



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 50 OF 2017

BETWEEN

VINCENT CHEMJOR.....1ST APPELLANT

PETER KIPROP CHEMJOR.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya

at Eldoret (G. W. Ngenye-Macharia, J.) dated 22nd July 2015

in

H.C. Cr. C NO. 6 OF 2008)

JUDGMENT OF THE COURT

[1] The two appellants who are brothers, were convicted by the High Court (**Ngenye-Macharia, J**) of three counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and each sentenced to death. They now appeal against the conviction and sentence.

[2.1] The prosecution case against the appellants was briefly as follows. On 23rd November 2007 at about 7.00 p.m. **Mica Chelimo (PW6)** was at his Agrovat shop at Kesisit Trading Centre. He was in the company of several other people, among them, **Joseph Kipkemei Chelenge (PW10); (Chelenge), Joseph Kipkenei (PW11) (Kipkenei)** and **James Chebet (PW13) (Chebet), Zephaniah Kipkulei (PW1) (Zephania)** was outside the Agrovat shop. **Stanley Toroitich (PW5) (Toroitich)**, the Chief of Saimo Location went to the trading centre. He met the 1st appellant (**Vincent**), who asked the chief why he wanted him arrested. The chief had reported the appellant to police over a matter and was being sought by the police. The chief told him to go away and that they would talk about the matter on the following day.

[2.2] The chief proceeded to the Agrovat shop and the 1st appellant followed him there. The 1st appellant who looked angry kicked the chief. The 1st appellant then removed a knife and pointed it at the chief. The chief held him and other people, among them, **Chelenge** and **Chebet** intervened. The 1st appellant was pushed outside the shop and was tied with a rope. The 1st appellant called out the name of the 2nd appellant who went to the scene with a lot of stones which he started throwing at people. The 1st appellant overpowered the people around him and untied himself.

[2.3] Thereafter, the two appellants went on a rampage. The 2nd appellant held one **Zephania** and the 1st appellant stabbed him with a knife on the left side of the ribs. The 1st appellant also stabbed **Harun Kimotol** (deceased in the 1st count) at the ribs. **Harun Kimotol** was a village elder and when his son **Francis Kandie** (deceased in the 2nd count) run to rescue his father, the 1st appellant also stabbed him. As **Charles Chepkitony** (deceased in 3rd count) was closing his shop, the 1st appellant stabbed him with a knife. After the incident the two appellants ran away. The three deceased persons died at the scene but **Zephania** survived.

[2.4] **Dr. Gilbert Cheruiyot (PW16) (Dr. Gilbert)** performed the postmortem on the three bodies on 28th November 2007. **Harun Kimotol** had a stab wound on the left side of the chest and on the left groin. There were also bruises on the occipital side of the skull caused by a blunt

object. The doctor formed the opinion that the cause of death was cardio respiratory arrest due to severe hemorrhage into neural cavity secondary to stab wound. The body of **Francis Kandie** had a deep cut wound on the thumb, deep wound on the 3rd inter-cortal space on the left side of the chest, deep stab wound on the left side of the chest along the 6th interspace and deep stab wound in the left forearm. The doctor formed the opinion that the cause of death was cardio respiratory arrest due to severe hemorrhage to *dural* space and *pericardio* space, secondary to penetrating injury. Lastly, the body of **Charles Chepkitony** had four stab wounds on the chest and one stab wound on the right posterior chest. The cause of death was diagnosed as cardio respiratory arrest secondary to severe hemorrhage into pleural cavity and pericardial space due to trauma.

[3] The 1st appellant testified at the trial that on the material day, he met **Toroitich**, the chief, outside a bar at Kasisit trading centre; the chief held his hand and hit him on his knees and hand and asked for a rope; that people came and tied his hands; that he asked the chief what the problem was and the chief told him that he had looked for him for a long time for an arson case; that people came from the bar and started beating him and a fight broke out; that he ran away to a neighbour's home with his hands tied where he remained until 10 p.m.; that he went home and found his house had been burnt; that the chief said he wanted to arrest **Peter Kiprof** (2nd appellant) over an arson case but mistook him for the 2nd appellant; that he went to the police station to report the assault by the chief but he was locked up and that on the following Sunday, the 2nd appellant went to see him at the police station but he was also arrested. He denied stabbing the three deceased persons and stated that a fight broke out between the group which supported the chief that he be arrested and the group which supported him.

[4] On his part, the 2nd appellant stated in his unsworn statement that on 23rd November, 2008, he and his wife visited his wife's parents at **Kapiemo** which was not far from Kesisit; that he stayed there until Sunday when he went home and was informed that people had been killed and houses burnt; and that he went to the police station to visit his relatives who had been arrested and he was arrested. He denied throwing stones at Kesisit trading centre or stabbing anybody.

[5] The prosecution called seventeen (17) witnesses. The trial Judge, after considering the evidence of the material witnesses made a finding of fact that the 1st appellant had a grudge against, and confronted **Toroitich** the area chief, over an impending arrest; that there was sufficient lighting at the scene from electricity, from security bulbs and from moonlight; the postmortem reports corroborated the evidence of witnesses that the three deceased persons were stabbed with a knife; that the two appellants were known by the witnesses and were identified by recognition through light from electricity and moonlight, that there was overwhelming evidence that it is the 1st appellant who stabbed the three deceased persons to death and his defence did not shake the strong prosecution case; that 2nd appellant handed over the knife to the 1st appellant; that the 2nd appellant was in the company of the 1st appellant as he went about the errand of stabbing the victims; that the 2nd appellant did not do anything to prevent the 1st appellant from accosting and fatally injuring the victims; that the 2nd appellant threw stones; that the 2nd appellant's alibi was dislodged by the strong prosecution evidence; and that the 2nd appellant was a principal offender.

[6] The main grounds of appeal are that there was no sufficient evidence of identification; the evidence of the prosecution witnesses was contradictory and that the evidence shows that the appellants were implicated. In his written submissions, **Mr. Miiyinda** learned counsel for the appellants analysed the evidence of the various witnesses and submitted that the entire episode occurred at night; that there were very many people at the trading centre; that the appellants were not properly and directly identified as the deaths occurred at a trading centre where there were very many people; that the evidence was contradictory with respect to stone throwing, the knife, the panga, fighting, fracas, sword stabbing, clan fighting, moonlight, electricity and solar, and that the witnesses did not see what happened, nor see who stabbed the deceased persons, and that the evidence of **Zephania Kipkulei** (PW1) showing that he implicated the appellants discredits the prosecution evidence.

[7] Similarly, **Mr. Mulati**, the prosecution counsel filed written submissions and submitted, among other things, that a number of the 17 witnesses placed the appellants at the scene and gave graphic accounts of how the appellants confronted the deceased persons and stabbed them to death; that evidence showed that the 1st appellant was armed with a knife and stabbed the deceased persons; that the witnesses knew the appellants before and could not have mistaken them from other persons and that there was cogent evidence against the appellants.

[8] Our duty is to reconsider the evidence, re-evaluate it, and come to our independent conclusions while bearing in mind that we have not had the opportunity to see and hear the witnesses.

[9] There was overwhelming evidence that the three deceased persons were stabbed to death at Kasisit trading centre on the night of 25th November, 2007 and that they all died at the scene. **Chelenge** (PW10) testified that the body of **Harun Kimotol** was lying about five (5) metres from the Agrovat shop; the body of **Francis Kandie** was lying about six (6) metres from the Agrovat shop and the body of **Charles Chepkitony** was lying about fifteen metres from the Agrovat shop. Stanley Toroitich, the chief testified that when he went back to the scene in the company of the police and the District Officer, he found the three dead bodies on the ground and the bodies were carried away by the police. The evidence of **Dr. Gilbert** showed that the three bodies had stab wounds on the chest and that the cause of death of the three persons was due to cardio-respiratory arrest secondary to severe hemorrhage.

[10] The events leading to the killing of the three persons was described by several witnesses. The evidence of chief, **Toroitich** that the 1st appellant confronted him at the Agrovat shop for reporting him to police was supported by **Mica Chelimo**, **Chelenge**, **Kipkenei** and **Chebet**. The 1st appellant admitted that the chief held his hand and that he had an argument with him but he stated that people came and started beating him and a fight broke out. The location of the shop or kiosks of some of the people involved was described by some witnesses.

Anderson Kibet Kandie (PW4), a son of the deceased **Harun Kimotol** testified that his father had a hotel at the trading centre. **Charles Chepkitony** (deceased) had a shop beside their hotel; that the shops are in one block divided into several shops; and that the shops are about six metres apart. According to him, the fight was near the shop of his father; **Margaret Charles** (PW15), the widow of **Charles Chepkitony** (deceased) testified that her deceased husband had a shop bordering the hotel of **Harun Kimotol** (deceased). She also testified that the Agrovat shop is about 20 - 30 metres from their shop.

[11] There was also evidence that **Martha Kobilu**, the mother of the appellants was at the trading centre and attempted to intervene in the

dispute between the chief and her children. **Charles Somukwa (PW3)** stated that he is a brother to the two appellants and that on the material day, he was at the hotel of **Harun Kimotol** (deceased) when the mother of the appellants went to the hotel and asked the deceased why the chief had arrested her sons and the deceased told her that the matter was over. **Margaret** testified that on the material day at about 7 p.m. the mother of the appellant went to the shop and told her husband to call **Harun Kimotol** which her husband did and the mother of the appellants and **Harun Kimotol** went towards a nearby transformer.

[12] The finding of the High Court that there was electricity and moonlight was supported by the evidence of several witnesses. **Zephania, Anderson Kibet Kandie** (PW4), **Toroitich** (PW5), **Mica Chelimo** and **Kipkenei**.

[13] The finding that the appellants were known to the witnesses and that it is the 1st appellant who stabbed the three deceased persons with a knife while the 2nd appellant was throwing stones was supported by the evidence of several witnesses. **Zephania** who is an uncle to the appellants testified that he was stabbed with a knife on the left hand by the 1st appellant; who then passed him running, met **Francis Kandie** and stabbed him and that he was about 10 metres from where the incident occurred. On his part **Kipkenei** testified in part:

“I then say Haron coming towards us. Then I head accused 1 tell Haron that ‘I was looking for you’. I then saw accused 1 (David) stab Haron on the ribs. I then saw Francis running towards his father Haron. He wanted to rescue his father. Again I saw accused 1 Daudi stab Francis. I realized I was in danger and ran away.”

This witness also testified that when the 1st appellant confronted the chief, he and **Chebet** held the 1st appellant who was holding a knife and overpowered him. **Robert Chesaro Cheburet** (PW12) testified that he saw people running from all directions and while he was 10 metres away, he saw the 2nd appellant holding **Harun Kimotol** as the 1st appellant stabbed him. He also testified that he saw the 1st and 2nd appellants tie **Francis** who had come to help his father and the 1st appellant stabbed him. He further testified that as **Charles** was closing his shop, the two appellants held him and **Charles** pleaded with them not to kill him and, to help **Charles**, the witnesses threw a stone which hit the 1st appellant on the head; that the 1st appellant fell down and released Charles but that this was after the 1st appellant had already stabbed Charles.

In his evidence in cross-examination, he testified that **Charles** and **Harun** fell 6-7 metres apart and that the Agrovet shop is at a corner from where **Charles** fell and that one could see the bodies from the shop.

Lastly, **Kennedy Chebon Kimuge** (PW17) testified that when stones were thrown to the shop where he was watching TV, he came out and personally saw the 1st appellant stab **Francis Kandie** and also saw the 2nd appellant throwing stones.

[14] Although there was no concrete evidence regarding the geographical area of Kasisit trading centre, the evidence showed that the scene of the confrontation between the chief and the 1st appellant, and the scene of the killing of the three deceased persons occurred within a small radius. The Agrovet shop where the confrontation occurred and the shop of **Charles Chepkitony** (deceased in count III) and the hotel of **Harun Kimotol** (deceased in count 1) were very close to the Agrovet shop. All these premises were described as kiosks. Some of the witnesses also gave evidence that they were present when the 1st appellant confronted the chief. They intervened and pushed the 1st appellant outside. The overwhelming evidence is that the 1st appellant fought with the chief before he was subdued and tied with a rope, that is then that he called out the 2nd appellant to help him and the 2nd appellant rained stones on the persons who were assisting the chief. The 1st appellant then disentangled himself and run after the three deceased persons and stabbed each of them to death. **Harun Kimotol** one of the deceased persons was a village elder who was described as a helper to the chief. **Francis Kandie** who was also stabbed to death was the son of **Harun Kimotol**. The mother of the appellants had immediately before the incident called on **Charles Chepkitony** (deceased) to call **Harun Kimotol**. The mother of the appellants had immediately before the incident questioned **Harun Kimotol** why his sons were being arrested. It is apparent that **Harun Kimotol** and **Charles Chepkitony** were associated with the chief who had reported the 1st appellant to the police. The 1st appellant admitted that he was at the scene; that the chief held him and that he was beaten. He also stated that all the deceased persons were relatives of the chief. There was ample evidence that the chief had reported the 1st appellant to the police and that the police were looking for him.

[15] The 1st appellant was the only person aggrieved by the previous report by the chief to the police and by the assault on the material night. The trial Judge evaluated the evidence exhaustively and considered the case law on identification. We have considered the authorities on identification cited to us. Nonetheless, we are satisfied that in all the circumstances of the case, the evidence of the witnesses that they identified the 1st appellant as the person who stabbed the three deceased persons was credible. There was ample evidence that some of the identifying witnesses saw the 1st appellant at close range and had personal contact with him when he confronted the chief. There was also ample evidence that the conditions for identification were favourable as there was light from electricity and from the moon.

[16] As regards the 2nd appellant, **Toroitich** testified that he ran away when the 1st appellant called the 2nd appellant loudly. **Chelenge** testified that when the 1st appellant shouted the name of the 2nd appellant, the 2nd appellant emerged from the shops about 40 feet away and started throwing stones at the people outside the Agrovet shop where the chief, the 1st appellant and other people were. Several other witnesses saw the 2nd appellant as he was throwing stones. **Zephania** and **Kennedy Chebon Kimuge** saw the 2nd appellant throwing stones. **Robert Chesaro Cheburet** saw the 2nd appellant holding stones. As we have already found, the conditions for positive identification were favourable.

[17] We find, as the trial Judge did, that the 1st appellant as he was being arrested by the chief and others called out the 2nd appellant who went to the scene and started throwing stones and further that the 2nd appellant was throwing stones as the 1st appellant stabbed the three deceased persons.

[18] The learned Judge made a finding of fact that it is the 1st appellant who stabbed the three deceased persons to death. However, relying

on **section 20(1)** of the Penal Code, the learned Judge made a finding that although the 2nd appellant did not stab the three persons, he was a principal offender. The reasons why the learned Judge found the 2nd appellant to be a principal offender are clear from the following excerpt from the judgment.

“But from the evidence of PW1 he clearly saw the 2nd accused who is a brother to the 1st accused handing over the killer knife to the 1st accused. The 2nd accused too was in the company of the 1st accused as the 1st accused went about his errand of stabbing the victims. He did not do anything to prevent the 1st accused from accosting and fatally injuring the victims. Further, according to PW11, when the 1st accused was held by the Chief, he called out to the 2nd accused that he had been arrested. That is when stones started being thrown. The 2nd accused was throwing them.”

The evidence of *Zephania Kipkulei* (PW1) that it is the 2nd appellant who gave the knife to the 1st appellant was contradicted in material respect by the evidence of the chief *Toroitich* and *Mica Chelimo* who both testified that the 1st appellant removed the knife as he confronted the chief. This was before the 1st appellant called out to the 2nd appellant for help. *Mica Chelimo* categorically stated:

“It is not true Kiprop brought the knife to Vincent.”

The finding that the 2nd appellant accompanied the 1st appellant as he went about stabbing the people was not borne out by the evidence. As we have already found in para. 14 above, the scene of the confrontation between the 1st appellant and the chief and the scene of the killing of the three deceased persons occurred within a small radius. It seems from the evidence that as soon as the 1st appellant called out the 2nd appellant, the 2nd appellant appeared and started throwing stones and continued throwing stones as the 1st appellant disentangled himself from the rope with which he had been tied and suddenly thereafter ran after the deceased persons who were also nearby and stabbed all to death. It is clear from the evidence that the 1st appellant called out the 2nd appellant to save him from being arrested and the throwing of stones by the 2nd appellant was to stop the arrest and not to aid the 1st appellant from stabbing the three deceased persons.

[19] From the foregoing, we have come to the conclusion that in that brief moment, the 2nd appellant and the 1st appellant had not formed a common intention to kill the three deceased persons, or that the 2nd appellant aided and abetted the 1st appellant to kill the three persons. We give the 2nd appellant the benefit of doubt.

[20] There are other grounds of appeal, namely; that the trial Judge did not comply with **section 200(3)** of the **Criminal Procedure Code**; that the investigating officer was not called as a witness and that the trial judge erred in admitting written submissions after the reception of the evidence. Both appellants were represented by a counsel at the trial. It is clear from the record of the proceedings that the trial Judge took over the trial after the evidence of four witnesses had been received by another Judge who was not available, and that the appellants in the presence of their respective counsel elected to have the trial proceed from where it had reached. It is true that the investigating officer did not give evidence. The record shows that he had been transferred and witness summons were applied for and issued but the investigation officer failed to attend. Indeed, a warrant of arrest was issued against him. An application for adjournment to have the investigating officer give evidence was opposed by the respective counsel for the appellant and the learned Judge declined to adjourn the trial.

Accordingly, this is not a case where the prosecution deliberately failed to call the investigation officer as a witness. The fact that the investigating officer did not give evidence creates a lacuna in the prosecution case but in the circumstances of this case, such lacuna did not occasion a miscarriage of justice. The final submissions of the appellants after the trial were received through written submission and considered by the trial Judge. The tenets of a fair trial as stipulated in **Article 50(2)** of the Constitution were substantially fulfilled.

There is no merit in these set of grounds of appeal.

[21] We note that the appellants were sentenced to death in each of the three counts. Sentence of death should have been imposed in one count and the sentences in the other two counts left in abeyance. Further, although as held in **Francis Karioko Muruatetu and others v Republic [2017] eKLR** that sentence of death for offence of murder is not mandatory, the High Court made a finding that the crime was most foul. Having regard to the circumstances of this case, we are in agreement that the 1st appellant deserved the sentence of death.

[22] For the foregoing reasons;

- (i) The appeal by the 1st appellant, Vincent Chemjor against conviction and sentence is dismissed save that the 1st appellant shall suffer death in the first count and sentences of death in the 2nd and 3rd counts are held in abeyance.
- (ii) The appeal against conviction and sentence by the 2nd appellant Peter Kiprop Chemjor is allowed, the conviction in each of the three counts is quashed and sentences set aside.

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR