IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 95 OF 1996

BETWEEN

STEPHEN YEBEI KURGAT……..APPELLANT

AND

REPUBLIC……..RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Eldoret (Justice R.N. Nambuye) dated 17th July, 1996

IN

H.C.CR.C. NO. 16 OF 1994)

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JUDGMENT OF THE COURT

The appellant was charged before the superior court (Nambuye, J.) of murder contrary to section 203 as read with section 204 of the Penal Code in that on the 27th day of November, 1985 at Chepkemel Village Kabeimet Location in Nandi District of the Rift Valley Province unlawfully murdered Kiplanget Kibet Karget. He was convicted as charged and sentenced to suffer death in the manner prescribed by law.

The appellant and deceased were brothers. One Shabani Kibet Yebey (P.W.8) allegedly a step brother to the two on the fateful day heard a commotion and went to find out about it when he saw the appellant hitting his brother using a metal pipe used for digging holes. This evidence is supported by that of Kimeli Arap Songok (P.W.6.) who was a neighbour and married in the same family as was the deceased. He found the appellant hitting his brother with a metal pipe and when he was asked why he allegedly said he must finish him. It was about 6.00 p.m. and one was able to see and recognize objects. These two witnesses knew the accused and deceased before and they were firm that the two were recognized.

The next day the police removed the body which was found with multiple deep wounds. There were found a total of 21-22 wounds. The cause of death was due to hyporolemic shock due to severe haemorrhage. The appellant disappeared from home until 1993 when he re-appeared. He was arrested by village elders and handed to police and charged with the offence.

The appellant's defence was that at the time of the incident, he was not at home but that he was in

Tanzania. The assessors returned a verdict of guilty of murder. Before us the main argument urged was the alibi of the appellant which had been rejected by the trial Judge.

It is now well settled that subject to the defence of insanity and certain statutory exceptions which are not relevant to the present case no burden rests upon an accused person to establish any defence. In the case of R V Johnson 46 Cr. App. R.55, the Court of Criminal Appeal dealt specifically with the burden of proof when a defence of an alibi is raised. The head note of that case reads:-

> "Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case."

After a careful consideration of her judgment, we are satisfied that the trial Judge in no way indicated that any burden rested on the appellant with respect to his alibi. We also consider that the issue of alibi was adequately dealt with by the learned Judge. Indeed, in her summing up to the assessors she stated:-

> "The accused version is that he had gone to Tanzania. It is not for the accused to prove that he was in Tanzania but for the prosecution to establish that he was at the scene."

In her judgment, she said:

> 'the Court has to bear in mind that the accused is not required to prove his innocence. He is not required to prove that he was in Tanzania. It is for the prosecution to oust this defence that he was not in Tanzania but at the scene.'

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create a reasonable doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

It is in the light of this last proposition that we proceed to consider if the prosecution in this case was thin. Mr. Odhiambo for the appellant submitted that the contradictions between the two eye witnesses referred to above rendered it unsafe to convict or at least made the prosecution case thin. We do not agree. Each of the two witnesses was well known to the appellant and the circumstances favoured a clear identification of the appellant. P.W.6 talked to the appellant and indeed took the metal pipe from him and threw it away in the Shamba. He was their neighbour and a relation. Having carefully considered all the evidence we are satisfied, as was the learned trial Judge, as to the identification of the appellant by the two eye witnesses at the scene. In our judgment, it sufficiently displaces the alibi. In all the circumstances, and notwithstanding certain contradictions between the testimony of P.W.6 and P.W.8 which we consider minor, we are satisfied that this is a case where the alibi was disproved by the strength of the prosecution's evidence of identification.

We dispose of the issue of alibi by simply saying that having been seen and spoken to by a relation and a neighbour the appellant's defence of alibi is not available to him.

One final matter. It was argued by Mr. Odhiambo for the appellant that the learned trial judge erred in law in admitting the evidence of the appellant's previous conviction. It was also contended that the charge and cautionary statement made by the appellant in which he confessed to the charge was repudiated by the appellant although it was admitted in evidence without objection. Assuming, without deciding, that these two items of evidence were inadmissible, there was other admissible evidence that the appellant had committed the offence. It is quite clear from the judgment and the opinion of the assessors that both the judge and the assessors accepted the evidence of P.W.6 and P.W.8. Once the evidence of these two eye witnesses was accepted, the conviction of the appellant was inevitable. In these circumstances, we have no doubt that had there been no misdirection both the judge and assessors would still necessarily and without doubt have arrived at the same conclusion as to the guilt of the appellant.

We, therefore, order that the appeal be and is hereby dismissed.

Dated and delivered at Nakuru this 14th day of March, 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