



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CRIMINAL APPEAL NO. 139 OF 2010**

**BETWEEN**

**F U M ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu (W. Karanja, J.)*

*dated 5<sup>th</sup> May, 2010*

**in**

**H.C.CR.C No. 23 of 2003)**

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**JUDGMENT OF THE COURT**

Before this Court is a first appeal against the conviction and sentence meted out to the appellant for the offence of murder. This Court is therefore enjoined to re-evaluate the evidence tendered before the trial court and make its own conclusion. In *Dickson Mwangi Munene & Another –vs- R – Criminal Appeal No. 314 of 2011* this Court expressed its duty as follows:-

***“This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court’s decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge’s finding of fact unless it is not supported by the evidence on record.”***

The appellant was charged with four counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** in the High Court at Meru. The particulars of the offences were that on 6<sup>th</sup> February in Mbeere District within the then Eastern Province, he murdered T N, N N, S K N and J W.

The appellant pleaded not guilty to all counts and the prosecution called a total of 11 witnesses. The trial was protracted and conducted before three different Judges in succession. It was the prosecution's case that on 6<sup>th</sup> February, 2003 while PW1, J N (J) who was then a pupil in class 3 at [particulars withheld] Primary School and her mother, F W N N (F) were at their shamba, the appellant went to see the latter, who was his mother in-law. He asked for drinking water and J went inside the house to get the water. When she came back outside she saw her mother lying on the ground bleeding. The appellant then got hold of J and cut her with the panga he had, leaving her for dead. Meanwhile PW2, SU (S) who was in her garden saw a man armed with a panga running away from the direction of J home. She then heard J calling out to her grandmother and she rushed to where J was. She found J on the ground bleeding profusely. With the assistance of neighbours, J was rushed to hospital.

Earlier on PW4, NK (N) and PW5, S N M (S) separately met the appellant on the material day. They both testified that the appellant was carrying a panga and a *kiondo*. N and the appellant were brothers in-law. N met the appellant at around 10:20 a.m. while he was going for a meeting. The appellant informed him that he was going to the farm to get maize for his family. He asked N whether his wife, S K N, had prepared porridge so that he could pass by. N informed him that his wife had already prepared porridge. On his way back home, N was informed by members of the public that several people had been killed in the area. He rushed home only to find his wife and his one year old daughter, J W, dead. They had multiple cut wounds. He noticed a *kiondo* which was close to his wife's body and recognized it as the one he had seen the appellant carrying.

On his part, S was going to take a bath when he met the appellant. On coming back he found people gathered in his shamba and saw his wife, T, bleeding from cuts on her body. His wife informed him that it was the appellant who had cut her. Unfortunately, S wife died as she was being rushed to hospital.

Later on F body was discovered in her compound. J testified that even though she did not see the appellant cut her mother, when she went into the house she left her in the company of the appellant who was armed with a panga. When she came out she only saw her mother on the ground and the appellant who now attacked and injured her with the panga.

PW11, APC Khamis Hasan Khamis (APC Khamis) testified that on the material day at around 1:00 p.m. the appellant went to the A.P. camp and reported that he was being chased by angry villagers from Kiangombe because of his business. The appellant looked tired and suspicious; he was only wearing a pair of trousers and APC Khamis gave him a shirt to put on; APC Khamis directed the appellant to go and make the report at Siakago Police Station and the appellant left. The appellant was later arrested and charged.

Convinced that the prosecution had established a case against the appellant, the learned trial judge placed him on his defence. He was given a number of opportunities to present his defence but he failed to do so. Consequently, the trial court ordered the defence case closed without the appellant giving evidence.

The court evaluated evidence on record and by a judgment dated 5<sup>th</sup> May, 2010 convicted the appellant on all four counts of murder and sentenced him to death on one count while directing the sentences for the other counts to be held in abeyance. Aggrieved by that decision the appellant has lodged this appeal based on the following grounds:-

- ***The learned trial Judge erred in failing to take judicial notice that in cases of the nature the appellant was facing, a mental assessment is always done before the commencement of the trial.***
- ***The appellant's mental status was not determined before he was charged.***
- ***The appellant did not understand the evidence of those witnesses who spoke in Kiswahili which he did not understand and which was not translated to him thereby breaching his constitutional right under Section 77(f) of the then Constitution of Kenya.***

- *The learned trial Judge erred in law and fact when she denied the adjournment sought by the appellant on 28/4/2009 having regard to all the circumstances of the case.*
- *The learned trial Judge erred in not eliciting the reason(s) why the appellant was not prepared to proceed with his defence on 28/4/2009.*
- *The conviction was against the weight of the evidence*

**Mr. S.K Njuguna**, learned counsel for the appellant, submitted that the appellant never underwent a psychiatric examination to determine whether he was fit to stand trial. He argued that by dint of **Section 60(1) (o)** of the **Evidence Act** this Court is enjoined to take judicial notice of all matters of general or local notoriety. Therefore, the Court ought to take judicial notice of the established practice in murder cases, that is, the accused has to undergo mental examination before being put to trial. In Mr. Njuguna's view the trial court might have convicted a person who was mentally unstable.

Mr. Njuguna contended that the appellant did not understand some of the proceedings wherein the witnesses testified in Kiswahili since the same were not interpreted. This was contrary to the appellant's rights under **Section 77(1)** of the retired **Constitution**. He also faulted the trial court for declining to grant the appellant the adjournment sought on 28<sup>th</sup> April, 2009. He argued that the trial court ought to have indulged the appellant and given him more time to prepare his defence taking into account the serious nature of the charges against him. Mr. Njuguna urged this Court to allow the appeal.

**Mr. J. Kaigai**, Assistant Director of Public Prosecutions, supported the appellant's conviction and sentence. He submitted that the facts were not in dispute and that at no point did the appellant or his counsel raise the defence of insanity. According to him, the trial court did not find it necessary to subject the appellant to psychiatric evaluation. Moreover, under **Section 11** of the **Penal Code** there is a presumption that every person is of sound mind unless the contrary is proved. By dint of **Sections 107** and **109** of the **Penal Code** the appellant ought to have raised the issue of his mental examination at the earliest opportunity.

Mr. Kaigai submitted that the direct and circumstantial evidence against the appellant was overwhelming; PW4 and PW6 testified that they had met the appellant carrying a panga; the kiondo he was carrying and his shirt were found at the murder scene. On the issue of adjournment, Mr. Kaigai was of the view that the trial court was right in declining the application for adjournment having previously granted the appellant other adjournments. He argued that at all material times the appellant was represented by counsel and there was no evidence that there was no interpretation of the evidence on record as alleged. He called upon the Court to take judicial notice that the role of the court clerk includes interpretation. He finally submitted that the appellant waived his right to give his defence and could not be heard to complain.

Having considered the record before us and the submissions made by learned counsel on both sides, this is the view we take on the various issues raised. On whether or not the appellant should first have been taken for a psychiatric examination, we are unable to find a legal basis for that requirement. It little matters that some practice exists whereby murder suspects are first taken for such assessment. The law is quite clear that all persons are presumed to be *compos mentis*: **Section 11** of the **Penal Code** states as much. If it is an accused person's defence that he was not of good mind at the time of the commission of the offence, the onus is on him to raise and prove it on a balance of probability. See section **107**, **109** and **111** of the **Evidence Act**. No such defence was raised or even suggested by the appellant. He also had the benefit of counsel who did not question his mental status. Had the issue being raised or had the trial court been given reason to have doubts as to the appellant's mental status there would have been a duty to make an enquiry and an assessment of the same but that did not arise herein. See **Section 162** of the **Criminal Procedure Code** and this Court's decision in **MURAYA –VS- REPUBLIC 2001 KLR 50** and **PAUL MUTUNGU –VS- REPUBLIC [2006 eKLR]**.

Regarding the complaint that the appellant was denied the right to translation, it is axiomatic that such

right is an integral component of a fair trial, for an accused person must be in a position to fully appreciate the goings on at his trial and the evidence given by the witnesses so as to challenge the same, should he wish to. We reiterate what this Court stated in **SAID HASSAN NUNO –VS- REPUBLIC [2010] eKLR**;

***“This court has continually held that an accused person is entitled to choose a particular language he will use in the proceedings and there is a duty to provide an interpreter to him in that language – DEGOW DAGANE NUNOW- VS- REPUBLIC, Criminal Appeal No. 223 of 2005 (UR)”***

Whereas that is the law, we are not at all persuaded that the appellant’s right to an interpreter was violated in the trial. Having gone through the record, we find that the appellant’s grievance that he did not understand the evidence of the witnesses who spoke in Kiswahili is not borne out. It is some two witnesses PW6 and PW7 whose evidence is titled “***Sworn speaking in Kiswahili***” but this is hardly different from the testimony of other witnesses such as “***PW8***” and ***PW10*** whose evidence is titled “***Sworn speaking in English,***” a language the appellant presumably does not understand. What binds and places on the same footing the testimony given in the two languages that are not the appellant’s mother tongue is the fact that there was interpretation or translation. This was doubtless undertaken by the court clerk who was always present in court. It is common knowledge, of which we readily take judicial notice, that the role and function of court clerks in court includes centrally the interpretation of any testimony or proceedings given in a language an accused person does not understand. See, **SAID HASSAN NUNO – VS REPUBLIC (Supra)**. There is no reason to believe, nor has it been alleged, that the court clerk who was present during the material dates when testimony was offered in Kiswahili failed to perform that function.

A further reason why that ground of complaint must fail is the fact that the appellant had the services of an advocate at the material time and that advocate did not inform the court that the appellant was in any difficulty with regard to understanding the proceedings. We are content to reiterate what this court stated in **BONIFACE KAMANDE & 2 OTHERS –VS- REPUBLIC [2010]eKLR** on precisely this point;

***“Lastly, we deal with the issue of language. In the particular circumstances of these appeals, we are satisfied the appellants fully understood the language used in their trial.....The considerations we have set out in respect of the issue of the constitution must equally apply to this issue, namely the presence of advocates at various stages of the trial and none pointing out that an appellant did not understand the language being used”.***

Turning now to the last two grounds urged together on behalf of the appellant, his complaint is that in being denied yet another adjournment, he was denied an opportunity to present his defence. The record shows that on 2.2.09, **Mr Mogusu**, learned counsel then on record for the appellant informed the court that the appellant would be giving a sworn statement and had no witnesses to call.

Counsel did not proceed to invite the appellant to the witness box so as to give his statement under oath. Rather, counsel addressed the court thus;

***“Mr Mogusu: I am asking for another date. I am not prepared”.***

The learned Judge granted that application for adjournment, notwithstanding

that the finding that the appellant had a case to answer and placing him on his defence was made a month and a half previously, on 18.11.08.

On the adjourned date for the defence hearing, being 31.3.09 some two months later, Mr Mogusu did not come to court but sent a Mr Kuria, Advocate who informed the court that Mr Mogusu was not ready to proceed as the appellant was not well. The appellant told the court it was true he was unwell, having a problem with his stomach.

This turn of events did not go down well with the prosecution with **Mr Omwega** for the Republic quipping on the record that the appellant had been giving his counsel problems and it appeared he did not wish to proceed. On its part, the Court, also quite unimpressed, nevertheless granted the adjournment to 28.4.09 but stated very categorically;

***“The defence will be adjourned for the last time. If the accused does not which (sic) to make his defence next time, the Court will proceed to deal with the case as if he had opted to call no evidence”.***

When came the date to which the defence hearing was so adjourned, Mr Mogusu addressed the court thus;

***“After talking to the accused person this morning, he is saying that he is not ready to proceed with his defence. He is asking for time”.***

The learned judge was not inclined to grant this latest unexplained application for adjournment and placed the following on the record;

***“Court: Accused is informed that the court’s ruling of 31/3/2009 still stands. It is clear that he does not wish to proceed with the defence. The matter has been in court for 6 years and there is no justification for its being delayed further. I have tried to convince him to make up my mind in light of my ruling that I am not adjourning the matter but he has refused to proceed”.***

So stating, the learned judge proceeded to fix a date for judgement.

Is there substance in the appellant’s criticism against the learned judge that she improperly denied him an adjournment thereby scuttling his chance to mount a defence? We respectfully disagree. An accused person is of course entitled to apply for an adjournment, but the grant of it is not automatic. It is at the discretion of the court, to be exercised upon principle and reason. The Criminal Procedure Code provides for adjournments of proceedings at the High Court in the following terms;

***“S 283(1) If, from the absence of witnesses or any other reasonable cause to be recorded on the proceedings, the court considers it necessary or advisable .....to adjourn a trial the court may from time to time adjourn it on such terms as it thinks fit for such a time as it considers reasonable.....”***

(Our emphasis)

Taking into consideration what transpired before the trial court as we have set out herein, it seems clear to us that the appellant was simply bent on recalcitrance and had no desire to offer his defence. He was afforded ample opportunity but he sought to obtain an adjournment without making any effort to give any reasonable grounds for it. He did not give the learned judge material upon which she could exercise again her discretion in favour of granting an adjournment. He was given all the opportunity to present his defence and was even implored to do so but he spurned the same and he cannot be heard to complain. Any inconvenience suffered, if at all, was self-authored and the learned Judge cannot be faulted for proceeding as she did.

Having disposed of the issues raised in this appeal, and upon an anxious perusal of the record, we are left in no doubt that the appellant was well and properly convicted and sentenced to death for the multiple murders that he committed with chilling brutality. We see no reason whatsoever for interfering with the conviction and sentence. The appeal is dismissed.

We so order.

***Dated and delivered at Nyeri this 17<sup>th</sup> day of June, 2015.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**