



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 174 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 2111 of 2007 the Principal Magistrate's Court at Kwale: Ogembo D.O. – P.M.)

MUTUKU MASEVE MUTUNGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

MUTUKU MASEVE MUTUNGA the Appellant herein has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the trial court on 13th November 2007 and charged with two counts as follows:

COUNT NO. 1

“ADMINISTERING POISON WITH INTENT TO HARM CONTRARY TO SECTION 236 OF THE PENAL CODE”

COUNT NO. 2

“INJURING ANIMALS CONTRARY TO SECTION 338 OF THE PENAL CODE”

The Appellant entered a plea of ‘**not guilty**’ to both charges. His trial commenced before **HON. OGEMBO** Principal Magistrate on 19th August 2008. The prosecution led by **INSPECTOR GITONGA** called a total of six (6) witnesses in support of their case. **PW1 KANYOLU BENSON NDULO** told the court that the Appellant has been his farm-worker for the past five years. On 8th November 2007 **PW1** left for work leaving his 2 wives and children with Appellant in the home. When **PW1** returned home at 9.00 p.m. he found his wives and children all sick with stomach pains and vomiting. He also found 30 of his chickens dead. It was revealed that all the family except for the Appellant had eaten a meal of ugali and beans. **PW1** reported the matter to the Assistant Chief and took his family members for treatment at Lunga Lunga Dispensary. The food was taken to the Government analyst for examination. Upon completion of investigations the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer. He gave a statement on oath in which he vehemently denied both charges. On 28th September 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both charges and sentenced him to serve 10 years imprisonment on the first count and three years imprisonment on the second count. The sentences were ordered to be served concurrently. Being aggrieved with both his convictions

and sentences the Appellant filed this appeal.

MR. ONSERIO, learned State Counsel who appeared for the Respondent State opposed the appeal. I have perused the written submissions filed by the Appellant. As a court of first appeal I am mandated to re-evaluate the evidence adduced before the trial court and to draw my own conclusions on the same [see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32**].

PW1 told the court that on the material day he arrived home from work at 9.00 p.m. only to find his wives and children vomiting and complaining of stomach ache. This evidence is duly corroborated by **PW2 KAMANI NGUTA** who was employed as a herder by **PW1**. He tells the court that on the material day he and the family of **PW1** ate a meal of ugali and beans. After he ate he went to sleep but started getting stomach pains and vomiting. It is very telling that the only person who escaped this ill health was the accused and more suspiciously it was only the Appellant who failed to share the meal with the family. What was it he knew about the food which the others did not know? **PW4 CONSTANE HOSERA TUMAINI** is the Government analyst. He tells the court that he examined a sample of the food partaken by the dead chicken. He found it to contain traces of rat poison. It is clear that this food was contaminated by rat poison. Two key questions then arise. Firstly, was it the accused person who contaminated this food and secondly was this contaminated food the source of the ill health suffered by the complainant's family? With respect to the first question there is no witness who saw the Appellant place any poison in the said food. No containers of rat poison were found lying around. There is even no evidence to show that it was the Appellant who prepared the meal – indeed the court is not told exactly who prepared the meal. The evidence relied upon by the prosecution in this case is largely circumstantial. The fact that the Appellant did not partake of the meal as well as the evidence of **PW3 KYALO SAMSON** that the Appellant warned him not to eat the food are all taken as pointers to his guilt.

Be that as it may in my analysis I have come across certain anomalies which severely weaken the prosecution case. The complainant told the court that his two wives and children fell ill after eating this meal. None of these family members was called to testify to confirm that they did actually partake of this meal. Even in the case of **PW3** who told the court that he fell ill after eating that food and who stated that he went to hospital to seek treatment no medical notes were produced to confirm exactly what was ailing the witness. The police ought to have issued p3 forms to the victims of this so-called poisoning and facilitated their examination by a police surgeon. This was not done which amounts to a serious omission by the prosecution as very crucial evidence is left out. The court cannot just assume that the cause of the vomiting on stomachache by **PW3** was the meal he had taken. The law places a burden on the prosecution to prove their case beyond all reasonable doubt. As such the prosecution is required to prove each and every element of the offence. To merely allege that the meal of beans and ugali contained rat poison without adducing any evidence to prove that it was this rat poison that caused the ill health of the witnesses will not suffice.

The evidence of **PW4** the Government analyst is of no help in this regard. **PW4** testified that what he was asked to examine and analyze were samples “*containing avian gastro intestinal fluid*”. The word ‘*avian*’ is defined by the Advanced Oxford Dictionary as “*of or relating to birds*”. It is clear therefore that the sample taken to **PW4** for analysis was the sample from the intestines of the allegedly dead chickens referred to in Count No. 2 of the charge. I say “*allegedly dead*” because no proof has been tendered that any chickens did actually die as a result of this incident. We are not told where the sample taken to **PW4** was obtained from. No dead chickens were produced in court and/nor were any photographs of the dead chickens produced. This again amounts to a major omission on the part of the prosecution. It is also imperative to note that failure to submit samples the actual food eaten (i.e. the ugali and beans) for analysis by the Government chemist means that the court is left in the dark as to whether this food was actually contaminated by rat poison or not. Proof of contamination of samples taken from a chicken does not suffice to prove poisoning of humans. This is also a grave omission on the part of the prosecution. Taken as a whole I find that the prosecution case consisted merely of suppositions and conjectures. The case was very poorly investigated. Several crucial leads were not followed at all. As a result several doubts remain abounding. In my view the evidence adduced did not meet the threshold of proof for either charge. For that reason I find that the conviction of the Appellant was unsafe and I do

hereby quash his convictions on both counts. The subsequent 10 and 3 year terms of imprisonment are also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 20th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Appellant in person
Mr. Onserio for State