



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MWILU, MUSINGA, KIAGE, JJA) CRIMINAL APPEAL NO.260 OF 2010

BETWEEN

JACOB KIPLANGAT NGETICHAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kericho (Ang'awa J) dated 30th February 2010 in

H.C. Criminal Case No.13 of 2008

JUDGMENT OF THE COURT

1. JACOB KIPLANGAT NGETICH, (hereinafter referred to as the appellant), was charged before the High Court sitting at Kericho with the offence of murder contrary to the provisions of section 203 as read with those of 204 of the **Penal Code**. He was tried, found guilty and convicted of the murder of **LEONARD KIPNGENO LANGAT**, (deceased), and sentenced to suffer death as by law provided. The particulars of offence as appeared in the information dated 8th April 2008 had been that he the appellant, on the 23rd day of March 2008 at Kapsimotwo village, Bomet District of the Rift Valley Province, murdered the deceased.

2. The prosecution case was made up of the evidence of eight (8) witnesses. **Leonard Kibet Chepkwony**, a farmer living at Kapsimotwo gave evidence as PW1 to the effect that he was taking tea in Mengo Hotel at Kapsimotwo on 23.3.2008 when he heard people say that the appellant and the deceased had fought but he did not witness the incident. He knew the fighting duo. At the request of the prosecuting counsel, PW1 was declared a hostile witness for changing his recorded evidence that he had indeed witnessed the appellant stab the deceased.

3. The evidence of PW2, one **Gilbert Kimutai Cheruiyot**, was that on 23.3.2008 he was at work at Mid West Hotel making *mandazi*. At about 6.00 p.m. he heard people fighting. He walked out of the hotel and saw the deceased and Nicholas Kipkorir Ngetich fighting. He then saw the appellant try to separate the fighting duo. The deceased and the appellant on their part almost fought after exchanging words. Instead they walked away towards town with the appellant leading the way while the deceased followed. Then the appellant got into Mid West Hotel, he had a knife with which he turned and stabbed the deceased. The appellant and the deceased then threw stones at each other and shortly after the deceased fell down and the witness and others ran to assist him into a vehicle to be taken to hospital, but the deceased passed on

right there at the scene.

This witness insisted during cross examination that indeed he witnessed the fight and the stabbing from a little distance away. He did not know the reason for the fight. He concluded by stating that the appellant ran away with the knife from the scene. The witness did not recognize the knife shown to him in court on 8.12.2009 when he first gave evidence.

4. Samuel Cheruiyot Keter the prosecution's third witness was at Kapsimotwo town at about 5.00 p.m. on 23.3.08. He saw the appellant stab the deceased and the witness helped the deceased who then fell down bleeding. The witness began to scream. He had seen the appellant holding a knife but did not see what type of knife it was but said that he was present when the incident occurred and indicated to court that the deceased, who was his nephew, was stabbed at the back side of his right shoulder. He further stated that the deceased was stabbed while outside of building and that the witness tried to assist the deceased after he was already stabbed.

5. PW4, **Kimutai Keter**, another uncle of the deceased, heard screams when he was in his shop and heard someone say, "he has been stabbed." He quickly locked his shop and tried to rush his nephew to hospital but he died on the way and so he and others went to Bomet police station instead from where they were re-directed to the hospital for a medical practitioner's confirmation of the deceased's state. PW4 never witnessed the incident. On his part, PW5's, (**Daniel Kipkemoi Chemwa**) evidence was that on the material date he saw the appellant and the deceased throwing stones at each other and that the appellant ran away from the scene upon seeing PW5. He was unable to recognize the small pink knife first shown to him in court but when he was recalled and shown a knife with a leather handle he acknowledged it as the blood stained knife that he had taken to the police station on the date following the incident

6. The evidence of PW6, one **Joseph Kiplangat Sang**, was that he carried out hotel business at White Hotel, Kapsimotwo. On the 23.3.2008 he was at the hotel outside of which the deceased and the appellant had a quarrel. He saw the appellant enter his hotel and take a knife with which he stabbed the deceased on the back. After the stabbing people screamed and the appellant began running away with the knife in his hand and threw it into a school compound from where it was retrieved by a lady and taken to the chairman of the shopping centre. He identified the knife shown to him in court as his knife saying that it had blood stains when it was retrieved from the school. This witness insisted during cross-examination that he saw the appellant stab the deceased and saw that the appellant had a knife in his left hand and stones in his other hand. After the stabbing, the witness continued, the deceased ran in shock for about 10 metres and picked a stone. He soon collapsed and it was then the witness and others approached him and realized that he was bleeding. He said that he recognized the knife as his from the skin (leather) handle and as the knife he saw retrieved from the school and handed over to the chairman of the shopping centre.

7. Dr. Birech Koros, PW7, was at the time of giving evidence a senior medical doctor, having qualified in surgery and medicine. He gave evidence on behalf of Dr. S. K. Cheruiyot, a consulting surgeon who had conducted the postmortem report on the deceased herein. Dr. S. K. Cheruiyot had himself died sometime after the postmortem. The postmortem was performed by him on 25.4.2008 at 4.30 p.m. at Tenwek Mission hospital. Time of death was indicated as 6.30 p.m. on 23.5.2008. A deep penetrating stab wound was noted on the right posterior chest between the 4th and 5th right ribs measuring 3cm x 1 cm and penetrating into the right chest cavity with massive right haemothorax and a tear of the middle lung lobe with lung collapse and torn right parenchymal blood vessel. The deceased's T-shirt was heavily bloodstained and it had a small tear. The examining doctor formed the opinion that the cause of death was cardiopulmonary arrest due to haemorrhagic shock from right haemothorax resulting from penetrating stab chest wound from a sharp object. The postmortem report was produced as exhibit No.2 and exhibit No.3 was the mental assessment report on the appellant which showed the appellant to be of normal mental status.

8. The last prosecution witness was No.71424 corporal George Abima, the investigating officer in the case. His evidence was that he, his OCS and other police officers visited the scene of crime after the OCS received a telephone call from the Assistant Chief (PW5) about a person stabbed with a knife. They found

blood stains at the scene. His enquiries revealed that the appellant had stabbed the deceased after a quarrel and the latter had been taken to hospital. The police officer visited the appellant's home and found that their houses had been burnt down and there was no one there. They subsequently went to the hospital where they found the deceased's body lying at the mortuary. The following day the Assistant Chief (PW5) brought a knife to the police station and said it had been recovered from a garden. He identified the knife shown to him in court as the one the assistant chief (PW5) took to the police station and which knife belonged to a businessman at Kapsimotwo market. He said that the knife had blood stains when it was taken to the station. The officer's further evidence in cross examination was that there were eye witnesses to the incident.

9. In the appellant's sworn testimony before the superior court below, he said that he was at Bomet Garage on 23rd March 2008 in his employer's motor vehicle. At about 5 p.m. he went into a hotel to take tea and it was then his employer called for the vehicle and so the appellant drove away to the employer. The employer told him that the appellant's brother had stabbed someone and that some people had burned all the appellant's family houses at their home. He said that he met his employer, Joel Sang, at Kapsimotwo where he also saw someone, Julius Towet, on the ground whom he said he would call as a witness. The appellant also learnt that his brother had stabbed someone and escaped. The appellant was warned by people not to go home but he went anyway, only to find that their houses had been burned. He saw his brother that night but they parted ways in the morning. He learnt that it was the relatives of the deceased who had burnt the appellant's family houses. He added that police who included the OCS went looking for his brother but they did not arrest the appellant. He denied participating in the death of the deceased or even knowing that the deceased had fought with the appellant's brother. In cross examination, the appellant said that he would not cover for his brother's wrongdoing. He added that he did not know any of the witnesses and did not know why they would be against him. He said that the police arrested him to await the return of his brother. Saying that it was his brother who had killed the deceased, the appellant concluded by stating that he had no reason to kill the deceased.

10. The appellant called **Victory Chepkurui Cheruiyot**, his real brother, as DW2. His evidence was that on 23.3.2008 people went to their home alleging that the appellant had killed someone and they burned their houses. These were the relatives of the deceased. This witness said that he was at home together with the appellant when these people who burned their houses came. DW2 said that he and the appellant ran away. On 25.3.2008 the appellant was arrested from home allegedly for having murdered the deceased. When he visited the appellant at the police station he saw a knife that was brought there. This witness said that he was not at the scene but he knew that his brother the appellant herein had not killed anyone. He said that the person who was alleged to have murdered was from his family but he had escaped.

11. DW3 was **Elizabeth Bett**. On 24.3.2008 at about 4.00 p.m. she was headed to the posho mill at Kapsimotwo. On the way she met many people including Joseph Ngeny. She saw a knife along a road which she said Joseph Ngeny took. When shown a knife with a leather handle she denied that it was the knife she had given to Joseph Ngeny but it was similar. She thought that the knife she had recovered was like another knife she was shown in court which had no blood stains.

12. After a consideration of the totality of the adduced evidence the trial court found the appellant guilty as charged and sentenced him to death.

13. Being aggrieved by that outcome the appellant preferred this appeal and raised the following grounds in his supplementary memorandum of Appeal,

“1. THAT the learned judge erred in law and fact by relying on contradictory, insufficient, uncorroborated and fabricated evidence of the prosecution witnesses.

2. THAT the learned judge erred in law and fact in holding that the appellant was identified as the person who stabbed the deceased and inflicted the fatal injury where there is no sufficient evidence on record to support that finding.

3. **THAT the learned judge erred in law and fact by failing to appreciate that there was no proper identification of the knife used to stab the deceased.**
4. **THAT the learned judge erred in law in convicting and sentencing the appellant when vital witnesses were not called upon to give evidence.**

THAT the learned judge erred in law and fact by failing to consider or give due consideration to the appellant's defence...."

14. At the hearing of this appeal before us, **Mr. Mitey**, learned counsel appearing for the appellant, abandoned grounds 4 and 5 and arguing grounds 1 and 2 submitted that the availed evidence of PW2, PW3 and PW6 who were eye witnesses was contradictory and insufficient. Counsel added that in one breath PW2 said that the deceased and the appellant began exchanging words, in another he said he saw them fighting, yet in another he said that he saw the appellant stab the deceased and then said it was the deceased's brother, Nicholas, who was fighting. PW3 on his part contradicted himself, according to counsel, when he said that he saw the stabbing then again said that he arrived when the deceased had already been stabbed. Counsel further submitted that the appellant was not seen inflicting the fatal injuries, saying that even the trial court had doubt as to who inflicted the fatal injuries and that is why she issued witness summons to the brother of the appellant one Nicholas Ngetich. Mr. Mitey submitted further that the court disregarded the evidence of PW1, adding that even the Assistant Chief (PW5) said that he only saw the appellant throw stones and when he ran away the appellant had nothing in his hands. Counsel wondered why witnesses would give different versions of the same event.

15. On the third ground that the killer weapon was not properly identified, Mr. Mitey submitted that PW3 was not shown the murder weapon to identify the same and that PW6 failed to positively identify the knife. As for DW3, **Josephine Bett**, counsel said that her evidence was that she had never before seen the knife she was shown in court. Learned counsel Mr. Mitey therefore concluded that the prosecution case was not proved beyond reasonable doubt and therefore the doubt should have been resolved in favour of the appellant.

16. The appeal was vehemently opposed and learned counsel, **Mr. Idagwa**, for the Director of Public Prosecutions, submitted that the evidence of PW2, PW3 and PW4 proved that indeed the appellant stabbed the deceased. He added that the evidence of PW6 was that the appellant ran off with a knife which when retrieved had blood stains. Counsel added that there was no doubt as to the stabbing which was followed by the two throwing stones at each other, that indeed PW3 had witnessed the stabbing and saw the appellant with the knife and therefore Mr. Idagwa submitted that murder had been proved beyond reasonable doubt.

17. This is a first appeal and by the authority of **OKENO V REPUBLIC [1972] EA 32**, our duty as such first appellate court is to **consider the evidence, evaluate it and draw our own conclusions whether the judgment of the trial court should be upheld.**

This court must therefore re-assess and re-evaluate all the evidence on record, by way of a retrial as it were, so as to arrive at our own decision – See **GABRIEL**

KAMAU NJOROGE V R [1982 -88] KAR 113A wherein the following finding as regards a fresh assessment of the evidence was made;

"It is the duty of the first appellate court to remember that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for it...."

18. Having carefully considered the entire record and reappraised the same, we note that this case principally turns on the eye witness accounts as well as the appellant's own evidence and that of his brother witness DW2. Those eye witnesses are PW2, PW3 and PW6. PW2 was at the scene. He witnessed the deceased and the appellant fight. He narrated the sequence of events. First there was a fight and a bitter exchange of words between the deceased and Nicholas Kipkorir Ngetich, a brother of the appellant herein. At that stage the appellant came and separated the two. The two then started walking away, the appellant heading the way only for him to enter Wide (White?) hotel and come out with a knife. PW2 was walking behind the deceased. Then the appellant stabbed the deceased after which the appellant and the deceased started throwing stones at him. Soon after the deceased fell down. This witness remained consistent in his testimony during cross-examination that **"I saw the accused stabbed (sic) the deceased yes. It was a distance but I saw. I was a distance where I stood,"** the witness pointed a distance which the court estimated to be 15 metres. What is important to note is the consistency of this witness account of what is said to have happened. As the cross examination continued PW2 remained firm and said,

"Leonard (deceased) met with Jacob (appellant) at Midwest hotel. Right there he stabbed him in the back. Yes I said those words to the police. Yes I told the court as (sic) so. He then fell down Jacob ran away with the knife."

19. Contrary to Mr. Mitey's submissions on inconsistencies of evidence, PW2's evidence is fortified by that of PW3 in all material aspects. PW3's evidence as concerns the stabbing was, **"I saw Jacob Ngetich (appellant) stabbed (sic) him.**

I saw Leonard Langat being stabbed....I began screaming. Jacob is the one who ran away.....When I saw him he had knife. I saw him having a knife. I did not see what knife it was.....I was present when incident occurred. The deceased was stabbed (indicates back of right side shoulder)".

This type of evidence complements that of PW2 so much so that it becomes irrelevant when PW3 said that he saw the appellant with a knife but did not see the stabbing. What is the material corroboration and similarity of how things happened is that the evidence of PW2 and that of PW3 agree. One event occurred that showed the total truthfulness of these two witnesses. When they were shown a small pink knife they were both to deny ever having seen that knife in relation to the stabbing of the deceased.

20. Then follows the evidence of PW6, the last of the three eyewitnesses. His evidence was that he was present at the scene of the incident. The time was about 6.00 p.m. He saw two men Jacob (appellant) and the deceased. He continued thus, **"They had quarreled. Later they left each other after a short period one took a knife from my hotel. He is Jacob (appellant). He took the knife and stabbed the other on the back after he stabbed him people began to scream. Jacob (appellant) began to run with a knife in his hand. I (sic) he threw the knife (sic) the school. The knife was picked and taken to the chairman of the shopping centre by the lady."**

When this witness was shown a knife he said, **"This is my knife I have seen it before. By then it had a blood stain. I identify this as a (sic) knife."** The witness remained firm during cross examination and told defence counsel that though he was trying to confuse him with questions he would tell the truth, he said like all other relevant witnesses on the point that the fight was outside the video room about 30 metres from PW6's hotel and not inside a building. He insisted that he saw the appellant stab the deceased, a thing they confirmed when PW6 and other went to where the deceased fell and found him bleeding.

21. That witness account by PW2, 3 and 6 is not contradictory and it is not insufficient, in our very considered view. On the contrary the same is supportive of each other, corroborative even, identical as it is. This is direct evidence that is not flawed and we find that the trial judge was right in relying on the same to found a conviction.

22. And there is more. The evidence of PW7 was conclusive to the point that the cause of death was cardiopulmonary arrest due to haemorrhagic shock from right haemothorax **"resulting from penetrating stab chest wound from a sharp object."**

All relevant witnesses to the point agreed that a knife was used by the appellant to stab the deceased. It is true that two different knives were introduced at different stages of the proceedings, a small pink one that was rejected by all witnesses and another one with a leather handle that was identified to be the one that was seen on 23.3.2008 and which was similar to the one recovered the following day by DW3. Admittedly the penetrating wound was consistent with what would ordinarily be caused by a knife, and all evidence was that it was a knife that was used by the appellant to inflict the fatal stab on the deceased. The confusion brought by the introduction of two knives therefore, does nothing to dent the otherwise strong and overwhelming evidence that it was a knife that was used by the appellant to stab the deceased.

23. The defence evidence was that the appellant would initially deny that he was at the scene. He would say that he was told by his employer that his (appellant's) brother had stabbed someone, that people warned him not go home as there were people burning their houses and that he was in danger. He said that the police framed him and arrested him to await the return of his brother who had escaped. He denied ever having seen any of the knives that were produced in court. He said that he had no reason to kill the deceased. That account would change during cross examination and now he said, **"I reached at (sic) Kapsimotwo someone was on the ground....I handed over the keys I learnt (sic) my brother stabbed someone else.....I found people were gathered I had come with the vehicle."**

And right there the appellant admitted that indeed he was at Kapsimotwo and right at the scene of the incident that PW2, PW3 and PW6 described as where he the appellant inflicted, a fatal stab injury to the deceased.

24. If the appellant's evidence is not enough to nail him, then that of his own brother DW2 is. The appellant gave evidence that he was not at home when or before their houses were burned. Instead he was at Kapsimotwo where he had taken keys to his boss, Joel Sang. Contrary to that, DW2 said that he and the appellant were together at home on 23.3.2008 when people, relatives of the deceased, went there and said Jacob (appellant) had killed their relative and so the appellant and DW2 together ran away leaving the intruders to burn their homes down. Quite clearly one of these two witnesses, DW2 or the appellant was not being candid. It is not humanly possible for a human being to be at two different places at the same time. Consequently therefore the appellant was either at Kapsimotwo where he was seen by various witnesses stabbing the deceased or he was with his brother DW2 at their home. What came out of evidence, particularly that of PW1 who later turned hostile, PW2, PW3 and even the Assistant Chief PW5 and PW6 was that the appellant was at Kapsimotwo on 23.3.2008 at about 6 p.m. or thereabouts and it was he, to the exclusion of any other, that inflicted the fatal penetrating injury with P.exhibit 1 on the deceased. His conviction was on that count rightful and we so find and hold.

25. In our consideration therefore there was sufficient direct evidence to convict the appellant. There was circumstantial evidence against the appellant as well. Upon seeing the Assistant Chief (PW5) at the scene of stabbing, the appellant ran away no doubt from a guilty mind. The time of the incident as given by all the relevant witnesses is the same time that the appellant in his own admission said he arrived at Kapsimotwo to give car keys to his boss, Joel Sang.

26. We do not find merit in Mr. Mitey's submission that the trial court was in doubt as to who committed the murder herein. The trial judge clearly stated the reasons why under the provisions of section 326 of the **Criminal Procedure Code** she had summons issued to the alleged run away appellant's brother, Nicholas and one Towett, whom the appellant had said he would call but did not. The reasons given were to confirm whether the appellant was arrested as a bait to entice the brother to come forward and give himself up and additionally for Towett to corroborate the accused's evidence. The trial court was in no doubt whatsoever as to who committed the crime and hence found at paragraph 20 of its judgment; **"I do not believe that the Accused's brother was the one who inflicted the injuries. It was in fact the accused who was clearly pointed out to be the person who committed the crime (emphasis ours).**

27. The totality of the evidence on record leads to one inescapable conclusion, that it was the appellant who, with malice aforethought, by the use of a knife and causing the resultant deep penetrating chest

injury he inflicted on the deceased, caused the death of the deceased herein and we find that the trial judge cannot be faulted for arriving at the verdict that the appellant is guilty of murder.

28. In the end we find and hold that this appeal is totally devoid of merit and the same is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at Nakuru this 26th day of March 2015.

P. M. MWILU

..... **JUDGE OF APPEAL**

D. K. MUSINGA

..... **JUDGE OF APPEAL**

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original.

DEPUTY REGISTRAR