



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MARAGA & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 196 OF 2010

BETWEEN

PAUL KIMANI WACHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the sentence of the High Court of Kenya at Nairobi (Ochieng, J) dated 10th June, 2010 in H.C.CR.C. NO. 59 OF 2008)

JUDGMENT OF THE COURT

PAUL KIMANI WACHIRA, the appellant was charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the offence are that on the 15th day of March 2008 at Dandora Phase two estate in Nairobi East District, within the former Nairobi Province he murdered **James Gitau**, hereinafter referred to as “**the deceased**”.

Jackson Kinyanjui Njenga, (PW1) is the father of the deceased. On 17th March 2008, he received a phone call from his other son, **Joel Njuguna Kinyanjui, (PW2)**, who informed him that the deceased had been admitted to Kenyatta National Hospital, having been assaulted by **Paul Kimani Wachira** in Dandora, a person he did not know. PW1 rushed to the hospital, where he found the deceased unconscious. According to PW1, the deceased was unable to speak but when he eventually spoke, the deceased told him that it was his friend, **Paul Kimani** who had beaten him. On 1st May 2008, the deceased passed away. A postmortem was conducted on 7th May 2008 at Kenyatta National Hospital mortuary by **Dr. Minda Okemwa, (PW5)**, who had formed an opinion that the deceased had died from respiratory failure due to neck injuries caused by a blunt object.

When PW2 a brother to the deceased, received a telephone call from one **John** to inform him that his brother was seriously ill in the hospital, he rushed to the hospital where he found both the deceased and PW1. When he asked the deceased what had happened to him, the deceased, in a soft voice, told him that while in a bar in Dandora, he had been hit by Kimani with a stone on the back of his neck after the two had a disagreement. PW2 testified under cross examination that he had known Kimani even before the incident and that he was the same person who the deceased had named as his assailant. PW2 went on to explain that he had delayed in making a report to the police station as he had not been aware that the statement was required, and that had he known, he would have filed a report earlier.

PC Fred Nyanguru, (PW3), a police officer attached to Dandora Police Post accompanied by PC Moyo and PW2 went to a bar in Dandora Phase 2 where they found the appellant, whom they arrested when he confirmed that the deceased was known to him.

PC Eunice Kipchumba, (PW7), an Investigating Officer testified that she visited the deceased in hospital on 7th April 2008, where she recorded a statement from the deceased in the presence of PW2 and *John Kamoko*. According to PW7, the deceased stated that he was beaten up by his friend, who PW7 stated was the appellant, on the night of 15th March 2008, when in the course of a discussion, the deceased had described the appellant as a “helping hand” or (*mtu wa mkono*). The description had elicited anger from his friend, who then pushed the deceased, causing him to fall backwards, picked up a stone, and hit him on the back of his neck. It was as a result of the beating that the deceased sustained serious neck and spine injuries, resulting in his paralysis. The incident occurred in an open area and the deceased was left lying out in the open. He thought to call this friend *Kimani* and ask him to take his money for safe keeping. The deceased was then moved to a nearby pub belonging to Nyambura. The next day he was taken to a dispensary, where some medication was prescribed for him and subsequently, admitted to the Kenyatta National Hospital after making a report at the Dandora Police Post.

When the appellant was placed on his defence, he gave his evidence on oath and called one witness. He stated that on 15th March 2008, he left his house at Dandora Phase 2 at about 6 am, and went to Gikomba Market. He returned to his pub in Dandora, “Whose pub”, at about 8.30 pm. The appellant was to meet the deceased, but when he arrived, at the pub the deceased was lying intoxicated at one of the tables. A waitress called *Muthoni*, had requested that he be allowed to continue sleeping. At about 10.30 pm, the deceased woke up, walked out of the pub alone, and entered the neighbouring pub operated by Nyambura. It was not until the next day that he, the appellant learnt that the deceased had been beaten up and it was alleged that it was the appellant who had assaulted him. The deceased was brought out from Nyambura’s pub, the next morning and as he did not look well the appellant and Nyambura took him to the dispensary for treatment. The deceased then asked the appellant to keep his money and to call John. On arrival, John was given the deceased’s money, whereupon he escorted the deceased to the Kenyatta National Hospital. He was arrested two weeks later by the police, at “Whose Pub” for assaulting the deceased. The appellant’s evidence was corroborated by ***Kennedy Maina Mwangi, (DW2)***, a resident of Dandora who stated that when he entered the pub at about 8.30 pm, he heard the appellant ask about the identity of the person lying at the table whereupon the waitress, *Muthoni*, requested the appellant to allow the person to continue resting at the table. At about 10.00 pm, DW2 heard the deceased asking the appellant to keep his money as he was afraid of losing it when he left the pub.

Following a full trial before *Ochieng J*, the appellant was found guilty as charged and sentenced to death. In arriving at a finding of guilt, the trial court delivered itself thus:-

“In the light of my analyses of the events, I have come to the conclusion that the deceased positively identified his assailant. It is the (sic) Kimani whom he was scheduled to meet on 15th March 2008. That Kimani is by his own admission, the accused. The nature of the beating he received resulted in his becoming paralysed. The accused confirmed that the deceased was paralysed. The nature of the injuries sustained by the deceased was verified by the pathologist. Therefore there was ample evidence to directly connect the accused to the assault which later resulted in the death of the deceased. I find and hold that the prosecution has adduced sufficient evidence to prove beyond any reasonable doubt that the accused is guilty of the murder of JAMES GITAU.”

Being dissatisfied with the conviction and sentence, the appellant filed an appeal to this Court. During the hearing of the appeal, *Mr Njanja*, learned counsel for the appellant, sought leave to file a supplementary memorandum of appeal, and abandoned the memorandum of appeal and grounds filed earlier by the appellant. Counsel raised four issues mainly centered on the dying declaration and the failure to call critical witnesses.

With respect to the issue of the dying declaration, counsel contended that there was insufficient evidence as it was written by PW7; that it was said to have been written by the deceased, yet there was nothing to

show that it was the deceased's statement; that there was mention of *Kimani*, but not the exact identity of him; that the statement was contradictory, as following a severe beating, it was strange that the deceased referred to the appellant as a friend, and then gave him his money for safe keeping; that from his illness the deceased was immobilized, and suffered from nerve sickness and mental incapacity, and it was doubtful that he was capable of making the statement. With respect to the issue that a number of key witnesses did not testify, counsel complained that witnesses such as Nyambura, the owner of the neighbouring bar, *John Kamongo*, the doctor in the dispensary, the Police Officer from Dandora should have been called; and that failure to call them negated the evidence of the prosecution.

Ms Oundo opposed the appeal, and argued that the court relied on the deceased's dying declaration made to PW7, which was corroborated by the evidence of PW1 and PW2, as well as the postmortem report; that the conditions for a dying declaration are set out in **Section 33** of the Evidence Act; that the deceased implicated the appellant who was properly identified, as he was well known to the deceased; that the cause of death was consistent with the dying declaration; that the corrections in the statement were immaterial; that the dying declaration was true and voluntary; and, that on what authority did the appellant rely to state that the deceased did not have clarity of mind; that *Kimani's* wife and the barmaid *Nyambura* who should have testified could not be traced; and that under **section 143** Evidence Act, the prosecution is not required to call unnecessary witnesses.

This being a first appeal, this Court has stated on numerous occasions that the first appellate court has a duty to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. See ***OKENO VS. REPUBLIC [1972] EA 32***. As the case of ***OKENO*** (supra) clearly shows mere failure to evaluate the evidence by the trial court does not in all cases lead to an acquittal. The Court has to be satisfied that the irregularities complained of occasioned a failure of justice. In that case the court stated in part at page 36 thus:-

“Notwithstanding the form taken by the High Court’s judgment, we are nevertheless satisfied that the Judges did make their own evaluation of the facts although this is not made to appear clearly we are satisfied that the irregularities undoubtedly contained in the first appellate judgment did not in fact occasion a failure of justice and that had the Judges discharged their duties in accordance with the law as laid down in the long line of authority they must have inevitably come to the same conclusion.....”

We have anxiously considered the evidence, and the submissions of counsel, and having regard to these principles, we turn first to re-evaluating the evidence, bearing in mind that we neither saw nor heard the witnesses give evidence.

From an analysis of the evidence it is undisputed that the deceased died from injuries to the neck and the spine. It is also undisputed that, none of the witnesses who testified saw the appellant assault the deceased. The only people alleged to have witnessed the assault are the wife of the appellant and a waiter who used to work in the pub that was operated by the appellant's wife. These two persons did not testify as they could not be traced. It is also clear that the prosecution relied on the dying declaration of the deceased, as orally given to PW7.

We turn first to the issue of whether the deceased's dying declaration could be relied on as a basis for the appellant's conviction.

The dying declaration is central to the facts of this case. It is the deceased's evidence on the events of the fateful night. No other witnesses testified as to the events. For a court to rely upon the deceased's dying declaration, as a basis for a conviction, it must exercise caution, as it is generally unsafe to base a conviction solely on a dying declaration unless there is satisfactory corroboration. In the Court of Appeal for Eastern Africa in the judgment of ***JASUNGA AKUMU VS REPUBLIC (2) [1954] EACA 334*** stated thus:-

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous

cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R V OKULU S/O ELOKU (1938) 5 EACA 39.)

In determining whether the dying declaration was sufficiently corroborated, it has been necessary to evaluate it as against the evidence of the witnesses who testified. In seeking to ensure that the dying declaration is adequately corroborated, the circumstances surrounding the incident must be interrogated. In the case of ***KIHARA VS REPUBLIC 1986 KLR 473***, this Court stated:-

“Even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated, and particular caution must be exercised as to when the attack took place, the identification of the assailant, and the weapon used.”

When the circumstances surrounding the assault in this case are considered in relation to the dying declaration given that no other independent witnesses testified as to the events that night, various anomalies and uncertainties emerge. One aspect is the evidence of PW1 and PW2. It is undisputed, that they were not present during the incident. Their testimony is mainly based on what the deceased had told them about the assault. PW1 testified that, the deceased was in hospital for one and a half months, and that he visited him every day until he died on 1st May 2008. PW2’s testimony provided a few more details on the assault, more particularly that, the deceased had told him that while in a bar in Dandora, he had been hit by *Kimani* with a stone on the back of his neck. Yet the deceased stated that he was hit in an open area outside the bar. When the evidence of PW1 and PW2 is examined in relation to the dying declaration, glaring omissions and discrepancies are apparent. That as family members they were not aware of the existence of the dying declaration is conspicuous, to the extent that their evidence particularly, that of PW2, is contradictory.

A second aspect is that the location of the assault cannot be clearly defined with any level of certainty. The deceased stated that it took place in an open area. PW2 stated that it occurred in the appellant’s bar, while PW7, despite having recorded the statement, stated in her evidence that the attack occurred in a dimly lit corridor inside the bar, and that *John Kamako* had shown her where the assault had taken place. Remarkably, this directly contradicted the deceased’s dying declaration given to PW2. From the available evidence, was it possible that the deceased was confused as to his whereabouts when the assault occurred, given the different locations stated?

Another aspect is the issue of identification. Did the dying declaration sufficiently identify the appellant? In this respect, the High Court found that the appellant was properly identified. The learned judge stated thus:-

“The point I am making is that the deceased was clear, in his Dying Declaration, about the Kimani he was referring to. It was the Kimani who was his friend, and who owned the pub in Dandora phase 2. It is the Kimani whom he met on 15th March 2008, and is the same Kimani who kept his money safe, when the deceased was helpless. That Kimani was the accused, and nobody one else.”

From the evidence, reference was made consistently by PW1, PW2, PW7 and the deceased’s statement to the name of *Kimani*. The appellant has argued that, the dying declaration did not clearly state that it was he, the appellant that had carried out the assault, as it did not state which *Kimani* was being referred to. In ***REPUBLIC V MUYOVYA BIN MSUMA (1939) 6 EACA 128*** where the court held:-

“The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).”

In the instant case, the dying declaration did not specify the appellant’s names in full, namely, ***Paul Kimani Wachira***. Nor did it expressly state that *Kimani* was responsible for the assault. Instead it referred to a friend and his wife, who owned the pub, that it was the friend who assaulted the deceased. The friend’s name was not given. Thereafter, the deceased stated:-

“Later I decided to call this friend Mr. Kimani after taking a breath...”

This is the first mention of “*Kimani*” in the dying declaration, and it is notable that the name is not made with reference to the assault, but with reference to the safe keeping of money. It is not clear whether this is the same *Kimani* who assaulted the appellant, or whether there was another friend called *Kimani* who would usually hold for the deceased money in safe keeping, and whether this friend was the appellant.

We take the view that, *Kimani* is a fairly common name in this jurisdiction and reference to that name only would not identify with certainty the person being referred to. The summation by the witnesses that the mention of the name *Kimani* meant the appellant can only be based on conjecture and not on established facts, and does not necessarily point to the appellant’s guilt.

In the circumstances, we find that the dying declaration was imprecise testimony that did not convincingly point to the appellant’s guilt. There is no certainty as to where the assault occurred, and who carried it out. With reference to *Kimani*, it is unclear whether this *Kimani* was the friend who assaulted him, or whether the appellant was in fact the *Kimani* in question. The evidence of PW1 and PW2 was inadequate, as, besides reference to a *Kimani* being the assailant, their testimonies were devoid of any constructive details. Reference to *Kimani* does not necessarily point to the appellant, and without the benefit of cross examination, the dying declaration leaves critical clarity as to who assaulted the deceased.

The trial court, did not consider the imprecise nature of the facts in the dying declaration and instead, in an attempt at exercising caution, citing ***KATO VS UGANDA [2002] 1 EA 101***, was conscious of the need to ensure that the dying declaration was corroborated. To reach a finding that there was corroborative evidence, the trial court relied on the appellant’s own defence, but failed to adequately interrogate the evidence surrounding the incident. Clearly, without the benefit of independent witness’ evidence, the dying declaration was a standalone testimony, against the appellant, with respect to the incident itself. The only other evidence with respect to the events that night was the appellant’s testimony. What this boiled down to was the deceased’s word against that of the appellant.

We therefore find that, without sufficient independent evidence to connect the appellant to the offence, we are unable to rely on the dying declaration as indisputable evidence of what transpired that fateful night.

On the issue that the prosecution failed to call critical witnesses from what we have observed earlier, we find that there were gaps in the evidence that would probably have been resolved by some of the persons who did not testify. We say this because reference was made to *Kimani*’s wife, the waitress and the waiter, who allegedly witnessed the events that night. We consider that their testimony would have assisted the court arrive at a conclusive finding on where the assault occurred, the reason for the assault, and who the assailant was. Though he did not witness the assault, *John Kamako*, featured extensively in this case, having taken the deceased to the hospital, pointed out to PW7 where the assault occurred, and attended the hospital when deceased’s statement was recorded. It begs the question, why was *John Kamako* also not called as a witness? In effect, without such evidence, the findings remain inconclusive, and as such, we are not satisfied that the prosecution proved its case beyond reasonable doubt. As a consequence, we must to resolve these inadequacies in favour of the appellant.

For the reasons above stated, we allow this appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise held for some other lawful cause.

DATED and DELIVERED at NAIROBI this 17th day of JANUARY, 2014.

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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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