



**REPUBLIC OF KENYA
IN COURT OF APPEAL
AT MOMBASA
(CORAM: KWACH, SHAH & PALL, J.J.A.)
CRIMINAL APPEAL NO. 16 OF 1997
BETWEEN**

**SALIM MENZA MGANGA.....APPELLANT
AND
REPUBLIC.....RESPONDEN**

**(Appeal from a conviction and judgment of the High Court
of Kenya at Mombasa (Justice Ang'awa) dated 14th
February, 1997**

**in
H.C.C.R.C. NO. 32 OF 1993)**

JUDGMENT OF THE COURT

On 7th September, 1992 Ernest Mutende (PW1) was driving his Datsun pick-up vehicle when, near a place known as Foreman's Camp, near a sisal estate in Taveta, he met the appellant Salim Menza Mganga and Musia Nguku Kitemi and offered them both a lift. According to Mr. Mutende the appellant was not keen on taking up the offer of the lift but Kitemi (hereinafter referred to as "the deceased") was not averse to accepting the offer. Mutende then left both the appellant and the deceased walking together. That was the last time the deceased was seen alive. The rest of the evidence of the appellant is confirmed by the evidence of the witness Peter Getone (PW2). His evidence, as recorded, does not help either the prosecution's case or the defence case. What he said was that his father's (the deceased's) two bulls had gone off after the appellant's cows on 5th September, 1992 and were "arrested" at the sisal farm belonging to Hon. Basil Criticos and that, he saw the deceased for the last time on 6th September, 1992 when he (the deceased) went off to see the appellant allegedly to retrieve the bulls after paying some sort of fine to the sisal farm owners. The evidence of PW2 is also really of no assistance to anyone. He has however made a vague allegation as regards the appellant's father harbouring malice towards the deceased.

His evidence in so far as it pertains to the appellant allegedly selling the deceased's bulls is at best hearsay. He said "I was told they were sold by Salim (the appellant) and given no money to me" (sic). The evidence which emerged, for the first time, out of re-examination of PW2, after an objection was overruled by the learned judge was to the effect that the appellant sold the deceased's bulls and kept the money. There is no evidence as to when the sale was conducted and completed. Nor do we know who the buyer was. At best the evidence in this regard was tenuous. This witness attempted to show malice between the deceased and the appellant's father. The evidence of this witness falls short of proof that there was bad blood between the deceased and the appellant's father as to lead the appellant to kill the deceased.

John Undani (PW3), a son of the deceased, was able only to confirm that the animals belonging to the deceased and the appellant strayed over to Hon. Criticos' farm and that the deceased borrowed some money to go and get the cattle released. The body of the deceased was found by Natha Boniface (PW4) on 9th September, 1992 when he was in the plantation looking for some firewood. Philip Mwangi (PW5) who was employed by the sisal estate also saw the corpse of the deceased and he said that the body had

wounds in the stomach.

The evidence of Nicholas Masendano Kesanyi (PW6) added nothing to the prosecution case.

George Omusiru (PW7) who is employed by Taveta sisal estate stated that on 4th September, 1992 he along with Philip Soko "arrested" some two cows, two calves and two bulls for "trespassing" onto the sisal estate and that it was the policy of the owners of the sisal estate not to release any "arrested" animal until and unless such time the owners came and paid shs.150/- per animal. It would appear that some sort of a Kangaroo court was being run on that sisal farm. He said that the appellant paid for and collected all the six animals. This witness then introduced evidence to the effect that the appellant had sold a bull and had the other animals released from the proceeds of the sale. He does not say how he knew that the bull had been sold by the appellant. There is no cogent evidence, to show, who the buyer was and what the price was. The evidence of PW7 was recorded, in some aspects, de bene esse, after Mr. Gacivih for the prosecution confirmed that he would be calling the butcher (who presumably bought the bull) and the other "askari" from the sisal estate for giving evidence to confirm the hearsay part of the evidence of PW7. We note that none of these two witnesses was called. This factor throws doubt as regards the sale of the bull. There is no acceptable evidence that the appellant sold the deceased's bull.

