



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.433 OF 1998

GEORGE NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.440 OF 1998

MWEMA KITHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL 443 OF 1998

RONALD KINYAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.444 OF 1998

FRANCIS KABURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.447 OF 1998

STEPHEN YAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original conviction and Sentence in Criminal Case No.1773 of 1998 of the Chief Magistrate's Court at Mombasa – Stella Muketi, Mrs. – S.R.M.)

J U D G M E N T

Appeals Nos. 433, 440, 443, 444 and 447 all of 1998 were consolidated without objection as they all arose out of the same trial before Mombasa senior Resident Magistrate.

The appellant **George Njeru (Njeru)** in Cr.A.433/98 was the 2nd Accused; **Mwema Kitheka** (Kitheka) in Cr.A.440/98 was the 5th Accused; **Ronald Kinyai** (Kinyai) in Cr.A.443/98 was 3rd Accused; Francis Kaburu (Kaburu) in Cr.A.444/98 was the 1st Accused, while Stephen Yawa (Yawa) in Cr.A.447/98 was the 4th Accused. They were all jointly charged with the offence of Manslaughter contrary to S.202 as read with S.205 of the Penal Code. It had been alleged that on the 2.9.1997 at Kibarani, Changamwe, Mombasa, they unlawfully killed one Harrison Muli.

Upon their trial they were all convicted and sentenced to serve 5 years imprisonment each.

The deceased was an employee of a Construction Firm, working on some Godowns in Kibarani, Changamwe. He together with other workers including PW.1 **Jonathan Mgaza** (Mgaza) had the duty of drawing water from a tap some 250 metres or so away from the Construction site. They were using pails.

At about 1 p.m. on 2.9.97, the deceased left the other workers and went to relieve himself in the bush. That is when PW.2 Edwin Oluoch, a resident of Kibarani heard shouts of “robber, robber”. When he went out of his home he found a man lying down and a large group of people some armed with bows and arrows surrounding him. Among those people were the five Appellants. The deceased had already been injured when Oluoch arrived and upon asking the crowd what had happened he was told that the deceased had stolen some flour. The deceased who was then bleeding and in pain said he was not a bad person and was working with a Construction Firm. Oluoch suggested that they confirm the story with the Construction Firm. The deceased was able to walk and so he, Oluoch and the five Appellants walked towards the Construction site. At the water tap they met with PW.1 Mgaza and the other workers. Mgaza saw the 5 Appellants some of whom held pangas, bows and arrows. Mgaza heard them say the deceased was a thief while the deceased said he was a worker. They all went to the Construction site to verify the deceased's claim. The foreman confirmed he was a worker and the five Appellants were confined in the premises to await arrival of the Police. The deceased was taken to hospital where he underwent two operations before he died the following morning.

As to what weapons each of the Appellants was holding, Mgaza recalled that Kaburu (A1) Njeru (A2) and Yawa (A4) were carrying pangas, while Kitheka carried a bow and arrows but Kinyai had no weapon. Mgaza was a stranger to all the Appellants and saw them for the first time that day. Oluoch on the other hand, was a neighbour and knew them. He could not remember what Kaburu was carrying, but saw Njeru and Yawa with pangas, while Kitheka had a bow and three arrows. Kinyai was just standing there without any weapon.

As for the injuries, Mgaza saw the deceased with several cuts on the hands but still talking. Oluoch saw him bleeding in the face. The Supervisor at the Construction Firm PW.3 Hilary Boma (Boma) saw his hands had been cut and was bleeding from the leg. He was talking and stated how he had gone to relieve himself only to be pounced upon by the Appellants who were at the site. The deceased repeated the same story to the investigating officer PW.5 IP Stephen Oduor (IP. Oduor) who saw visible injuries on the hands and severe pain at the back. Finally Dr. Mandalya (PW.6) who examined the body two days after death. He saw cuts on both thumbs which had been stitched. Internally, however, he found that the spleen had been torn and was enlarged. He formed the opinion that the cause of death was massive intra-abdominal haemorrhage due to ruptured spleen.

There is no doubt that the deceased was violently assaulted by a group of people on that fateful hour in broad day-light. There is no doubt that he died. No one gave any direct evidence on who inflicted the injury to which the deceased succumbed. All that is on record and which the Learned Trial Magistrate correctly surmised, was circumstantial evidence. The issue is whether that evidence irresistibly points to the inference that the five Appellants were the perpetrators or among the perpetrators of the offence.

All of them in their defences deny their presence at the scene as described by Mgaza, PW.1, and Oluoch, PW.2 or their arrest at the Construction site as narrated by those two witnesses and the Supervisor Boma, PW.3. Kaburu who used to sell sacks at Kongowea but lived in Kibarani, said he was going home when he met some boys who asked him where he was going. He told them but he was beaten up and called one of the raiders. Njeru, a casual worker who stays at Changamwe was going to visit his brother early in the morning when he met two people who said they were Police and took him. Kinyai, a resident of Kibarani and a carpenter was arrested in a swoop by Police as he returned home. Yawa who lived in Changamwe just met two officers as he was going towards Magongo and was arrested; while Kithaka, also of Changamwe said he was arrested in a Police swoop as he went to collect his bicycle, because he had no I/D Card. They are all alibis but the Appellants have no duty to prove them, the burden always being on the prosecution.

In Petitions of Appeal drawn up and argued in person all the Appellants attacked the evidence of Oluoch (PW.2) and the Trial Magistrate's reliance on it. They attacked the evidence of the injuries found on the deceased which they submitted, were not related to the weapons allegedly found on them. They referred to the dying declaration of the deceased as given by Oluoch, Boma and IP Oduor, that it was the five Appellants who had attacked him, and submitted that there was no corroboration. All claimed that their defences were not considered and that the sentence imposed was excessive.

Learned State Counsel Mr. Ogoti had differing views. He saw nothing wrong with the assessment of the evidence by the Trial Magistrate. There was no doubt, he submitted, that the five Appellants were at the scene of crime. The deceased stated that they had attacked him and they had weapons on them. They went with the deceased where he worked and were disarmed. There was no explanation found or given for the weapons when there is clear evidence that the deceased was unarmed and only went to the bush to attend a call of nature. The Appellants took the law into their hands and assaulted an innocent man. They acted in concert. The offence was committed in broad daylight and the injuries found on the deceased were consistent with assault.

I have anxiously considered and re-evaluated the evidence as I am bound to do on a first Appeal. The Learned Trial Magistrate relied heavily on the evidence of Oluoch who was a neighbour of the Appellants at Kibarani and knew them. Although he did not find any of them assaulting the deceased and none of them did after his arrival, he placed all five at the scene and that evidence was believed. When it comes to the credibility of a witness on a matter of fact, the Trial Court is of course better placed than an Appellate Court to assess that witness. She believed that the witness saw these Appellants and saw the weapons held by four of them. PW.1, Mgaza was also believed on that aspect and it was after leaving the scene of the assault that they headed towards the Construction site where the five were detained. The Learned Trial Magistrate was right in rejecting the alibis of the Appellants. The crucial question is whether they were innocent bystanders or were acting in concert with others not before court to assault the deceased.

It is true that Dr. Mandalya did not give an opinion of what caused the injuries found on the deceased. But the deceased was able to speak after his ordeal and informed those who heard him, among them Mgaza, Oluoch, IP Oduor and his father Josphat Muli (PW.7), that he was attacked, cut with a panga and beaten. That would be evidence admissible under S.33 of the Evidence Act more commonly referred to as a dying declaration. Its application has been considered in many cases among them **Choge -v- R., [1985] 2 KAR 42** at Pg.59 to 62. There is no rule of law that corroboration be found for such evidence though the court must be cautious in assessing its weight for obvious reasons; among them lack of testing in cross-examination, surrounding circumstances, of confusion and surprise obscuring accurate observation; or omission of important particulars to which attention is not called.

In talking about his attack the deceased was consistent and I believe also accurate as he spoke in the

presence of his assailants and in broad daylight.

One may wonder why the Appellants who had seriously assaulted another person would willingly accompany that person to a place where they would probably be incriminated in the assault. In my view nothing turns on any speculative answers one may conjure up for this human behaviour. There is evidence however that they believed they had immobilised a thief or robber and may well have found nothing wrong with handing him over to the authorities if he was not what he claimed to be, a worker at the Construction site. There are lingering but reasonable doubts however as to whether the Appellant Ronald Kinyai was an innocent by-stander or took part in the assault. No one saw him with any weapons. I give the benefit of doubt and allow his Appeal, quash the conviction and set aside the sentence. He shall be set at liberty unless otherwise lawfully detained.

I think however that it was safe to convict the other Appellants on the evidence on record. I dismiss their Appeals on conviction.

As for sentence the maximum sentence is life imprisonment. The Appellants took part in punishing another human being for alleged offences without going through established legal channels. A life was lost in the process. Five years imprisonment is not excessive sentence in the circumstances. I dismiss the Appeals on sentence also.

Dated this 29th day of March 2001.

P.N. WAKI

J U D G E