



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWILU & OUKO JJA)

CRIMINAL APPEAL NO. 35 & 37 OF 2008

JAMES GITAU NJUGUNA1ST APPELLANT

SILAS NDUNGU WAHIHENYA2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi

(Ombija J) dated 28th March 2003

in

HC. CR. Case No. 79 of 2003)

JUDGMENT OF THE COURT

1. **JAMES GITAU NJUGUNA** and **SILAS NDUNGU WAIHENYA** were charged, convicted and sentenced to suffer death for the murder of **PETER NDUMBU NDERITU** by the High Court at Nairobi on 28th March 2003. Dissatisfied they preferred separate appeals to this court, which for the purposes of hearing before us were consolidated. The appellants' home-made memorandums of appeal filed on 8th April, 2008 and their supplementary grounds of appeal filed herein on 14th September 2010 were subsumed in the further supplementary petition of appeal dated and filed on the 16th May 2013 by the appellants' advocate Mr. Nyachoti. They raise six (6) grounds as hereunder:-

“1. The Learned trial judge erred in law and fact in returning a finding of culpability on the part of the Appellants in a case wholly dependent on circumstantial evidence without corroboration.

2. The Learned trial judge erred in law and fact by convicting the Appellants on the basis of evidence of identification that did not meet the required legal standards.

3. The Learned trial judge failed in law to evaluate and analyze the evidence thus reached a

wrong finding.

4. The Learned trial judge erred in law and fact by his failure to find that the prosecution had failed to discharge the burden of proof.

5. The Learned trial judge grossly misdirected himself in law by failure to draw adverse inference against the prosecution case by failure to summon essential witnesses.

6. The Learned trial judge erred in law and fact by failing to find that malice aforethought was not established in the instant case.”

2. Learned counsel for the appellants urged us to allow the appeal on the submissions that identification of the appellants as the perpetrators of the crime was below the required standard and the evidence adduced to prove that issue was contradictory. He added that the prevailing circumstances were not conducive to a proper identification and that the attempted identification parade was a sham and that was the reason the appellants protested. Counsel added that the appellants did not participate in the attack on the deceased and the prosecution did not, by their evidence, disclose a common intention amongst the appellants and the touts. The fact that there were five persons arrested and booked for the offence of preparation to commit a felony, long after the death of the deceased, was seen as a sign that no proper investigations were done and the arrests were haphazardly made.

The fact of failure to call Margaret Wairimu, the lady in whose kiosk the crude weapons that were used to assault the deceased were found, was seen as tending to prove that had she been called her evidence would have been adverse to the prosecution case and so we were called upon to make that inference. Counsel submitted that it was not shown that there was a grudge between the appellants and the deceased and therefore the prosecution had failed to prove malice aforethought. And as the only available evidence was circumstantial and the same was not corroborated according to counsel for the Appellants, his view was that we must allow this appeal.

3. Ms. Oundo learned counsel for the State was of a totally contrary view, which was that the appellants were convicted on very sound evidence which was direct and not circumstantial as several of the prosecution witnesses placed the appellants at the scene of crime and that it was immediately after the 2nd appellant summoned the touts that the deceased was fatally assaulted. Counsel added that PW1, PW2 and PW9 saw the 1st appellant with a panga and saw him cut the deceased. She stated that this was a case of recognition and the appellants refusing to participate in the identification parade was of no significance. Ms. Oundo was of the further view that no particular number of witnesses was required to prove the commission of an offence, and so she saw the failure of calling Margaret Wairimu as a prosecution witness as not being fatal, and in her view such failure did not weaken the prosecution case. She concluded that the massive magnitude of the head blow was sufficient evidence of malice aforethought and common intent. To her, murder was proved. Counsel urged us to reject any submissions on contradictory evidence, recovery of exhibits and the manner of arrest because they were not based on any grounds raised in the Petition of Appeal.

4. This is a first appeal. Our duty therefore as such first appellate court is,

“----- to consider the evidence, evaluate it ourselves and draw our own conclusions whether the judgment of the trial court should be upheld,”

as the authority of **OKENO V REPUBLIC [1972] EA 32** stipulated long ago. The onus placed on us is an onerous one as we are duty-bound to review, re-assess and re-evaluate all the evidence on record to arrive at our own conclusion. The guiding principle in such re-evaluation of the evidence has been enunciated in many cases, the one quoted above and many others. For our purpose we further quote, **GABRIEL KAMAU NJOROGE V R [1982-88] KAR 1134**, in the following words;

“It is the duty of the first appellate court to remember that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to

weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for it”

In discharging that mandate we have carefully perused the record and fully appreciated the evidence tendered at trial and the resultant judgment.

5. The appellants’ case is that the only available evidence was circumstantial and the same was not corroborated. Whether that is borne out by the record is the question we must endeavour to answer. Several prosecution witnesses were at the scene. They belonged to a social-economic association styled ‘Young Adults Group’ that concerned themselves with garbage collection. They were PW1, **FRANCIS MWANIKI NDIKINI (Nderitu)**, PW2 **RADING AGINA KINYANY**, PW9 **ANTHONY MUGO NDERITU**, PW13 **MARK PAUL AGERO OBARA** and PW14 **APIDI OPICHE KINYANY**. A summary of the totality of their evidence is that on 4/11/2002 they were headed to Kasarani stadium for the launch of FORD ASILI, a political party. They boarded a matatu at Huruma Roundabout to take them to Allsops. The usual fare was Kes.10/=. However on the material day the matatu crew hiked the fare by Kes.5/= which hike gave rise to an argument between the conductor of the matatu and the passengers comprising members of the ‘Young Adults Group’ who numbered about ten. The conductor was identified as the 2nd appellant herein. No solution was reached and so the members of the group disembarked from the matatu. This incensed and infuriated the conductor who called the touts manning the matatu stage. The group exchanged a few unpleasant words with the touts. Suddenly the touts ran into a nearby kiosk and came back with crude weapons. Upon seeing that, the group scattered in different directions to evade an imminent attack.

6. The uncontraverted evidence from the prosecution pointed out in paragraph 5 above places the two appellants at the scene that, is to say, Huruma Roundabout stage near Marphic Hotel. The evidence of PW1 **Francis Mwaniki Ndikini (Nderitu)** and PW2 **Rading Agina Kinyany** that it was the crew of motor vehicle registration number KXC 865A, a Mazda pick-up more specifically the conductor who is the 2nd appellant herein that called up the touts to the scene following which a fight arose was corroborated by the other witnesses present at the scene. All witnesses agreed that once the attack began everyone ran away for dear life.

7. PW1’s evidence was that he and another member of the ‘Young Adult Group’ one Andrew Kamunyu took refuge in a nearby kiosk from where they observed the attack. He said that the 1st appellant who was the driver had a panga and the conductor, 2nd appellant, had a rungu and they were among the touts when beating the deceased. There was debate as to whether the two hid in a kiosk or at the petrol station. What was not disputed, however, was the fact that they took cover nearby. Later the trial judge in his judgment stated:-

“The offence, on the evidence, was committed in the morning in clear day light hence there was no possibility of mistaken identity. Some of the group members like PW1, PW2 and PW3 knew the matatu crew before this incidents (sic). They recognized them in court. I am persuaded that such identification suffices since the accused person (sic) refused to participate in the identification parade.”

To that extent we find no fault with the judge’s finding.

8. The evidence of PW2 is spot on as to what actually happened. He said that after the attack by the touts who had been called to the scene by the 2nd appellant every one ran away to safety. As he escaped, PW2 saw the deceased trying to reason with the gang of attackers. He then saw the attackers descend on the deceased beating him. He saw that the 1st appellant had a panga in his hand but could not make out what weapon the 2nd appellant had. What is clear from his evidence, just like that of PW1 before him, is that the driver and conductor of the matatu who are the appellants in this appeal were among the attackers of the deceased herein irrespective of what weapon each of them used to beat the deceased. Indeed PW9 **Anthony Mugo Nderitu**’s evidence in court was that:-

“I am able to identify the conductor with whom we had the argument”

And thereupon he pointed to the conductor in the dock. He added that at the scene he saw the conductor among the touts who were chasing after the deceased and he had a maasai rungu in his hand. For all intents and purposes all the evidence so far analysed is direct, not circumstantial evidence.

9. Counsel for the appellants did not point out to us what he called circumstantial evidence and what was needed to corroborate it. We do not find any such evidence. What we do find from the evidence is this, that the two appellants were placed squarely at the scene where the deceased sustained the injuries that led to his death. What is more, there is evidence of their involvement from the start of the argument due to hiked fare upto the attack on the deceased. It was direct evidence of eye witnesses.

That evidence is indeed supported by that of the 2nd appellant in his defence. He did not exclude himself from the scene although he denied involvement in the fight. He said that he was on duty on 4/11/2002 and the following day as well with the driver. He never denied being the conductor in question. His feeble denial did not dent the evidence of prosecution witnesses on the role he played in the commission of the crime and the trial judge cannot be faulted for not excluding the 2nd appellant from the events of 4th November, 2002 that led to the death of the deceased herein.

10. The arrest of the appellants, though attacked by the defence, was free of error as the appellants were the known crew of the matatu that the deceased and his group members disembarked from, giving rise to the incident that led to the deceased's death. The release of the other 3 arrested persons was not shown to have been wrongful as the charge preferred was that of murder and not one concerning the mere presence of weapons.

11. That arrest followed a report by PW1 that the appellants had been spotted at the bus stage. And that is the precise reason that this was not a case of dock identification but one of recognizing the appellants.

The reasons given by the appellants for refusal to participate in the identification parade were escapist. 1st appellant said in his defence that he was at Kagio, far away from the scene. 2nd appellant stated that those to identify him were his fellow footballers who knew him well. At that early stage of the case as well as during the hearing itself the appellants did not state the reason why they would be implicated in a crime they had nothing to do with. And as correctly pointed out by the appellants' counsel, no grudge was shown to exist between the appellants and the witnesses. The burden to prove the commission of a criminal case is for ever on the State and that is not lost on us. What we are saying is that the appellants had no valid reasons to refuse to participate in the identification parade.

12. We were told that the trial judge did not analyse and evaluate the evidence. A perusal of the judgment would show the opposite. The trial judge firstly prepared a thorough summing up for the assessors and gave them clear guidelines on the applicable law. In his judgment, after recapitulating all the evidence the judge did in fact evaluate the same and found as a fact that the deceased and his group members were attacked by the touts and the conductor who called them and both the conductor and driver took part as was clear from the evidence. The judge further said,

“The group of matatu touts that attacked inter alia, the deceased were acting in concert to prosecute an illegal purpose. In the course of their illegal acts the deceased was assaulted and eventually succumbed to his injuries. In law all the accused persons who were in that group are accordingly guilty of murder by dint of provisions of section 21 of the Penal Code. The doctor confirmed that the deceased died and that the cause of death was trauma occasioned by a blunt object which is consistent with the evidence regarding the weapons employed and recovered.”

That the judge clearly and fully analysed and evaluated the evidence is again borne out by the following passage from his judgment when discounting the assessors' verdict;-

“Although all the two assessors returned a verdict of NOT GUILTY, I am in disagreement with them. The accused persons were properly identified. The offence was committed in clear day light. Hence no doubt as to identification. They were identified by more than one person. The actus – reus was proved by medical evidence. The assessors failed to comprehend the summing up as related to the concept of common intention and malice aforethought. For that reason they reached a wrong verdict.”

13. In our evaluation of the available evidence we have not found, and we were not shown, instances where the prosecution failed to discharge the burden of proof placed on them.

14. The woman from whose kiosk the crude weapons which the attackers used on the deceased were taken was not called as a witness. We were not told what her evidence would have been and how it would weaken the prosecution case. In those circumstances the trial judge did not make an adverse inference from her failure to be a witness. On our part we note that had she been called she would have confirmed or denied that the crude weapons were retrieved from her kiosk to be used in the attack of the deceased and they were returned to the said kiosk after the attack. She would perhaps have had something to say about the recovery of those weapons from her kiosk by the police. But that is surmising and proof of criminal culpability does not countenance such. We, in the circumstances do not make any adverse inference to her not having been called as a prosecution witness but instead we make the finding that the failure to call her as a prosecution witness did not weaken the prosecution case.

15. We are agreed that the trial judge properly appreciated the law on common intent and arrived at the correct conclusion. When the conductor – 2nd appellant – summoned his touts and all of them using crude weapons descended on the deceased, we agree they acted in concert and thereby satisfied the provisions of sections 21 as well as those of section 206 of the Penal Code on common intent and malice aforethought respectively, and thereby became jointly criminally culpable. Malice aforethought was proved by the nature of the attack and the choice of the body part attacked – the head. As the trial judge correctly observed;

“The fact that death occurred by a blow to the head of such massive magnitude or degree is proof of excessive force and evidence of malice aforethought as defined in section 206 of the Penal Code,”

We agree. For clarity purposes we quote sections 21 and 206 of the Penal Code to show that they were met in the circumstances of this case;

“Section 21 When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

and

“Section 206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

16. The upshot is that we find no merit in this appeal. We accordingly dismiss the same in its entirety.

Orders accordingly.

Dated and Delivered at Nairobi this 4th day of March, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

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