



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 131 OF 2014

BETWEEN

KIPYEGON MASUDI REUBEN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Bungoma, A. Mabeya, J.) dated 26<sup>th</sup> day of May, 2014*

in

HCCRC NO. 34 OF 2009)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court (**A. Mabeya, J**) whereby the appellant was convicted for the offence of murder of Dickson Kiplangat (deceased) contrary to **Section 203** as read with **Section 204** of the Penal Code and sentenced to death.

[2] The particulars of the offence read that on the 17<sup>th</sup> February, 2008 at Kaboiywo Forest in Kaboiywo Sub-Location within Mt. Elgon District, the appellant jointly with others not in Court, murdered Dickson Kiplangat.

[3] Briefly, the background of the appeal is as follows;

**David Tumo Kuku (David)**, testified that on 20<sup>th</sup> February, 2008 at around 11.00 a.m., he was at his house with his two wives, when he heard gunshots and a lot of noise made by people running towards his direction and was informed that members of 'janjaweed' also known as Saboti Land Defence Force, hereinafter referred to 'SLDF' were heading to the area. David claimed that he saw the appellant, whose alias is "Okwengu" in a group of about ten men of the SLDF group, holding a gun and shooting in the air and chasing people around. David then ran and sought refuge at Kaboiywo Administration Police Camp, where some police men armed themselves and pursued the aggressors. It was David's testimony that he was in the company of the police men, including the deceased, pursuing members of SLDF who were dressed in police uniforms. He told the trial court that the appellant shot the deceased in the head and also proceeded to hit him in the head with his gun. He and the police men then ran away and left the deceased's body there.

[4] Another witness, **David Kandie (PW3) (Kandie)**, the Deputy OCPD, Kapkaten South Division, testified that he received a call from his superior that Kaboiywo Administration Police Post had been attacked by members of SLDF after which he mobilized some police officers to pursue the group. He testified that there was a shoot-out between members of SLDF and the police officers, during which the deceased unfortunately lost his life; that the police men were outnumbered and they opted to retreat from the scene; that they returned the next day at the place where the deceased was shot and found his body although it was badly mutilated; that he never saw who shot the deceased and that the members of SLDF were not dressed in police uniform but were dressed as civilians.

[5] PW1 further testified that in June 2009, about one year and four months from the date of death of the deceased, he had attended a football match when he saw the appellant, whom he identified as the man who fatally shot the deceased. He alerted the police leading to the appellant's arrest.

[6] A post mortem examination report prepared by **Dr. Vilembwa** on 22<sup>nd</sup> February 2008 was produced in court by **Dr. Hilary Shivachi**

(PW4), who was familiar with the latter's handwriting. The report noted that most body parts of the deceased were missing and the body was partly eaten by wild animals. He concluded that the cause of death was cardio pulmonary arrest due to bullet shot injuries.

[7] The appellant in his sworn evidence stated that on the material day of 17<sup>th</sup> February, 2008, he was at the house at Sikinwa in Saboti where he resided with his wife and two children. He denied that he was holding any gun on the 20<sup>th</sup> February, 2008 or that he shot the deceased while in the company of other people. He stated that David was his neighbour for more than twenty years. After the 2007 post-election chaos in the area, he relocated to another area until June 2009, when he was arrested while playing a soccer match. He claimed that David and another person had stolen cattle of the appellant's father and had a grudge against the appellant.

[8] The learned judge considered the evidence and made a finding that the appellant murdered the deceased, that the evidence of David was consistent and positively identified the appellant as the deceased's killer. The learned Judge made a finding at para 18 of the judgment thus:

**“The evidence of PW1 was consistent and remained unshaken both in chief and in cross examination. He identified the accused as the person who shot the deceased... His evidence was credible and unshaken. This Court believed his testimony.”**

[9] The appellant has filed this appeal against the judgment of the High Court on the grounds, among others, that the prosecution failed to prove the offence of murder beyond reasonable doubt; that the High Court failed to properly re-evaluate the evidence; that there was no investigation done or evidence presented in form of exhibits of D.N.A or cartridges linking the appellant to having committed the crime.

[10] **Mr. Okoyo** for the appellant reiterated the grounds of appeal and submitted that there was no evidence provided by the prosecution in support of the conviction as the appellant was only convicted on the basis of evidence by David, and that the evidence of David was contradictory.

[11] **Ms. Tumaini Wafula**, the Assistant Director of Public Prosecutions conceded the appeal and in doing so, submitted that there was a lot of contradicting evidence starting with the date the offence was committed, the contradicting evidence on whether the appellant was dressed in police uniform or dressed as a civilian and the further confusion as David mentioned at one point that he pursued the appellant with his family members and later with police officers, all these forming material contradictions. She further submitted that the prosecution failed to tender evidence to disprove the appellant's alibi hence the learned Judge erred by shifting the burden of proof to the appellant.

[12] Section 29(1) (a) of the Appellate Jurisdiction Act provides that on any appeal from a decision of a superior Court acting in the exercise of its original jurisdiction, the Court shall have the power to re-appraise the evidence and to draw inferences of fact. In the case of **Njoroge – vs- Republic [1987] KLR 19** this Court observed:

**“... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of facts as on questions of law, demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect...”**

[13] Despite the respondent conceding the appeal, this Court has a duty to re-evaluate and re-analyze the evidence presented and consider the merits of the appeal. The approach to be taken by this Court where the DPP concedes an appeal was stated in **Patrick Omikunda Omung'ala v Republic, Cr. App No. 195 of 2012** as follows:

**“While it is the right of the respondent to oppose or concede a criminal appeal, that in itself does not bind this Court. The decision of this Court turns on whether, based on the evidence on record and the law, the conclusions of the first appellate court are proper. The respondent's opposition of an appeal does not invariably lead to a dismissal of the appeal; conversely the respondent's concession of an appeal cannot lead to its automatic success.”**

[14] The essence of the grounds of appeal is that the prosecution did not prove the charge beyond reasonable doubt. Only one material witness, David, gave evidence in support of the charge and was the only single identifying witness.

[15] The evidence by the prosecution was marred by a lot of material contradictions. The first major contradiction was on the discrepancies on the date when the offence happened. The charge sheet stated that the deceased was murdered on 17<sup>th</sup> February, 2008, while David in his evidence stated the events leading to the deceased's death occurred on 20<sup>th</sup> February, 2008. The trial court was very aware of these discrepancies but was of the view that the discrepancies in the date were not prejudicial to the appellant.

[16] Further, David claimed that members of SDLF whom he, in the company of the police, were pursuing, were dressed in police uniform while **Kandie** testified that the member of SLDF they were dressed as civilians. David claimed to have seen the appellant shoot the deceased, while David Kandie, the OCPD, on the other hand, testified that he never saw the appellant shoot the deceased. According to the evidence of David, who saw the appellant shoot the deceased, the appellant was also shooting in the air thereby indicating that there must have been a lot of shooting going on at the time. Indeed, it was the evidence of both witnesses that the two groups were shooting at each other.

[17] With all that going on, how exactly can one be sure of who shot the deceased? The prosecution never presented any ballistic evidence or any other evidence showing that the gun wounds on the deceased leading to his death were fired from a gun held by the appellant. Without producing the alleged gun held by the appellant and also lack of any ballistic evidence pinning the appellant's gun to the deceased's murder, there seems to be no connecting evidence pinning the deceased's murder on the appellant. Since there was a lot of shooting, it is doubtful that David identified the appellant as the person who fired the fatal shot.

[18] The conviction of the appellant was based on the evidence of one eye witness **David**, who claimed that the appellant was his neighbour. The deceased was an administration Police Officer who was in a contingent of police officers who were pursuing members of SLDF down a valley. The members of SLDF and police were exchanging fire in the course of which the deceased was shot dead. This is according to the evidence of **SP David Kandie (PW3)**. The deceased was shot at about 7.00 p.m. This was at night.

[19] Further, according to SP David Kandie, the exchange of fire went on until darkness and the bandits were increasing in numbers. The police retreated until the following day. According to SP David Kandie, he did not see who shot the deceased and was not informed that the person who shot the deceased was known. The body of the deceased was not retrieved because it was dark and the attackers were increasing in number. David claimed that he was behind the police officers and was hiding among bananas when he said that the appellant shot the deceased. It is David who caused the appellant to be arrested over one year after the incident. This is a case of the word of David against the word of the appellant.

[20] There was no evidence that in the course of that period the police were pursuing the appellant. It is clear that in the prevailing circumstances: darkness and exchange of fire, was not favourable for positive identification of the appellant. In the circumstances, the defence of alibi and the claim that David had a grudge against the appellant cast reasonable doubt on the credibility of the prosecution case. We find that the charge was not proved beyond reasonable doubt and that the respondent quite properly conceded the appeal.

[21] Accordingly, the appeal is allowed, the conviction is quashed and the sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

*Dated and delivered at Kisumu this 27<sup>th</sup> day of June, 2019.*

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH 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**