IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 30 OF 2011

BETWEEN

KENGA CHARO HINZANO ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Meoli, J.) dated 17th September, 2010

in

H.C.Cr.C. No. 31 of 2010)

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JUDGMENT OF THE COURT

The appellant, ***Kenga Charo Hinzano*** was charged with the offence of murder contrary to ***section 204*** of the Penal Code. The particulars of the information were that on the 9th day of October, 2010 at Msongoleni Village in Malindi Township within Kilifi County, he murdered ***Hassan Kahindi Gona***. The appellant pleaded not guilty to the information.

The trial then proceeded before ***H.A. Omondi, J.*** who on 26th October, 2011 found the appellant guilty of the information. However for reasons that are not readily apparent on the record, the judgment was delivered on her behalf on 2nd December, 2011 by ***Meoli, J.*** who proceeded to mete out the sentence of ***DEATH*** as by law prescribed. The appellant was dissatisfied with the conviction and sentence hence this appeal. He filed the following five grounds of appeal:-

> *"1. That the high court Judge did not consider that the dying declaration evidence relied **(sic)** by the high court Judge was not proved to the required standard of law hence my conviction was un safe.*
>
> *2. That the high court Judge failed to notice that my arrest was based on mere suspicion as **(sic)** conviction and sentence cannot stand in law.*

3. That the learned high court Judge misdirected herself by not considering that the instant case was contradictory hence contravening section 163(1) of the evidence Act.

4. That the learned high court Judge failed to notice that the prosecution case never ***(sic)*** *proved their case beyond reasonable doubt.*

5. That the defence I gave was reasonable enough hence the benefit of doubt ought to have been awarded to me appellant."

During the hearing of the appeal, ***Mr. Ngumbau,*** learned counsel for the appellant urged us to find that the circumstantial evidence did not irresistibly point to the guilt of the appellant. He submitted that there was no eye witness and the alleged murder weapon was not found. He contended that the evidence of a dying declaration as stated by PW1 ***Munde Kabakazi Nyoka***, PW2 ***Hamisi Kazungu Gona*** and PW3 ***Moses Gona Ngolo*** was unreliable. He cited the case of ***Tuwamoi vs Uganda 1967 EA*** which provide the principles to guide a court when dealing with a dying declaration. Mr. Ngumbau's further submission was that no evidence of a grudge was adduced that would have led the appellant to commit the crime.

Mr. Oyiembo the Assistant Director of Public Prosecutions opposed the appeal. He pointed out that the appellant and the deceased knew each other well, as they lived in the same community. He submitted that the dying declaration was reliable and further that the two were at a function together during that evening. Besides there had been a grudge in existence as the appellant suspected the deceased to have had a hand in the death of his brother in the high seas during a fishing expedition. To buttress his argument on circumstantial evidence, Mr. Oyiembo submitted that immediately after the commission of the offence, the appellant vanished and could not be found by the investigation officer, PW6 ***Pc. Noah Kiplagat.***

This being a first appeal, our mandate is to reconsider the evidence which was before the trial court, evaluate the same and draw our own conclusions and at the same time giving due allowance to the fact that we have neither seen nor heard the witnesses. In other words, we should turn this appeal into a retrial, however without the benefit of the presence of the respective witnesses. See ***Okeno vs Republic [1972] EA 32.***

The prosecution called six witnesses.

PW1 ***Munde Kabakazi Nyoka***, a fellow fisherman as the deceased was at a funeral ceremony together with the deceased on 9th October, 2010 in the home of one, Baya Muhuga. At about 8 p.m. the deceased left to answer a call of nature and shortly returned bleeding profusely. The deceased stated that he had been stabbed by Kenga Charo Hinzano, the appellant herein. The deceased had a big gush running vertically down his abdomen. There were bright electricity lights from the bulbs because of the disco at the home. Earlier on, PW1 had seen the appellant serving food within the homestead. As the deceased had mentioned the appellant as the one who had stabbed him, PW1 and others looked for him but could not find him.

The appellant's brother Kibao Charo Hinzano who was also a fisherman had drowned at sea in Kipini in September, 2009. PW1's further testimony was that the appellant warned other fishermen not to go near the deceased's body as they were thought to have been responsible for the appellant's brother's death. He threatened to kill any one of them personally who got near the body. PW1 stated that on 10th October, 2010 an old man picked a letter just near the deceased's house which was produced in court as exhibit. The letter listed all the names of the fisherman who had been at sea when the deceased passed on and concluded ominously:

"I have killed Hassan Kahindi Gona and I will clear all these on the list".

PW2 ***Hamisi Kazungu Gona***, is a fisherman and brother of the deceased. He too was with PW1 as well as the deceased when the latter went to relieve himself. The deceased returned shortly saying he had been stabbed by the appellant, Kenga Charo. PW2 had seen the appellant serving food, although he did not

serve them.

PW3 ***Moses Gona Ngolo***, the deceased's elder brother upon receiving information that his brother had been stabbed rushed to the scene but found the deceased being taken to hospital. At the time, the deceased was still alive. He asked his brother who had stabbed him and the answer he got was that it was the appellant. The vehicle proceeded to hospital and the deceased was pronounced dead upon arrival.

PW4 ***Omar Hassan Mazao*** a sub-locational Chief received news of the death and rushed to the scene, arriving there at 10 p.m. By then the deceased had been rushed to hospital. However, since the area did not fall within his area of jurisdiction he acted no further.

PW5 ***Dr. Berly Kaudia*** produced the postmortem form prepared by his colleague *Dr. Chepsiror*. The cause of death was attributed to ***"excessive hemorrhage"*** and there was a ***"penetrating abdominal injury***".

PW6 ***Pc. Noah Kiplagat*** was the investigating officer. On 10th October, 2010, he was detailed to investigate the case. He proceeded to Malindi District Hospital mortuary and observed the body of the deceased and noted the injuries. Thereafter he proceeded to the scene and interrogated members of the public. The information he received pointed at the appellant as the perpetrator of the crime. However, the appellant was nowhere to be found. He had vanished. He was eventually traced in Gede where he was arrested and handed over to Malindi Police Station and was subsequently charged.

Upon conclusion of the prosecution case, the appellant was found to have a case to answer and he was put on his defence. He elected to make an unsworn statement. He told the court that on the fateful day between 6.30-7.00 p.m. he was at home serving guests. He was called by his mother to attend to his in-law. He discounted the theory that he had suspected the deceased for bewitching his late brother as his brother drowned at sea. He denied killing the deceased.

We have considered the submissions by Mr. Ngumbau as relates to dying declarations. There is no doubt that in his dying declaration the deceased said he had been killed by the appellant. The deceased together with PW1 and PW2 were at the home of the appellant. The deceased left PW1 and PW2 to answer a call of nature only for him to return with his intestines popping out. He then told PW1 and PW2 that he had been knifed by the appellant. He had no hesitation in providing the name of the assailant as they knew each other very well. The appellant was in this homestead and at some point was helping to serve food. The dying declaration was also made to PW3 as well by the deceased as he was being taken to hospital. The dying declaration was made immediately after the fatal assault. All the three witnesses that is PW1, PW2 and PW3 had no illusion as regards the person who knifed the assailant. They all knew each other as were village-mates. The attack on the deceased was not under circumstances of confusion. There was bright light in the homestead on account of a disco. PW1 and PW2 saw the appellant serving food with the assistance of those lights. There can be no doubt at all that these witnesses recognised the appellant. Indeed there was peace and tranquility at the homestead. There was merry and feasting. The deceased's sense of judgment cannot also be said to have been impaired. He was at this home for a funeral ceremony. He left briefly to relieve himself only to come back with a stabbed wound. Nothing had impaired his faculties inspite of the bleeding from his stomachThe dying declaration was reliable as to the identification. As was stated in ***Musili v R [1991] KLR 323***:

> ***"The law in Kenya relating to acceptance of dying declaration as evidence is clear –***
>
> ***In our view this was a strong evidence of a dying declaration made immediately after the fatal assault and given by witnesses who were found by the learned trial judge to be witnesses of truth and credibility. The law in Kenya relating to acceptance of drying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect – (U) R v Elighu s/o Odel & Another [1943] 10 EACA 90."***

In our view the dying declaration was reliable and sufficient proof that the appellant committed the heinous act.

It would appear that the appellant had a vested grudge against his late brother's fishermen colleagues. PW1 in his evidence told the trial court that the appellant blamed the fishermen for his brother's death. He also said he saw the letter which was picked on 10th October, 2000 and had a list of fishermen. That was a day after the death of the deceased. The letter stated:

> ***"I have killed Hassan Kahindi Gona and I will clear all those on the list."***

The deceased was a fisherman and the appellant inflicted the injury that caused his death so as to avenge his brother's death.

We are satisfied that the appellant knifed the deceased and that this resulted in fatal injuries which caused the death of the deceased. In view of the foregoing, we find that this appeal lacks merit and is dismissed.

Dated and delivered at Mombasa this 3rd day of April, 2014

H. M. OKWENGU

….....

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