



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 68 OF 2014

BETWEEN

NEWTON NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi

(Odero, J.) dated 12th September, 2012

in

H.C.Cr.A. No. 24 of 2009)

JUDGMENT OF THE COURT

On the night of 14th-15th June, 2009 at around 11p.m, some mourners had congregated at one of the homes in Majimboni village to conduct funeral arrangements for one of their own. Whilst the arrangements were underway, along came two strangers, requesting to be given directions to Ukunda. The village elder, **Sammy Manthi Mutua** (PW1) and other vigilantes, among them **Chikoko Mangale** (PW2), asked the two strangers to identify themselves, at which point it emerged that neither of them had their National Identity Cards. PW1 then requested to inspect their luggage, which was found to contain a kanzu, a sweater and a pair of open shoes. A further search conducted on their persons, revealed a wallet containing an identity card and other documents apparently belonging to a third party. In the course of the body search, a toy pistol also fell out of one of the pockets of the strangers, causing the villagers present to scamper for safety. In the midst of the melee, the two strangers fled from the scene, leaving their luggage and the recovered items.

Accompanied by PW2 and the other vigilantes, PW1 went to report the occurrence to the village chief, **Patrodius Nzula** (PW3). Hardly had they been on their way, when they encountered a white saloon vehicle, which appeared to have been vandalized and abandoned on the road side. They proceeded to fetch the area chief and alerted him of the state of the abandoned motor vehicle. Together, they returned to the scene of the abandoned vehicle and upon close inspection, found the same unlocked. On conducting a quick check inside, they came across a driver's licence in the name of **Felix Syanda**, which

they linked to the identity card and documents earlier recovered from the two strangers. Upon opening the vehicle's boot, they found a body of a young man, whom they identified as the man whose face appeared on the identity card left behind by the two fleeing strangers. The body was later indeed identified by **Judy Kamula** (PW5) as that of Felix Syanda (deceased) who was until then, her husband. Also discovered alongside the body was a white manila rope. Police led by **P.C. Patrick Kuranga** (PW 17) were called in and took the body to Msambweni District Hospital Mortuary and the vehicle to Diani Police station, with all exhibits so far collected being handed over as well, after the scene of crime had been photographed by **Sgt Michael Oduor** (PW 14)

The following day, the police suspecting foul play, mounted a manhunt led by **PC Elisha Lumbasa** (PW4), in which they inspected all vehicles coming from Shimba Hills headed for Mombasa. In the company of PW1, and PW3 they stopped the first *matatu* and therein PW1 and PW2 identified one suspect whom PW4 apprehended. He was the appellant, whom the two witnesses positively identified as one of the two strangers from the previous evening's encounter. A quick search was conducted on him and an Equity bank ATM card was recovered. The card bore the names of the deceased. Upon interrogation, he mentioned the names of **Philip Wambua Kioko** (2nd accused) with whom he had been staying together with **Anthony Chunia Mutua** (PW11), in his brother's house. He had however moved out to Mtito Andei two or so days earlier. Acting on a tip off by an informer and with the assistance of PW11, the police were able to trace and arrest 2nd accused who was also suspected to have participated in the commission of the offence alongside the appellant. They were then both charged with murder, contrary to **Section 203** as read with **Section 204** of the Penal Code.

The particulars of the information given were that the duo:

“On the night of 14th and 15th June, 2009 at Majimboni village in Msambweni District within Coast Province murdered Felix Kisila Syanda.”

They both pleaded not guilty to the information and the case proceeded to full trial before **Odero, J.** who upon hearing seventeen prosecution witnesses, found the duo with a case to answer. In defending themselves, they elected to make unsworn statements that comprised of blunt denials of their culpability in the deceased's death, with the 2nd accused further raising an *alibi* defence. In a reserved judgment delivered on 27th August, 2012, the appellant was found guilty as charged and sentenced to thirty (30) years imprisonment. With regard to the 2nd accused, the learned Judge found that not only did he have an *alibi*, but that no proof was adduced in court placing him at the crime scene or linking him in any way to the murder. She went on to hold that the charge against the 2nd accused was based solely on the evidence of identification parade and that of an accomplice. That since she had found the identification parade flawed, the same could not sustain a conviction. Accordingly, the 2nd accused was acquitted.

That conviction of the appellant and sentence is what provoked this appeal, mounted on three grounds. Firstly, that the conviction was based on insufficient evidence; that the prosecution failed to establish the ingredients necessary to sustain a murder charge and lastly, that the learned Judge failed to consider the appellant's defence.

Prior to the commencement of the hearing of the appeal, the appellant was duly cautioned and warned of the likelihood of an enhancement of sentence should his appeal fail. Indeed, counsel for the appellant conceded that the sentence imposed was illegal, given that a conviction arising out of a murder information carries a mandatory sentence of death. The caution and warning notwithstanding, the appellant elected to prosecute the appeal regardless of the consequences.

Urging the grounds, **Mr. Ngumbau**, learned counsel for the appellant submitted that no evidence was adduced as to the circumstances of the identification of the appellant. In particular, that there was no interrogation as to the proximity and strength of the light from the torches used by PW1 and PW2 when they first confronted the strangers, yet this was the very light through which PW1 and PW2 claim to have seen the appellant and identified him. It was also submitted that in absence of such an interrogation, the conviction cannot stand. Still on the aspect of insufficiency of evidence, Mr. Ngumbau further submitted

that no proof was tabled to show that the death of the deceased was due to an unlawful act or omission on the part of the appellant. He contended that the scant evidence adduced to this end was in any event contradictory, as the testimonies of the arresting officers- **PC Elisha Lumbaso** (PW 4) and **PC Patrick Kuranga** (PW 17) differed from those of PWs 1, 2 and 3 in particular with regard to how the wallet and its contents were recovered. That PW 4's testimony and the investigation diary both seem to suggest that the items were recovered after the appellant's arrest; a fact confirmed by PW 17, who stated that he recovered the wallet and all exhibits including the Equity ATM card at the scene. Conversely, counsel submitted, according to PW1, 2 and 3, the wallet was retrieved from the appellant and his accomplice the previous night prior to the arrest; when the two went in search for directions to Ukunda in the village. It was the appellant's case therefore, that given these two sets of evidence, the court was not in a position to ascertain when the wallet and its contents were recovered and handed over to the police. That by extension, there was doubt as to whether at the time of arrest, the appellant had anything on him linking him to the deceased and/or his death. Counsel thus submitted that these were material contradictions which ought to have been resolved in the appellant's favour. He concluded by saying that since the appellant was never found at the scene and given the woefully inadequate and contradictory circumstantial evidence, the conviction should be quashed and the appellant set free.

Opposing the appeal, **Mr. Monda**, learned Assistant Director of Public Prosecutions submitted that the trial court's evaluation of the evidence was proper and the conviction well founded. That the testimonies of PW1, PW2 and PW4 were consistent and even corroborated by PW3 and that the appellant's possession of the deceased's Equity ATM card shortly thereafter pointed to the appellant's involvement in the deceased's death. He urged this court to find the judgment of the trial court sound and to dismiss the appeal.

This being a first appeal, this court is obliged to re-analyze and re-evaluate the evidence of the trial court and come up with its own concurrent findings and conclusion (see **Okeno v. Republic [1972] E.A 32**).

Dealing with the first issue of identification and the circumstances thereof, the appellant has sought to impugn the conviction on the basis that the intensity and proximity of the light during the encounter between PW1, PW2 and those seeking directions to Ukunda was never interrogated. On this, counsel sought solace in the case of **Wamunga v. Republic (1989) KLR 424** in which this Court held that:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can make it the basis for a conviction”

Such interrogation must of necessity include the intensity and source of light if the alleged offence was committed at night. From the testimony of PW1 and PW2, it is apparent that PW1 carried a torch and that the encounter was at night. That fact was not disputed. However, also apparent from the record, is the fact that no evidence was led to indicate the intensity of the light from the said torch. In determining the quality of identification by a single eye witness using light at night, it is most essential that the nature of the light available be ascertained, the kind of light, its size as well as its position relative to the suspect (see **Maitanyi v. Republic [1986] KLR 198**). A conviction based solely on identification evidence by a single eye witness must be supported by an inquiry into the lighting. Failure to make such inquiry renders the conviction unsustainable and or unsafe. Such would have been the case here, were the conviction based solely on identification evidence. From the record however and despite the flawed identification evidence, a search of the appellant conducted at dawn the morning after the incident, revealed his possession of an Equity Bank ATM card belonging to the deceased. This can be seen from the testimony of PW3 who was one of the witnesses to the appellant's arrest who said:-

“At 5am we began to search all matatus heading to Mombasa. We searched one matatu..... The village chairman identified one of the suspects at the rear of the matatu. He was trying to cranch (sic) down police removed him. The police searched him and recovered an equity bank ATM bearing the names Felix Syanda.”

This evidence of the recovery of the Equity ATM card from the appellant was corroborated by PW4 who conducted the search himself. He stated:-

“.....We decided to search matatus coming from Shimba Hills to trace the suspects. We stopped the first matatu. PW1 and PW2 identified one suspect inside the matatu. I arrested the man and conducted a quick search. I recovered an Equity Bank ATM also bearing the names Felix Syanda.....”

Needless to say, the appellant never advanced any logical explanation as to how he came upon the said card.

The appellant has attacked this evidence saying that the same was contradictory and inconsistent with that of PWs 4 and 17 whose testimonies suggest that the Equity bank ATM card was recovered not from him, but by witnesses at the scene. However, a holistic reading of PW 17's testimony indicates that he arrived at the scene after the appellant's arrest by PW4. It would thus follow, that PW 17 came in after all the exhibits had been recovered and in PW4's custody. In no way does this contradict the testimony of PWs 1, 2, 3 and 4 that the Equity ATM card was found on the appellant.

Then there is the appellant's submission that on cross examination, PW4's testimony was at variance with the Occurrence Book's report and his own witness statement pertaining to the recovery of the wallet and all the documents therein. That according to the witness, the investigation diary showed an Occurrence Book entry No. 26 of 15th June, 2009 whose contents indicated that the bag and all other exhibits were recovered after the appellant's arrest. However, neither the Occurrence Book report in question nor the witness statement were tendered in court. To the contrary, on re-examination, this witness reiterated his evidence in chief, stating that he is the one who recovered the Equity ATM card from the appellant when he apprehended him; while the bag and wallet were recovered earlier from the appellant and his accomplice by members of the public as they fled. PW4 further clarified that Occurrence Book entry No. 26 of 15th June, 2009 in fact related to a report entirely unrelated to this case. The appellant's allegation of contradictions between the Occurrence Book entry and the witness testimony therefore cannot hold.

Similarly, the contention that in his statement PW4 failed to mention the recovery of the wallet is neither here nor there. This omission (if at all), did not in any way prejudice the appellant's case, as PW1 and PW2 had in their respective testimonies, given a consistent account of the wallet's recovery. Provision of witness statements to an accused person is simply meant to aid him in his preparation of his defence (see **Juma v. Republic [2007] EA 461**). As a result, the omission of a detail from the witness statement, which detail later emerges in the course of trial, cannot be a sufficient ground to upset a conviction; particularly if the said detail has not been shown to have occasioned prejudice to the accused's defence. Whether or not PW4 had made reference to the wallet does not negate the fact that the appellant was found in possession of the deceased's Equity ATM card, possession of which he could not explain and this is the most incriminating piece of evidence and upon which the conviction of the appellant turned.

Lastly, is the contention that the prosecution failed to establish the ingredients of murder, in particular the appellant's *mens rea* or guilty mind. On this aspect, the trial court held in part as follows:-

“.....Malice aforethought is defined by S. 206 of the Penal Code. In this case, as I have stated earlier, there was undoubtedly an intention to rob the deceased. This is quite evident from the fact that the 1st Appellant (sic) was found in possession of the deceased's bank documents. He has no reasonable explanation to give for such possession save for a blanket denial in defence. There is no reason why the prosecution witnesses who did not know the 1st accused before would have conspired to tender false evidence against him. S. 206 (c) of the Penal Code provides that where a death is caused in the pursuance of a felony, then malice aforethought is deemed to have been proved. This is precisely the situation in this case. I am therefore satisfied that *mens rea* for the offence of murder has been proved....”

The appellant has not taken issue with the learned Judge's interpretation of **Section 206(c)** of the Penal Code aforesaid. We take view that having established the appellant's possession of the deceased's Equity

Bank ATM card, a few hours after the deceased was found dead and in the absence of an explanation from the appellant as to how he came upon the said card, the learned Judge was right in her inference of the appellant's guilt. In view of the foregoing, we are satisfied that the conviction was proper. Accordingly, we would dismiss the appeal on conviction.

For the offence of murder the only sentence available upon conviction is death. We note however that the Judge instead imposed a sentence of thirty (30) years imprisonment. Clearly, this was an illegal sentence, which compels us to intervene by way of correction. The appellant was at the very commencement of the hearing of the appeal warned of this possibility, nonetheless he opted to take the risk. Accordingly, we set aside the sentence of thirty (30) years imprisonment and in lieu thereof impose the mandatory death sentence.

Dated and delivered at Mombasa this 16th day of October, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR