



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR J.J.A)

CRIMINAL APPEAL NO. 665 OF 2010

BETWEEN

MOHAMMED ABDALLA VINCENT.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 15th November 2011,

in

H.C.C.R.A No. 54 of 2009)

JUDGMENT OF THE COURT

Mohammed Abdalla Vincent, the appellant, was charged before the High Court at Kisii with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on 15th August 2009 at Nyamanaga village, Masaba District within the then Nyanza Province, he murdered **Peter Ombae Otuke, (the deceased)**.

A plea of not guilty was entered as against the appellant and the prosecution called 6 witnesses.

Charles Otuke, PW 1, (Charles) testified that he was on his way home from Kibirichi SDA church in the company of his sister, Esther Kerubo Otuke, on 13th August 2009, when they came across the appellant who appeared to be annoyed. The appellant picked up a branch and assaulted Esther, who he accused of spreading rumors that he was a smoker of bhang. Esther screamed, alerting several people, and the appellant ran away. On 15th August 2009 at about 2pm, as he was on his way to collect milk from a neighbor, Charles met with the deceased who informed him that he had confronted the appellant over the assault of his sister Esther, and that the appellant had ran home to arm himself. Charles says that he was unable to collect milk, and as he returned home he met with his cousins, Simba and Boss, and were later joined by the deceased. While proceeding home, the appellant suddenly emerged from the bush and stabbed the deceased with a sword in the ribs. Charles placed the deceased on the ground and shouted for help. His screams attracted the attention of people who assisted him carry the deceased to Keumbu Health centre where the deceased died the next day.

James Otuke, PW 2, (James), the deceased's father, testified that, on the material day at about 7pm he heard shouts outside his home. He rushed to the road only to find his son on the ground. He had been speared through the ribs. Though he was weak and could not stand, James stated that the deceased was able to speak. He said that the deceased told him that he had been speared by Vincent Simba, the appellant. With the assistance of neighbours, James took the deceased to the Health centre in a wheelbarrow. While there, they were told that the deceased required to be taken to Kisii District Hospital. As they had no money they planned to take him the next day but this was not to be, as the deceased died the following morning. When he reported the matter to the police, James testified that he was informed that the appellant had already surrendered himself, and was in police custody and that, the sword was confiscated from him.

Justus Nyambega Mose, (PW 3), testified that on the evening of the 15th August 2009 at about 7pm he was on his way home from Keumbu market when he came across a crowd of people some of whom he recognized. He was informed that the deceased had been stabbed, and he assisted in taking him to Keumbu Health Centre. They were advised to take him to Kisii District Hospital, but as they did not have any money they were to do so the next day, but that the deceased died the following morning.

PC Ernest Kosgei Rotich, (PW 4), stated that on 15th August 2009 he was at Keumbu police post when at 10pm, one Vincent Mohamed Abdalla, the appellant, came to the police post. According to the appellant, he had stabbed his uncle, Otuke, with a Somali sword. PC Rotich stated that after he interrogated the appellant, he arrested him and confiscated the sword. He produced the sword as an exhibit.

IP Joseph Kisoi, (PW 5), the deputy Officer in Charge of Keroka Police Station, testified that he received a report from Keumbu police post that a suspect had surrendered himself at the police post the previous night. That following interrogation the next day, the suspect confirmed having quarreled with the deceased, and subsequently stabbing him. On the same morning, the relatives of the deceased came to the police post and informed him that the deceased had since passed away while undergoing treatment. IP Kisoi stated that he visited the hospital, where he found the deceased's body with blood stained bandages around the chest. The body was removed from the hospital and taken to Gucha Private Hospital mortuary.

Dr. Rante, (PW 6), the Senior Medical Officer in Nyamira County Hospital, stated that he performed the post mortem on the deceased on 19th August 2009 at Gucha Nursing Home. He stated that the deceased's body was identified to him by James and Justus Nyabega (PW 3), and that there was a wound on the right upper abdomen about 2 cm wide, and another stab wound on the left chest with the internal organs outside. There were signs of severe blood loss from the mucus membrane, and that from the examination he formed the opinion that the cause of death was due to excessive blood loss and chest injuries following an assault.

When the appellant was placed on his defence, he testified that, after he closed school on the 13th August 2009, he went to stay with his grandparents. On 14th August 2009, his mother gave him money to attend tuitions in Suneka and he returned to his grandparents. That at about 5.30 pm, while taking shelter from the rain in Keumbu market, his grandfather, the father of the deceased got hold of him, and told him to accompany him to the police post, where he was arrested and charged with the death of the deceased. The appellant denied killing the deceased, and testified that all the witnesses including Charles had lied, as they had not identified him at the scene, and neither had they seen the deceased being stabbed. He concluded by stating that he had not surrendered himself to the police.

Following a full trial before Sitati J, the appellant was found guilty as charged and sentenced to death.

Being dissatisfied with the conviction and sentence, the appellant filed an appeal to this Court.

When the appeal came before us, **Mr. Indimuli**, learned counsel for the appellant, abandoned the memorandum of appeal filed on 21st November 2014, and instead consolidated the grounds in the Supplementary memorandum of appeal of 6th July 2015 into one ground, namely, that the High Court failed to analyse and evaluate all the evidence.

It was counsel's contention that the High Court was wrong to conclude that a dying declaration was made by the deceased to James, as on cross examination, it was stated that it was Charles, and not the deceased, who had informed James that the deceased had been killed by the appellant. On the issue of identification, counsel contended that Charles had stated that he knew the deceased well, but had failed to indicate that the deceased was his relative. Counsel further argued that the High Court failed to observe that the attack was swift and occurred in a bushy area, yet relied on the evidence of a single identifying witness. Counsel finally submitted that the appellant provided a reasonable explanation as to his whereabouts on the fateful night in his defence which the High Court failed to take into account.

Mr. D.N. Ogoti, learned Senior Assistant Deputy Public Prosecutor, opposed the appeal. Counsel submitted that the High Court properly analysed all the evidence which placed the appellant at the locus in quo, and that the conditions for identifying and recognizing the appellant were favourable. As a consequence, the High Court rightly relied on the evidence of a single identifying witness, and the dying declaration made by the deceased to his father, James.

Counsel concluded that the evidence of Charles, James, PC Rotich and IP Kisoi placed the appellant at the scene of the attack, and the appellant's defence and alibi did not displace the prosecution's case. Counsel urged the Court to dismiss the appeal.

Being a first appeal, the role of the first appellate court was outlined in ***Okeno vs Republic [1972] E. A. 32*** at page 36 thus:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs R [1975] E. A. 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E. A. 424”.

Bearing this in mind, the issue before us is whether having regard to the appellant's defence the High Court properly analysed the evidence with respect to the deceased's dying declaration and identification of the appellant.

We will begin with the issue of identification. The appellant has argued that the High Court wrongly convicted the appellant on the evidence of a single identifying witness.

In this regard the High Court stated thus,

“Is it possible that this witness could have mistaken the accused for someone else? I do not think so. He was categorical that he saw and recognized the accused. That evidence was not at all challenged by the accused in cross-examination. Infact the issue as to whether the witness could have been able to recognize the accused in the circumstances was given a wide berth by counsel for the accused. He never challenged the presence or lack of sufficient light at the scene that would have enabled the witness to recognize the accused. Much as it was 7 to 7.30p.m when the incident happened, the witness maintained that it was still bright enough to have enabled him to recognize the accused. I believe his evidence. This evidence was further buttressed by that of PW2 who confirmed that it was not so dark and that one could see and recognize another person. Further, the accused and the witness were close relatives. The possibility that the witness could have mistaken him for someone else is clearly remote. He was even able to tell the kind of clothing that the accused was wearing on that material day. That fact was not discounted either by the accused...”

In the case of ***Kariuki Njiru & 7 others vs Republic Criminal Appeal No. 6 of 2001*** this Court stated:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

And it was also stated in Wamungu vs Republic [1989] KLR 424 that:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence and to be fully satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis for a conviction. Second, that recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

It was Charles’ evidence that, on 15th August 2009 at about 2pm, while going to collect milk from a neighbor, he had met the deceased who informed him that after he confronted the appellant over the assault of his sister, Esther, the appellant had gone home to arm himself. On his return home, he was joined by the deceased, when suddenly; the appellant emerged from the bush and stabbed the deceased with a sword in the ribs.

There is no doubt from the judgment that the High Court was satisfied that Charles who was present during the attack, saw and witnessed the appellant stab the deceased. It is also clear from the judgment that, after duly cautioning itself on the evidence of a single identifying witness, the High Court painstakingly analysed the evidence having regard to the adequacy of light at time, which it found to be suitable for identification. The trial court also appreciated that this was a case of identification by recognition, since the witness recognized the appellant who was known to him as a relative and a neighbor, which recognition is usually ***“...more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*** See Anjoni & others vs Republic [1980] KLR 59.

In the circumstances, we are satisfied that the High Court rightly concluded that the appellant was properly identified as the assailant who speared the deceased.

Having said that, as corroboration of Charles evidence, the learned judge also found that deceased made a dying declaration to his father, James, as to who his assailant was on the fateful day. It is this finding of the existence of a dying declaration that the appellant has faulted.

The appellant’s contention is that James did not hear the deceased make the dying declaration, but was instead informed by Charles that the appellant had stabbed the deceased, and as a consequence, no dying declaration was made to James.

In his evidence, James stated,

“I rushed to the scene and found my son on the ground. He had been speared through the ribs. He was weak and could not stand. He was able to speak though. He told me he was dying as he had been speared. He told me that he had been speared by Vincent Simba, the accused...”

When cross examined by the appellant, James also stated thus,

“At the scene I met PW1 and many neighbours. PW1 told me that the deceased had been killed by the accused.”

From these excerpts, it is evident to us that, James engaged in two different conversations at the scene of the attack. One was with the deceased, who was still alive at the time, while the other was with Charles. We can find no discrepancy or contradiction in James’ evidence. We agree with the High Court that the

deceased's statement to James was indeed a dying declaration which it properly took into account together with the corroborative evidence of Charles as a single identifying witness to arrive at the conclusion that the appellant was responsible for the deceased's death.

The final issue was that the High Court failed to take into account the appellant's defence, and his alibi.

In considering the appellant's defence, the High Court stated thus,

“The entire evidence on the record points to the culpability of the accused in the death of the deceased. The defence of alibi advanced by the accused cannot hold in the face of the overwhelming evidence brought forth by the prosecution connecting him to crime.”

In addition to the testimony of Charles, and James, which we have considered above, there was also the further evidence of PC Rotich, the police officer who was at the Keumbu police post on 15th August 2009 when the appellant surrendered himself together with his sword which was produced in court on the basis that he had stabbed his uncle with a Somali sword. There was also the evidence of IP Kisoi, the investigating officer who stated that following interrogation, the appellant owned up to having had a quarrel with his uncle, the deceased, and as a result had stabbed him. The trial court considered this evidence and found no reason for the two witnesses to have conjured up the surrender and subsequent arrest.

When considered in its totality, the evidence clearly placed the appellant at the scene of the attack. We agree with the trial court that the appellant's defence and alibi was not capable of dislodging the prosecution's case, and we take the view that in the face of this overwhelming evidence, the appellant's defence amounted to an afterthought.

For the aforesaid reasons, the appellant's appeal is without merit and we find no reason to interfere with the findings of the High Court, and order that the same be and is hereby dismissed.

We so order.

Dated and delivered at Kisumu this 9th day of October, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR