *matatu* driver and one of the people who took the deceased's body to the mortuary for post mortem.

PW6 was **Michael Wafula Kimungui**, the senior chief of Malungi sub-location where the incident occurred. It was his evidence that he knew both the deceased and the appellant and that on **7th April 2011,** he heard screams from the road and rushed there and found the deceased lying down unconscious and upon enquiry, he was informed that the deceased, the appellant and another person had been fighting and that the deceased was unconscious. It was his further evidence that since the deceased was unconscious, he asked his driver to rush him to hospital and on arrival at the hospital his assistant called him and told him that the deceased was pronounced dead on arrival whereupon he looked for one of the assailants namely; **Evans** and arrested him.

PW7 was **Inspector Sheila Malukha** the Deputy OCS Kimilili police station who produced the investigation file on behalf of CI **Maroche** who had investigated the matter and who had since been transferred to Nakuru.

PW8 was **Dr. Edmond Welembwa** who produced the post mortem report in respect of the deceased. According to the post mortem report, the cause of death was severe head injury due to blunt trauma.

On the other hand, the appellant in his defence opted to give a sworn statement and denied having committed the offence and testified that he knew the deceased as a neighbour and that on the material day he heard noise about 200 meters away from his home and rushed to the scene when he saw his younger brother one **Evans Simiyu** being surrounded by people and the deceased who was lying down and bleeding on the head. That upon enquiry, he was informed that the two were fighting and that his brother was later charged with murder but was acquitted. It was his further evidence that he was being implicated because **Evans** was his brother and PW1's lover and that he did not know the cause of the crime and that he did not run away as alleged.

With regard to the first issue raised by the appellant faulting the trial court for failing to appreciate the fact that the court had already pronounced itself on this matter in criminal case number 16 of 2007 and that the learned judge erred in allowing the case to proceed and rendering judgment in disregard of that fact, first, we note that the accused person in that case was one **Evans Wanyonyi Simiyu** who is a brother to the appellant. The case therefore related to a different person as the appellant's brother and the appellant cannot be said to be one and the same person. Secondly, **Mr. Mureiithi** for the State stated that the only reason why the appellant was not charged in criminal case No. 16 of 2007 was because he ran away after realizing that the victim had died only to return 4 years later when he was arrested and charged for murder.

We have perused the record and note that on **26th March 2013**, the trial court was indeed informed that the only reason why the appellant was not charged in that case was because he was at large, a fact that the defence did not controvert. Similarly, the record clearly shows that attempts indeed were made to produce and/or avail the proceedings in criminal case No.16 of 2007, but the attempts were unsuccessful. Moreover, as noted above nothing turns on fact of the non-production of this file. Further, the trial court noted and observed in its judgment that the appellant only resurfaced after the accused (his brother) in criminal case no. 16 of 2007 was acquitted. Be that as it may, save for the appellant generally stating that he was not accorded a fair trial for failure to produce the said proceedings, it has not been demonstrated how his rights to a fair trial were violated and neither has it been shown that he was prejudiced in anyway by failure to produce the proceedings in criminal case No. 16 of 2007. Consequently, we hold and find

that failure to produce the proceedings in criminal case No. 16 of 2007 was not fatal to the prosecution's case as no prejudice was suffered by the appellant. Consequently, this ground of appeal must fail.

The other issue that was raised by the appellant was failure by the prosecution to produce the weapon that was allegedly used by the appellant to commit the offence. PW1 who was the only eye witness to this incident testified thus:"***my husband was at the shop while I was preparing lunch behind. I heard some commotion and went to the front I found people fighting with my husband…."my husband Eric was fighting with Evans when Godfrey saw my husband had overpowered Evans he took a bench made of wood and hit my husband at the back of his head twice. My husband fell and became unconscious." (Emphasis supplied.)***

The evidence of this particular witness remained firm and unshaken in cross examination. The post mortem report indeed confirmed that the cause of death was severe injury due to blunt trauma. There is no requirement in law for a murder weapon to be produced in criminal cases. As a matter of fact, many a times the weapon is never recovered. Whereas it might have been important to produce the murder weapon, it is our considered opinion that failure to produce the same was not fatal to the prosecution case. Faced with a similar situation in the case of ***Karani v. Republic (2010) 1 KLR 73*** this Court stated thus:

"***The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."***

Again, in ***Ramadhan Kombe v. Republic, Mombasa C.A. NO. 168 of 2002,*** this Court held as follows: -

"In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the postmortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission."

Consequently, nothing turns on this point.

The trial court was also faulted for failing to find that the prosecution evidence was insufficient to sustain the conviction and that from the accounts of the witnesses, the deceased was involved in a fight with two brothers and that the only eye witness (PW1) who was wife to the deceased, only came in the midst of the fight and that this presented doubt on when exactly during the fight the deceased was hit on the head, how many times he was hit on the head and what object(s) were used. The learned judge while analyzing the evidence of this particular witness in her judgment stated *inter alia* thus:

"this is a case of recognition as PW1 and the accused knew each other well. The court has taken heed that a court may rely on the evidence of one witness on identification having warned itself of any likely danger….." (Emphasis ours)

Again at para 9 the learned judge stated:

"the eye witness PW1 stated that the fight was during lunch hour and she was known to her husband's assailants a fact confirmed by the accused. The accused confirms the deceased was lying unconscious though denies having hit him. I rule out

the question of wrong identification as the witness and the accused knew each other well and this incident occurred in broad day light. Secondly all witness who arrived at the scene confirm to have not just been given the name of Evans but that of the accused as the person who hit the deceased with a bench." Emphasis ours)

At paragraph 11 the judge again stated:

"***the evidence of PW1 was very categorical in naming the assailants, the conditions were favourable towards positive identification coupled with the conduct of the accused who disappeared for 4 years and only returned once his brother's case was concluded put an accusing finger upon the accused."***

We need not say more. Nobody could have said it better that the learned trial judge who had the chance and opportunity of seeing the witnesses testify and who as a matter of fact, warned herself on the dangers of relying on the evidence of a single witness. The appellant in his defence stated that indeed he knew the deceased who was his neighbor and a businessman near his home. This therefore corroborates the evidence of PW1 that the deceased and the appellant were neighbors. This was therefore a case of positive recognition of a person known to the witness as opposed to identification of a stranger. In the case of ***Anjononi & Others vs. Republic [1976-80] 1 KLR 1566*** it was stated:

"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

The contention by the appellant that the evidence of PW1 presented doubt on when exactly the deceased was hit on the head during the fight, how many times he was hit on the head and what object(s) were used, is certainly without basis as PW1 clearly testified that it was the appellant who hit the deceased twice at the back of the head and her evidence towards this respect remained firm, consistent and unshaken even in cross examination. Consequently, nothing turns on this point.

Lastly on sentence, the appellant urged the court to review the sentence putting into consideration the fact that he had served 3 years in prison. On the other hand, **Mr. Mureiithi** for the State urged us not to disturb the sentence as it was very lenient. The appellant herein was sentenced on **21st December, 2017** to thirty (30) years' imprisonment for the offence of murder. Although **Section 204 of the Penal Code CAP 63 of the Laws of Kenya** provides for a mandatory death sentence for any person charged and convicted with the offence of murder, in **Francis *Karioko Muruatetu & Another vs Republic SC Pet. No. 15 &16 of 2015***, the Supreme Court had on **14th December, 2017** just a week prior to the appellant's sentencing held that the mandatory nature of the death sentence prescribed for the offence of murder by ***Section 204*** of the ***Penal Code*** was unconstitutional as it deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The sentence of thirty (30) years imprisonment imposed on the appellant was therefore in accordance with the decision in ***Francis Kariako Muruatetu v Republic*** *(supra).*

From the circumstances of this case, the deceased died as a result of two fatal blows at the back of his head occasioned by the appellant. A life was lost and the learned Judge properly exercised her discretion in sentencing. We see no reason to disturb the sentence of thirty (30) years meted out on the appellant. The same is hereby affirmed and upheld.

The upshot of the foregoing is that the appellant's appeal on both conviction and sentence is without merit. The same is hereby dismissed in its entirety.

It is so ordered.

Dated and delivered at Nairobi this 9th day of July, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

Signed

DEPUTY REGISTRAR