REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 70 of 1995

KINSHANTO OLE SIOLOLO …….....…….APPELLANT

AND

REPUBLIC …….....……..…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mr. Justice D. M. Rimita) dated 13th October, 1994

IN

H. C. CR. C. NO. 41 OF 1993)

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JUDGMENT OF THE COURT:

The discretion of a judge of the superior court in arranging his list or in fixing the time for trying cases before him should never be interfered with unless that discretion is exercised so as to result in a denial of justice: for the whole duty of every court is to do justice between the contesting parties - see Maxwell v. Keun and Others, [1928] 1 K. B. 645.

At the hearing of this appeal on 25th September, 1995, Mr. Onyango -Oriri for the respondent stated that he did not support the appellant's conviction for the offence of murder contrary to section 204 of the Penal Code in the absence of the medical evidence as to the deceased's cause of death.

The appellant had been charged with the murder of Murosawa Ole Ntukoiwan (hereinafter referred to as the deceased) in the High Court of Kenya at Nakuru. The two who are Maasai tribesmen were brothers-in-law as the appellant had married the deceased's sister.

From the record of the proceedings in the superior court, when the appellant first appeared in that court on 26th October, 1993, the case against him was set down for hearing on 22nd November, 1993. On the latter date, counsel for the prosecution applied for adjournment of the hearing of that case for the reason that he had to attend to another matter at the Principal Magistrate's Court, Nakuru. Consequent thereto, the hearing of the Case against the appellant was fixed for 26th and 27th January, 1994. On 26th January, 1994, the trial judge was away on session at Kericho and because of this, the said case was set down for mention on 3rd February, 1994. On that date, it was fixed for hearing on 18th and 19th April, 1994. Its hearing commenced on 18th April, 1994 and two prosecution witnesses- S. Ole Tialila (P. W. 1) and Muitale Ole Sadera (P.W. 2) - gave evidence. Further hearing of the case was to proceed on the following day - 19th April, 1994. On this date, only one prosecution witness- Maripe Ole Ntukoiwan (P.

W.3) - gave evidence and thereafter, counsel for the prosecution sought adjournment as other prosecution witnesses who included the doctor who performed the post-mortem examination on the body of the deceased were not present although they were bounded to avail themselves for the two days set for the hearing of the case against the appellant. This was the second application for adjournment by the prosecution but it was, however, opposed by the defence for the reason that the appellant herein was entitled to a speedy trial. Holding that there were no good grounds to support the prosecution's application for adjournment, the learned trial judge rejected the same and ordered the prosecution to proceed with its case against the appellant. Severely handicapped by the refusal of adjournment, the prosecution had no alternative but to close its case even without availing the trial court with the medical evidence as to the deceased's cause of death. Nevertheless, the learned trial judge put the appellant on his defence who gave evidence on oath and called two witnesses - Stanley Siololo (D. W. 2) and Samuel Loroko Kotuk (D. W. 3).

On the evening of 7th July. 1990 at about 9.30 p. m., the appellant and the deceased together with others who included P. W. 1 and P. W. 2 were drinking beer in Starehe Bar at Ololongoi Trading Centre within Narok District of the Rift Valley Province. In the course of their drinking, the deceased demanded to be bought beer by the appellant. The latter refused. Consequent to this refusal, the deceased hurled a bottle of beer at the appellant, which hit him on the head. In retaliation, the appellant also threw a bottle of beer at the deceased. Some Administration Police Officers who were taking soft drinks in the same bar arrested the appellant and the deceased and took them to their nearby Administration Police Lines where the two combatants were reconciled with the deceased being required to pay to the appellant a sum of K. Shs. 200/= as he was the younger of the two. That sum of money was paid to the appellant by P. W. 1 on behalf of the deceased as the latter said that he had finished his money. In accordance with Maasai custom, that money was used in buying beer to the elders at Starehe Bar where the appellant and the deceased had returned to together with those of their companions who had accompanied them to the Administration Police Lines. At this Bar, they continued drinking beer until about 10.00p.m. when the appellant left. At about 10. 30 p. m. , the deceased also left. The deceased had been drinking beer in this Bar from about 6.00p.m. while the appellant had come into the Bar at around 7.00 p. m. By about 9. 30. p. m. both men were already drunk.

At about 11.30 p. m. , P. W. 1 left the Bar for his home but he neither saw the appellant nor the deceased. P. W. 2. However, had left that Bar at about 11.00 p. m. and about a mile from Ololongoi Trading Centre on his way home, he found the appellant and the deceased fighting. There was moonlight and he was able to see that the appellant was armed with a sword while the deceased was armed with a "rungu". As he was about 35 feet from where the two were holding each other, he told them to leave each other. He then proceeded on his way home, as he did not consider that their fight would result in the death of any one of them - possibly because of their relationship as brothers-in-law. On the following day - 8th July, 1990- however, the dead body of the deceased was found at the scene where on the previous night P. W. 2 had left him and the appellant fighting. According to P. W. 3, the deceased's dead body had cut wounds on the hand, legs, neck and stomach. However, although it would appear that post-morterm examination was performed on the body of the deceased, in the absence of medical evidence in this regard, the extent of any one of these injuries was uncertain.

The appellant's defence to the charge levelled against him was that on the material day he never visited Starehe Bar at Ololongoi Trading Centre. Indeed, according to him, on this day, he had arrived at Nakuru from Molo at about 4.00 p. m. and had spent the night there and left for Laikipia at 9.00 a. m. On the following morning of 8th July, 1990 where he seems to have stayed for a period of about four (4) months while looking for a piece of land to buy. His, was therefore a defence of alibi.

In his judgment dated 7th October, 1994 but delivered on 13th October, 1994, the learned trial judge (Rimita, J.) observed that:

"Normally in cases of this nature expert evidence would be required to prove cause of death. But expert evidence while of great value to courts is evidence like any other evidence and is not necessarily binding on its own facts. In this particular case, the accused says that he does not know anything about the case. He has nothing to say about the death. The accused leaves it to the prosecution to prove the cause of death

or the killing among other things."

The learned trial judge then proceeded to hold that from the evidence available before him, he was not in any doubt that the deceased was killed by some person or persons and that he had died of cut wounds inflicted on him on various parts of his body. Believing the evidence of P. W. 1 and P. W. 2, the learned trial judge discounted the appellant's defence of alibi and concluded that the cut wounds leading to the deceased's death were inflicted by the appellant who then fled to Laikipia to avoid arrest. Holding that the appellant had malice aforethought when he inflicted these cut wounds, the learned trial judge found the appellant guilty of the murder of the deceased. He accordingly convicted him and sentenced him to suffer death in the manner authorized by law. It is against that conviction and sentence that the appellant now appeals to this Court.

In his appeal to this Court, the appellant has put forward eleven (11) grounds of appeal grounds six (6) and seven (7) of which are as follows:

6. That the learned trial judge erred in law in drawing an inference on the cause of death in the absence of expert opinion from a doctor.

7. That the learned trial judge erred in law in failing to find that the failure by the prosecution to tender evidence or sic (as to) the cause of death was fatal to the case."

As pointed out at the beginning of this judgment, from the outset, counsel for respondent conceded this appeal for the reason that there was no medical evidence as to the deceased's cause of death. No doubt as the learned trial judge observed in his judgment , expert evidence is not necessarily binding on the court. However, in cases of culpable homicide where a deceased person's cause of death is crucial to the conviction of an accused person in a criminal charge, medical evidence in that regard is necessary. It is only when such cause of death is so patently obvious, as where such a deceased person's head had been decapitated, that medical evidence as to his cause of death in a criminal proceedings may not be necessary; although in all Criminal Proceeding relating to culpable homicide, it is always prudent to tender medical evidence as to the deceased's cause of death unless such evidence is unavailable.

The circumstances of the case before the learned trial judge may have compelled him to conclude that the appellant inflicted the injuries that led to the deceased's death: but as we have indicated in this judgment, in the absence of medical evidence, the extent of any one of those injuries was uncertain. Indeed, from all the evidence, available before him, without the benefit of medical evidence, the deceased's cause of death remained unresolved. In his enthusiasm for speedy disposal of the case before him as is outlined towards the beginning of this judgment, the learned trial judge may have ushered into that case a state of affairs that led to an unsatisfactory trial of the same with possible miscarriage of justice. With the unresolved cause of the deceased's death, the appellant's conviction of murder contrary to section 204 of the Penal Code was unsustainable. In the result, we allow this appeal, quash the appellant's conviction, set aside his sentence of death and order that he be set at liberty forthwith unless he is held in custody for any other lawful cause.

Dated and delivered at Nakuru this 26th day of February, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR