**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 33 OF 2013**

**BETWEEN**

**CHENGO NICKSON KALAMA…….APPELLANT**

**AND**

**REPUBLIC ……...……...RESPONDENT**

*(Being an appeal from a judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 25th October, 2013*

*in*

*H.C.CR.A. No. 8 of 2011.)*

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## JUDGMENT OF THE COURT

On 25th October, 2013, the High Court at Malindi (**Meoli, J.)** convicted the appellant for the offence of murder contrary to **Section 203** of the Penal Code and surprisingly but illegally sentenced him to fifteen (15) years imprisonment. Not satisfied by both the conviction and sentence, the appellant on 30th October, 2015 lodged an appeal in this Court by submitting a memorandum of appeal. He faulted the judgment of the High Court on the basis that the circumstantial evidence used to convict him was conspirational and uncorroborated; that the assault on the deceased and who committed it was not established since that investigations in the case were shoddy and casual; that the case against the appellant was not proved beyond reasonable doubt; that the prosecution did not tender in evidence the postmortem report and medical treatment notes showing the hospital where the deceased was treated and therefore the ingredients of the offence of murder were not proved; and finally, that vital witnesses were not summoned by the prosecution to testify.

The facts of this appeal may be briefly stated. On the night of 3rd February, 2013, several villagers of Bora Imani village of Mokowe Location, Lamu County, including the deceased's brother **Keah Karisa Gamoyo** (*PW1*), and a village elder, **Jackson Charo Ngumbao** (*PW 2*), received information through a fellow villager, **Rehema Abe Guyo** (*PW 3*), that she had heard the deceased crying in distress saying '*njoo msaidie nafa'* (come I am dying help me) from her neighbour's home. She was familiar with the

deceased's voice. Together with her brothers, they rushed to inform PW 2. On the way to the scene, PW 2 called PW 1 on phone and informed him what had happened. At the scene, they found the deceased writhing in great pain. He had a deep injury in the abdomen with his intestines protruding. He was lying on a path in the homestead of the appellant. He was conscious and when asked by PW1 how he had found himself in the situation, he pointed an accusing finger towards the appellant. Apparently, the appellant had shot him with an arrow. With a makeshift stretcher made out of sacks obtained from **Hashora Habajilla Guyo** (*PW 4*), they carried the deceased to Mokowe Police Station where they reported the incident. Thereafter, the deceased was taken to Mokowe Health Centre and was attended to by **Nicholas Charo Lewa** (PW 6), a clinical officer who administered first aid. However, since the case was serious, he escorted the deceased to Lamu District Hospital. In the meantime, when he asked the deceased who had caused the injuries, he mentioned the appellant. Lamu District Hospital could not manage the deceased's condition. He was therefore referred to Coast General Hospital in Mombasa. However two days later, the deceased passed on as he underwent treatment at the said hospital. Following the death, the body was taken to the mortuary and on 7th February 2011, a postmortem examination was conducted by **Dr. Otieno**, whereupon, it was released to PW 2 for burial.

On receiving the information regarding the death of the deceased, **CPL, Jidraph Maina Mugwe** (*PW 8*), of Mokowe Police Station contacted **Joseph Njenga Gichoya** (*PW 5),* a police reservist who knew the home of the appellant. They proceeded there and had him arrested. He was then charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code.

The appellant denied committing the offence and when placed on his defence, elected to keep quiet. In a judgment delivered on 25th October, 2013, Meoli, J. found the appellant guilty as charged on the premise that-

> **"12. When the Accused was put on his defence, he elected to remain silent. He therefore did not explain his whereabouts on the material night, his excessive interest in the issue surrounding the death and unproved alibi defense to PW5, all of which constitute formidable case against him.**
>
> **13. Taking all this evidence together I am satisfied that the Prosecution evidence has sufficiently established the guilt of the accused. I find him guilty and convict him as charged."**

Upon convicting the appellant, she sentenced him as already stated to fifteen (15) years imprisonment for reasons which are not readily apparent. This sentence is clearly wrong and illegal. Having convicted the appellant for the offence of murder, the only legal and available sentence was one of death.

The foregoing notwithstanding, the appellant lodged the instant appeal. Urging the appeal, **Mrs. Gicharu**, learned counsel for the appellant submitted that the prosecution had failed to prove the offence of murder in the trial court. There was no evidence of malice aforethought. That neither the death certificate nor the postmortem report of the deceased was tendered in evidence. There was nothing to suggest that the deceased died and if so the cause of such death. For these submissions, counsel relied on the High Court case of **Republic v Samson Siganga Kibwabwa [2011] eKLR** and this Court's decision in **Ndungu v Republic [1985] eKLR.**

On circumstantial evidence relied on by the trial Judge to return a conviction, counsel submitted that the evidence was unsatisfactory. That the alleged dying declaration, was not in accordance with the law and was therefore inadmissible. That in any event, the deceased according to PW 1, PW 2 and PW 3 never mentioned who had shot him. Counsel also submitted that the appellant raised an *alibi* defence which was never rebutted and the trial Judge never interrogated the same. Finally, counsel submitted that the sentence imposed was illegal. According to counsel, this can only mean that the court was not sure whether the appellant had committed the offence charged.

When it was the turn of **Mr. Monda**, learned Assistant Director of Public Prosecutions to respond, he conceded to the appeal on the grounds that: - though the trial Judge relied on dying declaration to convict

the appellant, looking at the record, it is not clear as to the prevailing light conditions at the scene that would have enabled the witnesses including the deceased to identify the appellant. Further the possibility of another person having committed the offence was not ruled out completely given the circumstances under which the offence was committed; the postmortem report of the deceased was not tendered in evidence, and the trial Judge did not discuss in the judgment the cause of death. In those circumstances, it was difficult to tie the appellant to the death of the deceased. That the prosecution's case was therefore built on suspicion *per se* which cannot support a conviction; and lastly, an *alibi* defence advanced by the appellant was not displaced at all. Instead the court shifted the burden of proving the *alibi* to the appellant which was a misdirection.

Despite the concession, on a first appeal, our task is still to give our own consideration and views on the evidence as a whole and our decision thereon. It is our duty to rehear the case and as regards credibility of witnesses to be guided by the trial Judge's impressions if any, of the witnesses he saw and heard. Indeed, we have to be satisfied that there was evidence upon which the Judge could properly and reasonably find as she did. See **Shantilal M. Ruwala v R [1957] E.A. 570** and **Okeno v Republic [1972] E.A. 32.**

From the record, it is abundantly clear that the incident occurred deep in the night. According to PW 1, she heard the deceased crying for help at 1.45 a.m. However, according to PW 2, he received PW 3's call at about 1.30 a.m., yet according to PW 1, PW 2 called him at about 2 a.m. No doubt therefore and despite the discrepancies as to the exact time, the offence was committed at night. None of the witnesses saw the deceased being assaulted. None of these witnesses testified as to the availability of light at the scene nor whether there was moonlight. The evidence on record suggests that the deceased was not assaulted at the scene where he was eventually found. It appears, he was assaulted elsewhere and his body dragged and dumped on the path in the appellant's homestead. This is so because, though seriously injured and intestines exposed, there was no blood at the scene. The visibility question therefore presents a doubt as to whether the conditions of light at the time and place of attack could have enabled positive identification of the assailant (s) by the deceased. That is a critical issue as it creates doubt whether the deceased clearly saw who attacked him. Accordingly, it is possible that the deceased never saw the attacker or attackers. Yes, the deceased may have mentioned the appellant as his attacker to PW 1. However, he never stated how he was able to see and recognise the appellant. He never mentioned availability of any light at the scene of attack. The possibility that the deceased mentioned the name of the appellant merely because he was dumped on a path in the homestead of the appellant cannot be ruled out completely. In a nutshell, what we are saying is that the evidence of identification was far from satisfactory. The conditions obtaining in the absence of any light could not have afforded or accorded the deceased an opportunity to positively identify his attacker(s) even if the attacker was the appellant. He could have easily and mistakenly picked on the appellant. The deceased could easily have been attacked by another person or persons and his body dragged to the appellant's homestead as a diversionary tactic and to throw off balance police investigations that were bound to follow.

Of course, a dying declaration is receivable in evidence in terms of **Section 33**(a) of the Evidence Act. However, before such evidence can be received and acted upon, certain conditions must be met; the person who made the declaration must be dead, the trial must be for the person's death, the statement must relate to the cause of death, the person must be a competent witness and there must be circumstances which goes to show that the deceased could not have been mistaken in his identification of the accused. See **Pius Jasanga s/o Akumu v R [1964] 21 E.A. 331** and **Choge v Republic [1985] KLR 1.** Word of caution though, it is generally unsafe to base a conviction solely on such evidence unless there is satisfactory corroboration. It is not a requirement of law but a practice to obviate the inherent dangers.

In the circumstances of this case, we are of the view that in the absence of evidence regarding lighting conditions at the scene of the crime, it cannot be said positively that the deceased could have seen and identified the appellant as the author of his misfortune. Secondly, there is doubt as to whether the deceased really uttered the words attributed to him. Whereas PW 1 testified to that fact, PW 2 and PW 3 who were with him throughout categorically denied that the deceased ever made such declaration. Lastly, there was no corroborative evidence of the dying declaration.

The foregoing notwithstanding, Meoli, J. found such corroboration on the basis that the deceased was found very close to the appellant's house. This in our view cannot amount to evidence of corroboration. In her own assessment of the evidence, she concluded that the deceased could have been assaulted elsewhere and his body dragged to the scene. Would the appellant knowing that he had committed such a heinous crime drag the deceased to his own homestead and thereby make himself the first suspect? It is doubtful. Secondly, she thought that since the deceased screamed calling for help and the appellant did not come out of his house as did other neighbours, this is yet some piece of evidence of corroboration. However, the assumption here is that the appellant was in his house. There was no such evidence. In criminal proceedings, presumptions are a rarity and in this case, given the *alibi* defence advanced, such presumption becomes ludicrous. Thirdly, the Judge considered the appellant's active inquiry into the case as evidence of corroboration pointing to his guilty mind. That on the evening of 5th February 2011, the appellant met PW 5 on a path in the village and asked him where he was going and when he informed him that he was going to the headman's house, the appellant confirmed that he too had been there because he had learned that someone had been shot on his farm although he had not been on the farm for a week. According to the Judge, this conversation was telling of the appellant's guilt. We cannot see how this exchange can amount to a guilty mind. The appellant was a member of the village and someone had been shot and killed on his farm. Surely, is he not entitled to find out what the narrative regarding the death was, either from the headman or even PW 5?. Given all the foregoing, we are satisfied that the Judge wrongly admitted in evidence the dying declaration and relied on it to convict the appellant.

Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a postmortem examination was conducted on his body on 7th February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the postmortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.

In almost similar circumstances as this case, this Court in the case of **Ndungu v Republic [1985] eKLR** held:-

> "….**Where a body is available and the body has been examined, a post mortem must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the Judge…."**

We are of course aware of a High Court decision in Tanzania to wit; **Republic v Cheya & Another [1973] E.A. 500** in which the Judge held that:-

> **"…….However the absence of medical evidence as to the death and the cause of it is not fatal because as I said at that stage post-mortem reports primarily are evidence of two things; the fact of death and cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts….."**

We wonder what such other evidence can possibly be. The proposition in the **Cheya** case was found in Ndungu case to have been improperly made. This Court stated:-

> **"…….The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case** (sic) **of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision….."**

The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt. Accordingly, the Judge erred in convicting the appellant. Surprisingly, the Judge did not even revert to, or address the issue in her rather terse judgment for such a serious offence. We must therefore deprecate the rather casual manner in which the learned Judge approached such a serious case.

Finally, is the manner in which the Judge dealt with the defence put forth by the appellant. The appellant when put on his defence elected to remain silent. However, the Judge does not appear to have been amused by the appellant's move. That the appellant was unable to explain his whereabouts on the material night, his excessive interest in the death of the deceased and his unprovoked *alibi* defence to PW 5, was according to the Judge evidence enough to displace the *alibi* defence. Actually, we do not see how keeping quiet can amount to an *alibi* defence. Nonetheless, in our view, these were serious misdirections on the part of the trial Judge. The law allows an accused person to keep quiet in his defence. Such an election should not and should never draw or attract adverse comments or inference from the Judge. This is exactly what the Judge did in this case. Perhaps without knowing, she invariably shifted the burden of proof on to the appellant with regard to his *alibi* defence if at all. It is not upon the accused to prove his *alibi*, rather it is always up to the prosecution to displace it.

On the whole, we have come to the inevitable conclusion that Mr. Monda was right in conceding the appeal. Our conclusion then is that the appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 4th day of December, 2015**

**ASIKE-MAKHANDIA**

**…….**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

**K. M'INOTI**

**…….**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**