IN THE COURT OF APPEAL

AT NAKURU

(CORAM: LAKHA, PALL JJ.A. & BOSIRE AG. J.A.)

CRIMINAL APPEAL NO. 21 OF 1996

BETWEEN

WILLIAM CHERUIYOT KANDIE…...…….APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Justice S.C. Ondeyo) dated 24th April, 1994

IN

H.C. CR. NO. 23 OF 1994)

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JUDGMENT OF THE COURT

William Cheruiyot Kandie (the appellant) was arraigned before the High Court at Nakuru on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 29 December, 1993 at Lower Solai Farm Maji Tamu Location, Solai in Nakuru District he murdered Richard Kigen (the deceased). At the end of a trial before Lady Justice S. C. Ondeyo the appellant was found guilty, convicted of murder and sentenced to death. It is against his conviction and sentence that he now appeals to this court.

The prosecution's case was that it all started on 25 December, 1993 at 9.00 a.m. when Joseph Kipsiele Kigen (P.W.1) was having a small Christmas party at his house. The appellant came to the house of P.W.1 and asked him to lend him his (P.W.1's) music compact cassette. P.W.1 refused to lend it to him as he said he was using it. P.W. 1 had three guests whom he was entertaining when the appellant came to ask for the cassette. They were Geoffrey Nyangweso, Joseph Koech and Olongei Kandi. P.W.1 left the appellant and the three guests in the house and went out to borrow a table from a neighbour. When he returned he found that the appellant had left but had taken his music cassette with him.

At midday P.W.1 and his three guess left for Solai Trading Centre. On the way they came across the appellant and P.W.1 asked him for his cassette. The appellant said that it was as his house and he could give it back to him if he accompanied him there. Leaving the three guests on the road, P.W.1 accompanied the appellant to the appellant's house. The appellant went into his house and came out armed with a bow and arrows and immediately shot an arrow at P.W.1 who ran into a nearby bush. The

arrow missed P.W. 1 but unfortunately hit the deceased who was herding his cattle in the bush with some other children.. The children raised an alarm when the arrow hit the deceased. The three guests arrived and ordered the appellant to drop the bow and arrows but the appellant went on shooting the arrows until they were all spent. P.W.1 then arrested the appellant and handed him over to the area chief together with the arrow which had hit the deceased. It is not in dispute that the appellant shot an arrow and the deceased was hit with an arrow. The deceased was rushed to hospital where he died later undergoing treatment.

Both in his charge and caution statement as well as in his unsworn testimony in his defence in court the appellant maintained his innocence and said that on 25.12.1993, P.W.1 and his three guests came to his house and claimed that he had taken P.W.1's cassette. An argument started which ended into a fight in which the appellant was beaten up by them. He was fighting alone against four of them. He feared that they would kill him. So, he ran into his house and came back with a bow and two arrows. He intended to threaten P.W.1 and his guests so that they would stop beating him. So, he shot two arrows one after another deliberately not aiming at his assailants who consequently dispersed but one of them came back and hit from behind with a club. He fell down and they arrested him and took him to the Chief where he was told that he had shot the deceased with an arrow. He did not shoot any of the arrows in the direction of anybody in particular. At the time of shooting the arrows he did not know where the deceased was and he had no reason to shoot at the deceased. While in the custody of the Chief, however, he feared for his life and escaped from his captivity. When after 4 days he heard that the deceased had died, he surrendered himself to the police. He added in his testimony:

> "P.W.1 was near me. If I had the intention to injure him, I could have injured him or killed him as he was near me, but I did not do so. That goes to show that I did not intend to kill anybody."

The appellant has now appealed on five grounds namely (1) That the learned trial Judge misdirected himself on essential ingredients of the offence of murder contrary to s.203 as read with s.204 of the Penal CODE; (2) That she misdirected herself in drawing the inference of malice aforethought without any evidence to support it; (3) That the prosecution failed to call essential witnesses and without their evidence no just decision could be reached; (4) That she did not take into account the defence which was supported by medical evidence and that (5) The totality of evidence does not squarely point to the appellant being guilty of even a lesser charge.

P.W.1 who was the prosecution's star witness testified that the appellant lured him to his house promising to give him his compact cassette. He said that he left his three guests on the road and went with the appellant to his house. The appellant according to him attacked him, totally unprovoked, with his bow and arrows. On the other hand the appellant's version as we have already noted was that there was a quarrel between him and P.W.1 and his 3 men.

A fight ensued and he was beaten up. He was about to be overpowered when in order to scare them away he armed himself with the bow and arrows and threatened to shoot the arrows at them unless they left him alone.

At page 93 of the record is the medical examination report of the appellant. It shows that the appellant when examined on 11.1.1994 had suffered several injuries which are enumerated in the report. The approximate age of the injuries was 2 weeks and 4 days and the probable type of weapons used on the appellant were blunt and sharp objects. The approximate age of the injuries goes to establish that they were sustained at the same time as the appellant alleges he was attacked by P.W. 1 and his 3 men. The medical examination report therefore lends support to the appellant's story.

Here the learned trial Judge was faced with two contradictory versions. The situation could have been resolved only if the three companions of P.W.1 were called to give evidence. She realised it and that is why she said in her judgment:

> "those who were with P.W. 1 did not give evidence, yet the accused person mentioned them adversely in his statement as having attacked him jointly with P.W.1 There is no evidence to the effect that these three people could not be found to testify for the prosecution. Had they come, they

could have told the court whether they remained on the road or whether they went together with the witness P.W.1 as the accused person says. In the absence of those who were with P.W.1 I am satisfied and I find for the accused."

But having found for the appellant, the learned trial Judge virtually somersaulted and convicted him of the offence of murder. She just ignored the appellant's story, for whom she had already found, that he was attacked by P.W.1 and his men and he had sustained several injuries. Although she had believed P.W.1 that he went with the appellant to his house alone as she held that P.W.1's men accompanied him when he went to the appellant's house, she agreed with P.W.1 that the appellant started shooting arrows at them without any provocation. She did not direct her mind at all to the fact that the appellant had suffered several injuries which according to the medical examination report could have been sustained during the fight in which the appellant had all along claimed he had been beaten by P.W. 1 and his 3 men.

The learned trial Judge held that the appellant had malice aforethought as he shot the arrows at P.W.1 knowing fully well that an arrow being a dangerous weapon could cause grievous harm to P.W.1 or whosoever it hit. She reasons that if the sole purpose of the appellant was to scare away P.W.1 and his men then as neither of them was armed with any kind of weapon, given the fact that he the appellant was armed with a bow and arrows, it would have been enough to scare away his alleged assailants, and he did not have to shoot the arrows as he did. But she has failed to note that the appellant had said that he was in fear of his life. He was fighting alone against four of them. There was a possibility that unless the appellant scared them by shooting in the air, as he said he did, P.W.1 and his men could have overpowered him and as the appellant said they could have even killed him. In our view, in the circumstances of this case it was unsafe to hold, as the learned trial Judge did, that malice aforethought had been proved.

The prosecution knew what the appellant's defence was. He had mentioned in his charge and cause statement the names of three men who along with P.W.1 had allegedly assaulted him. Yet the prosecution made no attempt to adduce any evidence to rule out the appellant's defence. In R v Uberele (1938) 5 EACA 58 the former Court of Appeal for Eastern Africa held that "the court is entitled to presume that the evidence which could be and is not produced would if produced be unfavourable to the person who withholds it".

In KIONDO HAMISI vs REPUBLIC 1963 EA 209 a constable who detained the appellant was not called to give evidence at the trial. Spry J. said that the proper course for the prosecution was to call the constable to "rebut the explanation given by the appellant". He went on to hold that".

We hold that in view of the contentious nature of the evidence before her, the learned Judge of the superior court ought to have given the appellant the benefit of doubt. We accordingly allow the appellant's appeal. We set aside the conviction and the sentence of death imposed on the appellant and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nakuru this 20th day of February, 1997.

A.A. LAKHA

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR