



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL 156 OF 2004**

PATRICK MOSE MUINDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the conviction and sentence of N N Njagi SRM in Kangundo S.R.M. Cr. Case
Number 1 of 2003)*

J U D G M E N T

The appellant, Patrick Mose Moindi was originally charged with the offence of manslaughter, contrary to section 202 as read with section 205 of the Penal Code. He was convicted after a full trial and sentenced to life imprisonment. He appealed against the conviction and the sentence.

The evidence against the accused came from seven prosecution witnesses, PW 1 to PW 7. It shows that on 4.1.2003 from about 2.30 p.m., the appellant in company of one Bernard Kilonzo Kitonyi, PW 2, went to the home of Edward Nzau Muli, PW 1, to buy and drink changaa. They found the latter's wife Agnes Waeni Nzau, PW 4, present and she became the one to serve them with the drink. Soon thereafter, the four above were joined by Boniface Ndonye Nzau, PW 3, and the deceased Kithya Nzioki. The evidence suggests that the five drunk changaa until about midnight, although some other evidence suggests that they left PW 1's home at about 9.00 p.m.

Several of the witnesses stated that the drinkers left at 9.00 p.m. after PW 1, Bernard Nzau Muli and his wife requested them to leave their home. The evidence suggests that it was at this point in time when the appellant who had come with a panga, began to quarrel with the deceased, first inside the house and later, outside as the visitors set to leave for their homes. There is also some evidence that when the visitors who included the appellant and deceased left PW 1's house, they were heard to say that they intended to go to look for more drinks in other homes, but not in the company of the deceased. It was suggested that the reason for the quarrel outside the house between the appellant and the deceased arose because that the appellant did not want the deceased to join them in going to look for more drink elsewhere that night.

Edward Nzau Muli, PW 1 testified further that when the visitors left his house at his request, he heard the appellant and deceased quarrelling outside, 30 meters from the house before the deceased screamed that appellant had cut him with a panga. That he sent his wife Agnes, PW 4 to go and see what had happened and that when she returned she reported that the deceased had been cut. While PW 1 first testified that he did not himself go out to confirm how the deceased had been injured or even give the deceased any help, he however, changed his story and said that it was not his wife but him who went out and witnessed that the deceased had been injured.

Edward Nzau Muli further testified that he talked with the deceased who told him that it was the appellant who had cut him with his panga. That he offered first aid and sought to take the deceased to hospital, but the latter declined. That the witness returned into his house and slept until about 3.00 a.m. when on going out for a call of nature, he found the deceased still at the same spot where he had left him, but this time, dead. That he then ran to his brother Muithya Muli at the latter's house and explained to him how the deceased had been killed by the appellant. That he then arranged and reported the incident to the police as advised by Muithya Muli, P.W. 5.

The second witness who gave evidence was Bernard Kilonzo Kitonyi. He said that he was one of the people who were in P.W.1's house, drinking changaa in the company of the deceased, the appellant and P.W. 1's wife, Agnes Waeni Nzau, P.W. 4. His testimony was to the effect that they drunk chang'aa until about 9.00 p.m. when he, P.W. 2, left the house for his home. At the time he left there was a quarrel between the deceased and the accused who was carrying a panga. That when he left the house, appellant followed him in leaving. But that he left the accused and deceased outside the home of P.W. 1. That he learnt of the death of deceased only the next day. He denied that he left that home in the company of the appellant.

P.W. 3 was Boniface Ndonge Nzau, a son of P.W. 1. He testified that he was present at his parent's house during that fateful night, and confirmed that the others above mentioned were present drinking until he left them there at 9.00p.m. when he went to sleep. That at midnight he heard the deceased, Kithya Nzoka, call him and tell him that he had been cut by Mose Muindi, the appellant with a panga. That he came out of his house and met his own father P.W. 1 but saw the deceased lying outside his own house with a cut wound on the forehead. That the deceased was seriously bleeding and he gave the deceased first aid but the deceased declined P.W.1's offer to take him to hospital. That he then went inside his house and slept, leaving the deceased outside near his door. That the next morning at 6.00a.m., he found the deceased dead where he had left him the night before. Asked whether he raised any alarm on finding the deceased injured, he said that he did not do so because it was night and he had given him first aid. He testified that he had seen the appellant with a panga that evening. Asked why he did not seek to have deceased taken to hospital, he said the deceased refused.

P.W. 4 was Agnes Waeni the wife of P.W. 1 and mother of P.W. 3 aforesaid. Her evidence confirmed that she was serving changaa to the deceased, Kithya Nzioka and that others who were drinking with him included her husband P.W. 1, he son P.W. 3, the appellant and Kilonzo Kitony, P.W. 2. She testified that the drinking started at 6 p.m. on 4.1.2003 until 9.00 p.m. when her husband requested those drinking to leave, which they did. That outside their house the accused and deceased began to argue. That she however went to sleep after taking a bath. That at midnight their son, Boniface Ndonge Nzioka, P.W. 3 awoke and called her husband outside and she followed her husband. There she found the deceased who had been cut with a panga on the forehead. That her husband gave the deceased a first aid as the latter was profusely bleeding. That the deceased was asked if he would be taken to the hospital, which he declined. That they left him there and went in to sleep until later that night when her husband who had gone out for a call of nature came back and confirmed that the deceased was dead, which she personally also went and confirmed herself. That the deceased died about four feet away from their door. Asked if she informed anybody or screamed, on finding the deceased injured on the head earlier, she said she did not do so because, according to her, the deceased did not appear to be seriously injured and was capable of going home. She said also that the deceased had claimed that appellant is the one who had cut him. She admitted disappearing from her home immediately because she feared being lynched by members of the public.

The 5th witness who testified was Muithya Muli, P.W. 5 who was said to be the brother of P.W. 1. He stated that on 5.1.2003 at about 3.00 a.m. his brother Edward Nzau Muli, P.W. 1, called him outside his house and reported that the deceased had been cut outside P.W. 1's house and wanted advise. That P.W. 5 told P.W. 1 to report the matter to the police. That he accompanied P.W. 1 to report at the Police Post at Kakuyuni. That the body of the deceased, the accused's bloodstained clothes and the accused were collected. That when accused was arrested, he did not appear to know that he had killed the deceased. He concluded with a startling statement that the deceased on being injured had fallen at the appellant's kitchen.

Other evidence came from PW 6, Patrick Nzioka, the brother of the deceased who had received the early death report. When he immediately visited the scene he found that the deceased had fallen at PW I's house door where he lay dead. He assisted in arresting the appellant whose panga they took for investigation purposes as they handed him over to Kangundo Police Station.

PW 7, Pc Simon Kivuria, received the first official report from PW 5, on 5.1.2003. He claimed to have arrested the appellant at a Kakuyuni Hotel and placed him in police station cells. This is despite the claim by PW 5 and P W 6 that they had arrested the appellant and escorted him to Kangundo Police Station.

Accused was placed on his defence. In his unsworn testimony, he stated that on 4.1.2003 night, he had been drinking changaa in the house of P W I. That at midnight PW 1 told them to leave so that he and his family could sleep. That as he stood at the door with his panga, PW I took the panga away. That he the witness, left for his home leaving Bernard Kilonzo, Agnes Waeni, PW 4, the deceased and PW I Edward Nzau Muli, outside the house of PW I. That he was the first to leave and when he reached his home, he slept. That the following day he woke up, took his panga and went to cut fodder for his cattle near his house. That it was while he was cutting fodder that PW 5 with his brother and other people arrested him and took him to PW I where the deceased was. That he did not know how the deceased met his death as he had left him behind at the house of PW 1. That he was taken to the Police Station and later charged in court. That he was that night so drunk that he could not later in court say what he had done to the deceased and he may as well have killed him.

I have carefully perused and considered the evidence upon which the appellant was convicted of manslaughter by the trial court. In coming to his final conclusion, the trial magistrate stated at page 21 (red) (typed page 4): -

“I have no doubts the witnesses told this court the truth. I find the accused guilty and convict him accordingly as charged for manslaughter, Contrary to Section 202 as read with section 205 of the Penal Code.”

The above statement and several others in the judgment show that the trial magistrate was convinced that the witnesses gave consistent and unconflicting evidence and therefore deserved under the law, to be believed. He came to this conclusion after analyzing the evidence of all the witnesses, which this court now also turns to examine.

Boniface Ndonge, PW 3's evidence, appears from the judgment, to have been the trial magistrate basis for convicting. The witness who was woken up by the deceased at midnight, was told by the deceased that the deceased had been cut with a panga by the appellant and needed assistance. That Boniface Ndonge called his father, Edward Muli Nzau PW I who came out of their house with his wife Agnes Waeni, PW 4. That they saw the deceased profusely bleeding from the head and they gave him first aid. Taking this evidence together with the evidence that appellant had earlier been seen with a panga as he left PW I's house in company of the deceased and others, the trial magistrate saw no reason for disbelieving their evidence or not relying on it. He also took into account the evidence that the appellant had been heard threatening to cut the deceased with his panga. The Honourable trial magistrate then concluded thus:-

“This court points out that the accused cannot (has not) given any reasonable explanation as to how the deceased met his death. It can safely be presumed that it is the accused who caused his death....”

In this courts view however, the evidence of PW 1, PW 3 and PW 4 is not that consistent and is not without conflicts. PW 1 testified at first on 22.6.2004 that those drinking in his house drunk until midnight when he told them to leave. Evidence from others assert that he had chased them away at 9.00 p.m., not midnight. He on 22.6.2004 testified that the lot left his house peacefully and after he locked he heard them quarrel outside his compound, at the road. He later admitted that quarrels started at his door and the deceased was cut or found cut on the face close to his door. Indeed other evidence asserted that the deceased was cut just 4 feet from PW 1's door. If the deceased screamed that he had been out, then the assault indeed took place right outside PW 1's door. PW 1 first claimed that when he heard the

deceased scream, he sent his wife out to find out what had happened and came back and reported. Later he claimed that it was himself in person who went outside and witnessed that the deceased had been injured. This version was later to be changed by Boniface Ndonge Nzau PW 3 who claimed that it was himself who went to alert PW 1 and PW 4, his parents, that the deceased had been injured and wanted help. While PW 3's version was supported by PW 4, it contradicted PW 1's two versions on the issue that it was either himself or his wife who first heard the deceased's cry for assistance.

It is also to be noted that while PW 1 claimed that the deceased was assaulted outside PW 1's house, PW 3 claimed that the deceased called for help outside and close to PW 3's own house door where going out he found the deceased. But surprisingly and contrary to PW 1's version that he went out of his house because he heard the deceased's cry that appellant had cut him, PW 4 claimed that it was PW 3 who went to call his father and her and announced to them that the deceased had been injured. PW 1 and PW 3's versions that they each found the deceased outside each one's house door, conflicts with PW 3's story that he came out because the deceased called for his help from outside his own house.

Then comes the issue of how PW 1, PW 4 and PW 3 who are close relatives i.e. father, wife and son, behaved that night.

Assuming that the issue as to who heard the deceased's cry for help is not important so that what is important is that the deceased was injured next to their door-step, did the three behave beyond suspicion? They all assert that deceased was seriously injured and that he called and needed their help. They all claimed that he was profusely bleeding. They claim to have given him first aid. Apart from the conflicting evidence that it was PW 1 who gave first aid contrary to PW 3's claim that it is him who gave it, the first aid given from PW 1 as he claimed, was that he gave the deceased a bandage. He did not assert that he tied it on the deceased's head considering that the latter was seriously hurt. Indeed, it is unlikely that a bandage would be available to local couples manufacturing changaa. Neither did any witness who claimed to have seen the body the next morning, including the police who collected the body and investigated the case, stress the issue of first aid. They did not indeed confirm finding any such bandage tied on the deceased's head. The impression this court got is that the story about first aid and bandage was made up.

