REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
CRIMINAL APPEAL NO. 67 OF 1997

BETWEEN

ROGENI MARATA & 6 OTHERS ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kisii (Justice Mbaluto) dated 30th November, 1995
in
H.C.CR.C. 14 OF 1994)
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REASONS FOR THE JUDGMENT OF THE COURT

On 25th November, 1997, we allowed the appeal against the conviction of murder of, and sentence of death passed on, the appellants. We now give our reasons for doing so.

The appellants were tried for the offence of having murdered one Kenyanya Machuki, the deceased, on 15th October, 1993. According to the record of appeal prepared by the criminal registry of the Kisii High Court, an information dated 11th October, 1994, only charged four of the appellants namely, Rogeni Marata Kinaro, Otondi Kinaro, Keegu Keegu and Kefa Onyango, with the offence of murder. But the record of proceedings shows that only three of the appellants namely, David Moimbo Onyango, Amos Nyengeresi and Onsare Marata, were on 17th May, 1994, charged with the murder in the High Court to which they all pleaded not guilty. It was not till seven months later that the four appellants already named, and who had also been charged with the same offence of murder, had their case consolidated with that of the three appellants. Though all seven then pleaded not guilty to the charge of murdering the deceased, the information itself, is no where to be found in the record of appeal.

Apart from this slip shod manner in which this serious criminal matter was handled, there are substantial defects in the evidence adduced by the prosecution which discredit it. The so called eye witnesses to the alleged beating by the appellants of the deceased and who died from the injuries sustained by him as a result of the beating, are the daughters of the deceased namely, Freda and Martha. What is uncontroverted is that although it may well have been that the appellants had attacked the sisters in their home after they had gone to bed, and had asked for their father who was spending the night guarding a sugarcane crusher, it is clear from their own evidence that the sisters did not and could not have seen those who, as accepted by all, had beaten their father outside their house where they had dumped his body. Martha had been truthful when she said that she had not gone outside to see those who were beating her father. Freda on the other hand, clearly lied when, contrary to what she had said in

examination in chief that:

> "My father was brought to our house .... When my father was brought those people who were inside the house went out and started beating my father. I remained in the house. After beating him all the assailants ran away.",

she went on in cross examination to say that she saw those who had dumped her father outside the house namely, David Moimbo Onyango, the lst appellant, Amos Nyangeresi Ongayi, the 2nd appellant, Ontondi Kinaru, the 6th appellant, and Keegu Keegu, the 7th appellant.

But it may be argued that since according to Freda, the appellants had, whilst beating her and Martha, asked for the whereabouts of the deceased, and one of them had even said that they were looking for him to kill, then the fact that he was found beaten up and left outside his house, constituted circumstances which must lead to the inevitable conclusion that it was the appellants who had beaten him up and left him for dead. In this regard, it must be remembered that whilst all the appellants were related, and well known, to Freda and Martha, Freda in examination in chief, said she had recognized only two of them namely, the 1st and 2nd appellants, by the light of the torch lights that she and some of those who had attacked them had, during the half hour when she and Martha were attacked in their house. She said:

> "I saw the 1st accused (identified) and 2nd accused (identified). These are the two people I recognized. I had known them before.".

Freda was to change this in cross examination when she said that apart from the lst and 2nd appellants, she had also recognized the 6th and 7th appellants. Martha, as was now becoming routine, had a different story to tell. She said she had recognized all seven appellants by dint of the light from Freda's torch light and those of some of the appellants.

The discrepancy in the evidence of the two sisters was also to be exhibited when Freda said that after she and Martha had carried their father into the house, he had told her that he had been attacked by only four of the appellants namely, the 1st, 2nd, 6th and 7th appellants, the very same four appellants whom Freda had, as observed earlier, lied about having seen them dump her father's body outside their house.

The evidence of Martha on this issue is that when she first went outside the house alone to see her father, he had told her that he had been beaten up, giving their names, by all the seven appellants. The wife of the deceased who had been spending the night away from home, was brought to the house hours later, where she said that the deceased told her that he had been attacked by all the seven appellants. In the face of the differing evidence of Freda and Martha already adverted to, and the differing accounts of Freda, Martha and their mother as to who the deceased had told them had beaten him, much reliance cannot be placed on them as corroborating the dying declaration of the deceased who was attacked in confusing darkness, and which was not made in the presence of his alleged attackers. Another instance of the conflicting evidence of the so called eye witnesses, Freda and Martha, is as follows. Whilst Freda had testified that:

> "those who went to where my father was took one hour before returning with the deceased.",

Martha's contrary version was that:

> "They beat me as (sic) Freda and then went outside. A few minutes later I heard some noise ... was coming from a road nearby. The noise was that of my father he was crying asking why he was being beaten ... I remained in the house with Freda and Douglas.".

At the beginning of Martha's examination in chief, the learned trial judge had recorded the following:

> "I am a student. I am sixteen years old. I go to church Sengera Catholic Church. I do not know God.".

Martha was then strangely, allowed to give evidence on oath rather than an unsworn one. We think that this also adversely affects the credibility that should be given to her evidence.

Another reason why much reliance cannot be placed on the evidence of the so called eye witnesses, Freda and Martha, emerges from the evidence of P.C. Peterson Kunga who was the investigating officer of the case. He said that the 1st, 2nd and 3rd appellants were the first of the appellants to be arrested by him on 4th November, 1993, after recording statements from witnesses.

On 17th November, 1993, he charged these three with the murder of the deceased. It was not till 16th February, 1994, that the 4th, 5th, 6th and 7th appellants were arrested and then jointly charged with the first three appellants with murdering the deceased. In this respect, he gave the following evidence in cross examination which most adversely affects the credibility of the evidence of the so called eye witnesses:

> "Accused 1, Accused 2, Accused 3 were arrested by member (sic) of the police. I booked them in the cells. The others were arrested by the chief and administration police. The four accused were named by witnesses. One was wife of deceased .... I prepared a bundle of all of them .... Later all witnesses came to the police station and recorded statements. They mentioned the names of Accused 4, Accused 5, Accused 6, and Accused 7. On initial statements, Accused 4, Accused 5, Accused 6 and Accused 7 were not mentioned.".

Now, the state in which Freda, Martha and their mother had found the deceased is also relevant in connection with the dying declaration of the deceased. In this regard, Freda said:

> "My father had injuries. He was injured on the ribs, the back and on the ear. He was bleeding. He could not walk. He was bleeding from the nose and ear.".

Martha said:

> "I went where he was outside the house, found him lying down. Freda remained in the house. She had been badly beaten. ... my father was not able to stand. I went back home to the house and called Freda. I and Freda carried our father to the house. After he(sic) had brought him to the house we closed the door took him to bed and he slept ... .".

The wife of the deceased who saw him much, much later than the daughters, had this to say showing that the deceased had been able to move from the bedroom to the sitting room:

> "I found that my husband had been attacked. He was in the house. He had been seriously attacked. He was in the sitting room. He was lying down in the sitting room. I talked with him ....".

Although these descriptions of the state of the deceased show that he was injured, indeed, badly injured, they cannot really be said to establish that the deceased himself, at the time he spoke to his daughters and wife, was in imminent expectation of death.

The statements which the deceased made to his daughters and wife concerning who had beaten him up, are admissible in evidence under section 33(a) of the Evidence Act, in relation to the cause of his death. But as was held by the Court of Appeal for Eastern Africa in PIUS JASUNGA AKUMU V R. (1954) E.A.C.A. 331,

> : "Caution must be exercised in the reception as evidence of dying declarations particularly as to identification when the attack has taken place in darkness.".

This holding is apt in the circumstances of the present appeal where it is clear, according to the evidence of Freda and Martha, that the deceased was beaten up during the night and in the dark outside their house. Furthermore, it is, as it is now well settled, that a dying declaration must by itself, be treated with caution. In the case of OKALE V REPUBLIC (1965) E.A. 555 at 558, et seq. Crabbe J.A., stated the

position more fully including the effect of the state of the maker of a dying declaration, thus:

> "The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from FIELD ON EVIDENCE (7th Edn.) has repeatedly been cited with approval:
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> `The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed .... The deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.' (Ramazani bin Mi randu (3); R. v. Okulu Eloku (4); R. v. Muyovya bin Msuma (5)).
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> Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R. v. Ramazani bin Mirandu (3); R. v. Muyovya bin Msuma (5)). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy (ibid.).
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> It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. v. Eligu Odel (6); Re Guruswami (7)), and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See, for instance the case of the second accused in R. v. Eligu Odel (6) and R. v. Epongu Ewunu (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. (See also Dala Mkwayi v. R. (9) (1956) 23 E.A.C.A. at p.613))
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> . The learned trial judge appears to have accepted the statement by the deceased as testified by Omolo as true without giving any reasons, and in our view the evidence of Joyce is anything but satisfactory corroboration. The deceased was not obviously at the time of the declaration in immediate expectation of death and in these circumstances we think that the learned trial judge, with respect, failed to approach the evidence of Omolo with that circumspection that the law enjoins with regard to dying declaration.".

The learned trial judge realized the necessity of corroboration of the dying declaration of the deceased. He first held that when the deceased talked to his wife and daughters, "he was conscious of his being in a dying state". But as we have already observed, our analysis of the relevant evidence does not support this finding. In anycase, even if the deceased was in immediate expectation of death, should the learned judge as he did, have and without giving any reasons for doing so, relied on the conflicting and unreliable evidence of his daughters as satisfactory corroboration of their father's dying declaration made in the absence of the appellants? We would from the observations that we have already made on the reliability of that evidence, say no.

We will now turn to the defence of all the seven appellants. In his judgement, the learned trial judge we regret to say, gave only scant consideration to this. In his seven and half page judgment, he devoted only the following nine lines to the defence of all the seven appellants put together, which makes his judgment untenable for not having given full and proper consideration as he should have, to the defence of each of the appellants:

> "The defence of alibi of the accused 1 is corroboration by that of his wife D.W.2. All the other accused as aforesaid also denied the offence and said they were in their respective homes when the beating occurred. But considering all the evidence as a whole particulary the positive identification of the accused by ... P.W.1 and P.W.2 coupled by the deceased dying declaration I find the defence of the accused have been rebutted by the strong prosecution

evidence. I find the prosecution case proved beyond any reasonable doubt.".

In the course of her evidence at the trial, the wife of the deceased herself, had said, and this was uncontroverted, that on the fateful night, the deceased had gone to guard the cane crusher in the company of his nephew, Marabu Onyancha. This person who must have been with the deceased at the time when the deceased was taken away by his assailants, and whose evidence would therefore be crucial, was not called by the prosecution to give evidence which from the statement which he had made to the police, would contradict in important aspects, the evidence of Freda and Martha. Marabu Onyancha gave evidence for the defence, which did not appear to have been seriously challenged. In brief, he said that earlier on the fateful night, he had gone to the deceased house which was in darkness and had by the light of his torch light, helped Freda, Martha and their brother to have their supper and to make their beds.He had then gone back to the place where the cane crusher was, and had gone to sleep there together with the deceased. At about 1 a.m. some people whom he did not recognize and who were dressed like policeman, came to where they were sleeping demanding to see their radio permit. They arrested and handcuffed the deceased whom they took away. He, however, managed to escape and ran to the house of one Tom Wandere.

Before giving his evidence which was unsworn, the following evidence and ruling occurred:

> "... I was born in 1980 in January. I do not go to school now I used to do so. I joined in 1990. I left in std. II. I go to church. I am a catholic I am baptised. I know God as holy spirit. I know the meaning of oath. It means I must tell the truth. I do not know consequence of telling a lie but I know that if one takes an oath he is to tell the truth.
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> Court: Proposed witness does not obviously know the meaning of an oath. To give unsworn evidence.".

We are somewhat surprised at the foregoing ruling of the learned trial judge. Unlike the case of Martha, who inspite of her saying when examined by the learned trial judge, that she did not know God, was allowed to give sworn evidence, we think from what Marabu Onyancha had said, that he obviously knew the meaning of an oath and that the learned trial judge erred in his ruling. But no matter. Even if the crucial but unsworn evidence of Marabu Onyancha, who at the time when he gave his evidence, was over fifteen years of age, required corroboration, it still had to be considered albeit, with caution, and then rejected if it was deserving. But there was not a word about this evidence in the learned trial judge's judgment. Indeed, it was treated as has been shown, with the same disdain as for example, the evidence of the wife of the 1st appellant to the effect that she and the 1st appellant had spent the whole of the fatal night in their house.

It cannot be said by any standard that the defences of the appellants were considered with the seriousness that they deserve. The casual consideration of their defences which the learned judge condessended to give to them by the learned trial judge, will not do. This amounts to a misdirection in law on the part of the learned trial judge.

It is our considered view that not only, did the evidence adduced for the prosecution not establish the guilt of the appellants beyond all reasonable doubt, but also, that the evidence of the appellants did not really receive any consideration worth its name, from the learned trial judge.

The foregoing are the reasons why on the 25th day of November, 1997, we allowed the appeal by all the appellants quashing their conviction on 30th November, 1995, by the learned trial judge of the murder of the deceased, and setting aside the consequential sentence of death passed on them.

Dated and delivered at Nairobi this 17th day of December, 1997.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR