



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CRIMINAL APPEAL NO 58 OF 2015

BETWEEN

GENYA MWASAHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of the High Court at Malindi (Meoli, J.) delivered on 23rd June, 2015

in

Criminal Case No 9 of 2018)

JUDGMENT OF THE COURT

[1] Kiti Nyale Gena (deceased) had just finished taking a bath at his home from an outside toilet when his wife, Menza Kiti Nyale (PW2) heard him screaming saying “Kaingu Kanyulu has killed me”. On rushing to the scene, she saw the deceased had been shot with an arrow that remained lodged in his abdomen. Some neighbours also responded to the distress call, they included Dickson Nyale Ngenya (PW1) and Daniel Mwalewa (PW6). They found the deceased writhing in pain with an arrow lodged in his stomach. At the same time they saw a person disappearing in the darkness, upon pursuing him, he disappeared in the compound of Genya Mwashaha (appellant) who came out armed with arrows and threatened them with death. Indeed PW1 was shot in the chest thereby forcing all the pursuers to retreat. The deceased was taken to hospital but he died during the operation to remove the arrow.

[2] Based on the dying declaration by the deceased that mentioned “Kaingu Kanyulu” also known as Kiti Nyale Kiti (1st accused) as the assailant and also on the conduct of the appellant who allegedly repulsed the persons who had responded to the deceased’s cry for help, the two brothers were arraigned before the High court at Maindi on the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on the 14th day of June, 2012 at M’buyuni village, Mwarakaya sub-location in Chonyi division within Kilifi County jointly murdered the deceased.

[3] Upon trial, Kiti Nyale Kiti was acquitted of the charge for lack of sufficient evidence to link him with the murder of the deceased. However the appellant suffered a different fate as the learned trial Judge was convinced that although the deceased’s dying declaration stated that it was the 1st accused person who attacked him and disappeared in the dark was not proved, the fact that the appellant was seen lurking in the vicinity armed with arrows and indeed shot PW1 and threatened the persons pursuing the attacker and the Judge was convinced that there was a common intention between the appellant and the person who attacked the deceased. On that basis the appellant was convicted of the offence of murder and he was subsequently sentenced to 25 years imprisonment.

[4] This is what the learned Judge concluded in a pertinent portion of the judgement as per her own words;

“The 1st accused’s defence has a ring of fabrication especially because his companion at the material time (DW1) was not mentioned by any of the prosecution witnesses as present in the homestead at the material time, and neither did the defence suggest such presence to the prosecution witnesses. However, the burden of proving the charges does not shift from the prosecution.

As regards the 2nd accused, the evidence tending to connect him with the crime is that he intercepted PW1, PW6 and others

who were pursuing the assailant. He uttered war cries to the effect that;

“Shoot (with arrows) kill all of them including children”

Although nobody saw his face, he was identified by voice by all the eye witnesses. He admitted that these witnesses knew him well and could not mistake his voice that heard from his house which was barely 100 metres from the deceased’s home.

...

There was from the evidence, only one continuous incident starting with the attack on the deceased at 9.00pm and ending with a chase towards the residence of the accused persons. I believe the prosecution evidence that this was the time the 2nd accused who was armed also appeared and not only threw stones as he admits in his defence, but also uttered the war cries. These words are a clear indication that he was aware and involved with the attack on the deceased. They were uttered with the aim of intimidating and deterring those who were pursuing the actual assailant to prevent his captive.

...

Reviewing the evidence on record I must find the prosecution evidence against the 1st accused cannot form the basis of a conviction. I will find him not guilty and acquit him. Regarding the second accused however, I am satisfied that the prosecution has proved his guilt beyond any reasonable doubt. I do convict him accordingly”

[5] Aggrieved by the said conviction and sentence the appellant has appealed before us on five grounds of appeal as per his own homemade memorandum of appeal. Mr. Ole Kina learned counsel appearing for the appellant during the plenary hearing of the appeal, combined all the grounds and argued them together.

[6] Counsel for the appellant challenged the aforesaid judgment on the grounds that apart from the fact that the identification of the attacker was challenged, because it was dark as the attack happened after 9pm in a rural village in Kilifi; there was also no evidence adduced to suggest that the appellant was at the scene of crime. The appellant’s defence that he came out to rescue his brother and threw stones so as to repulse the people who wanted to attack his brother could not have been construed as common intention. There having been no one else to form a common intention with, there was no basis for the conviction. As a matter of fact, the principal offender being the 1st accused who was allegedly named by the deceased in the dying declaration was acquitted- it therefore defeats common sense how the appellant was found culpable of having a common intention with the same principal offender. The judgement was also challenged for failing to recognize in an offence founded on common intention, there must have been at least two participants. Counsel for the appellant urged us to allow the appeal as the evidence before the court was mere suspicion without more which cannot be a basis of a conviction in a criminal trial.

[7] During the hearing of this appeal, the State through **Mr. Monda**, learned Assistant Director of Public Prosecutions readily conceded the appeal on three grounds to wit; - that there was no nexus between the appellant and the death of the deceased; going by the evidence of the persons who responded to the deceased distress alarm, they were all unanimous that the appellant was ‘dying declaration’ and although the assailant was chased, nobody was caught. Lastly even if the appellant was in his house and he uttered the words threatening to kill the pursuers of the attacker, the deceased had already been shot thus the common intention theory did not add up to sustain a conviction in a criminal trial.

[8] The aforesaid concession notwithstanding, it is still our duty as an appellate Court to subject the entire evidence to a fresh examination. (See ***NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR. APP. NO. 279 OF 2005 (NYERI)***).

“We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was”

[9] That said, it is common ground that no one witnessed the appellant inflict the injuries from which the deceased succumbed to death. It is also not in dispute that his conviction was somewhat based on circumstantial evidence which the Judge found was corroborated by evidence of voice recognition. For a conviction to be based on circumstantial evidence such evidence must meet certain criteria. This Court in ***Musili Tulo vs. R [2014] eKLR***, while discussing the criteria observed:-

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

[10] Consequently, what this Court is being called upon to do in this appeal is to determine whether the circumstantial evidence against the appellant met the foregoing threshold to render a credible and cogent conclusion that whoever the attacker of the deceased was, there was a common intention with the appellant. Or as the Judge posited, the appellant was lurking within the vicinity of the scene of crime and since he

was heard threatening the persons who went to rescue the deceased and was recognized by his voice, that evidence was sufficient to connect him with the murder. Our duty is to examine the evidence adduced before the trial court and subject it to our own independent analysis and to draw our own independent conclusions but with deference to the Judge's findings especially in regard to conclusions based on the demeanour of the witnesses. In doing so, we have to take a look at the chain of the circumstantial and other evidence that was relied on by the trial court.

[11] As summarized in the opening paragraphs of this judgment, no one saw the appellant attack the deceased. He was associated with the attacker because when PW1, PW6 and other witnesses went to rescue the deceased, he mentioned the name of the 1st accused person. These witnesses pursued a person who disappeared, but as the rescuers were baying for the blood of the 1st accused, as the person mentioned by the deceased, the appellant confirmed that he came out of his house to help his brother who was about to be attacked. The appellant testified in his defence that at the time he threw stones to the rescuers he had not understood why they wanted to attack his brother. Nonetheless, the trial Judge hinged the conviction of the appellant on the basis that the appellant was acting in concert with the 1st accused person and that they had a common intention. As per **Section 21** of the Penal Code, common intention is defined *inter alia*:

“....When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence....”

[12] The facts of this matter clearly do not fall within the definition of a common intention because the 1st accused person who was supposed to be the conspirator was acquitted. To us common intention signifies a pre-arranged plan where two or more persons acting in concert pursue a plan. In the instant case, the appellant was absent at the scene of crime. The Judge posited that he was perhaps lurking in the vicinity while his brother the 1st accused person who was acquitted executed the common plan. It is no wonder the state conceded to this appeal and we think rightly so because all the prosecutions' witnesses were unanimous that the appellant was not at the scene of crime. The appellant uttered what the Judge referred to as “war cries” that alone cannot make him a participant in the crime.

[13] The burden lay on the prosecution to prove there was actual participation of the appellant in the killing of the deceased. In this case, we find there existed suspicion, that the appellant perhaps was a conspirator with the person who killed the deceased and that is why he threatened and repulsed those who were pursuing the attacker. However the fact that the person who was suspected and pointed out in the ‘dying declaration’ by the deceased was acquitted, that even weakened the suspicion more. Needless to say that suspicion alone was not even sufficient to place the appellant on his defence. See the oft’ cited case of **Ramanlal T. Bhatt v. R [1957] EA 332** where the Court stated as follows:

“(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.”

(ii) The question whether there is a case to answer cannot depend only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

(iii) The judge hearing the case stated misdirected himself on the law when considering the question whether a *prima facie* case is made out, and, as it could not be said that the magistrate at the resumed trial would necessarily have reached the conclusion he did, had he not been influenced by this misdirection, it was not safe to allow the conviction on the first count to stand.”

[14] Taking the totality of all the evidence and the circumstances of this case, we are satisfied that this appeal has merit and that the State was justified in conceding to the same. The appeal is accordingly allowed, conviction quashed and sentence imposed set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR