



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Nyarangi, Platt & Gachuhi JJA)

CRIMINAL APPEAL 54 OF 1985

BETWEEN

KIHARA.....APELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Masime J)

JUDGMENT

The appellant was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. He went through the trial in the High Court in which he was convicted on a lesser offence of manslaughter and sentenced to imprisonment for 8 years. He now appeals to this court against the conviction and sentence.

The facts of the case are that there was a traditional liquor drinking party at the appellant's home. The deceased went there. According to the witnesses he appeared to be drunk. A quarrel ensued between the deceased and the appellant over chicken. The deceased left the kitchen where they were drinking and went outside. He was followed by the appellant. A few minutes later PW 5 Samwel Njoroge Kimani, a nephew of the appellant, followed them. PW 5 said that when he came out he found the deceased lying on the ground. He heard the deceased tell the appellant not to beat him any more. He went to the appellant and told him not to beat the old man. The appellant went and picked up an iron bar and threw it at the witness hitting him on the buttocks. The mother of the appellant who had left the kitchen before the deceased told the witness to leave the appellant alone as she would talk to him. The witness (PW 5) left the deceased and the appellant and went away. PW 5 also gave evidence that both the appellant and the deceased did not have anything in their hands as they left the kitchen. Although PW 5 was in the kitchen where drinking was going on, he did not drink.

PW 6 Joel Wainoga Kuria, a teacher, said that he went to Stanley Ndirangu's Farm. In the kitchen he found PW 5, John Maina Itegi, the appellant and his mother. They were all drinking *busaa*. The deceased who appeared drunk joined them at 6.00 p.m. He asked for drink and was given a glassful. The deceased and the appellant started an argument over chicken. The witness decided to leave and left all of them in the kitchen except the mother of the appellant who had left before him. He heard the following morning that the deceased had died.

PW 7 David Mburu Maina was on his way home from Nyahururu when at about 7.15 p.m. he met the deceased. The deceased told him that he was beaten by the appellant because of his chicken. At the time the deceased was staggering. The deceased further told PW 7 that he was kicked on the stomach. The deceased asked the witness to hold him and escort him to his home. The witness did so, and walked slowly till the deceased could walk no more. The witness left the deceased at the road and went to call the wife of the deceased 300-400 yards away. When his wife came the deceased repeated the story to her in presence of the witness that he was beaten by the appellant. Eventually the deceased was carried to his house. They failed to find transport to take the deceased to hospital. The following morning, the witness learned that the deceased had died.

PW 9 Joyce Muthoni the wife of the deceased told the trial court that at about 8.00 p.m. Mburu Maina (PW 7) went to her and told her to go to pick her husband at the road. Both left for the road where they found the deceased in pain. When she asked him what was wrong, the deceased said that Kihara kicked him on the stomach at Kihara's home. She touched the stomach and found it swollen. She was helped by other people to look for a vehicle to take him to hospital without success. The deceased was carried home because he could not walk. He had a sleepless night as he was complaining about the liver and the stomach. PW 9 went to Nyahururu at 4.00 a.m. to look for transport but when she arrived back home at 8.00 a.m. the deceased was lying on the ground resting on his stomach, dead. She noticed fresh injury at the back of the head. She could not relate how the injury was caused.

That is all the evidence from the principal witnesses relating to this incident from the time the deceased had a quarrel with the appellant till the next morning when he was found dead and before the police took over investigations. From the evidence there is no eye witness who saw the appellant kick the deceased on the stomach. PW 5 merely stated that the deceased begged the appellant not to beat him any more. The time was after 6.00 p.m. There is no evidence whether it was dark or whether there was light. Also before PW 5 came to where the appellant and the deceased were, there was no one else near there. PW 5 mentioned of a short discussion he had with the mother of the appellant, yet PW 5 does not state where and how far the mother was or whether the mother could have seen the appellants beat or kick the deceased or how the deceased got to the ground. The appellant had several complaints.

The first complaint is that the prosecution did not call witnesses who were in the kitchen including his mother to give evidence. To answer this, perhaps it could safely be said that the prosecution is not compelled to call as many witnesses as there could be as it is not the number of witnesses that matters but the best sound evidence that can be given in court. The people who were in the kitchen could not give evidence of what went on between the deceased and the appellant outside the kitchen. They did not have any idea of what went on outside that evening in their absence. It would have been pointless to call them as witnesses.

The second complaint is that the court in convicting him relied on a dying declaration. These are the words alleged to have been said by the deceased to PW 7 David Mburu Maina and to his widow PW 9 that the deceased had been beaten by the appellant and that he was kicked on the stomach. The appellant in his unsworn statement never specifically denied kicking or beating, the deceased. In his cautionary statement he denied any knowledge of the incident. Though there is no rule that dying declaration must be corroborated, court needs to caution itself that in order to obtain conviction on a dying declaration, it must be satisfactorily corroborated, *R v Said Abdulla* (1945) 12 EACA 67, *R v Mgundulwa s/o Jalu and Others* (1946) 13 EACA 167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the weapon used. It may be that the dying person could not remember all that and may not be telling the truth. In *R v Ramazani bin Mirandu* (1934) 1 EACA 107 it was stated:

“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.”

In *Archbold Criminal Pleading, Evidence and Practice* 27th Ed. Section 2914 at page 950 on corroboration states:

“Even where there is sufficient warning, but matter is suggested as being corroborative which are not, and there is, in fact, no corroboration, a conviction may be quashed on appeal.”

The High Court accepted and relied on the dying declaration and stated that it was amply corroborated by the evidence as a whole. Before the dying declaration is relied upon, it has to be shown that the death is eminent and directly related to the incident. This was not so in this case. There is not much stated on the contents of the dying declaration. Whilst corroboration of the dying declaration as to the cause of death by the deceased before his death is desirable, it is not always necessary in order to support a conviction: *Eligu s/o Odel v R and Epongu s/o Ewunyu v R* (1943) 10 EACA 90.

In the light of what is stated above there is not sufficient corroboration in a dying declaration as narrated by two witnesses, the wife PW 9 and PW 7.

The third complaint is about the post-mortem report. The pathologist could not detect external injuries nor could he say whether the cause of death was due to beating or whether the beating caused the rupture of the spleen. Dr Walter Lowi Regd, the acting Police Pathologist was called.

He produced the post-mortem report and gave evidence which is recorded as follows:

“that it was a male African 69 years, old. No external injuries. Internally everything was normal except in the digestive system where all bowels were bruised. A large amount of fluid blood present in the abdominal cavity. Spleen ruptures. I formed opinion that the cause of death was internal haemorrhage due to ruptured spleen caused by “blunt force” on the abdomen.”

On cross-examination he said that the size of spleen was double the normal size due to previous infection not rupture. In fact “blunt force”, bruises on bowels and previous infection, were not explained in relation to the cause of death.

The pathologist was a professional witness, and hypothetical questions ought to have been put to him whose answers would have led to a suggestion as to the kind of force required and on which side of the stomach the force would be applied to cause the rupture. It would also have led the pathologist to say whether a fall on a soft surface would have caused the rupture. Section 45 at page 456, *Sarkar on Evidence* 10th Edition, states:

“The evidence of a medical man, who has seen and has made a post mortem examination of the corpse of the person touching whose death the enquiry is, is admissible: (1) to prove the nature of the injuries which he observed, (2) as to the manner in which those injuries were inflicted, and (3) as to the cause of the death. A medical man who has not seen the corpse and has not made the post-mortem examination is in the position of an expert witness who could give nothing but opinion evidence. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempted to prove and to ask the witness’ opinion on those facts. The general rule as to evidence of this kind is that the questions must be put to the witness hypothetically that is put in this way:

“Assuming such and such facts to be true, what is your opinion on the matter?”

Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?

The prosecution had the opportunity of obtaining the necessary evidence from this witness but there was not much elicited from him and in particular the vital part that would have assisted the court as to the cause of rupture of the spleen. The injury noticed by the widow on her return from Nyahururu was not

referred to the doctor.

The fourth complaint was that the assessors unanimously returned the opinion of not guilty of the charge of murder but the trial judge overruled their opinion and proceeded to convict him on a lesser offence of manslaughter. The learned judge agreed with the assessors fully that the prosecution did not prove malice aforethought, an essential ingredient in a murder charge but held that the appellant assaulted the deceased. A judge is not bound by the finding of the assessors under section 322(2) of the Criminal Procedure Code (cap 75) but a judge who disagrees with the unanimous opinion of the assessors should explain sufficiently his reasons for so disagreeing. That is not the case here.

The prosecution is duty bound to prove the offence beyond any reasonable doubt. Having appraised the evidence and the law, we do not find that the prosecution discharged this burden. It is therefore unsafe to uphold the conviction. This appeal is allowed, the conviction quashed and sentence set aside. The appellant will be set at liberty forthwith unless otherwise lawfully withheld.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR