



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Criminal Appeal 81 of 1995

**GEORGE GITAU KANGARA.....
.....APPELLANT**

AND

**REPUBLIC.....
.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Eldoret (Lady Justice R. N. Nambuye)
dated 23rd May, 1995**

IN

H.C.C.R.C. NO. 8 OF 1994)

JUDGMENT OF THE COURT

The appellant George Gitau Kangara was found guilty and convicted by the High Court of Kenya at Eldoret upon an information which charged him with murdering his brother Njenga Kangara on 22nd day of July, 1992 at Huruma Estate in Eldoret, contrary to section 203 as read with section 204 both of the Penal Code, and was sentenced to death.

At the commencement of the hearing of this appeal the Provincial State Counsel, Mr. John Oriri Onyango, informed us that the State did not support the conviction and the sentence and was, therefore, conceding the appeal. On the material day the deceased who appeared drunk, returned home from work between 7.00 p.m. and 8.00 p.m. He entered the compound of the estate comprising his house while singing a christian hymn. He then urinated after which he proceeded towards his house. Before the deceased entered his house a person ran towards him shouting words to the effect that the deceased had troubled him for a long time and that he was going to "taste" the knife. It would appear that the deceased was then stabbed with a knife and death was instantaneous. The post mortem report revealed that the deceased has sustained a stab wound on the left side of the chest through the spleen. the cause of death was certified as a collapsed lung and rupture of blood vessels. The appellant was arrested and subsequently charged with the murder of the deceased. He was convicted after a full trial before Nambuye, J. sitting at Eldoret on 23rd May, 1995, who agreed with two of the assessors and sentenced him to death. The appellant now appeals to this court from his conviction and sentence.

Mr. Mirugi Kariuki, who appeared for the appellant, has criticised the learned judge for misdirecting

herself on the law relating to identification and for overlooking material contradictions in the evidence of prosecution witnesses whom she wrongly found credible.

The compound of the estate was not lit and the witnesses testified that it was dark. None of the witnesses was able to identify the assailant of the deceased. Though Fredrick Odhiambo (P.W.1) alleges to have recognised the appellant's voice this witness was 70 to 80 metres away from the locus. Due to the many houses within the estate his hearing could have been impaired and the reliability of recognition is put in issue and it was possible that the witness had not really recognised the voice of the appellant. From her judgment we can deduce that the learned judge did not apply her mind fully to the necessity to be satisfied beyond reasonable doubt on the identification issue. It was absolutely essential for her to exclude the possibility of a mistaken identification by voice. Other evidence, in our view, was insufficient to remove this doubt.

The fact that the appellant was indifferent to the fate that befell his brother cannot per se be held to constitute conclusive evidence upon which to convict the appellant. It is common knowledge that an unidentified assailant can simulate a false and sympathetic concern towards his victim.

It is alleged that the appellant took the knife into his house wherein he locked himself until the police arrived to arrest him. It is worthy of note that despite a thorough search by the police for the knife it was never found.

For these reasons, we find that the conviction of the appellant cannot safely be supported and therefore the appeal is allowed. The conviction is quashed, the sentence of death set aside the appellant is ordered to be set at liberty forthwith unless held fo any other lawful cause.

Dated and delivered at Nakuru this 1st day of March,1996.

R. O. KWACH

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

