Case Number:	Criminal Appeal 128 of 2014
Date Delivered:	17 Dec 2015
Case Class:	Criminal
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Fatuma sichale, Patrick Omwenga Kiage
Citation:	Domiano Muruu Mwithia v Republic [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	H.C.CR.C. No. 53 of 2006
Case Outcome:	Appeal partly allowed
History County:	Meru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE, JJA)

CRIMINAL APPEAL NO. 128 OF 2014

BETWEEN

DOMIANO MURUU MWITHIA.....APPELLANT

AND

REPUBLIC …….....…….RESPONDENT

(*Appeal Judgment of the High Court of Kenya at Meru (Kasango, J) Dated 20th December, 2010*

in

H.C.CR.C. NO. 53 OF 2006)

****

JUDGMENT OF THE COURT

The appellant ***Domiano Muruu Mwithia*** was arraigned in the High Court of Kenya at Meru with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge are that on the 13th day of May, 2006 at Muthara Location in Meru North District within Eastern Province he murdered ***Benson Muthee***. The appellant denied the charge prompting the trial in which the prosecution called five (5) witnesses in support of its case. The appellant who gave an unsworn statement was the sole witness for the defence.

The brief facts of the case are that on the material day of PW1 ***Abraham Mamera*** in the company of the appellant and other youths were seated at the scene just passing time. It was alleged there was moon light, not very dark as one could see another twenty (20) meters away. While there the deceased came carrying firewood. He (deceased) requested people to make way so that he could pass. As the deceased was passing the appellant alleged that the deceased had hit him with the fire wood. The appellant then hit the deceased on the chest with a stick once and he fell down with the fire wood.

Seeing this, PW1 ran to call PW2 ***Domiano Karithi*** who was selling in his shop nearby. PW2 came to the scene and together with others tried to give first aid to the deceased but were unable to revive him. It was also alleged that they were unable to get through to his people and they left him at the scene at around 10.00pm. The next day PW1 found the deceased dead but a few meters from where he had fallen.

Members of the public arrested the appellant on the next day of and took him to Tigania police station where he was received by ***P.C. Ali Katel*** PW5 who booked him and placed him in the cells. (**PW5**) then

visited the scene where he drew a sketch plan, and removed the body to Meru District Hospital mortuary for post a mortem later done by a ***Dr. Njiru*** on the 17th May, 2006 witnessed by PW5 and two relatives. The post mortem report was tendered in evidence by ***Doctor Isaac Macharia*** on behalf of ***Dr. Njiru.*** The observations in the post mortem report were that externally there was a bruise extending to both the left and right side of the chest. There was also bleeding through the nose. Internally the blood vessels in the wall of the heart were damaged. In the Doctor's opinion the cause of death was severe injury to the heart due to chest trauma.

The appellant when put to his defence stated that on 13th May, 2006 he spent the day working in his shamba till 4.00pm when he left for his home where he stayed till the next day of 14th May, 2006 when he was arrested and taken to the police station and charged with an offence he knew nothing about.

At the close of the trial, the learned trial Judge ***Mary Kasango, J*** delivered herself thus:-

"The prosecution adduced very clear evidence whereby it was stated that the accused sat with PW2 (sic) ***for a bout an hour before the incident at 7.pm. PW1 was also there. The deceased came by carrying fire wood. A piece of wood touched the accused. There is evidence that a quarrel ensued then the accused using a stick hit the deceased on the chest causing him to fall and to begin experiencing difficulty in breathing. Those symptoms are consistent with the finding of the post mortem report. Those that were there tried to assist the deceased to rise up but they were unable. Although many people gathered it was said the deceased did not speak after being hit. The Doctors evidence is very clear that the deceased had blood oozing through his nose. The death was caused by trauma to the chest. Although the deceased was left throughout the night in the open after being attacked by the accused there was no evidence from the post mortem report to show that the deceased had any other injuries other than the one which PW1 and PW2 witnessed the accused inflicting on the deceased. The defence raised by the accused is rejected by Court. This is in the light of the prosecution clear evidence that the accused was at the scene on 13th May, 2006. In my view the prosecution has proven its case beyond reasonable doubt."***

It is on the basis of the above findings that the learned Judge found the appellant guilty of the offence charged and sentenced him to death.

The appellant was aggrieved by that decision. He is now before us having raised three (3) grounds of appeal in his supplementary grounds of appeal. These read:-

(1) The learned trial Judge erred in law and fact in failing to appreciate that the prosecution had not proved the offence of murder and the ingredients of malice after thought (sic) as set out in section 206 of the Penal Code.

(2) The learned Judge erred in law and fact in failing to hold that the evidence on recognition relied upon was not free from error.

(3) The trial learned judges (sic) erred in fact and law by failing to warn itself of the danger of relying on the evidence of a single witness to sustain a conviction.

In his submissions before us ***Mr. Ken Muriuki*** learned counsel for the appellant urged us to find that this was a clear case for manslaughter because the prosecution's evidence did not disclose the ingredients for malice aforethought as set out in **section 206** of the Penal Code as the appellant had no intention to harm the deceased. Instead it is the deceased who touched the appellant with a piece of wood which is evidence of provocation and that the two had a quarrel. Further, there was no evidence on how the

appellant came to be in possession of the stick he allegedly used to hit the deceased. Nor was its size given. Finally, there is no dispute that the deceased was hit only once.

To buttress his arguments the appellant relied on the case of ***Peter Kiambi Muriuki versus Republic [2013] eKLR*** where Court observed that:

"***before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions the test of which is subjective to the actual accused that is (i) the intention to cause death; (ii) the intention to cause grievous bodily harm and (iii) where the accused knew that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commit those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumb."***

He also cited case of ***Patrick Kallikia M' Kaibi versus Republic Nyeri Criminal Appeal No. 45 of 2012*** for the proposition that where a weapon is alleged to have been used in the commission of the murder it is necessary to establish the source of the weapon as it is imperative in determining whether the appellant had the requisite *mensrea* for the offence of murder.

There were two other cases relied on that is ***Francis Muchiri Joseph versus Republic [2014] eKRL and Charles Kirimi Minoru Nyeri Criminal Appeal No.338 of 2012*** both of which touched on the issue of identification which the appellant abandoned in favour of the submission that the offence disclosed was one of manslaughter as opposed to murder. There is therefore no need for us to reflect the principles in them on the record.

In response to the appellant's submission, ***Mr. Mungai M. Kahiga*** learned Prosecution Counsel for the State urged us to dismiss the appeal on the grounds that the offence charged was proved beyond reasonable doubt. Although there was confrontation between the appellant and the deceased, when the piece of wood that the deceased was carrying touched the appellant, the appellant reacted and used excessive force fatally injuring the deceased. The appellant must have known the consequences of his action of hitting the deceased with force when the deceased who was carrying fire wood simply requested the appellant to let him pass, which request paused no immediate danger to the appellant. Lastly, when the appellant was given an opportunity to defend himself he never raised the issue of any form of provocation of him by the deceased.

This is a first appeal. The role of a first appellate court was set out by the predecessor of this Court in the case of ***Okeno versus Republic [1972] EA 32*** thus:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Penalty versus Republic [1957] EA 336) and for the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drew its own conclusion (Shantilal M. Ruwela versus Republic [1957] EA 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 courts findings and conclusion; it must made its own findings and draw its own concussion only when can it decide whether the magistrates 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 versus Sunday Post [1958] EA.424"

We have given due consideration to the record in light of the rival arguments set out above. Only one issue is for our consideration as the appellant only urges his appeal as against the nature of the offence disclosed by the prosecution's evidence which he contends to be manslaughter and not murder.

It is trite that to prove an offence of murder the elements of malice afore thought set out in **section 206** of the Penal Code must be present. This section 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 persona actually killed or not.

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some persons whether that person is the persona actually killed or not, although such knowledge is accompanied by indifference whether of death or grievous bodily harm is cause 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 persons who had committed or attempted to commit a felony.

These elements have been approved in a long line of decisions of this Court. See ***Peter Kiambi Muriuki versus Republic*** (supra) and ***Nzuki versus Republic [1993] KLR 171.***

Applying those elements to the rival arguments herein, it is our finding that there is nothing in the testimony of PW1 who was the only eye witness to the incident to suggest that the appellant way laid the deceased; that he deliberately refused to move away when the deceased requested him to give way for him (the deceased) to pass; that he settled on the stick he used to hit the deceased only once knowing that if he used it even only once it would cause fatal injuries to the deceased or that he deliberately provoked a quarrel with the deceased.

In the circumstances, it is unsafe for us to uphold the conviction for murder. We accept the appellant's arguments that the offence disclosed was one of manslaughter. As found by the learned trial judge the cause of death was consistent with the injury PW1 witnessed appellant inflict on the deceased.

In the result we partially allow the appeal. We set aside the conviction and sentence for the offence of murder. We substitute it with a conviction for the offence of manslaughter contrary to **section 202** of the Penal Code, as read with **section 205** of the Penal Code.

As for sentence we consider that an innocent life was lost. The offence was committed on 13th May, 2006. It is on record that the appellant was arrested the next day of 14th May, 2006. The appellant has been in custody for about nine (9) years and six (6) months to date. Taking the totality of the above, the appellant is sentenced to serve fifteen (15) years of imprisonment. The period to run from the date he was first sentenced.

Dated and Delivered at Meru this 17th day of December, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR