



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CRIMINAL APPEAL NO. 100 OF 2014**

**BETWEEN**

**STEPHEN ONDIEKI ONGETO..... 1<sup>ST</sup> APPELLANT**

**RICHARD ASIRI MOREMO.....2<sup>ND</sup> APPELLANT**

**JOSEPH ONGOTO ONGOTO.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from judgment of the High Court of Kenya at Kisii (Sitati, J) dated 23<sup>rd</sup> October 2012,*

*in*

*H.C.CR.A No.28 of 2008)*

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**JUDGMENT OF THE COURT**

***Stephen Ondieki Ongoto, Richard Asiri Moremo and Joseph Ongoto Ongoto Alias Kenyambi, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants*** respectively, were jointly charged with the offence of murder contrary to **section 203** as read with **section 205** of the **Penal Code**. The particulars of the offence are that on the 5<sup>th</sup> March 2008 at Matangi village, Bocharia sub location in Masaba District within the then Nyanza Province with others not before the court, they murdered **Ondieki Bureki, ( the deceased )**. The appellants denied committing the offence.

The prosecution called 5 witnesses, and it was their case that on the night of 4<sup>th</sup> and 5<sup>th</sup> March 2008, the son of the 1<sup>st</sup> appellant, one John Ondari Ondieki, was abducted by people he claimed were witches. It was further alleged that he was taken to the forest where he was tortured, and forced to drink a concoction mixed with blood. He became unconscious, and only regained consciousness on the morning of 5<sup>th</sup> March

2008, but that he remained confused. With the assistance of a good Samaritan, he was returned home to his father, the 1<sup>st</sup> appellant. Following his recovery from the ordeal, he informed his father of what had transpired the previous night, and gave the name of the deceased, as one of the abductors. Upon learning that the deceased, who was a neighbor and well known to the 1<sup>st</sup> appellant was involved, the 1<sup>st</sup> appellant had him brought to his home. This attracted the attention of neighbours from the area.

**Joseph Gisemba Ondieki PW 2 (Joseph)**, son to the deceased was one such neighbour who went to the 1<sup>st</sup> appellant's home attracted by the sound of whistles blowing. On arrival he found the 3 appellants and other members of the public in the 1<sup>st</sup> appellant's compound. Joseph heard the 1<sup>st</sup> appellant remark that witches, one of whom was the deceased, had abducted his son, John Ondieki. He thereafter instructed the 2<sup>nd</sup> appellant who is a neighbor, and the 3<sup>rd</sup> appellant, his brother, to take the deceased away and kill him.

According to Joseph, the deceased had denied that he was a witch, but could not run away as one of his legs was fractured. His crutches were taken away and he was taken to the road where he was assaulted. It was the 1<sup>st</sup> appellant who tied the deceased with a rope and ordered that he be killed. The 2<sup>nd</sup> appellant beat the deceased on his back with a rungu, and the 3<sup>rd</sup> appellant speared the deceased on the back and chest.

When the deceased fell down and passed out, some members of the crowd that had assembled collected firewood, while the 1<sup>st</sup> appellant obtained petrol from a passing vehicle. He poured it on the deceased, lit a match and set the deceased alight.

**Samuel Gisemba alias Tegisi Musoma, PW 5 (Samuel)**, a brother to the deceased stated that on the 5<sup>th</sup> August, 2008 at about 3.00 p.m, he was with the area Assistant Chief, at Shooters Hotel Keroka when the Assistant Chief was informed that a witch had been caught and later, lynched and burnt. Samuel left for the scene of the alleged lynching in the company of the Assistant Chief, but before they got to the scene, while at Westland Trading Centre, the 3<sup>rd</sup> appellant approached Samuel and told him that he (Samuel) could do nothing since the witch had already been lynched. As they neared the scene, Samuel learnt that, it was his brother, the deceased, who had been lynched. At the scene, Samuel found the deceased's body still smoldering, and his hands and legs had been cut off.

**Corporal Bernard Barasa, PW 4 (Corporal Barasa)**, of Keroka Police station testified that on 5<sup>th</sup> March, 2008 at about 3.00 p.m., he accompanied, Inspector Muriuki, OCS, to the scene of crime. On arrival, they found the remains of the deceased's body which was burnt beyond recognition lying in the middle of the Matanyi-Keroka road. They removed the charred remains to Gucha District Hospital mortuary to await a post mortem.

**Dr. Maurice Rante, PW 1 (Dr. Rante)**, the medical doctor at Kisii Level 5 Hospital, carried out the postmortem examination, and testified that the deceased's body was severely burnt. The skull was completely burnt and the brain reduced to a small mass. The right chest wall was completely burned exposing the lunar. The upper limbs had been amputated both sides at elbow joints. The right lower limb had been amputated at the distal femur. The left femur bone had a compound fracture at the distal portion with a small piece of muscle attaching the distal to proximal part. Internally, the right lung was completely burnt, the abdomen had undergone changes, and the external genitals were completely burnt. Dr. Rante concluded that the deceased died from cardio respiratory arrest due to excessive hemorrhage and severe burns.

While he was on duty on 5<sup>th</sup> August, 2008, at Keroka Police Station **Police Constable Saitoti No, 88950 PW 3 (PC Saitoti)**, received information that a suspect in the murder of the deceased was outside the station. He went out and arrested the 1<sup>st</sup> appellant. Then, with the assistance of members of the public, PC Saitoti later traced the 3<sup>rd</sup> appellant to Nyansiongo where he arrested him. The 2<sup>nd</sup> appellant was arrested by the area Assistant Chief and re-arrested by PC Saitoti.

In his unsworn statement the 1<sup>st</sup> appellant, stated that he was a mason by profession, and that on 5<sup>th</sup>

March, 2008, he was on a building site at Ramasha. While on his way home at about 6.00 p.m, he was informed that someone had been killed in his village. He denied being present when the deceased died.

He further stated that on the 23<sup>rd</sup> July, 2008, he was informed that his son had been arrested and was being detained at Keroka police station. On 24<sup>th</sup> July, 2008, he went to Keroka police station to see his son, but on arrival, he was arrested in connection with the offence. He denied any knowledge of the offence, and in particular, denied tying the deceased with a rope. Instead, he contended that he had a land dispute with Joseph, over a lease agreement which Joseph was alleged to have prematurely terminated, and that Joseph vowed to fix the 1<sup>st</sup> appellant after the area Chief had ordered him to refund Kshs. 3,000/=.

In his unsworn statement the 2<sup>nd</sup> appellant, denied any knowledge of the allegations surrounding the death of the deceased and stated that he was a businessman in Keroka. That on 5<sup>th</sup> March, 2008, he travelled to Nairobi to buy some merchandise for his business. Upon his return three days later, he was informed that the deceased had been lynched. He further stated that on 8<sup>th</sup> August, 2008 at about 10.00 pm while on his way home, he was arrested by police officers and taken to Keroka police station. It was his testimony that a dispute existed between himself and Joseph over a girl, which was the reason Joseph had lied that he was at the 1<sup>st</sup> appellant's home, armed with a rungu on the date the incident occurred.

The 3<sup>rd</sup> appellant's unsworn statement was that on the 5<sup>th</sup> March, 2008, he was engaged as a mason at Isoge near Manga. He learned about the deceased's death on 9<sup>th</sup> March, 2008 when he read the TAIFA LEO newspaper; that he remained at Isoge until 27<sup>th</sup> September, 2009, when at about 10.00 am, Samuel, and three men who were Administration Police officers, arrested him in connection with the deceased's death; that he was escorted to the District Commissioner's Office and later taken to Keroka police station. He denied any connection with the offence.

The 3<sup>rd</sup> appellant stated that Samuel's allegations that the 3<sup>rd</sup> appellant had told him that he had killed the deceased, were untrue and that both Joseph and Samuel had a grudge against him over moneys taken by the two witnesses from a local investment which they had failed to repay.

In its judgment, the High Court convicted and sentenced the appellants as by law prescribed having found that malice aforethought was established and that the prosecution had proved its case to the required standard that the appellants had murdered the deceased.

The appellants were aggrieved with the decision of the High Court and have appealed to this Court on the grounds; that the learned trial judge convicted the appellant on shaky evidence of a single witness that the conviction was on the basis of the evidence of witnesses who did not testify; that the prosecution failed to prove its case beyond reasonable doubt; that the appellants' written submissions were not taken into account; that the court disregarded the appellants' defence.

Learned counsel for the appellants **Ms. C.R. Sagwe**, submitted that the High Court relied on the evidence of a single identifying witness to convict the appellants, yet this evidence did not show that the case was proved beyond reasonable doubt. Counsel contended that Joseph had testified that he had witnessed the attack on the deceased, and saw one Ondieki pour fuel on the deceased's body. In addition, Joseph's evidence was that the deceased's limbs had been amputated earlier at the elbow joint, yet at no time did Joseph testify that he saw the appellants amputate the deceased's limbs. Counsel submitted that the only conclusion that could be drawn was that Joseph was not present during the alleged attack, and that as a result, his evidence ought not to have been relied upon.

