REPUBLIC OF KENYA

Court of Appeal, at Nairobi

Criminal Appeal No 171 of 1984

Ndungu

v

Republic

(Appeal from the High Court at Nairobi, Butler-Sloss J)

November 15, 1985, Nyarangi JA, Platt & Gachuhi Ag JJA delivered the following

Judgment.

On November 14, 1984 the High Court (Butler-Sloss J) convicted the appellant Benson Nguny Ndungu of the offence of murder contrary to section 203 as read with section 204 of the Penal Code (cap 63) and sentenced him to suffer death in the manner authorized by law. Not surprisingly on September 13, 1985 he appealed to this court against the conviction and sentence by submitting his own supplementary memorandum of appeal which was abandoned by his Advocate, Mr Kamunge, who based the appeal on the following grounds :

> 1. The Honourable learned trial judge erred in law and in fact in that he failed to appreciate and ascertain the proximate cause of death of the deceased.
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> 2. The Honourable learned trial judge erred in law and in fact in that he accepted the evidence of the prosecution witnesses on identification at night wholesomely without warning himself of the danger of such identification.
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> 3. The Honourable learned trial judge erred in law in that he admitted inadmissible evidence.
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> 4. The Honourable learned trial judge erred in law and in fact in that he failed to appreciate and assess the credibility of the witnesses.
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> 5. The Honourable learned trial judge erred in law in that he convicted the appellant against the weight of the prosecution's evidence.

The facts underlying the present proceedings may be summarized as follows; Anna Wausi PW 1 the deceased's wife was as usual in their house on January 18, 1983 when at about 11.00 pm she heard her deceased husband, who use to take a little drink and who did not usually come home late, making a noise at distance of about 100 metres away, calling her, crying, screaming and telling her to ask people to go to his assistance. Anna carried a spot-light and hurried to tell Sammy Mutiso PW 2 but she found he had answered her husband's call and run towards where the deceased was. When she reached where the deceased was, Anna found the deceased lying. Mutiso was already there. The deceased told her of the

people who had caused him serious injuries at his abdomen, at his back and at the stomach. The deceased was carried to Matuu Health Centre. But Anna and the others first reported the incident at the Kithimani Police Station where they were issued with a P3 form. There was no Doctor at the Health Centre but he deceased was given some drugs. The deceased was taken back to the health center on 20th where a doctor completed the P3 form and according to Anna, the deceased was given three injections and some tablets. Two weeks later, the deceased developed stomach pain and his body turned yellow. He was taken to Thika Hospital, where he was given tablets, his condition immediately worsened and the deceased who was very sick was returned to Matuu Health Centre but was referred to and admitted at Machakos District Hospital where he died, after two days, on March 3, 1983.

Anna claimed she knew that the appellant, Peter Mwangi and Kariuki Maingi who were her neighbours were with her husband at the time he screamed. Of the condition that night Anna said,

> "I carried a spotlight. You could see somebody but not recognize because of the darkness".

That brings us to the next set of facts of the matter contained in the evidence of Mutiso PW 2 who heard someone scream about 100 yards from his house and, as it was at night, carried a five-cell torch and a rungu, of course, proceeded to where the person was screaming being the first person to reach there and when he flashed, he saw and identified the appellant, Mwangi Ngunyi and Kariuki Maingi people who he had known since their youth, who were his neighbours and whose names were mentioned by the deceased, bending over the deceased who was lying. The three men ran away when Mutiso flashed his torch. According to Mutiso, the deceased said he had not been with three men; he had followed them. Each of the three carried a stick and they came all of a sudden and started beating him. Mutiso observed the deceased and saw an injury on his forehead, at the lips and at the back of his neck. Mutiso recalled that the deceased said he had no money at the time but that he had lost his watch.

Mr Kamunge for the appellant complained, while he argued his first ground of appeal, that there was no indication what the cause of death was, that there is no evidence to support the judge's finding that the deceased died as a result of the injuries he sustained, there being no supporting medical evidence, and no post-mortem report and that there was no evidence of the exact treatment which he received at the Matuu Health Centre and at the two hospitals. Under ground two, Mr Kamunge urged that the evidence of identification is unsatisfactory, that Mutiso PW 2 could not have sufficiently seen the appellant and the two others, that Anna PW 1 did not say that her deceased husband mentioned the names of the appellant and the others and that the entire evidence of identification could not be relied on. Arguing the third ground, Mr Kamunge said that what the deceased said at the scene is not a dying declaration and that because the deceased died 44 days after he was assaulted, it could not be held, reasonably, that the death was related to the beating because the cause of the death was not established. The submission in respect of the fourth ground was that the judge failed to analyse the evidence of Anna PW 1 and of Mutiso PW 2 before declaring that they were credible witnesses. Mr Kamunge gave an example of the error committed by the judge, this, that although there was no evidence that PW 1 was beaten by the appellant, she told P C Ali PW 4 just that and that the deceased who had earlier on told Mutiso that he had no money on him when he was attacked, yet told P C Mwaka PW 5 that he was robbed of Kshs 400 and said nothing about a wrist-watch. The last ground of appeal is the usual general one that the appellant was convicted against the weight of the prosecution evidence. Under that ground, Mr Kamunge reiterated his contention that there was no evidence adduced as to the cause of death, and that there were serious and irreconcilable contradictions between the testimony of Anna PW 1 Mutiso PW 2 P C Ali PW 4 and P C Mwaka PW 5.

In reply, learned state counsel Mr Haq accepted that there was lack of medical evidence as to the cause of death and conceded the appeal as regards the conviction for murder. Mr Haq urged us to find that the prosecution evidence supports the lesser and cognate offence of assault causing actual bodily harm contrary to section 251 of the Penal Code (cap 63). The argument of learned State Counsel was that the appellant was recognized by Mutiso PW 2 which is a better basis than identification, that the evidence of Anna PW 1 showed that the deceased was consistent and that on the evidence of Mutiso PW 2 the appellant associated himself with the offence.

On this first appeal our task is to give our own consideration and views of the evidence as a whole and

our decision thereon. It is our duty to rehear the case and as regards credibility of witnesses to be guided by the judge's impressions, if any, of the witnesses he saw and heard. We have to be satisfied that there was evidence upon which the judge could properly and reasonably find as he did: Shantilal M Rawala V R[1957] E A 570 and Anwar Kimngetich v R, Criminal Appeal No 14 of 1985 (unreported).

Committal proceedings by subordinate courts specify committal documents which the prosecution shall furnish to an accused person or his Advocate and the court. Under section 231 (2) (ii) of the Criminal Procedure Code (cap 75) a copy exhibited in court of any medical, psychiatric or post-mortem report is identified as one of the committal documents. The material committal proceedings which were available to the judge at the trial contain an unsigned copy of the post-mortem report. That was the copy which P C Eschesson PW 6 unsuccessfully attempted to produce at the trial because it was useless.

A post-mortem examination was carried out by a medical officer whose name is not given. At the committal proceedings, the Magistrate should have inquired and insisted that the copy of post-mortem report, which is a vital committal document on which to base a committal for trial before the High Court, is satisfactorily completed and properly signed by the person making it or ask for the original to be produced. The magistrate is required under section 322(2) of the Criminal Procedure Code to read the committal documents, before the commencement of the proceedings and to be satisfied, on the contents of such documents, that there are sufficient grounds for committing the accused.

Clearly a committal document which is undated and which does not bear the name or signature of the medical officer who performed the post-mortem examination is not a copy and ought not to have been accepted as a committal document. We would say that if a committal document which is vital and on which the prosecution case will be based is not produced during the committal proceedings, the subordinate court concerned should adjourn the proceedings to enable the prosecution to furnish it with the necessary document. It must be stressed that committal proceedings must be based on sufficient grounds so that committing the accused for trial before the High Court is meaningful and is seen to be meaningful. We have no enthusiasm for incomplete and sloppily prepared committal proceedings which waste time and cause unnecessary hardship.

Similarly the statement which the deceased made to Corporal Mwaka should have been produced as an exhibit to the magistrate.

Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge.

The prosecution, relying on the decisions in Republic v Cheya and Another [1973] E A 500, argued that death and the cause of it could be established otherwise than by medical evidence and that the evidence of PW 1 about the sickness of the deceased proved that the deceased's death was as a result of the accused's attack on him on January 18, 1983.

It was also submitted before the judge that a doctor gives only opinion evidence which the court can accept or reject.

The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical

evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.

Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.

To return to Cheya. It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.

There was no evidence from the clinical officer at Matuu Health Centre who was said to have completed the P3 form and who according to Anna, gave the deceased three injections and some tablets . There was no explanation of the drugs nor any evidence of the diagnosis to support the treatment. As matters stood at the conclusion of the trial in the High Court, there was no evidence to tie up the treatment at the Matuu Health Centre, at Thika District Hospital and at Machakos District Hospital to the evidence of the injuries. That was all the more necessary after the deceased's body began to turn yellow which condition suggested that death was due to a different illness. Whether or not what the deceased said to Anna and to Mutiso came within section 33(a) of the Evidence Act (cap 80) depended on whether the circumstances mentioned by the deceased to the two witnesses resulted in his death. Because the cause of death was not proved, the statements of the appellant did not advance the prosecution case.

As a result of the course taken at the trial, learned state counsel properly conceded the appeal against the conviction for murder.

So far as the submission of learned state counsel that the appellant should be convicted of the lesser cognate offence contrary to section 251 of the Penal Code is concerned, we have formed the view that identification by the single witness, Mutiso was not positive.

Anna, who also carried a torch and flashed it, said it was impossible to recognize a person. Mutiso said he saw three people bending and that as he flashed his torch, they stood and ran away. The witness did not say how much opportunity he had to see and identify the people.

Our conclusion is that the appeal must be and is allowed, the conviction quashed, the sentence set aside and the appellant shall be set at liberty unless otherwise lawfully held .

November 15, 1985

Nyarangi JA, Platt & Gachuhi Ag JJA