REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 49 of 1995

JOSEPH BOKE MATAIGA .....……..……...APPELLANT

AND

REPUBLIC…….....…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Justice Tanui) dated 17th September, 1993

IN

CR. C. NO. 38 OF 1992)

****

JUDGEMENT OF THE COURT

This is an appeal against the conviction of the appellant by Tanui, J. of the offence of Murder. The appellant was a member of an armed patrol of four Administrative Policemen and one regular policeman which was on duty at Chemasesi village in Bungoma District to forestall and suppress the tribal clashes that were then occurring in the district.

The evidence that was led by the prosecution to establish the charge, was that on the afternoon in question, three brothers of the deceased and a neighbour who are P. W. 1, P. W.2, P. W. 4 and P. W. 3 respectively, that is to say, James Murambi, Vincent Kimtai, Nicholas Masai and Peter Simatwa, had been arrested by the patrol. As they were being escorted from the Chemasasi School back to the home of the deceased and his brothers the former joined them having been sent home to fetch the identification card of his brother Vincent. Three of the policemen were in the front of the four that had been arrested and two of the policemen, the appellant and one Joseph Marwa, brought up the rear. Upon arriving at the scene, the deceased went to the appellant. The appellant was then heard ordering the deceased to get away. This was followed by a gunshot and when James, Vincent, Nicholas and Peter turned back to look, they saw the deceased lying dead on the ground after having been shot by the appellant who was standing behind the deceased and still pointing his gun at the dead man. These witnesses who were only a few paces away from the deceased and the appellant, were quite definite about what they saw. They all also said that they and the deceased were not armed and, what borne out by the medical evidence, that the deceased was shot in the back of the head not only negating any presumption that he had been shot in self defence but also confirming that he had been killed with malice aforethought in that, he died as a result of grievous bodily harm which had been inflicted on him by the appellant. Another eyewitness to the shooting was the father of the deceased, but he was not as near to the scene as the others were and his

evidence did not carry much weight. The learned judge did take into consideration the possibility that James, Vincent and Nicholas being brothers of the deceased and also having been arrested by the policemen, might implicate the appellant in the murder of their brother out of sheer vindictiveness. But he remained convinced of the truth of their evidence which was supported by the other eyewitness, peter who although he had also been arrested by the policemen, was not a brother of the deceased. And we ask ourselves , why did the eye witnesses accuse the appellant when they could just as easily have accused any of the other members of the patrol particularly Joseph Marwa who was bringing up the rear with the appellant, if what they were saying was not the truth.

There are, however, other aspects of the case for the prosecution which we must consider. The only member of the armed patrol that was called to give evidence for the prosecution was police constable Mohamed Ali, who was not an Administration policeman like the others, but a member of the regular police force. His evidence was that his patrol had been shot at by some unknown persons and that they had later come upon a group of people among whom were James, Vincent, Nicholas and Peter who were preparing to burn houses of Tesos because as he said rather lamely, in cross examination, "they were many in a house". He also said that earlier on, he and two others had found at the spot two spent cartridges. Upon their being reinforced by two more policemen who included the appellant, they arrested James, Vincent, Nicholas and Peter who were all not armed. It was whilst they were escorting them away in the fashion as described by the deceased's brothers and Peter, that is to say, himself and two other policemen in front and the appellant and Joseph Marwa bringing up the rear, that he heard the gun shot. He took cover and told the prisoners to sit down. He and his colleagues then went back to the compound of the Chemasesi school nearby, which was teeming with people armed with bows and arrows and where they saw a dead man who had been shot in the head. This witness avoided saying that the dead man was the deceased in the case, but did say that although they could not guard the dead body and decided to look for "a way of saving their lives" by beating a hasty retreat, yet they had time to take away with them two bows and some arrows which were lying near the dead body. He did not suggest that the deceased had been killed in a shoot out that had earlier taken place.

Inspector David Wangombe who investigated the murder also gave evidence for the prosecution which has some unusual features. He said that he did not ask for the gun used in killing the deceased because the gun used was what the appellant had been issued with. He then said that he did not ask for the gun because he did not know the particular Administration Policeman who had shot the deceased. Any way, it was he that produced the spent cartridges which could not be certified to have been fired by any particular gun, and the bows and arrows found at the school compound.

But other matters which have given us cause to pause are the fact that Joseph Marwa who was in the company of the appellant at the rear of the arrested persons when it was alleged that the deceased had been shot by the appellant, was not called to give evidence for the prosecution and the fact that there was no ballistic evidence adduced to show that the bullet that killed the deceased was fired by the appellant's gun. We do not know why Joseph Marwa was not called to give evidence for the prosecution and we cannot speculate about the reason for this. What we must consider however, is whether the absence of his evidence adversely affects the evidence of the other eyewitnesses as proof beyond reasonable doubt of the offence with which the appellant was charged. In this regard, we are of the same view as the learned judge, that even though three of the eyewitnesses were brothers of the deceased and the offence with which the appellant had been charged is one which upon conviction, carries a mandatory death sentence, the evidence for these eyewitnesses by itself, established the guilt of the appellant beyond all reasonable doubt. We would wish to add that it is not an unusual occurrence when a person is subjected to physical violence that the only persons who may be witnesses to such an attack may well be close relatives of the person attacked. This propinquity should not normally by itself, adversely effect the truthfulness of the evidence of such close relatives. With respect to the lack of ballistic evidence connecting the shot alleged to have been fired by the appellant which caused the death of the deceased, there is the uncontroverted medical evidence that the deceased died of a gunshot wound sustained in the back of his head and the evidence of the eyewitness that is was the appellant who fired the fatal shot. Though these eye witnesses did not actually see the appellant fire the fatal shot, the circumstantial evidence given by them which the learned judge accept and which we also do, lead to no other conclusion but that it was the appellant who fired the shot from his gun which killed the deceased. In such circumstances, even if the bullet had been

found which was not, it may well be superflours as in this case, to require ballistic evidence to prove what was obvious, namely, that the bullet that killed the deceased was fired by the appellant from the gun that he was carrying.

To all this, the defence of the appellant was that upon information received, his patrol set out for the Chemasesi school near where they had been informed, that people who were planning to burn down other peoples' houses, had gathered. And this is significant, he went on to say that some fifty meters before reaching where these people had gathered, a shot was fired at them forcing them to take cover. Later, they went to where the people had gathered and arrested the deceased's brothers and Peter. From there, they took those they had arrested and two spend cartridges to the District Officer's office at Kapsokwony. Unlike the eye witnesses and Mohamed Ali who testified that a shot was fired after the eye witnesses had been arrested and that they had also seen the dead body on the ground, the appellant's evidence was that no shot was fired after the eye witnesses had been arrested, and neither did he see any dead body anywhere. The evidence of the appellant did not shake the convincing evidence of the prosecution and the learned judge convicted the appellant as charged.

Mr. Menezes who appeared for the appellant in this appeal argued the following grounds:- that the evidence of the brothers of the deceased should not be relied upon, neither should that of Peter who though not a brother of the deceased was found in the deceased's home; that the learned judge failed to draw an adverse inference against the prosecution because it failed to call really independent witnesses, presumably the other members of the patrol particularly Joseph Marwa; that there was no evidence of malice aforethought if at all, it was the appellant who shot the deceased; that the prosecution's case had been weakened by the evidence of prosecution witnesses Inspector Wangombe and Mohamed Ali; and that the learned judge did not sum up properly to the assessors because he left the issues to be considered by them hanging in the air.

We have already expressed our views on the first three grounds and need not repeat them again except to reiterate that we do not find any merit in them. As regards the fourth ground, though the evidence of these two witnesses do not incriminate the appellant, it does not detract from that of the eye witnesses. Although no ballistic tests of the appellant's gun and the bullet that killed the deceased if the bullet had been found, was ever done, the evidence of the eye witnesses if believed as was done by the learned judge, and as we do, is sufficient to establish the guilt of the appellant beyond all reasonable doubt. The evidence of Mohamed Ali might seem to favour the appellant, but he did not look back when he heard the shot like the eye witnesses did. As regards the last ground, we have carefully considered the summing up of the learned judge and think that perhaps the criticism of his summing up is founded on the last sentence of his summing up which is:-

"The question is what do you think happened on 27/12/1991 and (to) the deceased."

If one considers all the summing up of the learned judge prior to posing this question, one cannot come to any other conclusion that after having summoned up on the evidence and the issues involved in the trial and on the standard of proof and who should discharge it, he properly put in a nutshell to the assessors the crucial question which they had to determine.

We have given anxious thought to the appeal before us and have come to the conclusion as must already be obvious, that the appeal must be dismissed. It is so ordered.

Dated and delivered at Kisumu this 22nd day of November, 1995.

R. O. KWACH

…….

JUDGE OF APPEAL

A. M. AKIWUMI

……..

JUDGE OF APPEAL

A. A. LAKHA

…….

JUDGE OF APPEAL

The majority Judgment is not signed by Kwach, J.A.

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

DEPUTY REGISTRAR