Turning to another issue related to the above piece of evidence, the three witnesses all admitted that they went back to their houses, locked their doors and went to sleep leaving the deceased out there in the could seriously injured. They neither raised alarm nor took the deceased to hospital although he, who they claimed cried to them for assistance. Confronted with the logical question, as to why they behaved so, they all stated that the deceased turned down their request to take him to hospital! This in the court's view, is not credible. If he completely refused, they would seek the help of their neighbours to carry him to the nearest medical facility to save his life. They would still raise alarm for neighbours to come to help if they did not wish to help. On the other hand, why would the deceased who allegedly sought help from PW 3, refuse it when they offered to take him to hospital? This court believes that the three main witnesses were hiding the truth as to what really happened.

Even PW 2 who claimed first that he left the drinking house first, followed by the appellant, later changed his story and said that appellant did not leave after him. PW 1, PW 2, PW 3, PW 4, and PW 5 all stressed the evidence of the panga that appellant was allegedly carrying that fateful night. The panga the appellant was found carrying the next morning was identified as the one allegedly used by the appellant to cut the deceased. The panga was found with no blood stains early the next day. The police who took it for tests were never heard of again and the expected tests on the panga never formed part of the evidence for or against the appellant. Where did the police take it? The presumption is that it carried no positive evidence against the appellant.

That the first five witnesses came out with what might be called a dying declaration by the deceased naming the appellant as his killer, is not surprising in the court's opinion. It is however unlikely. No one saw appellant cut the deceased not even those who were nearest to the two at the time. PW 3's story that he heard the deceased call his own name seeking assistance and saying that appellant had cut him, is negated by the evidence of his father PW 1 who claimed that it was his wife who went out and came to

report to him. This of course contradicted PW 4 who said that it was their son who came to report to them. But even if the court accept the assertion that PW 3 went out immediately the deceased called him, who did PW 3 find out there? It was his father PW I. No investigation was carried out to establish why PW 1 was out there where the deceased was crying for help. If PW 1 had come out earlier and had seen the deceased lying 4ft from his own door, why did he not alert his son immediately instead of waiting for the deceased to go for his son's help? Why do PW 1, PW 4 and PW 3 all differ about the spot where they discovered the deceased lying injured, noting the evidence that PW 1 and PW 4 say he was attacked and found four feet away from their door while PW 3 claimed it was outside and near his own house door?

The conclusions I reach is that all the witnesses, whose evidence the trial magistrate relied on, even in respect to the dying declaration, were unreliable. They were all close relatives who conducted themselves strangely that night as earlier herein pointed out. The possibility that they could have conspired against an outsider, cannot be ruled out in the presence of the contradictions and conflicts in their evidence and the strange conduct, as already pointed out. While the trial magistrate was therefore, in a better position to better judge their demeanour, the conclusions he reached and the final decision to convict the appellant, cannot be said to be as safe as he proclaimed it. Sadly even the Police Officer, PW 7 No. 52054, PC Simon Kivuria, joined the murky scene when he claimed that he arrested the appellant at Kakuyuni Hotel as the appellant was running away and took him to Kakuyuni Police Post. And yet PW 6 Patrick Nzioka had claimed that he and other civilian witnesses had chased and arrested the appellant and handed him over to Kangundo Police Station. While this conflict relating to the arrest of the appellant may appear of small importance, it nevertheless confirms the tendency throughout the trial to create evidence or tell what is "suitable" across the totality of the evidence against the appellant.

Not least in this case, the trial magistrate appears to have shifted the burden of proof to the appellant. A careful study of the Honourable magistrate's assertion that the accused could not give a reasonable explanation as to how the deceased met his death for which reason he would be presumed to have caused the deceased's death, is clearly offensive to the basic principles of our Constitution. The latter provides that the burden of proof throughout lies with the prosecution. Even where in certain exceptions or circumstances there is a temporary shift to the accused, the burden is very light and is rebutted on the mere balance of probability.

In the case before me the appellant had explained what had happened which together with some other circumstances in the prosecution evidence, should have adequately given him sufficient protection of the law. First he stated in his defence that his panga, was that night taken away by PW 1 before he left PW 1's house. The prosecution did not disprove the statement or even attempt to rebut it.

Secondly, the pervading evidence throughout the case was that everyone who was in that house had been drinking changaa, probably since 2.30 p.m. that day until probably after midnight. It cannot be wrong to assume and presume that all the witness who gave evidence and appeared to be so confident on what they testified, were generally drunk it would not be safe to rely upon the facts and circumstances which they testified under such a condition. This is what the appellant tried to explain in his defence, when he stated that he could have killed the deceased while drunk. This court understood him to be denying any evidence that he did it. And if this court does accept that assertion which was indeed posited by the prosecution, on what basis would it think differently about other witnesses who were drinking in that house with the appellant? There was no suggestion that PW 1, PW 2, PW 3 and PW 4 were not as drunk as the appellant. The fact that PW 1 and PW 4 threw the other witnesses out; that the witnesses were quarrelling in and out of the house after being ordered out, suggest their state of in sobriety.

This court understood the appellant to have denied the offence when he stated that he was too drunk to understand what really took place that fatal night. That the appellant may or may not have killed the deceased. It was not, in the opinion of this court, an admission that the appellant killed the deceased, which is how the trial magistrate wrongly interpreted the appellant's statement of defence.

Before coming to the final conclusion, the court further notes that PW 1 was in a position of an accomplice. He was arrested and kept in cells as a joint suspect. He was only released when he recorded a police statement heaping all blame upon the appellant who in any case has little to connect him to the

killing except the death declaration conveniently coming from the mouths of the said PW I with his closest relatives. PW 1 also was sent to jail for 8 days by the honourable trial magistrate for giving evidence which the prosecution found to be conflicting with the recorded police file evidence. Probably only when he promised to give evidence written in the police prosecution file. A hostile witness is treated as hostile and his evidence disregarded. He is not sent to jail to make him change his mind and evidence to be in favour of the accused as happened in this case. PW 4, his wife, has shown herself to have run away from home when her husband was arrested and was giving evidence in the lower court while living away from her home. The Honourable trial magistrate did not consider these witnesses as being in a position of accomplices. Had he done so, he might probably have not arrived at the same conclusions he did.

Finally, this is a case where the court relied heavily on circumstantial evidence. While such evidence in suitable cases might be the best evidence, in this case it was not such reliable as already pointed out hereinabove. The law requires that the inculpatory facts must have been so incompatible with the innocence of the appellate and so incapable of explanation upon any other reasonable hypothesis than that of guilt. That is what would justify the inference of guilty. As already explained, there were other alternative explanations that pointed to the appellant's innocence. The circumstantial evidence was accordingly not water tight. These raised a reasonable doubt capable of being interpreted in favour of the appellant.

The appeal questioned the harshness of the life imprisonment. Since there are good grounds to quash the sentence there might be no need to consider this ground. But if I did, I would find the sentence too harsh in the circumstances of this case and would, due to the presence of drunkenness involved, have reduced the sentence to five years imprisonment.

For the above reasons, I allow this appeal, quash the conviction and set aside the sentence of life imprisonment. The appellant who has been in detention since the 5.1.2003, is hereby set free from prison unless otherwise lawfully therein detained. It is so ordered.

Dated and delivered at Machakos this 6th day of December 2007

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D A ONYANCHA

JUDGE