



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: KOOME, OKWENGU, G. B. M. KARIUKI, JJ.A.)**

**CRIMINAL APPEAL NO. 53 OF 2014**

**BETWEEN**

**GUNGA BAYA.....1<sup>ST</sup> APPELLANT**

**SAID BAYA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Malindi*

*(Meoli, J.) dated 3<sup>rd</sup> March, 2014*

*in*

*H. C. Cr. A. No. 23 of 2014)*

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**JUDGMENT OF THE COURT**

[1] Gunga Baya and Said Baya who are the 1<sup>st</sup> and 2<sup>nd</sup> appellants in this appeal were tried and convicted by the High Court sitting in Malindi (Meoli, J.), for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The information upon which the appellants were arraigned in court alleged that on the 2<sup>nd</sup> August, 2012, at Bomani village in Magarini District within Kilifi County, jointly with others not before court, they murdered John Baya.

[2] The trial judge having heard the evidence of four prosecution witnesses, and the unsworn statement of defence of the two appellants, found the appellants guilty and sentenced each to suffer death as by law provided. The appellants have now appealed to this Court each separately raising four grounds of appeal that are identical. In short, the appellants faulted the trial judge for convicting each of them on inconsistent and contradictory evidence, and accepting that the appellants had a grudge against the deceased when there was no evidence of any report made to any person in authority by the deceased about the alleged grudge. The appellants further faulted the learned judge in failing to find that the prosecution case was not established as there was no incriminating evidence against any of the appellants, nor was the body recovered established to be that of the deceased.

[3] Before the hearing of the appeal commenced, the firm of Walter Mayaka and Associates who represented the appellants in this appeal filed supplementary grounds of appeal in which two more grounds were added. These were first, that the learned trial judge failed to consider the issue of provocation or to appreciate that the circumstances of the appellant's case established manslaughter rather than murder. Secondly, that the learned judge failed to properly consider the appellant's defence.

[4] In arguing the appeal before us, learned counsel Mr. Mayaka, concentrated on the supplementary grounds submitting that although the learned judge rightly found that there was a land dispute between the appellant and the deceased, and that this formed the genesis of the bad relationship, the learned judge failed to recognize and take into account the fact that there was provocation, which reduced the offence to one of manslaughter. Counsel argued that the issue of provocation being one of law it ought to have been taken into account even if it was not raised by the appellants in their defence. Relying on the case of ***Richard Oginga Okwany & Another vs Republic*, 2005 eKLR**, counsel urged the court to allow the appeal and set aside the death sentence.

[5] Mr. Monda, Assistant Director of Public Prosecutions who appeared for the state, opposed the appeal maintaining that the learned judge properly evaluated the evidence and rightly found the appellants guilty of murder. Mr. Monda submitted that the evidence that was adduced by the prosecution showed that the 1<sup>st</sup> appellant was the last person to be seen with the deceased, and that given the 1<sup>st</sup> appellant's reluctance to cooperate in the search for the deceased, and the brutal circumstance under which the deceased met his death, malice aforethought could be imputed under **Section 206** of the **Penal Code**. Mr. Monda further argued that the expulsion of the appellant's mother from the family land did not amount to provocation in the heat of the moment, and that in any case, the issue of provocation had not been raised at the hearing.

[6] This being a first appeal, we are alive to the fact that our obligation in determining the appeal as has been repeated numerous times is to reconsider and re-evaluate the evidence that was adduced in the trial court with a view to drawing our own conclusions, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanour of the witnesses. (***Pandya vs R.*, 1957 EA 336; *Peters vs Sunday Post*, 1958 E A 424**). Secondly, as was held in ***Chemagong vs Republic* [1984]KLR 611**, this Court will normally not interfere with the finding of fact made by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles. With these principles in mind we have considered the appeal and the submissions made before us by counsel together with the authorities referred to.

[7] The evidence adduced before the trial judge was that the 1<sup>st</sup> and 2<sup>nd</sup> appellants are brothers and that the two are step brothers to the deceased. Their home was at Magarini, though the deceased spent a great deal of his time in Tarasaa. On the evening of 2<sup>nd</sup> August, 2012, Msanzu Baya, (PW 2) who is a cousin to the deceased and the appellants saw the deceased at Magarini village. The deceased was in the company of the 1<sup>st</sup> appellant. PW 2 joined the two, and together they walked for some distance before they parted ways, the deceased and the 1<sup>st</sup> appellant, proceeding together towards their home. Shortly thereafter, PW 2 heard cries of distress of someone shouting words to the effect that he was 'being killed'. PW 2 recognized the voice as that of the deceased. Together with one Defa and Kajera, they ran towards the direction of the cries but the cries stopped and they, therefore, went back home and slept. Early the following morning, the 2<sup>nd</sup> appellant went to PW 2 and sought to know whether the deceased had "arrived". The 2<sup>nd</sup> appellant claimed that the deceased was being sought by some people from Malindi on allegations that the deceased was a motorcycle thief who had not only robbed someone of a motorcycle, but also killed the victim in the process.

[8] PW 2 informed the 2<sup>nd</sup> appellant of the screams that he had heard the previous night, to which the 2<sup>nd</sup> appellant responded that it was probably drunkards quarreling. He informed PW 2 that the deceased had informed him that he was travelling to Tarasaa. Two days later, PW 2 spoke to the 1<sup>st</sup> appellant, who informed him that the deceased had travelled to Malindi. Feeling anxious on account of these varied reports and the deceased's unexplained absence, PW 2 reported the matter to the area chief and later the police.

[9] The police advised PW2 to organize a search party for the deceased and towards this end, PW 2 approached the appellant as well as other members of the community in a bid to commence the search. However, the appellants not only refused to join the search party, but also denied the members of the search party ingress onto the family property, on the excuse that by allowing the search of the deceased on the family land, their maize crop might be stolen and/or destroyed in the process.

[10] Ultimately, on the 29<sup>th</sup> of August, 2012, with the intervention of the police, a search was carried out and a body in a gunny bag was discovered buried in a bush on the family land of the appellants. Identification of the body was done by among others, Chengo Katana Dzombo (PW 3), who was an uncle to the deceased. He confirmed that the body and the clothes on the remains were that of the deceased whom he had known since birth. He also stated that though the body was in a serious state of decomposition, the head was still relatively intact and this enabled the identification.

[11] According to PW 3, sometime in June 2012, the 2<sup>nd</sup> appellant had complained to him that the deceased had ejected the 2<sup>nd</sup> appellant's mother and wife from the family home. PW 3 proposed a meeting with a view to possible mediation, to which the 2<sup>nd</sup> appellant responded, '*mimi nikijahapo, hakuna story nikumalizana*'. On 3<sup>rd</sup> September, 2012, a post mortem examination was done on the recovered body by Dr. Gathendu Edwin who prepared a report that was produced in evidence by Dr. Allan Makhoha. The report showed that Dr. Gathendu was unable to determine the cause of death due to the extensive decomposition. The appellants were subsequently arrested and charged with murder as earlier stated.

[12] In their defences, each appellant denied having committed the offence. The 1<sup>st</sup> appellant explained that he last saw the deceased on 3<sup>rd</sup> August, 2012, when the deceased bid him bye as he was going to Tarasaa where he had previously been staying. He maintained that the deceased was resident at Tarasaa and would only come to Magarini to visit. The 2<sup>nd</sup> appellant also stated that he was with the deceased on the 2<sup>nd</sup> of August, 2012, when they had supper and retired to bed and the next morning, the deceased bid him farewell and went away. Both appellants stated that PW 2 informed them that he had recovered some human bones in a neighbour's place but the identity of the person could not be established.

[13] From the evidence adduced there was no eye witness to the murder of the deceased and therefore, the evidence upon which the appellants were convicted was essentially circumstantial evidence. As was held by this Court in *Muchene vs Republic*, [2002] 2KLR 367:

***"1....where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also there exists no co-existing circumstances which could weaken or destroy such inference.***

***2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such".***

[14] Therefore, the issues that arise in this appeal, is whether the body allegedly recovered was that of the deceased, and if so, whether the deceased died as a result of an act or omission on the part of the appellant. Further, in re-evaluating the evidence, we must consider whether there were any inculpatory facts implicating the appellants and if so, whether such facts were inconsistent with any hypothesis other than the guilt of the appellants, and whether there are any co-existing circumstances that could weaken such an inference. And finally, we must consider whether there was any provocation that could justify the charge against the appellant being reduced to one of manslaughter.

[15] The evidence is that, a body was recovered about a month after the disappearance of the deceased. It was recovered from family land where the appellants and the deceased had their home. Among the persons who recovered the body was PW 2 a cousin to the appellant and the deceased, and PW 3 an uncle to the deceased who had known the deceased since he was a child. PW 3 maintained that he was able to

positively identify the body as that of the deceased from the clothes which were on the remains, and also from the head which was not completely decomposed at the time of recovery. This is the same witness who identified the body four days later, to Dr. Gathendu Edwin, for the post mortem examination. The trial judge made a finding that the body which was recovered was positively identified as that of the deceased. This was a finding of fact based on the evidence before her, which evidence we have also adverted to. We, therefore have an obligation to accept that finding and do find that the recovered body was that of the deceased.

[16] Dr. Gathendu noted that the body was severely decomposed as a result of which he was unable to form any opinion on the cause of death. In this regard the learned Judge rendered herself thus:

***“Although the exact cause of death of the deceased could not be established due to the state of the body at the post mortem, there can be no doubt that he was murdered, even if we believe the evidence of the accused persons that he was alive and left home seemingly in good state on the morning of 3<sup>rd</sup> August 2012. The body was trussed on both legs and it was stuffed in a gunny bag. No animal could have achieved such a feat. Secondly, there is the evidence by PW 2 that no sooner had he parted with the deceased who was accompanied by the 1<sup>st</sup> accused than he heard the deceased wailing saying “I am being killed”.***

[17] We are totally in agreement with the learned Judge as it is clear from the circumstances that the deceased died as a result of being assaulted, stuffed in a gunny bag and buried. Thus there was sufficient evidence that the deceased was killed.

[18] The next question is whether the appellants were involved in the deceased’s death. In this regard the inculpatory facts implicating the appellants that emerge from the evidence briefly include the following:

(i) that about three months before the deceased disappeared, the 2<sup>nd</sup> appellant had complained to PW 3 that the deceased had expelled his wife and mother from their home and when PW 3 suggested that they should meet and discuss the matter the 2<sup>nd</sup> appellant threatened that there would be no discussion but ‘*kumalizana*’ which may be understood as reference to death or termination.

(ii) that the deceased was last seen in the company of the 1<sup>st</sup> appellant, shortly before PW2 heard a voice he recognized as that of the deceased screaming that he was being killed;

(iii) that the two appellants gave information which was misleading that the deceased had gone back to Tarasaa/Malindi and that the deceased was being sought for a criminal offence;

(iv) that the two appellants exhibited apathy and lack of concern for the deceased’s disappearance;

(v) that the two appellants prevented people from looking for the deceased in their family shamba where the body was eventually recovered.

[19] In our view the above facts reveal that the appellants had motive to kill or harm the deceased, opportunity to carry out such an action, and knowledge as to what had happened to the deceased, hence the apathy and reluctance to participate in the search for the deceased. The appellant’s reluctance to allow the search for the deceased in the family shamba, and the recovery of the body in a bush within the shamba, coupled with the appellants attempts to put off PW 2 and PW 3 from searching for the deceased, by misleading them that the deceased was a fugitive and had gone back to Tarasaa/Malindi was telling. In our view these facts confirmed that the appellant’s conduct was inconsistent with any other explanation other than complicity in the disappearance and death of the deceased. The facts point irresistibly to the conclusion that the appellants were the persons who killed the deceased and buried his body in a bush in their shamba.

[20] Although the appellants did not give any evidence regarding the alleged differences between them and the deceased, the investigating officer PC Andrew Wekesa (PW 4), testified that the deceased who

had just come back home after the death of his father caused friction in the family by expressing an intention to sell his share of his father's land. This was confirmed by PW 3 who explained that the 2<sup>nd</sup> appellant had complained to him that the deceased had expelled his wife and mother from the land because he wanted to sell the land contrary to the family's wishes. Thus, there was clear evidence before the learned Judge regarding a possible motive and this evidence was relied upon by the learned Judge who concluded that the appellants plotted the death of the deceased to ensure that he did not carry out his threats to sell the family land.

[21] **Section 208(1)** of the **Penal Code** provides a definition of provocation that includes any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult was done or offered. **Section 207** of the **Penal Code** provides that murder may be reduced to manslaughter if the act which caused death was done in the heat of passion arising from sudden provocation and is committed before there is time for the passion to cool.

[22] Regarding the failure by the appellant to plead the defence of provocation, in **Cr Appeal 372 of 2006, Katana Karisa & Others v Republic**, (Unreported) this Court stated as follows:

***“However, the fact that the appellants did not raise the defence of provocation at the trial did not preclude the trial court from considering such alternative defence if it emerged from the evidence, for the prosecution had not only to dispose of the defence set up by the appellant herein that they did not kill the deceased but had also to prove that evidence adduced by the prosecution was only consistent with murder.”***

[23] Thus, notwithstanding, the failure by the appellants to plead provocation, the trial Judge ought to have addressed the question whether the dispute regarding the land and the deceased's action of ejecting the appellant's mother and 2<sup>nd</sup> appellant's wife from the land constituted legal provocation under **Sections 207** and **208** of the **Penal Code**. In this case, the ejection incident had taken place three months earlier. There was no evidence of any recent act that could have revived the land dispute such as to agitate the appellants to the point of losing self-control. To the contrary the action of the appellants appears to have been a well premeditated action with the objective of thwarting the deceased's intention of selling the land by eliminating the deceased. Thus, the circumstances were such that the defence of provocation was not available to the appellants.

[24] The upshot of the above, is that there was compelling circumstantial evidence against both the appellants which was not weakened by any co-existing circumstances. We find that the appellants were properly convicted of the offence of murder. The appellants were each sentenced to death which is the lawful sentence provided for the offence. Accordingly, we uphold the appellants' conviction and sentence, and dismiss the appeals.

Those shall be the orders of the court.

**Dated and Delivered at Malindi this 3<sup>rd</sup> day of July, 2015.**

**M. K. KOOME**

**JUDGE OF APPEAL**

**H. M. OKWENGU**

**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**