



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 56 OF 2016

BETWEEN

GARAMA MILANDA WACHE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.)

dated 24th November, 2014

in

H.C.CR.C No. 26 of 2011)

JUDGMENT OF THE COURT

1. On 7th September, 2011 at around 4:00 p.m. Agnes Katana (PW3) came out of the house and saw her grandmother, Kache Mangi (deceased), on fire. Whilst the deceased was screaming in pain Agnes frantically tried to put out the fire with water. Moments later, neighbours who had heard the screams came to the homestead and managed to put out the fire. By then the deceased had been severely burned.
2. Be that as it may, she remained conscious and upon being interrogated by people she informed them that Garama and Kazungu had poured a liquid on her and set her ablaze. She repeated the same to Karisa Milanda (PW4), Renison Chengo Karisa (PW5), the area assistant chief, Daniel Murimi Kithi (PW6), the area chief and John Sulubu (PW9). According to the prosecution witnesses, the Garama she referred to was the appellant who resided in the same homestead. Both the appellant and the said Kazungu were the deceased's relations.
3. By the time the deceased was taken to the nearest health centre a few hours later her condition had deteriorated and she wasn't able to speak. Unfortunately, before she could receive any first aid she succumbed to her injuries and died. The matter was reported to the police and investigations were conducted. Apparently, the previous day at around 6:45p.m. the appellant in the company of another had purchased ½ litre of petrol from Jemima Riziki Mwinyi (PW7).
4. Subsequently, the appellant was arrested and charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars were that on 7th September, 2011 at Dololo Village, Magarini District within Kilifi County, the appellant jointly with another not before the court murdered Kache Mangi.
5. In his defence, he denied committing the murder. He testified that on the material day he left early and spent the better part of the day working at the farm; he only returned briefly to have lunch and soon thereafter went back to the farm. When he came back to the homestead at around 5:00p.m he found a crowd had gathered and was informed that he had been named as one of the assailants. Notwithstanding the allegations against him, he stayed put and even attended the deceased's funeral. He was arrested and charged a month later.
6. The trial Judge (Meoli, J.) weighed the evidence on record and in a judgment dated 24th November, 2014 expressed thus,

“From the description of the witnesses PW4, PW5, PW6 and PW9 the deceased had extensive burn injuries to her torso and face resulting from the attack. Most possibly she believed herself to be at the point of death due to the injuries. ...

The fact that the deceased was familiar with her assailants and that she was attacked in the day time lends credence to her identification of the assailants. She gave their names to several persons, which is indicative of consistency. Secondly, the dying declaration is strongly corroborated by the evidence of PW7 who just the evening before received the accused a customer who purchased petrol from her. (sic) According to PW3 the deceased was engulfed in fire when she came out of the house.”

Ultimately, having found that the case against the appellant had been proved, the trial Judge convicted him for murder. Subsequently, he was sentenced to 25 years imprisonment by Chitembwe, J.

7. It is the foregoing decision that has instigated the appeal before us which is based on the grounds that the learned Judge erred in law and fact by-

- i. Failing to find that the offence of murder was not proved beyond reasonable doubt.***
- ii. Failing to find that the circumstantial evidence did not irresistibly point at the appellant.***
- iii. Rejecting the defence of alibi.***
- iv. Failing to consider that witchcraft was a defence for murder.***
- v. Failing to find that there were material contradictions and inconsistencies in the testimonies of the prosecution witness giving rise to reasonable doubt.***

8. Making reference to the High Court’s decision in ***Solomon Kirimi M’rukaria vs. Republic [2014] eKLR***, Ms. Otieno, learned counsel for the appellant, submitted that the test of when circumstantial evidence can warrant a conviction was settled. Taking issue with the circumstantial evidence relied on by the trial court, she argued that the dying declaration by the deceased was not credible. The deceased being 90 years old, it was more likely than not that her eyes might have been failing hence, calling into question the accuracy of the identification. Moreover, one of the persons who the deceased confided in namely, Karisa, was not sure which ‘Garama’ the deceased referred to since the name was common. In any event, the appellant could have purchased the petrol for any purpose. In her view, there was no chain of events giving rise to an inference of guilt on the part of the appellant.

9. Ms. Otieno contended that the learned Judge failed to consider not only the alibi defence put forth by the appellant but also that an allegation of witchcraft against the deceased gave rise to a defence of provocation. She urged the Court to allow the appeal on those grounds.

10. Mr. Wamotsa, Senior Prosecution Counsel, maintained that the case against the appellant had been satisfactorily established. He submitted that the deceased’s declaration to PW4, PW5, PW6 and PW9 was consistent as to who the assailants were. Furthermore, the incident occurred during daylight hence the circumstances favoured positive identification of the assailants by the deceased. He added that the dying declaration was corroborated by the evidence of Agnes who found the deceased engulfed in fire.

11. Mr Wamotsa contended that the appellant’s alibi had been considered and rightly rejected by the learned Judge. He also argued that there was no evidence to support the allegation of witchcraft. He urged us to dismiss the appeal.

12. We have carefully considered the evidence on record as it is our duty to do on a first appeal. There can be no doubt that the deceased died as a result of complications arising from extensive burns on her body which were sustained on 7th September, 2011. As correctly surmised by the trial court, there was no eyewitness account on how the deceased sustained the burns. The evidence relied on was circumstantial. In ***Sawe vs. Republic [2003] KLR 364***, the Court while considering the import of circumstantial evidence said:-

- 1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt;***
- 2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on;***
- 3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused”.***

13. What was the nature of this circumstantial evidence? It was the prosecution’s evidence that the deceased told various persons that it was the appellant who had set her ablaze. **Section 33 (a)** of the ***Evidence Act*** provides in part as follows:-

“33.

Statements, written or oral, of admissible facts made by a person who is deadare themselves admissible in the following cases:-

- a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction***

which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

14. This Court has considered the above provisions in several cases and indeed there is a wealth of authorities from this Court and its predecessor, the Court of Appeal for East Africa, on the nature and manner of receiving and considering evidence of dying declaration. In the case of ***Pius Jasanga s/o Akumu vs. R (1954) 21 EACA 331***, the predecessor to this Court observed;

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.

...

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v. Eligu s/o Odel and another (1943) 10 EACA 9, Re Guruswani (1940) Mad 158, and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.

...But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross examination, unless there is satisfactory corroboration.

15. In our view, the learned Judge was entitled to admit, as she did, and consider the dying declaration of the deceased made to Karisa, Daniel, Renison and John. We, like the trial court, also find corroboration of that dying declaration in the uncontroverted evidence of Jemima that the appellant had on the previous day purchased ½ litre of petrol. His alibi was clearly ousted by the overwhelming evidence of the prosecution witnesses and was rightly rejected by the trial court. All in all, the circumstantial evidence irresistibly pointed to the appellant as the assailant who burnt the deceased.

16. On the issue of witchcraft being a defence, we cannot help but note that it was never raised at the trial court and was being raised for the first time before us. As such, we decline to entertain the same. Moreover, if the defence of witchcraft was advanced and it is to be accepted as provocation, there is no evidence to show the deceased had practised witchcraft and the effects it had had on the appellants that provoked him to commit such an heinous act. In other words, who had the deceased bewitched? We also note that no particulars of the alleged inconsistencies in the prosecution's witnesses were given hence this ground fails.

17. Based on the foregoing this appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 12th day of October, 2017.

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