



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CRIMINAL APPEAL NO. 75 OF 2014**

**BETWEEN**

**KAZUNGU KATANA NGOA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the Ruling of the High Court of the High Court of Kenya at Malindi (Meoli, J) dated 4<sup>th</sup> June, 2014 in H.C. Cr. Case No. 2 of 2011***

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**JUDGMENT OF THE COURT**

**[1] Kazungu Katana Ngoa** (the appellant) was arraigned before the High Court at Malindi to answer one count of murder contrary to section 203 as read with section 204 of the Penal Code, particulars of the offence being that;

***‘KAZUNGU KATANA NGOA alias POLA KATANA on the 7<sup>th</sup> day of December, 2010 at Kibokoni II village, Kanjora Sub location within Kilifi County murdered KATANA NGOA SARO.’***

He denied the charge and the matter proceeded to hearing, with the prosecution calling a total of seven witnesses.

**[2]** According to the prosecution case, mourners had congregated at the deceased’s home on 7<sup>th</sup> December, 2010 for the burial of one of the deceased’s sons, known as Safari. While the funeral was underway, the appellant, who is a stepson to the deceased picked a mattock and hit the deceased on the head, seriously injuring him. This prompted the deceased to flee in a bid to save his life. Unfortunately, he could only get approximately a 100m away, where he stumbled and fell. According to **Mwalimu Katana Ngoa** (PW1), another son of the deceased, when the deceased fell, the appellant quickly caught up with him, declared his intention to finish him, produced a *luhamba* (a knife used by palm wine tappers) and while straddling the deceased, slit his throat. Once done, the appellant threatened all and sundry of dire consequences should anyone attempt to testify against him over what he had done. Needless to say, the shocked villagers scampered and fled. Meanwhile, PW1 and his kinsmen had to plead with a few of the villagers to come to their aid to conclude their late brother Safari’s internment. It was only after the grave had been tended to that PW1 was able to turn his attention to deceased’s body.

[3] Meanwhile, the appellant, had also fled the scene and rushed to Kilifi police station, where he reported the death of the deceased to **IP Newton Sangalia Mjomba** (PW6). He alleged that the deceased had been attacked and killed by a mob during the funeral of their late brother. In a bid to investigate the matter, PW6 partnered with **IP Sarah Amadi (PW5)** and accompanied the appellant back to the scene where they found the body of the deceased which had a severed throat and with the help of neighbours, they loaded the deceased onto a vehicle and transported his remains to the mortuary. Two days later, attempts by PW6 to interview persons who had been at the scene on the material date, PW2 included, were met with reluctance; leaving PW6 with suspicion that the witnesses were being threatened. Undeterred, he prevailed upon PW 1 & 2 to accompany him to the police station to record their statements. It was at that point that the two witnesses also got to learn that the appellant had already made a report with the police, which was strikingly different from what had transpired. Nonetheless, they two recorded their statements and headed back to the village.

[4] In her testimony before court, **Kadzo Katana Ngoa**, (PW2) pointed out that the appellant had in the past accused the deceased of bewitching him. She also stated that the appellant was the only person she was aware of who had expressed such a complaint against the deceased. Regarding the attack, she attested to have heard a loud sound, and to have seen the appellant holding a mattock. In addition, she bore witness that the deceased had been struck on the head and reiterated that despite the presence of many people, no one tried to intervene. The evidence by Kadzo that the appellant had in the past accused the deceased of witchcraft were echoed by the area chief, **Anthony Maitha** (PW4), who stated that in October, 2010 the appellant who was ailing at the time, had approached him claiming that the deceased had bewitched him and was the reason for his failing health and dwindling business. In response, PW4 advised the appellant to seek medical attention and warned him against accusing a person of witchcraft without evidence. PW4 added that later that same month, the deceased also visited him and made a report to the effect that the appellant had threatened to kill him unless he withdrew the spell he had allegedly cast upon him. On his part, PW4 once again advocated for peace and advised the deceased to report the matter to the police but for some reason, the deceased opted not to do so.

[5] Two days thereafter, both the deceased and the appellant were at it again, this time making a joint visit to PW4 over the same issue. Following an apparently conciliatory discussion mediated by PW4, the duo left, having been advised to live in harmony. However, on the material date, PW4 received a call from **Alphonse Kahindi Mwanguo** (PW3), informing him that the deceased had met his death at the hand of the appellant. In his further evidence, PW4 stated that a few days into the deceased's death, the appellant went to him with PW1 & 2 in tow, and tried to prevail upon PW4 to ensure that in his statement to the police, he attributed the deceased's death to killing by a mob. On his part however, PW4 encouraged the trio to be truthful when recording their statements and informed the appellant that in any event, his statement was already with the police and what the appellant was demanding of him was thus an impossibility.

[6] **Dr. Malik Tajbhaj** (PW7), produced the post mortem form which was completed by Dr. Rashida Zareri who conducted a post mortem examination on the deceased. He told the court that the deceased body had extensive deep cut wounds traversing the neck severing RHS carotid artery and veins. He also told the court that the said doctor had observed that the trachea and esophagus were completely severed but the cervical spine was intact. The doctor had concluded that the deceased's cause of death was severe hemorrhage and asphyxiation due to assault.

[7] Having considered the evidence adduced before the court in entirety, the learned Judge concluded that the appellant had a case to answer and consequently placed him onto his defence. He elected to testify on oath and call no witnesses. In his defence, the appellant contended that though he attended the late Safari's funeral on the material date, he did not kill the deceased. He said that on the contrary, midway through the burial, he heard screams of '*muue mchawi, muue mchawi*' (*kill the witch! kill the witch!*) emanating from some of the mourners. He had no idea who the witch in question was and struggled to make his way through the throng of approximately 1,000 people towards the heart of the scuffle. On getting there, he found the deceased had already been bludgeoned to death. He attributed the mourners' abrupt departure from their homestead on the material date to a concurrent funeral that was being conducted at a neighbouring homestead and surmised that the crowds must have departed to attend

to that ceremony. He denied allegations of having threatened the witnesses and stated that to his dismay, when he went to collect his late father's burial permit, the police arrested him over a murder he had nothing to do with.

[8] In a reserved judgment rendered on 27<sup>th</sup> May, 2014, the learned Judge **Meoli J.**, being satisfied that the prosecution had proven its case beyond reasonable doubt, convicted the appellant and sentenced him to suffer death. The appellant has challenged that conviction and sentence in this appeal in which he has proffered eight grounds of appeal. While some of the grounds may be obscure and tangential, learned Counsel Mr. **Gicharu Kimani**, who represented the appellant in this appeal was able to crystallize them into four. That the learned Judge erred; in basing her decision on contradictory evidence; convicting the appellant despite the fact that no murder weapon was produced in evidence; failing to find that malice aforethought had not been established and lastly, failure to hold that the case called for a mental assessment of the appellant prior to conviction.

[9] Addressing the first ground, counsel submitted that PW2's testimony was inconsistent and contradictory in so far as the identity of the killers were. On the one hand he said, the witness had purported that it is the appellant while on the other, she had stated it was a mob killing. He added that this contradiction was also evinced by PW4's testimony and that even the account of the injuries sustained by the deceased was contradictory, for contrary to witness testimony, the post mortem report indicated that the injuries were caused by multiple **attackers**.

[10] Turning to the failure by the prosecution to produce the murder weapon, counsel faulted the trial court for making an adverse finding against the appellant, notwithstanding the fact that the prosecution never produced the murder weapon though readily available. Counsel also found fault in the fact that not even the post mortem report gave an indication of the nature of the murder weapon. With regard to malice aforethought, it was submitted that though the appellant and the deceased had disagreed a month prior to the deceased's death, their issues had been ironed out in the presence of PW4 and come the material day, there was no bad blood between them. Consequently, the appellant had no intent or ill motive towards the deceased, nor was any proven at trial. He contended that this is even evident from the fact that the appellant willfully surrendered himself to the police. Counsel concluded his address by submitting on the issue of mental assessment. In his view, the testimony by PW1 that the appellant was known to imbibe bhang (marijuana) should have automatically vitiated malice aforethought on the appellant's part. He therefore urged this court to allow the appeal, quash the conviction and set aside the sentence.

[11] Opposing the appeal was the Assistant Director of Public Prosecutions, **Mr. Monda** who began by stating that the learned trial Judge duly dealt with the issue of contradictions when she commented on the appellant's demeanor. On the issue of the murder weapon, he submitted that the absence thereof does not vitiate the rest of the evidence, particularly that of the eye witnesses. Lastly, on the aspect of mental assessment, counsel pointed out that the appellant never pursued the defence of insanity at trial and the same cannot be raised now, more so considering that at no time was it ever suggested that the appellant had a history of insanity. He thus urged the Court to affirm the decision of the trial court and dismiss the appeal.

[12] The jurisdiction of this court in an appeal such as this was well stated in the often cited case of **Okeno versus Republic [1972] EA.32**; where the predecessor of this Court, pronounced itself as follows:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”***

[13] **With** those parameters in mind, we have identified three issues that fall for our determination in this appeal. One is whether the evidence relied on was contradictory and if so, the effect thereof; two, whether malice aforethought was established and lastly, whether the failure by the prosecution to produce the murder weapon rendered the conviction unsafe.

[14] On the first issue, it was contended that the testimonies of PW2 and PW4 as to who committed the murder, was contradictory; that even though PW2 sought to have the court believe that the appellant had committed the offence, her statements to the police indicated that the killing was perpetrated by a mob. By highlighting the inconsistencies in the testimonies of PW2 and PW4, the appellant was in this case casting aspersions on the credibility of the said witnesses. What we need to ask ourselves is whether the witnesses were lying to the court, or whether these inconsistencies impeached the credibility of these witnesses.

[15] This Court had occasion to address this issue recently in **Phillip Nzaka Watu vs. R** (2016) e KLR, where it expressed;

**“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”**  
(emphasis supplied)

[16] In this case, we must be alive to the caveat we mentioned earlier that unlike the trial Judge, we did not have the benefit of seeing these witnesses testify and thus assess their demeanor. We note for instance that the trial Judge noted that when PW1 testified she appeared firm but traumatized. We did not have the advantage to do such an assessment on the witnesses. What we must appreciate however is that some of these witnesses were relatives to the appellant and his deceased father. They were burying another relative when this incident happened. They cannot be said to have been in a very lucid mind frame where they could follow the sequence of events that happened so abruptly and unexpectedly, and narrate them later with scientific exactitude. We also note that PW4 was not at the scene and was only narrating to the court what the eye witnesses had reported to him, and what both the appellant and the deceased had reported to him earlier. This witness had no interest in the matter whatsoever and had no reason to lie to the court.

[17] In this case, it is without doubt that the testimony of PW2 was central to the prosecution case. Not only was she one of the two eye witnesses, she had a close interaction with both the deceased and the appellant throughout the chain of events. From the record, PW2 owned up to having given contradictory accounts of who killed the deceased. Evidently however, she also followed it up with an explanation thereof by stating as follows:-

**‘On 9<sup>th</sup> December, 2010, Kazungu told me to tell police that members of public killed the deceased ...I know it was false- the report that attack was by mob. I was fearful about the threats of accused; that he would kill anyone who dared to give evidence against him...’**

[18] A similar account of duress was given by PW4, who stated that even though he too was threatened into stating that the killing was by the mob, he did not yield to that duress, mainly because at the time the threat was being made to him, he had already recorded his statement with the police. He added as follows:-

**“Accused said they had reported that the father was killed by members of the public. He asked me to record a statement to the effect that the father was killed by a mob. I told him I had already recorded my statement...”**

As stated by this Court in **Erick Onyango Odeng’ Vs R (2014) e KLR**,

**“The hearing before the trial court invariably entails consideration of often contradictory, Inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”**

On its part, the trial court resolved the matter by stating that;

**“PW2 reported that the accused had killed the deceased and she was returning to her parents’ home, which she did. It appeared to me that the weakest link in the evidence of PW1 and PW2 out of which the defence attempted to make mileage, was the allegation that they gave two reports or statements to police. Unfortunately, none of the alleged first report, supposedly suggesting that a mob killed the deceased, were shown to the two witnesses during the trial. The defence seemed to abandon that line after a challenge by the prosecution.”**

[19] The learned Judge considered the special circumstances of this case and resolved the issue of the contradictions by finding that the appellant was the sole architect of the contradictory witness statements, given that he had serially threatened not just PW 2 & 4, and PW3, into stating that the death was due to a mob attack. That finding was thus proper and in our view, this court has not been given any reason to interfere with the same. We are satisfied that the cited contradictions did not impeach the credibility of the witnesses, and their evidence was therefore properly relied upon by the learned trial Judge.

[20] On the allegation that the post mortem report was contradictory on the nature of injuries sustained, the eye witness accounts consistently attested to the deceased having been hit with a mattock and his throat slit, with the doctor pegging the cause of death on the hemorrhaging due to the slit throat. Nothing has been pointed out to show that the rest of the evidence contradicted the consistency of doctor’s findings on the nature of injuries. If anything, the post mortem form gave the injuries as cut wounds and only the cut to the neck was ruled as having been the cause of death. Coupled with eye witness accounts, there was no reasonable evidence upon which a hypothesis could be drawn, that the injuries were inflicted by a mob nor was there any evidence indicating that the deceased’s cause of death was anything but the hemorrhage from a cut throat inflicted by the appellant.

[21] There is no doubt in this case that *actus reus*, or the physical act of killing was proved. We are satisfied that the deceased was killed by the appellant herein. For the offence of murder to be proved however, malice aforethought, must be proved. Malice aforethought is defined under **Section 206** of the Penal Code in the relevant part as follows;

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.**

[22] In this case, given the conduct of the appellant at the scene and the nature of the injuries he inflicted on the deceased, there is no doubt that he wanted to kill him. A person does not slit his victim’s throat with the intention that he would survive, and indeed if such a person was to survive he would have been left with grievous injuries. In this case we are satisfied that all the ingredients of the charge of murder were proved. We note that the appellant’s defence before the trial court was that he was not the one who killed the deceased. He did not claim that he killed the deceased accidentally or while under the influence of alcohol or drugs. The defence of intoxication or temporary insanity was not therefore raised before the trial court and the learned Judge cannot be faulted for failing to consider a defence that was not raised or even implied.

[23] In any event, even if the defence had been raised, it does not avail to the appellant herein, because in order to successfully invoke that defence, certain conditions must be met. These are outlined under *Section 13 (2) of the Penal Code* which requires that:-

**Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**

**a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. (emphasis added)**

*That ground of appeal should therefore of necessity, fail.*

[24] Lastly, on the failure by the prosecution to produce the murder weapon; the question to be answered is whether, that failure was fatal to the conviction. This Court has in the past had occasion to deal with the question and in **Ekai v. Republic (1981) KLR 569**; held that failure to produce the murder weapon of itself was not fatal to a conviction and that as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. Similarly, in **Karani v. Republic (2010) 1 KLR 73**; the court stated that:-

**‘The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.’**

In this case, while relying on the post mortem report, PW7 explained the nature of the injuries sustained by the deceased by stating that;

**‘...Body had extensive deep cut wounds traversing the neck severing RHS carotid artery and veins. Trachea and oesophagus completely severed but cervical spine intact.’**

[25] This lends credence to the eye witness accounts that the killer had slit the deceased’s throat. When considered conjunctively, these testimonies leave no doubt as to the nature of weapon used. Therefore, the ground that failure to produce the murder weapon rendered the conviction unsafe cannot stand.

[26] Ultimately, having considered all the evidence adduced before the trial court, the grounds of appeal raised by the appellant, the rival submissions of counsel, and the law, our finding is that the learned trial Judge cannot be faulted. This appeal has no merit and the same is hereby dismissed.

**Dated and delivered at Malindi this 7<sup>th</sup> day of December, 2017.**

**ALNASIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**