



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, OUKO & GATEMBU, J.J.A.)**

**CRIMINAL APPEAL NO. 68 OF 2016**

**BETWEEN**

**1. DICKSON MBEYA MARENDE Alias DICKIE....1<sup>ST</sup> APPELLANT**

**2. ROBERT KOGI MWANGI Alias KOGIE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (F. Muchemi, J.) dated 12<sup>th</sup> February, 2015*

**in**

**H.C. CR.A. No. 85 of 2011)**

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**JUDGMENT OF THE COURT**

1. This is a first appeal from the original conviction and sentence of the appellants by the High Court (Muchemi, J.) on 12<sup>th</sup> February, 2015. The appellants were jointly charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on 6<sup>th</sup> October, 2011 at Huruma Ngei II Estate within Nairobi County, the appellants murdered Dennis Mwenda Wepukhulu, hereinafter referred to as **“the deceased”**.

2. The prosecution evidence briefly stated was that on the material day at about 11.00 a.m, the deceased was at his home at Huruma Ngei II Estate together with one **Peter Mukoto Nyakairu** (now deceased), when the deceased was attacked by the appellants.

3. **Jeff Ojiambo Kizito, PW2**, was the only eye witnesses who testified. He told the trial court that on the material day at about 10 a.m, he returned to his room to pick something. The room was on the 3<sup>rd</sup> floor of a 5 storey building that overlooks the block where the deceased was residing. Just before he started climbing the stairs to his room, PW2 saw the appellants collecting garbage.

4. Shortly after he entered his room, PW2 heard people screaming in the block where the deceased was residing. He went to the balcony to check what was happening. That is when he saw the appellants and

one King'ori assaulting the deceased. PW2 knew the deceased as he was his neighbor. He also knew the appellants as garbage collectors in that area. PW2 saw the appellants and King'ori stabbing the deceased with a knife. Thereafter the 1<sup>st</sup> appellant washed off blood that was on his hands and on his shirt; PW2 stated.

5. On 1<sup>st</sup> November, 2011 PW2 saw the appellants in a drinking den and called the deceased's father and informed him. The police were notified. **Police Constable Peter Shitemi, PW4, and Corporal Njeru** proceeded to the drinking den and arrested the appellants. PW4 was the investigating officer. He told the trial court that among the statements he recorded was that of one Peter Mukoto Nyakairu, who was also stabbed by the appellants when he was trying to rescue the deceased. At the time of the trial Nyakairu had since died. The prosecution sought and obtained leave to produce the statement of Nyakairu under **section 33** of the **Evidence Act**.

6. **Dr. Dorothy Njeru, PW5**, was the Pathologist who performed postmortem on the body of the deceased. She formed the opinion that the cause of death was blood loss due to severed blood vessels following sharp force stab into the right thigh.

7. In their defence, the appellants stated that on the material day and time they were collecting garbage when they saw the deceased coming down the stairs, bleeding from the waist. There was another person following him who picked up a stone and hit him then ran away, leaving the deceased lying on the ground. On the following day the appellants were summoned by the area Chief and taken to the D.O.'s office, who asked them to explain what they knew about the death of the deceased. Thereafter they were released, only to be re-arrested on 1<sup>st</sup> November, 2011 by PW4. They denied having committed the offence of murder as charged.

8. The trial court found PW2 a credible witness. Relying on his evidence and the statement recorded by Peter Nyakairu as eye witnesses, the learned judge convicted the appellants and sentenced them to death as by law prescribed.

9. Being aggrieved by the said conviction and sentence, the appellants preferred an appeal to this Court. **Mr. S.J. Saenyi** appeared for the 1<sup>st</sup> appellant, while **Mr. Robert Amutallah** represented the 2<sup>nd</sup> appellant.

10. In his memorandum of appeal, the 1<sup>st</sup> appellant faulted the learned judge for failing to caution herself on the danger of relying on the evidence of a single identifying witness to convict; for admitting the statement of Peter Mukoto Nyakairu under **section 33** of the **Evidence Act**; and for finding that the offence had been proved, without proof of *mens rea*.

11. The 2<sup>nd</sup> appellant raised more or less the same grounds of appeal. The only additional grounds were that the learned judge failed to find that failure by the prosecution to call some essential witnesses rendered the case unproven; that the learned judge erred in rejecting the appellant's defence which remained unshaken; and that the learned judge erred in convicting the appellants when their age and mental status had not been assessed and ascertained.

12. Arguing the appeal, Mr. Saenyi submitted that the trial court erred in law by relying on the evidence of PW2 as a single identifying witness, without cautioning itself on the danger of so doing, as was held by this Court in **MAITANYI v REPUBLIC [1986] KLR 198**.

13. Regarding admission into evidence of the statement of Peter Mukoto Nyakairu, Mr. Saenyi submitted that the statement was not admissible as it did not satisfy the requirements of **section 33** of the **Evidence Act**. The statement was not made in the ordinary course of business as required under **section 33(b)**; and neither could it be produced under any of the other subsections, counsel added.

14. Counsel further submitted that there were material contradictions in the prosecution evidence. The contradictions related to the evidence adduced by PW2 compared to that of Peter Nyakairu regarding the

nature of injuries sustained by the deceased and the number of people who attacked the deceased.

15. Mr. Amutallah adopted Mr. Saenyi's submissions and added that the prosecution failed to call one Mr. Mohammed, who, according to PW2, was at the scene of crime and witnessed the events that took place, and another person, a Mr. Freddie, who informed PW2 that the deceased had died. Counsel further submitted that malice aforethought had not been proved; that the appellant's age and mental status were not assessed; and that the trial court did not consider the appellant's statements of defence.

16. **Miss Maina, Senior Principal Prosecution Counsel**, opposed the appeal. She submitted that the appellants were well known to PW2, who testified as to how they assaulted the deceased in broad day light.

17. Regarding the alleged inconsistencies, Miss Maina said that they were immaterial and could not vitiate the conviction which was well founded. Regarding malice aforethought, counsel submitted that the appellants intended to cause death or grievous harm to the deceased; that was discernible by the kind of weapons they used to inflict the fatal injuries.

18. As to whether age and mental assessment of the appellants was done or not, Ms. Maina submitted that it was immaterial, as there was no contention by the appellants that they were either minors or of unsound mind at the time they committed the offence. She urged this Court to dismiss the appeal.

19. This being the first appellate court, we are well aware that we are enjoined to re-evaluate and re-examine the evidence that was tendered before the trial court and arrive at our own conclusion. In **KARIUKI KARANJA v REPUBLIC [1986] KLR 190**, it was held that:

***“On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to re-hear the case and reconsider the materials before the judge or magistrate with such materials as it may have decided to admit.”***

20. As earlier stated, the key witness and the only eye witness who testified was Jeff Ojiambo Kizito, PW2. The witness narrated in great details how the deceased was assaulted by the appellants. PW2 knew the deceased and the appellants. PW2 said that one Mohammed tried in vain to stop the appellants from attacking the deceased. After the attack Mohammed ran downstairs following the assailants. No reason was advanced for the prosecution's failure to avail Mohammed as a witness.

21. That notwithstanding, the trial court was satisfied that the evidence of PW2 was “credible, reliable and sufficient”. The court cited this Court's decision in **OGETO v REPUBLIC [2004] 2 KLR 14** where it was held:

***“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness, especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be mistaken”.***

22. Although the trial court did not specifically warn itself of the danger of relying on the evidence of a single identifying witness as we held in **CHARLES MAITANYI v REPUBLIC (supra)**, the court carefully considered the identification evidence and noted that there were favourable circumstances for positive recognition. The offence was committed in broad daylight and the appellants were well known to the material witness.

23. On our part, having carefully re-evaluated evidence of PW2, we are satisfied that his evidence was watertight and sufficient to found a conviction against the appellants.

24. Turning to the admission of the statement of Peter Mukoto Nyakairu (deceased), **section 33** of the **Evidence Act** deals with statements by persons who cannot be called as witnesses. The relevant portions

for purposes of this appeal is **section 33 (a) and (b)** which states as follows:

*“33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—*

*(a) relating to cause of death 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 [Rev. 2014] Evidence CAP. 80 E17-18 [Issue 3] in his death, in cases in which the cause of that person’s death comes into question. 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;*

*(b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.”*

25. The statement in issue was recorded on 24<sup>th</sup> October, 2011. PW4 told the trial court that Nyakairu died on 29<sup>th</sup> August, 2013 before he testified. The cause of his death was not stated. His hand written statement showed that on 6<sup>th</sup> October, 2011 at around noon he was in the deceased’s house together with the deceased when four young men, whom he did not know but who wore uniform of garbage collectors, entered the house. One of them called the deceased; they started beating him, when Nyakairu tried to stop them, one of the assailants who the others referred to as King’ori stabbed Nyakairu and thereafter they stabbed the deceased with a knife. Nyakairu was taken to hospital and after his discharge he learnt that the deceased had passed away.

26. We do not think that Nyakairu’s statement was admissible under **section 33** of the **Evidence Act**. Neither did the statement relate to the cause of death of its maker, Nyakairu, nor did it relate to the circumstances of the transaction which resulted in Nyakairu’s death as per **section 33(a)**. Equally, it was not a dying declaration. It did not also purport to identify the killers of the deceased. We would therefore agree with the appellants’ counsel’s submissions that the trial court ought not to have admitted it under **section 33(a)** of the **Evidence Act**.

27. We now turn to consider the other grounds of appeal. The appellants argued that some essential prosecution witnesses were not called. They singled out Mohammed who, according to PW2, was at the scene of crime, and Freddie, who owned a tailoring shop just a stone throw from the place where the deceased fell after the assault, who informed PW2 that the deceased had died.

28. In our view, Freddie was not an essential witness; given that he had not witnessed the commission of the offence. But as regards Mohammed, we would agree with the appellants that he would have been an important prosecution witness. However, we do not think that failure to call him was fatal to the prosecution case. **Section 143** of the **Evidence Act** provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.

We have already held that a fact can be proved by evidence of a single witness, provided the necessary precautions are taken to ensure that the evidence is watertight.

29. As regards the alleged contradictions, we do not think much turns on that. It is trite law that not every contradiction warrants rejection of evidence. In **TWEHANGANE ALFRED v UGANDA [2003] UGCA 6**, the Uganda Court of Appeal held:

***“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point out deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”.***

30. The alleged contradictions in this appeal related to the number of times the deceased was stabbed and the entry point of the stab weapon. In our considered view, those contradictions were minor and did not discredit the evidence of PW2 as to how the appellants caused the death of the deceased.

31. Another ground of appeal that was argued is that the appellants were not subjected to age and mental assessment before they stood trial. However, we note that there was no allegation by their advocates that the appellants were either minors or of unsound mind when they committed the offence.

32. Although it is a usual practice to subject a person accused of murder to a mental assessment test, we do not think that there is any express statutory provision that requires such assessment be undertaken as a pre-requisite to institution of such a charge. However, **section 162(1)** of the **Criminal Procedure Code** provides that **“when in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness”.**

33. Under **section 11** of the **Penal Code**, every person is presumed to be of sound mind, and to have been of sound mind at any time in question, until the contrary is proved. The burden of proof of a defence of insanity is upon an accused person, not the prosecution. See **section 111(2) (c)** of the **Evidence Act**. However, none of the appellants alleged that they were insane at the time of the commission of the offence. The trial proceeded on the presumption of sanity as per **section 11** of the **Penal Code**. Whereas ordinarily a mental assessment is conducted before a person charged with murder stands trial, the absence of such an assessment per se cannot invalidate a criminal trial, especially where the court had no reason to doubt that the accused persons were of sound mind.

34. The appellants were first arraigned before the High Court (**Ombija, J.**) on 2<sup>nd</sup> November, 2011. On that day, **Miss Kithiku**, State Counsel, told the court that plea could not be taken because no advocate had been appointed to represent the accused; and that mental and age assessment had not been done on the accused. Consequently plea was deferred to 9<sup>th</sup> November, 2011.

35. The court assigned the matter to one Miss Abongo Advocate and directed that age and mental assessment be done on the accused before the 9<sup>th</sup> of November, 2011 when plea was to be taken. Come that day, both Miss Kithiku for the State and Miss Abongo for the accused were present in court when the charge was read to the appellants. The defence counsel did not raise any objection to the taking of the plea. It must therefore be presumed that the direction regarding age and mental assessment on the appellants had been complied with.

In the circumstances, we must reject, as we hereby do, the ground of appeal that alleges that the conviction of the appellants was vitiated by the prosecution’s failure to subject the appellants to age and mental assessment.

36. Having carefully considered the entire record of appeal, we are satisfied that the High Court rightly held that malice aforethought had been established; and that the appellants’ statements of defence were evaluated and rightly rejected. All in all, we find this appeal lacking in merit and dismiss it in its entirety. It is so ordered.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of December, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**