Counsel's next complaint was that the learned judge dismissed the appellants' defence, yet the prosecution had not tendered any evidence to dislodge their defence. Counsel further submitted that the High Court was wrong to dismiss the appellants' defence on the basis that the appellants had disappeared from their homes following the incident, yet there was nothing to show that the prosecution had made any effort to locate the appellants.

On his part, **Mr. Ketoo**, learned prosecution counsel for the State opposed the appeal, and submitted that though the evidence of a single identifying witness should be treated with caution, the incident took place in broad daylight, and so the lighting was sufficient; that Joseph stated that he saw the appellants assaulting the deceased, thereby seriously injuring him, after which they set his body on fire. This was corroborated by Dr. Rante's evidence, and the postmortem report.

With regard to the complaint that the appellants' evidence was not taken into account, counsel submitted that the defences were with reference to two aspects, namely, the existence of grudges and alibi evidence. On the alleged grudges, the learned judge concluded that they were an afterthought.

On the alibi defence, counsel submitted that when this was weighed against the Joseph's evidence, the medical doctor's evidence and the postmortem report, it was found to be unreliable and an afterthought. According to PW 3, efforts were made to trace the appellants' one month after the incident. It was evident that a crime had been committed and the appellants were on the run. Counsel concluded that the learned judge was satisfied that the prosecution's case was proved beyond reasonable doubt.

This is a first appeal, and on the authority of the case of ***Okeno vs Republic [1972] EA. 32***, among other authorities on the issue, this Court is under an obligation to reconsider the evidence, re-evaluate it and come to its own independent conclusions. In doing so, this Court must bear in mind that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify to be able to assess their demeanour. See also ***James Ngugi Njoka vs Republic Court of Appeal Criminal Appeal No. 315 of 2006***.

We have considered the evidence and the submissions of the parties and are of the view that the issues for determination are whether the learned judge rightly convicted the appellants on the evidence of a single identifying witness; whether the appellants' defence was taken into account; and whether the prosecution's case was proved beyond reasonable doubt.

Beginning with the issue of whether the court rightly relied on Joseph's evidence to convict the appellants, it is apparent that, Joseph was the only witness who testified as to the events as they unfolded on the material day.

In such circumstances, it is trite that the evidence of a single identifying witness ought to be treated with caution before a court can base conviction on it. The court could, in law convict on the evidence of a single witness, but extra care was required before a conviction could ensue. See ***Karanja & another vs Republic [2004] 2 KLR 140***. *The court should however warn itself of the dangers of relying on the testimony of a single witness, on identification in ***Maitanyi vs Republic (1986) KLR 198***.*

In the instant case, the argument is not whether the conditions for identification were suitable, or whether the appellants were appropriately identified, but whether Joseph was at the scene and saw the appellants assault and kill the deceased the contention being that, he could not have been present as firstly, his testimony that one Ondieki poured fuel on the deceased's body was erroneous, and secondly, that he did not show how the deceased's limbs were amputated.

In the light of this, we have a duty to re-evaluate Joseph's evidence to determine whether the appellants were properly convicted.

The incident took place on 5<sup>th</sup> August 2008, at about 3.00 p.m. in broad daylight. As such, the conditions for identification of the appellants were favorable and Joseph was able to see and hear the events as they took place that afternoon.

When he went to the 1<sup>st</sup> appellant's home, he saw that it was the 3<sup>rd</sup> appellant blowing a whistle. The 2<sup>nd</sup> appellant was armed with a rungu, while the 3<sup>rd</sup> appellant was sharpening a spear. He testified that he identified the 3 appellants, as they were his neighbours and were known to him.

While there, Joseph saw the 1<sup>st</sup> appellant throw away the deceased's crutches, and carry him to the road where he was assaulted and seriously injured; he watched as the 1<sup>st</sup> appellant tied a rope around the deceased, and order that he be killed. At this point, the 3<sup>rd</sup> appellant speared him on his back and chest. When the deceased fainted and firewood was heaped on his body he saw the 3<sup>rd</sup> appellant obtain fuel from a passing vehicle which he poured on the deceased, and he watched as the 3<sup>rd</sup> appellant struck a match and set the deceased alight.

Joseph's evidence on the injuries and the fire was corroborated by the police who removed the deceased's charred remains from the road outside the 1<sup>st</sup> appellant's home, and the postmortem report that showed that the deceased had died from severe injuries and burns.

As to the identity of the person who poured fuel on the deceased, throughout his evidence, Joseph consistently maintained that it was the 3<sup>rd</sup> appellant who did that. The fuel was obtained from a passing motor vehicle driven by one John Omambia. During cross examination, his evidence on this remained consistent and unwavering. He was categorical when he stated that he *"...never told the police that one Moturi Ondieki was the one who poured fuel on the deceased."* By this he meant that he did not at any time inform the police that it was Moturi Ondieki, instead of the 3<sup>rd</sup> appellant who had poured fuel on the deceased.

On the issue of the amputation of the deceased's limbs, Ms. Sagwe's complaint was that, since Joseph did not testify as to how this happened, he could not have been at the scene on the material day.

Joseph testified that, one of the deceased's legs was fractured and that he could not walk without the aid of crutches. There was no mention in his evidence of when and how the amputations of the deceased's upper limbs occurred.

This notwithstanding, the evidence shows that during the incident, Joseph and his brother were momentarily chased away from the scene by the appellants, and the crowd, but that he returned and continued witnessing the events. It could have been during such moments that the deceased's limbs were amputated.

Given Joseph's unassailable account of the incidents leading to the deceased's death, notwithstanding that he may not have seen all the appellants' delinquencies, we are satisfied that he was at the scene, and observed the appellants assault, injure and ultimately murder the deceased. This ground therefore fails.

The next issue was whether the High Court rightly dismissed the appellants' defence. In the judgment, the learned judge considered the question of the existence of a grudge, and the alibi defence proffered and found them to have been afterthoughts.

On the existence of grudges between Joseph and the appellants, we find this claim to be unsubstantiated and irreconcilable with the evidence on record. We say this because, there is nothing to connect the grudges the appellants are alleged to have had with Joseph with the vicious attack on his father. Accordingly, we find it to be illogical and an afterthought.

On the alibi defence, all the three appellants denied being at the scene on the material day, and stated that they were carrying out their respective assignments away from Matanyi village.

It is trite that where alibi defence is proffered, it is up to the prosecution to investigate it, unless it is proffered too late in the proceedings to be investigated and verified. In the recent case of ***Victor Mwendwa Mulinge vs Republic [2014] eKLR*** this Court upheld ***Karanja V R [1983] KLR 501*** and rendered itself on alibi evidence thus:

***"...in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he has not put forward his defence of***

***alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that it is an afterthought.”***

In the instant case, alibi defences were proffered by the appellants during their testimony and after the prosecution had closed its case. As a result, the High Court weighed them against Joseph's testimony and finding them to be unsatisfactory dismissed them.

When we analyse all the evidence tendered by the prosecution and weigh it out as against the appellants' alibi evidence, we are satisfied that the trial court arrived at the right conclusion that the alibi defence was an afterthought. As such this ground is also dismissed.

The final issue whether that the prosecution proved its case beyond reasonable doubt.

In order for the offence of murder to be proved, three pre-requisites must be established by the prosecution prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought. (See *Nyambura & Others vs Republic [2001] KLR 355*).

It is clear from the evidence of Joseph who witnessed the incident, watched as the appellants assaulted the deceased and subsequently set his body on fire that they (appellants) were responsible for his death.

According to Dr. Rante, the medical doctor, the deceased's body, was completely burnt. The upper limbs had been amputated on both sides at elbow joints. The right lower limb had been amputated at the distal femur. The left femur bone had a compound fracture at the distal portion with a small piece of muscle attaching the distal to proximal part. Dr. Rante's conclusion was that the deceased died from cardio respiratory arrest due to excessive hemorrhage and severe burns.

When Joseph's testimony is analysed in the light of the medical evidence, we find that the injuries sustained, and cause of death was consistent with the Joseph's testimony. A clear link was established between the assault and the injuries the deceased sustained, and the appellants' actions, and we find, as did the trial court, that the appellants' were responsible for the deceased death.

That said, the next precondition we must determine is whether malice aforethought was established on the appellants' part. Malice aforethought is provided for in **section 206** of the **Penal Code** where it is stipulated that it shall be deemed to be established by evidence proving any one or more of the following circumstance: (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; (c) An intent to commit a felony; (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. Based on the foregoing, there has to be an intent to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person.

The evidence in this case pointed to malice aforethought on the part of the appellants, who had formed a common intent to avenge the abduction of the 1<sup>st</sup> appellant's son by killing the witches, one of whom was allegedly the deceased.

As such, we find that the pre requisites for the offence of murder were established and proved by the prosecution beyond reasonable doubt.

Accordingly, for these reasons, this appeal has no merit, and is dismissed.

It is so ordered.

*Dated and delivered at Kisumu this 12<sup>th</sup> day 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**

**DEPUTY REGISTRAR**