



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 120 OF 2014

BETWEEN

JOHN NDEDE OCHUODHO alias OBAGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu, (*Ali-Aroni, J.*) dated 8<sup>th</sup> day of May, 2012 in HCCRC NO. 3 OF 2007)

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JUDGMENT OF THE COURT

[1] This is an appeal against the Judgment of the High Court (*Ali-Aroni, J.*) convicting the appellant for the offence of murder of **Ibrahim Agok Achar** (*deceased*) contrary to **section 203** as read with **section 204** of the Penal Code and sentencing the appellant to twenty five (25) years imprisonment.

[2] The prosecution case was briefly as hereunder.

On 13<sup>th</sup> December, 2006, between 2 pm and 3 pm, **Marcelus Akok Achieng** (*Marcelus*) was walking home in Tamu, Muhoroni when he saw the appellant herding cattle. He also saw the deceased and **Jastus Anzenze** (*Justus*) resting under a tree at the shamba (*farm*) of one **Otieno Achar**.

The appellant's cattle were moving about eating grass and sugar cane. As the cattle reached the shamba of Otieno Achar, Justus rose up holding a stick and said that he would not allow the cattle to pass over the land; directed them back and told the appellant to take them back. Thereupon the appellant who had a rungu (*club*) hit Justus with it on the head and Justus fell down. The deceased ran to the scene to rescue Justus and the appellant hit him on the head with a rungu. The deceased fell down and the appellant again hit him twice on the head. Marcelus went to the scene and the appellant attempted to hit him with a rungu but Marcelus blocked it and held the appellant. Thereafter the appellant ran away. Marcelus chased him and arrested him near a river. The appellant threw the rungu beside the river. The appellant was tied and later handed over to **P.C Gideon Magut** at Muhoroni Police Post. The deceased was taken to hospital in an unconscious state. He died on the same night.

Two other witnesses, **Maurine Atieno Abok** (*Maurine*) and **James Otieno Achar** (*James*) testified that they witnessed the incident and saw the appellant hit the deceased with a rungu on the head.

[3] **Dr. K. Otieno** of New Nyanza Hospital performed the post mortem on the body of the deceased. He found that the deceased had a compound fracture of the skull and subdural haematoma and formed the opinion that the cause of death was due to severe head injury caused by assault. Dr. K. Otieno left Government service and was not available at the time of the trial. The post mortem report was produced on his behalf by **Dr. Susan Arodi** who had worked with him for one year and was familiar with his handwriting.

[4] The appellant testified at the trial that he was grazing cattle along the road when three people who were beside the road approached him saying that he had stolen cattle; that the three people beat him and turned the cattle back; that he tried to escape and one person threw the rungu at him; that the rungu missed him and hit one of the other two people and that the three people then tied and arrested him. The appellant stated in part:

“I tried to escape when beating became too much and the person threw the rungu on me. The two were in front, the one with a rungu was behind. I tried to run when he threw the rungu but it missed me and fell on one of the other 2. I did not see exactly what happened...”

[5] The learned judge considered the evidence and made a finding that the deceased was injured in an altercation and sustained severe injuries; that the evidence of Marcelus, Maurine and James was credible and that the explanation of the appellant failed to explain the severe injuries sustained by the deceased. The learned judge said in part:

**“The accused made an attempt to explain what happened but his version does not displace the evidence of PW1, 2 and 3. I must also say that PW1, PW2 and PW3 appeared credible and I believe their account of what transpired leading to the death of the deceased. The evidence of PW, 2 and 3 is corroborated by the post mortem report giving several injuries indicating that the deceased was hit more than once which fails again to give credence to the defence.”**

[6] The appeal is based on the three grounds in the amended memorandum of appeal namely, that the learned judge failed to consider the evidence of the defence and only considered the evidence of the prosecution; that the learned judge shifted the onus of proof to the appellant; that the trial judge erred by convicting the appellant without the evidence of a key witness namely, **Justus Anzenze Omasaba**.

[7] **Ms. Namusubo**, learned counsel for the appellant filed lengthy written submissions pointing out the weaknesses of the prosecution case. Counsel submitted, amongst other things and in essence that, the evidence of Maurine and James is fabricated because the evidence of Marcelus showed that it is only him, the deceased and Justus who were at the scene; that there was no evidence that the rungu was recovered or evidence of who handed it over to the police; that the rungu produced at the trial was not the one which was allegedly used or thrown beside the river and that failure to call Justus, a crucial witness weakened the prosecution case.

[8] **Jacinta Nyamosi** for the respondent opposed the appeal and submitted that the evidence of Marcelus was consistent, clear and sufficient; that there was no reason to fabricate the evidence and that the evidence was overwhelming.

[9] The essence of the grounds of appeal is that the prosecution did not prove the charge beyond reasonable doubt. Three material witnesses, Marcelus, Maurine and James gave evidence in support of the charge. Maurine is the widow of the deceased. It is clear from the evidence of the three witnesses that the scene of the assault on the deceased was at the shamba of James. According to the evidence of Maurine, they all lived in one homestead. This includes Justus and the deceased. In the circumstance, the evidence of Maurine and James that they saw what happened is not a fabrication. Furthermore, the submission that Marcelus said that it is only him, Justus, the deceased and the appellant who were at the scene is not entirely correct, for Marcelus is recorded to have said:

**“When we reached where the victims were, we found Ibrahim’s parents. Three people came. The wife of Ibrahim, his brother and the father took him to hospital.”**

The evidence of the three witnesses was consistent that the appellant hit the deceased with a rungu when the deceased went to rescue Justus.

[10] It is true that the witnesses did not give evidence relating to the recovery of the rungu which according to Marcelus the appellant threw beside the river. However, **P.C Jackson Omariba** testified that P.C Magut to whom the appellant was taken, handed over a rungu to him which he produced as an exhibit at the trial.

Marcelus identified the rungu at the trial. The appellant’s defence was that a rungu was thrown at him but hit one of the people assaulting him. Since the appellant admitted that a rungu hit one of the people (the deceased) and that he was not himself armed with a rungu, the question of the recovery of the rungu was not directly material. The important issue was whether the deceased was hit with a rungu three times on the head causing his death. The trial court believed the evidence that the deceased was hit with a rungu on the head resulting in his death. The compound fractures of the skull were consistent with an assault on the head with a rungu.

[11] The prosecution case was dependent on the credibility of the witnesses.

A first appellate court does not normally interfere with those findings by the trial court which were based on the credibility of witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed an error of law (*Republic v. Oyier* [1985] 353).

From the passage of the judgment of the trial court quoted above, and from our re-evaluation of the evidence, we are satisfied that the prosecution case was cogent and credible even without the evidence of Justus that it is the appellant who hit the deceased on the head with a rungu causing his death.

[12] There is no appeal against the custodial sentence of 25 years imprisonment. The Supreme Court has now clarified in **Francis Karioko Muruatetu & another V. Republic – Petition No. 15 of 2015 (consolidated with Petition No. 16 of 2015)** that the death sentence is not mandatory. It follows that the custodial sentence was lawful.

For the above reasons, the appeal is dismissed in its entirety.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of June, 2018.**

**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**