



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL 79 OF 2008

SOSPETER MAYENGA AMENYA alias
AMENYA OCHENGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 19th day of February, 2007 at Nyaramba sub location in Gucha District within Nyanza Province, he jointly with others not before court, robbed **Joackim Omache Ondego** of cash Kshs. 5,925/= and two mobile phones and at or immediately before or immediately after the time of such robbery murdered **Thomas Oketch**.

The prosecution evidence briefly stated was that on 19th February, 2007 at about 9.00 p.m., **Agnes Kwamboka, PW2**, was in the back room of her shop where she resided. A gang of robbers entered through the back door. They ordered her to sit down and demanded for money. She gave out Kshs. 5,000/=. She was also robbed of several other items.

On the same night **Joackim Omache Ondego, PW1**, was at his bar at suguta market. He was with three people, two workers and a customer. Suddenly the gang of robbers entered through the back door. One of them was armed with a gun. They ordered them to lie down. The customer was slow in obeying the order and he was shot on the shoulder and the chest. The gang robbed them of cell phones, shoes and cash Kshs. 3,600/=. The attackers kicked and put off a lantern lamp that was burning at the counter.

After the robbers left PW1 raised an alarm and members of the public rushed to the bar. They took the person who had been shot to Tabaka Hospital. PW1 said that he did not identify any of the assailants.

Felly Okongo, PW3, was one of the people who took the person who had been shot (**Thomas Oketch**) to hospital. He testified that on the way to hospital the deceased repeatedly cried saying “**mbona Amenya ameniua bure?**” meaning, “**why has Amenya killed me for no apparent reason?**” Upon reaching Tabaka hospital the deceased told the doctors “**Amenya ameniua bure**” that is “**Amenya has killed me for no reason.**”

Both PW1 and PW3 said that the appellant was known as “**Amenya.**”

Nyambati Mamboleo Silas, PW5, accompanied PW3 in taking the deceased to the hospital. He corroborated the evidence of PW3 to the effect that the deceased said repeatedly that he had been assaulted by Amenya (the appellant) who was his friend.

Similar evidence was given by **Police Constable Erot Danshon, PW7** and **Henry Ogeto Nyangiri, PW8**, who was driving the pick up in which the deceased was taken to hospital.

In his defence, the appellant said that his name was **Sospeter Mayenga Ochengo**. He further stated that on 7th March, 2007, his area

Chief from South Mugirango telephoned him and requested that they meet at his place. While there he was arrested by police officers and taken to Etago police station. He denied having committed the offence.

The learned trial magistrate held that none of the prosecution witnesses identified the appellant and that the only evidence that connected the appellant to the offence was the dying declaration by the deceased. She held that the dying declaration was sufficient evidence to warrant a conviction of the appellant.

The crucial issue for determination in this appeal is whether the dying declaration as aforesaid can be sufficient evidence to found a conviction in the absence of any other evidence that tends to incriminate the appellant.

Under **section 33 (a)** of the **Evidence Act**, when a statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in a case in which the cause of that person's death is in question, such statement is admissible. See **CHOGE –VS- REPUBLIC** [1985] KLR 1. There need not be corroboration of such evidence for it to be admissible but the exercise of caution is necessary in the reception into of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

In this case, although PW3 said that he knew the accused as Amenya Mayenga Ochieng, there was no other evidence to connect the appellant to the robbery. None of the stolen items were recovered from him. The police said that the only reason why they arrested the appellant was because one of his names was Amenya and he was thought to be the one who was referred to by the deceased in his dying declaration. There may have been several people known by the name “**Amenya**” and it would amount to a miscarriage of justice to assume that the appellant was the exact person who was referred to by the deceased in his dying declaration.

In the absence of any other evidence, it was unsafe to base a conviction solely on the dying declaration.

In the circumstances, we allow this appeal, quash the conviction and set aside the death sentence that was passed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF FEBRUARY, 2010.

D.K. MUSINGA
JUDGE.

A.O. MUCHELULE
JUDGE.

2/2/2010

A.O. Muchelule, J.

C/I – Bibu

Mr. Kemo for the state

Appellant present

Court: Judgment read in open court.

A.O. MUCHELULE
JUDGE.