



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 34 OF 2014 (R)

BETWEEN

JOHN OKETCH OGANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii, (R. Sitati, J.) dated 11th day of July, 2013

in

HCCRA NO. 47 OF 2008)

JUDGMENT OF THE COURT

1. The appellant, John Oketch Oganga, was found guilty of the offence of murder and convicted by the High Court (Sitati, J.) at Kisii. The particulars of the offence were that he murdered Bernard Okinyi Ogalo (the deceased) on 5th September 2008 at Osingoa, North sub-location in Migori in the former Nyanza Province. He was sentenced to death. He has in this appeal challenged the conviction and the sentence.
2. The appeal raises the question whether the identification of the appellant was mistaken. Akin to that is the question whether, there was sufficient circumstantial evidence to support the conviction and whether the learned trial Judge erred in relying on a dying declaration in support of the conviction.
3. On a first appeal, such as this, we are obliged to re- evaluate and analyze the evidence on record with a view to reaching our own independent conclusion. We bear in mind that we have not had the opportunity the trial court had of hearing and seeing the witnesses and was therefore better placed to assess their demeanor. In the circumstances, we should be slow to interfere with the trial judge's findings of fact unless the evidence on record does not support those findings. [See **Okeno v. Republic [1972] EA 32** and **Mwangi v. Republic 2002] 2 KLR 28**].
4. Eight witnesses testified in support of the prosecution case. PW1 was Monica Atieno Okinyi,

- the widow of the deceased. She testified that shortly after her husband, the deceased, left their house on a mission to buy cigarettes on 5th September 2008 at about 7.30 pm, she heard a scream. Accompanied by her mother-in-law she went in the direction of the scream. Approximately 70 meters from her house, they found the deceased had been stabbed at the appellant's door. Peter Odhiambo (PW2), his daughter Maureen Atieno and the appellant's wife Elizabeth Anyango were already at the scene when PW1 and her mother-in-law got there. The deceased's stomach and intestines were hanging out of his body. The deceased was crying and she heard him say in dholuo language: "*why has Tego stabbed me this way*". According to PW1, the appellant who was her neighbour in the next homestead was known in their neighbourhood by the name Tego. She conceded that she did not see the appellant kill the deceased.
5. Peter Odhiambo Abuso, PW2, a farmer in Osugo, Suna East in Migori also referred to the appellant by the name Tego. He recalled that he was at his home on 5th September 2008 at about 7.30 pm when he heard screams emanating from the appellant's home. Approximately 40 meters from his house on his way there in response to the screams, he encountered someone running towards him. That person was holding his stomach. He also saw someone, who he did not identify, fleeing from the appellant's home. The person holding his stomach turned out to be the deceased. He enquired from him what had happened. The deceased told him that Tego had stabbed him. The deceased pulled up his shirt to reveal his intestines hanging out of the body. PW 2 assisted the deceased to lie down. On enquiring a second time, the deceased reasserted that the appellant had stabbed him on his way back from buying cigarettes. The deceased's brother, Francis Odeny Ogalo then arrived at the scene, procured a taxi and took the deceased to Dr. Machage Hospital where the deceased was pronounced dead.
 6. On 5th September 2008 at about 7.20 pm, PW3 Walter Ochieng Abwao left one Pastor Onunda's house where he was visiting with others. Before reaching the road that was about 200 meters from the Pastor's house, he heard screams. Shortly after hearing the screams, he saw the appellant, to whom he referred by the name Tego, running towards him. The appellant was carrying a knife in his right hand. On enquiring from the appellant in Swahili "*iko nini kwako*" the appellant retorted that he should be left "*alone because things were bad at home.*" He was able to recognize the appellant with the aid of moonlight that he described as "*bright*" and "*strong*". PW3 and the others then proceeded to where the screams were emanating from. There, they found the deceased lying down crying with his hands on his stomach. Thereafter the deceased's brother arrived and the deceased was taken to hospital but died on the way there. Later they proceeded to Migori Police Station with the body of the deceased and made a report. They were asked to record witness statements the following day.
 7. The following day, PW3 was part of a group of people who started to hunt, unsuccessfully, for the appellant with a view to lynching him. He subsequently learnt that the appellant was arrested at his (appellant's) sister's place.
 8. PW 4 was Francis Odeny Ogalo the deceased's brother. He was in his house on 5th September 2008 at about 8.00pm when he heard screams from a neighbouring home and people calling out his father's name saying that Moi had been killed. He rushed to the home of the appellant, who is his cousin, where he found people, including PW2, had gathered and his brother, the deceased, was lying down holding his stomach. The appellant was not at home. He found a taxi and took the deceased to Machage Hospital where he was pronounced dead.
 9. The day after, PW4 accompanied by PW2 and PW3 reported the incident at Migori Police Station. On 9th September 2008 PW4 identified the deceased's body at Migori District Hospital for the purpose of a post mortem.
 10. On 20th September 2008, PW4 travelled to Migori having received information that the appellant had been seen there. He met the appellant there and alerted a traffic police officer who arrested the appellant.

11. The post mortem on the body of the deceased was conducted by PW5, Dr. Kogutu Vitalis, at Migori District Hospital on 9th September 2008. He observed a deep stab wound on the abdomen anteriorly measuring 7 cm in length. He opined a sword caused the stab wound. He concluded that the cause of death was due to internal bleeding secondary to injury to the spleen probably due to assault.
12. Corporal Benard Githanga PW6 was attached to Migori Police Station on the material date. He was at the police station when the murder of the deceased was reported there. After conducting investigations including recording witness statements, the appellant who was taken to Migori Police Station after being arrested at Namba within Migori town was charged with the offence of murder.
13. In his defence, the appellant who stated that he is a peasant farmer and small-scale businessperson denied that he murdered the deceased. He denied that he was known by the name Tego. He raised an alibi by asserting that when the alleged murder took place on 5th September 2008, he was at his place of business at Kababu near Namba in Migori, which is far from where the murder allegedly took place. He denied that he was related to the deceased or had ever met him or that he even knew him and could not understand why he was charged with the offence.
14. Based on that evidence, the trial court was convinced that the circumstances under which the appellant was identified were conducive for positive identification and that the identification was without a mistake. Whilst warning herself of the need for caution when relying on dying declarations, the learned trial Judge was fortified in that conviction by the testimony of PW1 and PW3 who stated that the deceased had prior to his death mentioned the appellant's name as the person who had stabbed him.
15. The learned Judge was not in any doubt that when pieced together, the evidence irresistibly pointed to the appellant as the murderer. The learned Judge had this to say:

“I am persuaded that there was sufficient circumstantial evidence to connect the accused to the murder of the deceased. Although the accused denied it on oath, I am persuaded that the accused and the deceased are first cousins as their fathers were brothers, and they lived next to each other. Soon after the deceased has been stabbed and sent out a loud scream saying that Tego had stabbed him, the accused was seen running away from his home, carrying a knife in his right hand and when he was asked what was wrong at his home, the accused told Walter that all was not well at his home.”
16. Basing their arguments on the appellant's supplementary memorandum of appeal filed on 24th September 2015, learned counsel for the appellant Mr. R. Odhiambo teaming up with Mr. T. Omondi submitted that the learned trial Judge erred in holding that there was sufficient circumstantial evidence to sustain the conviction; that the evidence of identification was insufficient; that the dying declaration relied upon by the Judge was not sufficiently proved and that the Judge failed to objectively appreciate the evidence tendered by the appellant in his defence.
17. Counsel stressed that none of the prosecution witnesses saw the appellant stab the deceased; that neither was the appellant found at the scene; that the incident occurred at night when it was dark; that there was no evidence that the person known as Tego who was allegedly mentioned by the deceased as the stabber is the same person as the appellant; and that having raised an alibi in his defence, it was incumbent on the prosecution to rebut it with cogent evidence. According to counsel, the fact that PW1 is a changaa brewer meant there would have been heavy human traffic at her premises and there was therefore opportunity for another person to have stabbed the deceased.
18. Opposing the appeal, Mr. E. Ketoo learned prosecution counsel submitted that the identity of the appellant as the person who stabbed the deceased was established; that the appellant was seen

running away from the scene of crime with a knife in his hand; that the conviction was further buttressed by the dying declaration made by the deceased in the presence of two witnesses.

19. We have reviewed the evidence and considered the submissions by learned counsel. As we have already indicated, the central question in this appeal is whether the identification of the appellant was mistaken. Related to that is the issue whether there was sufficient circumstantial evidence to support the conviction and whether the dying declaration was sufficiently proved.
20. It is common ground that none of the witnesses saw the appellant stab or assault the deceased. On identification of the appellant, the evidence on which the court relied as the basis for convicting the appellant was that of PW1, PW2 and PW3.
21. PW1, the deceased's wife, was categorical that when she reached the scene of the incident after hearing screams, she found the deceased had already been stabbed in the stomach with his intestines hanging out of his body; that the deceased was crying and saying "*why has Tego stabbed me this way*". She was clear that 'Tego' referred to the appellant who is her relative.
22. PW2's testimony was that he heard screams from the appellant's home and on his way there he encountered two people. One was fleeing from the appellant's home. The other was the deceased who was running towards him holding his stomach. Like PW 1, PW2 stated that the deceased also told him that the appellant, to whom he referred by the name Tego, had stabbed him; that he helped the deceased lie down and asked him again if it was the appellant who had stabbed him to which he (the deceased) responded in the affirmative.
23. PW3 having heard screams encountered the appellant, who he described as a relative and a neighbour, running with a knife, and upon enquiring from him "*iko nini kwako*" the appellant responded by saying that things were bad at home.
24. Quite apart from the fact that the deceased informed two people prior to his death that the appellant had stabbed him, there was the testimony of PW3 who saw the appellant running away from his home holding a knife in his right hand. Based on that evidence, we think the learned trial Judge was right when she stated that:

"In this case, the deceased was stabbed near the door of the accused's house. Soon after that the accused was seen running away from his home carrying a knife in the hand. The accused disappeared from home for about 15 days until he was arrested far away from his home. The fact of running away from home at a time when the family needed the accused during the funeral of the deceased was not consistent with his innocence."
25. In our view the incriminating facts as established by the trial court were, in the words of this Court in **James Mwangi vs. Republic Cr. Appeal No. 33 of 1983** "*incompatible with the innocence of the [appellant], the guilt of any other person incapable of explanation upon any other reasonable hypothesis than that of guilt.*"
26. There was no question that both PW1 and PW2 spoke to the deceased after he had sustained the fatal stab wound. The identity of the person with whom they conversed was not in any doubt. It was the deceased with whom they conversed. It was the deceased who informed them who his attacker was and that the attacker was the appellant. We are therefore satisfied that the learned Judge approached the evidence of the dying declaration with the necessary circumspection (**David Agwata Achira vs. Republic [2003] eKLR**).
27. Like the learned trial Judge we have difficulties with the credibility of the defence put forth by the appellant. The evidence, though circumstantial pointing at the appellant was overwhelming and displaced the alibi defence advanced by the appellant.

28.For the above reasons, this appeal is devoid of merit and is hereby dismissed. Orders accordingly.

Dated at Kisumu this 12th day of February, 2016.

D. K. MARAGA

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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.

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DEPUTY REGISTRAR