REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

CRIMINAL APPEAL NO. 68 OF 1997

BETWEEN

SITATA CHOI KERONCHE) FRANCIS CHWEYA)..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment of the High Court at Kisii
before (Justice T. Mbaluto) dated 9th
February 1995
in
H.C.CR.C. No.34/94)

JUDGMENT OF THE COURT

The appellants have come to this court on first appeal challenging the propriety of their respective convictions for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code respectively and the sentences which eventually were meted out to them.

The background facts of the case are simple. At about 8 a.m on 16th May 1993, at a village called Botabori in South Mugirango Location of Kisii District, a horn was blown summoning all villagers to the home of one Obaigwa. Yunuke Kemunto Keronche (the deceased), like many other villagers, responded and went to Obaigwa's homestead and so did her son Julius Obare Keronche (pw1) and his paternal grandmother Sabina Kerubo Chweya (PW3). It is in evidence that the villagers were called there because Obaigwa's daughter, Jane, had been suddenly taken ill and as a result had become physically disabled and dumb. It was believed her sickness was as a result of witchcraft.

The villagers were therefore called to participate in a form of lot casting ritual to identify the person who may have bewitched her. Each villager was required to uproot some grass and throw it on the patient who was laid on a mat which was spread outside the said Obaigwa's house. It was believed that the sick child would regain her strength and speech if the person who may have bewitched her threw grass on her.

The issue which was before the trial court and upon which a decision was finally reached to convict the appellants, was whether both the appellants were among the people who went to Obaigwa's home on the material date and time and later burnt the deceased. PW1 and PW3 testified that when they reached Obaigwa's home among the people they found there were the appellants. According to PW1 the Ist appellant appeared to be in charge and allegedly announced that all the villagers had been called to that home so that, like what other villagers elsewhere had done about their sick who were perceived to have

been bewitched, they would conduct a ritual to identify the person or persons who may have bewitched Obaigwa's child.He also testified, as did PW3, that the second appellant was also present and together with the first appellant and all other people then present cast lots in the manner earlier on stated. Evidence is conflicting as to what happened when the deceased performed the ritual. PW1 testified that nothing spectacular happened, but PW3 testified that the child rose up and could thereafter be able to stand up and to speak. Apart from that discrepancy there is also variance on what each of the two witnesses said about the role of the first appellant in identifying the deceased as the person who bewitched young Jane. PW1 testified that the Ist appellant read a piece of paper mentioning the deceased as the villain, but PW3 was silent on that score.

The learned trial Judge did not specifically deal with the first discrepancy but regarding the second his view was that the conflict was minor, and therefore inconsequential on what he considered to be clear, acceptable and believable evidence of the two witnesses. He then held that both the appellants were present at Obaigwa's homestead.

The deceased having been identified as the person who possibly bewitched Jane, correctly or otherwise, was set on by some of the people, tied with a rope together with her son, PW1, and were both dragged to their home where they were wrapped with a foam mattress and two blankets and then a pitched grass thatched granary roof was put over them thereby enclosing them inside. It was then set on fire. PW1 testified that Sitata Choi Keronche (Ist appellant) was one of three people who brought the granary roof, the others having been William Ongaga Okechi and Zakayo Obaigwa. It was also his evidence that even though he was under that roof, through parts of it which were not covered he was able to see Francis Choi alias Francis Chweya bringing a box of matches which was used to set the roof on fire.

George Mangongo Keronche (PW2), aged 14 years, testified to the same effect as his brother, PW1. He testified after a voire dire examination. Although the trial Judge found that the boy understood the meaning of an oath, there is no indication on record whether or not his evidence was given on oath. The position in law is that once a court makes a finding that a particular child understands the meaning of an oath he should be sworn before giving his evidence.For purposes of this judgment we will treat his evidence as evidence given not on oath under Section 19(1) of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya, and which may only be acted upon to support or uphold a conviction if corroborated in material particulars in terms of Section 124 of the Evidence Act.

PW2 did not go to Obaigwa's homestead even though he said he heard the call summoning all villagers to converge in that home. It was his evidence that the deceased, who was his mother, and PW1 were dragged into their home, a granary roof was thereafter put over them, Sitata Choi thereafter sent Francis Chweya to fetch a match box, which he did, and handed the same over to Zakayo Obaigwa, who then struck a match from it and set the granary roof on fire while the deceased and PW1 were inside it tied together. He said that he observed the granary and he could see that a part of it was not covered with grass. That evidence and that of PW1 mutually corroborates each other.

PW3, whom as we said was PW1's grandmother, also happened to be the grandmother of both appellants they having been her first son's children by the first one of his three wives. The deceased was his second wife. Like PW1 and PW2, PW3 testified that Sitata Choi sent Francis Chweya for a box of matches which he brought and the same was used to set the granary roof on fire. Besides, she intervened on behalf of PW1 and demanded to know what he had done to deserve being burnt. It was then that one Mogeni lifted the granary roof, cut the ropes which were fastening PW1 to his mother and let him out.

The deceased was burnt beyond recognition. All the people who were involved in burning her left. Thereafter the police at Kisii Police Station were informed. Inspector of police Lawrence Omachi (PW4) testified that Sitata Choi made the report of the killing at that police station and led the witness and three others to the scene. PW1's evidence on that score is that Sitata Choi went to his home at about 10 p.m. with two and not four policemen. Be that as it may the policemen took the charred remains of the deceased to Kisii District Hospital Mortuary for post mortem examination.Sitata Choi and PW1 accompanied the policemen there and later to Kisii Police Station where, in the presence of the former,

the policemen recorded a statement from the latter. However before the recording was completed the former is said to have sneaked away and escaped. He was, however, later traced and arrested as a suspect in the murder of the deceased. His coappellant and another person called Joseph Onkendi Ayienda were also arrested as suspects. The latter was however later released without charges being preferred against him. The two appellants were subsequently arraigned in court for the murder of the deceased.

The appellants put forward alibi defences which the trial Judge rejected after he duly and, to our minds, properly warned himself that an accused person does not assume the burden of proving his alibi, on grounds, firstly, that the evidence which was adduced by the prosecution witnesses was cogent and overwhelming against them; and secondly, because in his view both the appellants and their witnesses were not candid. He then proceeded to find the appellants guilty of the offence of murder contrary to section 203 of the penal code having been satisfied that the two were among the people who with common intent, mercilessly killed the deceased. The assessors had come to the same finding.

In this appeal the appellants, besides challenging the trial Judge's finding that they were present at and participated in the killing of the deceased, attacked his treatment of their alibi defences and contended that he improperly held that the testimony of defence witnesses, who included the appellants' respective wives and one Job Migiro Onchari (DW3), had been tailored in favour of the appellants. Mr Mogikoyo for the appellants submitted before us, inter alia, that in view of certain contradictions in the evidence of PW1 and PW3 in particular, which he regarded as material, and the hostile relationship which he said existed between the family of the deceased and that of her co-wife who was the mother of the appellants, the trial Judge should have been slow to accept and act on the evidence of the two prosecution witnesses, more so in absence of testimony from an independent witness implicating the appellants.

In answer to those submissions Mr Karanja, Senior State Counsel, did not think, rightly so in our view, that the contradictions Mr Mogikoyo referred to were material in his view because such contractions are natural in circumstances as obtained at the scene of the murder. Besides, he said, the way the evidence of prosecution witnesses flowed leads to no other conclusion than that the witnesses were credible and their testimony was sufficient to dislodge the alibi defences. Moreover, he said, no independent witnesses were traceable because according to PW4 those who may have witnessed the murder went into hiding.

Determination of this appeal as did the case against the appellants in the court below, depends on the credibility of witnesses. It is trite law that an appellate court will be slow to interfere with a finding of a trial court based on credibility of witnesses. That is so because unlike the trial court, an appellate court does not have the benefit of seeing and hearing the witnesses testify as to be able to assess their demeanor in the witness box (see Peters v Sunday Post Limited [1958] EA 424). That is not to say that an appellate court must accept without question the findings of a trail court based on credibility of witnesses. In a case like this one, this being a first appeal, we are obliged to reconsider the evidence, evaluate it and draw our own conclusions of course without overlooking the conclusions of the trial court. We are at liberty to come to a different finding on any issue if the evidence and circumstances so dictate.

The deceased was killed in broad daylight. Both PW1 and PW3 testified that they were present as from the time people started assembling at the home of Obaigwa; he witnessed every event which took place there; he was set on by a group of people and was tied together with his mother, the deceased, and was able to see and recognize those involved; that as they were being dragged to their home he was alert and could clearly see those who were dragging them. He could clearly see those who brought a mattress and two blankets that were used to wrap them, and those who eventually brought the grass thatched granary roof and placed it over them.

Thereafter, notwithstanding that the roof was over them, he was able to see what was happening through an opening in the granary roof. The whole incident was not momentary, but lasted quite a while. His testimony up to the time the granary was set on fire was amply corroborated by the testimony of his grandmother, PW3 whose demeanor greatly impressed the trial Judge. The contradictions which Mr Mogikoyo pointed out were on matters which did not affect the issue of the identification of the appellants.

Moreover some of those contradictions were realized when PW3's testimony was compared with the contents of her statement to the police which was not put in evidence. Mr Mogikoyo cited the case of Rex v Siyaya [1936]3 EACA 31, as authority for the preposition that the court may look at such statements and act on them. With due respect to him, that case is distinguishable on the facts, from this case. That case concerned depositions on oath in a preliminary inquiry. They were in the nature of evidence. Consequently this being a court of record we can only go by what was recorded down by the trial court. Moreover, it should be recalled that when the police eventually arrived at the scene, PW1 accompanied the deceased's remains to the mortuary, and thereafter gave his statement to the police. There was no opportunity available to him after the police came into the picture for them to be together with PW3 AND PW2 to conspire to frame the appellants before he recorded his statement. The statements of PW2 and PW3 to the police were recorded much later. In view of that the respective testimonies of PW1, PW2 and PW3 were properly accepted and acted upon.

In our view, therefore, Mr Karanja, senior state counsel was right when he submitted before us that in the face of that evidence the appellants' alibi defences could not stand. Moreover, even though the prosecution never took steps to investigate the alibi with a view to calling evidence to disprove them having had ample notice and opportunity to investigate them before the trial, we think that there was no necessity of doing so. The evidence of the appellants' respective wives, who testified that they witnessed the killing of the deceased, was properly rejected. If they were at the scene of the killing as they said, one would have expected that they would have seen and identified those who tied the deceased and set her on fire. In court they denied having seen those who did so arguing that there was a large crowd of people surrounding the deceased, and because they stood some distance away from her, they did not have a good view of what was taking place. Their evidence was clearly evasive and when put against that of PW1 who initially was tied together with the deceased with a view to being lynched and was therefore in a better position to observe and identify their assailants, is clearly unbelievable. The trial Judge therefore, properly rejected it. The same may also be said about the testimony of DW3. He testified that Ist appellant, a councillor, had, on 15th May 1996, paid him a visit. He was forced to sleep at his home because he (the Ist appellant) could not return to his home which was about 15 Kms away.DW3 testified that he had to escort him back to his home in his car, the next day. The witness did not explain why he never did so the previous day, because if he had a car and was able to escort the Ist appellant on that day, he could have escorted him on the previous day, even at night time. After all the distance was short. It would also appear to us, as it did to the trial Judge, that the witness and all the other defence witnesses gave their evidence in such a slanted manner, clearly to help the appellants to escape punishment for their complicity in this heinous and brutal act against the deceased.

In the result and for the reasons we have given the appellants were properly convicted. Their appeals therefore fail and are accordingly dismissed.

Dated at Nairobi and delivered this 17th day of December 12 1997.

R.O. KWACH

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR