REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 298 of 2010

ANTHONY KIOGORA KITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(*Appeal from a Judgment of the High Court of Kenya at Meru*

(Emukule, J.) dated 20th August, 2010)

in

H. C. CR. A. No. 54 of 2002)

****

JUDGMENT OF THE COURT

Anthony Kiogora Kithinji, ***the appellant*** herein, was charged with the offence of murder contrary to ***section 203*** as read together with ***section 204*** of the Penal Code, (Cap 63 Laws of Kenya). The facts of the offence are that on 2nd December, 2001 at about 10:00 p.m at Yururu Village, Kanyakine sub location in Meru Central District within Eastern Province, he murdered Japheth Muthuri Mutea.

The prosecution called a total of five witnesses and after hearing their evidence as well as the sworn evidence of the appellant and one defence witness, the learned Judge (Emukule, J.) in his judgment dated and delivered on 20th August, 2010 found the appellant guilty of murder and sentenced him to death, hence this first appeal.The evidence adduced by the prosecution is that on 2nd December, 2001 at about 11:00 pm, PW 1 Purity Ngugi Mutea (Purity) while asleep at her home heard screams and when she woke up she heard the wife of the deceased saying in Meru "*Muthuri has been killed by Kiogora.*" She proceeded to the deceased person's house where she found the door open. On arrival, and with the aid of a lamp, she saw the accused cutting the deceased with a knife. She ran to her uncle's house PW 2, Wilson Kaburu (Kaburu) and informed him of what was happening. Kaburu testified that he responded to the screams at about 11:30 pm and also responded to the calls by Purity Ngugi who told him that Japheth was being cut by Kiogora. When he arrived at the scene, Kiogora ran away and the deceased was lying

down. He testified that he identified Kiogora from the moonlight and that he knew him from a long time. Kaburu noticed that the deceased person had cuts on the body and recovered a *panga* and a shoe which he later handed to the police at Nkubu police station. PW 4 Police Constable Fredrick Isinga (P. C. Fredrick) testified that he was on duty at Nkubu police station on 5th December, 2001 when the accused person was brought by members of the public at about 5:00 p.m alleged to have murdered Japheth Muthuri. P. C. Fredrick booked the accused on the occurrence book and placed him in custody. PW 5 PC Ondieki also testified that he investigated the case as well as re-arrested the accused. In re-examination he confirmed that his role in investigation involved visiting the scene of crime which he did on 2nd December, 2001.

The deceased was taken to Chogorio hospital but he died on 5th December, 2011, three days after the attack. A post-mortem was conducted on the body of the deceased by PW 3, Dr. Stephen Ndungu Ngara (Dr. Stephen) who testified that there was an infection of the brain meaning secondary to the fracture of the skull which opened to the outside probably caused by sharp heavy weapon. Dr. Stephen produced the post-mortem form as an exhibit.When put on his defence, Anthony Kiogora Kithinji the appellant herein made a sworn statement to the effect that on the material day he was at his house and was visited by DW 2 Charles Mbaga (Charles). They later went to the deceased's house at about 1:00pm where they joined many people drinking the local brew. It was the appellant's testimony that at about 4:00 pm a fight erupted between some customers and he did not understand the cause of the fight. Two people unknown to the appellant picked up a quarrel with the deceased over change and at about 4:30 pm he excused himself and was escorted by the deceased and Charles. After they walked for about ½ km they met a group of 5 - 6 people who insisted on taking the deceased back to his home where they were to have a drink as the deceased was a local brew seller.

The accused testified that between 2nd December, 2001 and 5th December, 2001, when he was arrested on suspicion of the murder of the deceased he had been about his job and knew nothing about the death of his friend.

In his grounds of appeal, the appellant relied on the following:

"1. That, the trial judge erred in law and facts in failing to observe that the identification and/or recognition was not free from possibility of error.

2. That, the trial judge erred in law and facts or misdirected himself in failing to caution the prosecution in absence of vital witnesses mentioned in the trial case.

3. That the High court judge failed to find that the prosecution tendered contradictory and conflicting testimonies.

4. That the trial judge failed to note that the exhibited items were not proved to be of the accused beyond any reasonable doubts.

5. That the learned trial judge erred in law in failing to find that the assessors did not participate in the trial throughout.

6. That the learned trial judge erred in law in failing to observe that the motive of killing this malice aforethought was not revealed during trial.

7. That the trial judge failed to specify offence of which and section of the penal code or other law under which the accused person is convicted thus flouting section 169 (2) of the CPC.

8. That the presiding judge failed to date and sign the judgement thus flouting section 169 (1) of the CPC.

9. That, the trial judge dismissed and disregarded the proffered sworn deference without giving any

cogent reasons for the same." Mr. Ng'ang'a, learned counsel for the appellant, submitted that there was no evidence of murder against the appellant adding that the deceased's wife did not testify and say what happened and whether there was intention to kill. He also added that the trial judge failed to note that the exhibited items had no nexus to the appellant and that there was no proof the appellant was holding a panga. He submitted that there was contradictory evidence with PW 1 saying she saw a "*panga*" and not a knife. He also added that the deceased wife being absent to testify was prejudicial to the appellant. On the issue of identification, counsel submitted that the incident having occurred at 11:00 p.m. and there being only a lantern, it is hard to determine how the lighting was. PW1 was terrified and did not say how long she saw the appellant. There was also no evidence of how sufficient the moonlight was. The counsel finally submitted that dying declaration was not applicable since it was not immediate.

On the other hand, Mr. Kaigai, learned Assistant Director of Public Prosecution, for the State submitted that there was overwhelming evidence and witnesses saw the deceased being cut. There was moonlight and the case was that of recognition. The learned trial judge also considered the issue of light. Post-mortem report showed that the attack was vicious and therefore there was malice aforethought. There was also a dying declaration by the deceased. He added the alibi defence did not hold water. PW 2 testified that the shoe belonged to the appellant. Mr. Kaigai submitted that the appellant was represented by an advocate and should have called the deceased's wife as a witness, if he so wished.
As this is a first appeal, it is our duty to re-evaluate and analyze the evidence and make our own independent conclusion on that evidence – see ***Okeno vs R [1972] E.A.32.***The High Court was alive to the fact that the prosecution case stood or fell on the evidence relating to identification of the appellant. In this case, the appellant was not a stranger, but a person previously known to PW 1 and PW 2 and therefore it was identification by recognition. In the case of ***Wamunga vs Republic [1989] KLR 424*** the court stated that;***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***
In considering the issue of identification the learned High Court judge heavily relied on the evidence of Purity (PW 1) and Kaburu (PW 2). In this regard the High Court observed that there were two scenes in the case. The first scene where PW 1 was awaken by screams and came out of the hut to see the accused cutting the deceased and thereafter ran to call her uncle PW 2 who immediately came out of his house and walked towards the scene of crime. The judge described the second scene as the one where PW 2 approached the accused frontally and upon looking up, the accused saw PW 2 and PW 2 said there was moonlight and he could see upto 150 metres. The accused was 10 metres away from him so he could clearly see and recognize him. In this regard the judge held:

"I am satisfied that in the circumstances, the two witnesses (PW 1 and PW 2) were able to see the accused and thus positively identify the accused." Noting that the incident occurred at night, it is important to re-evaluate to what extent the witnesses were able to identify the appellant. As was held in the case of ***Maitanyi -vs- Republic (1986) KLR 198 page 201*** the court stated that:
"…it is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into...."
Both Purity (PW 1) and Kaburu (PW 2) in tendering their evidence described how they identified the appellant. Purity in her testimony said she proceeded to the deceased person's house where she found the door open. On arrival and with the aid of a lamp she saw the accused cutting the deceased with a knife while Kaburu said he identified Kiogora from the moonlight and that he knew him from a long time.

We are of the view, based on our own assessment, that the issue of identification was resolved by the High Court on sound basis and we have no reason to depart from those findings. Although the incident occurred at night there was sufficient light from the moon and the lamp enabling the two prosecution witnesses Purity and Kaburu to clearly identify the appellant.
As regards the ground of appeal argued on behalf of the appellant that the deceased's wife did not testify to say what happened and whether there was intention to kill and that the trial judge failed to note that the exhibit items had no nexus to the appellant we find no merit in the argument. The court in the case of

Benjamin Mbugua vs Republic ***[2011] e-KLR*** stated that:***"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires - see section 143 of the evidence Act.''*** In this regard we hold that lack of the deceased's wife's testimony was not prejudicial to the case.

The High Court also examined the issue that the prosecution tendered contradictory and conflicting testimonies with reference to whether the weapon was a knife or a *panga*. In this regard, the court held that there was no contradiction in the evidence and that the injuries which the doctor found were inflicted by both sharp and heavy object a description consistent with a "*panga*" which was produced in court as P Exh 3 by PW 2 and PW 4. We find no reason to disagree with this finding.

Finally, whether the appellant's defence of alibi was considered, the record speaks for itself – it was considered and rejected.

The sum total of the above is that having anxiously revisited the evidence that was adduced in this case afresh, analyzed it and re-evaluated it as we must do, being the first and also possibly the last appellate court, but having also considered that the trial court had the advantage of seeing and hearing the witnesses and having given allowance for that, our independent conclusion is that all the evidence, including the dying declaration, points to the appellant as the perpetrator of the attack that resulted in the death of the deceased and we have no doubt in our mind that the trial court's decision cannot, and should not be interfered with. Accordingly, we dismiss this appeal.

Dated and delivered at Nyeri this 6th day of February, 2013.

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

R. N. NAMBUYE
.....
JUDGE OF APPEAL

M. K. KOOME
….....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR