



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CRIMINAL APPEAL NO. 461 OF 2010

BETWEEN

DAVID SENERWA FIRST APPELLANT

JOSEPH MARURU ALIAS AYUB SECOND APPELLANT

AND

REPUBLIC RESPONDENT

Appeal from the Judgment of the High Court of Kenya at Kakamega (Kariuki, J.) dated 2nd October, 2007

in

HCCRC NO. 28 OF 2002

JUDGMENT OF THE COURT

1. The appellants were charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge were that on the 27th day of November, 2001 at Iloro Village, Shibuye Location in Kakamega District, the appellants jointly murdered **Sylvester Shakwala**, hereinafter referred to as “*the deceased*”. The appellants were duly convicted and sentenced to death.

2. Being aggrieved by the said conviction and sentence, the appellants preferred an appeal to this Court. The appellants have raised four grounds of appeal, namely, that the trial judge did not consider numerous discrepancies in the prosecution evidence, that he failed to evaluate the evidence before him, that he did not consider the appellants, defence, and that he shifted the burden of proof to them.

3. This being a first appeal, this Court is under an obligation to re-evaluate the evidence that was tendered before the High Court, analyse it and come to its own independent conclusion. See **OKENO V REPUBLIC [1972] E. A. 32.**

4. The prosecution evidence, briefly stated, was that on the material day the deceased, a teenager, was sent by his mother, **Wifrida Imeli Muse, (PW 4)** to some nearby shops to buy sugar. On the way he passed his brothers, **Christopher Mangoli (PW1)** and **Antony Shakwila (PW 4)**. His brothers were going to play football at Iloro Primary School and were with other boys, who included the two appellants and one Stephen.

5. The two appellants followed the deceased. At about 6.30p.m., **Fredrick Alusiola, (PW 8)** met the two appellants, whom he knew. The first appellant told PW 8 that he had to kill someone that day. Surprised by that remark, PW 8 asked the first appellant who he intended to kill but the latter did not answer. PW 8 walked on but after a short while he heard screams from behind. On turning to check, he saw the two appellants attacking the deceased. The first appellant had a rungu and the second appellant had a short panga.

6. PW 8 took off and went to Iloro Primary School where he found PW 1 and PW 2 and told them what he had witnessed. The three of them returned to the scene of the attack.

7. PW 1 saw the appellants running away. He said that the first appellant was carrying a walking stick, that the deceased had fallen down and had an injury on the head and was bleeding. PW 1 called the deceased but there was no response. PW 2 said that he did not see the appellants fleeing from the scene. PW 1, PW 2 and PW 8 were however in agreement that a walking stick was recovered about 20 feet from where the deceased's body lay.

8. The trial court observed that there were some inconsistencies between the evidence of PW 2 and that of PW 1 and PW 8.

9. The postmortem report showed that the cause of death was head injury.

10. The Area Assistant Chief, **Wilson Muchiti, (PW 3)** was given five names of suspects and he set out to arrest them in company of village elders. The five names included those of the two appellants. Upon investigations only the appellants were charged with the murder.

11. Each of the appellants denied any involvement in the death of the deceased. They denied having met PW 1, PW 2 and PW 8 on the material day.

12. The High Court was satisfied that PW 8 saw the appellants assaulting the deceased, and thereafter running away from the scene. The court further held that the appellants had malice aforethought since they inflicted the injuries to the deceased intending to cause his death or grievous harm.

13. The trial judge noted that he was impressed by the demeanour of the prosecution witnesses and that the discrepancies in their evidence were minor.

14. Arguing the appeal, **Mr. Anyumba**, learned counsel for the appellants, started by submitting on some of the discrepancies that existed between the evidence of PW 1 and PW 2. He stated that PW 2 said that when they went to the scene they did not see anyone, whereas PW 1 said that they saw the appellants running away. PW 1 also said that they were not told by PW 8 that the deceased was attacked by the appellants. There was also no unanimity that the first appellant had a walking stick when he was running away.

15. Counsel submitted that had the trial court carefully analysed this evidence it would have come to a different conclusion. He urged this Court to re-evaluate the evidence and reach a finding that the appellants had not murdered the deceased.

16. On the other hand, **Miss Kimani**, learned prosecution counsel, submitted that the trial court was alive to the discrepancies between the evidence of PW 1 and PW 2. However, the discrepancies were minor and did not occasion miscarriage of justice, she added.

Counsel went on to state that the evidence of PW 8 was sufficient to sustain a conviction.

17. On our part, we have re-evaluated all the evidence that was tendered before the trial court. PW 8 knew the appellants, the deceased as well as the deceased's family members, including PW 1 and PW 2. They all came from the same village. PW 8 met with the appellants at about 6.30 p.m. when there was daylight. He saw the appellants assaulting the deceased. The first appellant had told PW 8 that he would kill someone. PW 8 rushed to Iloro Primary School and told PW 1 and PW 2 what he had witnessed.

18. PW 1, PW 2 and PW 8 rushed to the scene. Both PW 1 and PW 8 testified that they saw the appellants running away from the scene. They pursued them but did not manage to apprehend them. PW 2 said that when they reached the scene, upon realizing that his brother was not alive, he ran to call their mother, PW 4. He said that he did not see the appellants running away.

19. There is no doubt that the offence, was committed at about 6.30p.m. There were favourable circumstances to enable PW 8 recognise the appellants, as they were persons who were well known to him. There was no evidence of any grudge that may have existed between PW 8 and the appellants as would have caused PW 8 to frame up the appellants.

20. Although the appellants' conviction was heavily based on the evidence of a single eye witness, given the circumstances as summarized hereinabove, we are persuaded that PW 8 was a credible witness. It is trite law that a fact may be proved by the testimony of a single witness, though such evidence must be tested with the greatest care. See **MAITANYI V REPUBLIC [1986] KLR 198**.

21. We do not agree that the trial judge did not evaluate the prosecution evidence. He did so and acknowledged the minor discrepancies in the evidence but concluded that such discrepancies had not occasioned miscarriage of justice. The appellant's defence was considered but found wanting.

22. All in all, We find this appeal lacking in merit and dismiss it in its entirety. It is so ordered.

DATED and delivered at Kisumu this 12th day of February, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR