



**IN THE COURT OF APPEAL AT NYERI**

**(SITTING AT MERU)**

**(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)**

**CRIMINAL APPEAL NO. 40 OF 2015**

**BETWEEN**

**STANLEY MWITHALIE MUCHUI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal against the Conviction/Judgment of the High Court of Kenya at Meru (Lesiit, J.) delivered on 31<sup>st</sup> July, 2014 in H.C. Cr. A. NO. 27 OF 2009)*

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**JUDGMENT OF THE COURT**

The appellant was convicted by the High Court, at Meru on information, charging the appellant with murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death. The particulars of the offence stated that on 9<sup>th</sup> March 2009, the appellant murdered **Peter Gitau**.

The prosecution called five witnesses in support of the charge namely; **Morris Kobia Maroo (PW1)** (Kobia); **Daniel Mbaria Kamere (PW2)** (Kamere); **Beth Wambui Gitau (PW3)** (Wambui); Dr. **Koome Guantai (PW4)**; and **Margaret Thirindi (PW5)** (Thirindi).

Before closing the prosecution case, the prosecuting counsel applied for adjournment to call the investigation officer saying that he was bonded but was in Mandera on leave. The application was opposed by counsel for the accused and the High Court ultimately dismissed the application.

The prosecution case as reconstructed from the evidence was briefly as follows:

On 9<sup>th</sup> March, 2009, at about 12.20 p.m. **Thirindi**, a neighbour of both Peter Gitau (deceased) and the appellant were in her house when she heard the deceased calling her name. She left her house to find out why the deceased was calling her and saw the deceased coming towards her home calling out her name. The face of the deceased was full of blood. She saw the appellant going round the deceased's homestead holding a panga at a distance of about 30 meters. She did not talk to the deceased as she was in shock. She also did not talk to the appellant. She instead went to call **Kobia (PW1)** - the deceased's son-in-law at his house.

According to the evidence of Kobia, Thirindi went to her house and reported to him that the deceased had

been cut several times and that she suspected that he was not alive. Thirindi walked away after reporting and Kobia followed her to the scene which was about 100 meters from his house. Kobia found the deceased lying on his back panting and groaning with blood stained clothes. He asked the deceased the name of the person who cut him and the deceased in a soft voice said that it was “**Mwithalie**” who cut him. Kobia left the deceased to look for people to prepare a stretcher and when he returned to the scene, he found his father in-law already dead. Meanwhile **Kamere (PW2)** who is an Assistant Chief received a call that the deceased had been murdered. He went to the scene in company of two Assistant Chiefs and found the deceased lying dead with cuts on the neck and forehead. He was informed that Mwithalie was at his home and he went there in the company of two the Assistant Chiefs. He found **Mwithalie (appellant)** inside his house taking tea and holding a long blood-stained panga. The appellant’s home was surrounded by members of public and Kamere arrested him and took him to the Chief’s camp where he was collected by a police vehicle and taken to Maua police station.

**Wambui (PW3)**, the deceased’s wife, was not at home at the time of the incident but saw the deceased’s body at Maua police station. She testified that on the previous day (8/3/2009) the appellant started throwing stones into the deceased’s home and that the deceased confronted him.

The post mortem on the body of the deceased was performed by **Dr. Macharia** whose report was produced by **Dr. Koome**. According to the postmortem report, the body had multiple cuts on the head and neck. The trachea, spinal cord, carotid arteries and left jugular veins were severed. He had compound fracture of the occipital bone and cervical vertebra. The cause of death was due to severe neck and head injuries caused by a sharp object.

The appellant testified at the trial. He denied attacking the deceased with a panga and testified that on the material day he was working on his shamba until 4.00p.m., when he returned to his house and that he was arrested while taking tea. He denied that he was in possession of a long blood stained panga at the time of arrest. He also denied that he had on the previous day thrown stones into the deceased’s compound. Regarding the evidence of Thirindi, he testified that Thirindi had said that she would one day revenge because in the year 2005 she had cut a tree which fell into his land and damaged his miraa for which she was forced by the District Officer to pay damages, which she did.

He testified that his relationship with Kobia was not good as he (Kobia) had stopped the relationship between the appellant and his school-going daughter Esther Mweni in 2007. Lastly, he stated that he and deceased were friends and lived very well.

The trial judge believed the evidence of Kobia on the identity of the person who cut the deceased and concluded that the deceased’s statement was a dying declaration and also the evidence of Assistant Chief, Kamere that the appellant was found in possession of a long blood stained panga at the time of the arrest, the evidence of Thirindi and the evidence of Wambui that appellant had thrown stones into the compound of the deceased on the previous day. The trial judge rejected the evidence regarding grudges of Kobia and Thirindi as an afterthought, stating that the witnesses were not cross-examined on the issue and concluded that the defence of the appellant was mere denial.

The appellant appeals against the judgment of the High Court on three grounds named:

**“1. ...**

**2. The trial judge erred in both law and fact in relying upon the evidence of a dying declaration without observing that the said evidence was not cogent enough to sustain a conviction.**

**3. The learned judge erred in both law and facts in not making a finding that the circumstantial evidence tendered did not point irresistibly towards the guilt of the accused.**

**4. The learned judge erred in both law and fact in failing to make a finding that there was an existing grudge between the appellant and PW1 and PW5.”**

**Mr. Wamache**, the learned counsel for the appellant argued the three grounds together. He submitted that the prosecution case was based on the dying declaration of the deceased which must be treated with caution; that malice aforethought and motive for the murder were not proved; that PW1 and PW4 stated that there was no grudge between deceased and the appellant; that the fact of a stolen phone was not proved; that the panga was not produced and the investigation officer was not called as a witness; and finally that the prosecution totally failed to prove that it was the appellant who committed the offence.

**Mr. Kariuki**, the Learned Senior Prosecution counsel opposed the appeal. He submitted that the deceased told Kobia that it was Mwithalie who cut him, that the appellant was found taking tea while holding a blood stained panga and that the alleged grudge between the appellant and PW5 was an afterthought.

The appellant was convicted on the basis of the evidence of Thirindi, Kobia and Assistant Chief, Kamere. This is clear from the following finding of the trial Judge;

***“I find that the evidence against the accused was circumstantial evidence. The evidence that the accused had a panga at deceased’s home soon after the deceased was cut, taken together with the dying declaration by the deceased and PW2’s evidence that he had a blood stained panga soon after the incident all form a chain so complete that there is no escape from concluding that it was the accused who cut the deceased.”***

There was ample evidence which was admitted by the appellant that the deceased, appellant and Thirindi are close neighbours. Their respective lands and homes are adjacent. The evidence of Thirindi was important circumstantial evidence. The appellant attempted to discredit her evidence by claiming that she had a grudge against him arising from an incident where she was forced to pay compensation to him when the tree she had bought and cut damaged his Miraa. That incident, according to the appellant, happened in 2005. However, he admitted that he has had no other case with Thirindi or any other issues with her since 2005.

Kobia testified that Thirindi was in shock when she reported to him that his father in-law had been cut several times. Thirindi herself testified that she was in shock after what she saw and did not talk to the deceased or to the appellant. The appellant was represented by counsel at the trial who did not cross-examine her on the alleged grudge. Thirindi testified that she did not witness the deceased being cut. If she had any such grudge, it is probable that she could have lied that she saw the appellant cut the deceased with a panga. The alleged incident giving rise to a grudge occurred about four years before, thus adversely affecting the credibility of the defence case.

The High Court considered Thirindi’s and the appellant’s evidence and made a finding that the appellant’s evidence of a grudge to be a lie. On our re-consideration of the evidence, we are satisfied that Thirindi was a credible witness and her evidence a true account of the events she witnessed.

The evidence of Assistant Chief Kamere that on visiting the scene, he found the appellant in his house holding a long blood stained panga was also an important piece of evidence. He said in his evidence in cross-examination that the panga was with the police. The trial court rejected the prosecution’s application for adjournment to call the investigating officer who could have probably produced the panga. The High Court believed the evidence of the Assistant Chief and made a finding that failure to produce the panga was not fatal to the prosecution case as the evidence adduced by witnesses was sufficient to establish the facts.

The evidence of the Assistant Chief was supported by the evidence of Thirindi who had earlier seen the appellant going round the deceased’s house holding a panga while the deceased was “**full of blood**”. The evidence of the Assistant Chief which was not discredited was credible and the trial judge correctly took it into account.

The evidence of Thirindi and the evidence of Assistant Chief Kamere is strong circumstantial evidence which was incompatible with the innocence of the appellant and incapable of explanation upon any other

reasonable hypothesis than that of the guilt of the appellant and thus satisfied the threshold stated in **R. v. Kipkering Arap Koskei & Another (1949) 16 EACA 135.**

The High Court made a finding that the deceased made a dying declaration to Kobia identifying Mwithale as his attacker. The evidence of Kobia was attempted to be discredited by the appellant on the ground that it was based on existing grudge. The finding of the High Court that Kobia was not cross-examined on the alleged grudge was obviously incorrect as the appellant's counsel directly questioned Kobia on his threat of dire consequences to the appellant arising from frustration by appellant of the Kobia intention to marry the appellant's daughter.

However, as the appellant stated in his evidence, the incident happened over five years before the present incident when Kobia was a young person. Kobia was the first relative of the deceased to arrive at the scene and it was logical from the state the deceased was in to inquire from the deceased of the identity of the person who had inflicted the injuries.

The identity of "Mwithalie" was clear from the evidence of Kobia who identified the appellant as the one the deceased named. The Assistant Chief Kamere testified that only the appellant is known as "Mwithalie" in the village. Indeed, the appellant stated that, if one asked for "Mwithalie" in his village one would be brought to him, thus admitting that he was the only "Mwithalie" in the village.

The evidence of Kobia was consistent and was not shaken in cross-examination. The allegation of a grudge was contrived and incredible. We are satisfied that the finding that the deceased made a dying declaration identifying the appellant as his attacker cannot be faulted.

Although there is no general rule that in order to support a conviction there must be corroboration of a dying declaration, courts have generally accepted that it is very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused person and not subject to cross-examination unless there is satisfactory corroboration (**Pius Jasunga s/o Akumu vs. R [1954] 21 EACA 333; Choge v. R [1985] KLR 1.**)

In this case, the dying declaration is corroborated by the evidence of Assistant Chief Kamere and Thirindi.

The evidence of a vicious attack on the deceased as disclosed by the evidence and post mortem report was intended to cause death, which intention establishes malice aforethought as defined in **section 206 of the Penal Code.** Although it is not necessary to establish a motive for attack, there was credible evidence from Wambui and the Assistant Chief Kamere, that the loss of Wambui's mobile phone and the subsequent reporting by the deceased to the Assistant Chief had precipitated tension between the deceased and the appellant.

As the first appellate court we have re-evaluated, re-analyzed and re-considered the evidence as we are required by law to do and have come to the conclusion that the charge against the appellant was proved beyond any reasonable doubt.

Accordingly, the appeal is dismissed in its entirety.

***Dated and delivered at Meru this 21<sup>st</sup> day of December, 2016.***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**