Dr. Otieno (PW8) examined the appellant on 15th September, 1992 and found that he had a wound on hand. The appellant, on being asked what caused the wound, stated that the cut was from a panga. At no stage did the appellant give any explanation other than that he gave for the wound, that is, that whilst he was chopping firewood he was so injured. He had been consistent on that all the way. That the wound was caused in the manner the appellant explained to the Doctor, also in his inquiry statement and also in his sworn testimony in court, is a distinct possibility, yet the learned judge did not properly consider this important aspect. In her judgment the learned judge said:

"On the very same day the accused is found with a wound on his left hand which is a cut wound. The deceased had wounds also caused by a sharpe (sic) object. The clothes recovered from the accused have blood stains on them. The accused explains this as it being his own blood. One would expect that blood stains would be on other clothings such as the shirt and upper part of the trousers."

It can be seen straightaway that the learned judge did not consider, sufficiently, the appellant's version of how the single wound was inflicted on him. With respect to the learned judge, the location of the blood stains cannot be relied upon to say that the injury must have been inflicted during the course of a fight.

The learned judge also did not consider the fact that apart from longitudinal cuts, the deceased had multiple puncture wounds on the small intestine at the site of the penetrating cut wounds. For the purposes of the defence it could well be stated that the wounds on the deceased did not come only from a matchette (panga). It is a possibility and it ought to have been considered which was not. The evidence of P.C. Joseph Kiplangat (PW9), in so far as it refers to the sale of the bull and differences between the deceased and the appellant is purely and simply hearsay and cannot be invoked in aid of sustaining a conviction of murder in the circumstances of this case.

The evidence of PW10, inspector Peter Musembi does not take the prosecution's case any further. At best he is referring to facts as narrated to him by others in addition to recording of the appellant's inquiry statement which statement is quite exculpatory. The prosecution's case was based on the evidence of ten witnesses the substance of whose evidence we have already referred to.

The learned judge correctly pointed out in her judgment that the evidence was purely circumstantial. She said:

"The deceased was found dead two days later. It is thus true that the evidence herein is circumstantial namely on 7.2.97 the accused was seen together with the deceased. The motive being that of the livestock on the very same day the accused, according to the doctor is said to have died."

Circumstantial evidence can only be relied upon to found a conviction when the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. See Kipkering arap Koske & Another v. Rex 16 EACA 135.

The factors which led the learned judge to infer the guilt of the accused are (1) that the accused was found with a wound on his left hand and (2) that the clothes of the deceased were found to have blood stains on the lower part of the body tissues of the appellant and (3) that there was animosity between the appellant and the deceased as a result of the appellant having sold the deceased's bull. We have already pointed out, how, in the circumstances of this case, the factors which led the learned judge to infer the guilt of the accused are not incapable of explanation upon any other hypothesis than his guilt.

We did make observations as to the inadequacy of the record before us, that is to say, in many instances the record of appeal is incomplete. Mr. Gacivih for the respondent suggested that in view of the state of the record we should send the same back to the superior court for correction. We declined to accept the suggestion and it is for this reason that we have gone into the evidence of each of the prosecution witnesses to appraise ourselves of the facts of this case and we are unable to say that those facts point to the guilt of the accused.

At best some suspicion could be cast on the appellant as a possible perpetrator of the crime but suspicion alone, cannot form the basis for the conviction of an accused person. There is no suggestion that the last meeting between the appellant and the deceased was nothing but cordial.

There is no evidence that the murder weapon or weapons allegedly used to kill the deceased were looked for and not found. The blood stains as they were do not irresistibly point to the assault on the deceased by the appellant. The same could well have been from such a cut as explained by the appellant. It is quite possible that the injuries to which the deceased succumbed may have been occasioned by other persons and not necessarily the appellant.

We accordingly allow the appeal, quash the conviction and set aside the sentence passed on him and direct that he be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 23rd day of January,

1998.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR