



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO, J. MOHAMMED & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 10 OF 2010

BETWEEN

IRENE CHEBET alias ALICE 1st APPELLANT

CHRISTOPHER OUMA ODHIAMBO 2nd APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kitale, (W. Karanja, J)

dated 14th December, 2005

in

KITALE HCCRC NO. 44 OF 2003)

JUDGEMENT OF THE COURT

This is a first appeal from the judgement of the High Court of Kenya at Kitale (W. Karanja, J – as she then was) delivered on 14th December, 2005 where the appellants, **Irene Chebet alias Alice** (“the 1st appellant”) and **Christopher Ouma Odhiambo** (“the 2nd appellant”) were convicted and sentenced to death.

In the information presented before the trial court the 1st and 2nd appellants together with another who was acquitted at the trial, were charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code particulars being that on the 16th day of January, 2003 at Makutano Township in West Pokot District of the Rift Valley Province they jointly murdered **Patrick Mukhwana**.

It is our duty as a first appellate court to re-assess and re-evaluate the evidence and to reach our own independent conclusions on the evidence tendered to the trial court – See the case of **Josiah Afuna Angulu v Republic (Nakuru) Criminal Appeal No. 277 of 2006 (ur)**. The same holding will be found in the oft-cited case of **Okeno v Republic [1972] EA 32** where it was held by this Court differently constituted that:-

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld.”

The prosecution case was through the evidence of five (5) witnesses and proceeded as follows: On 16th January, 2003 Yusuf Ali Simiyu (PW1) (Yusuf), Grace Nyelima (PW2) (Grace) and Penina Chemutai (PW3) (Penina) were in the house of the deceased at Makutano. Yusuf was a brother or cousin of the deceased, Grace was the wife of the deceased while Penina is the wife of Yusuf. They were all enjoying the evening meal when at about 9:00 p.m. there was a knock at the door and they were joined by one Lotikei (this came out in evidence as a nickname by which the 2nd appellant was known in their neighbourhood) who was invited to the meal but he declined. The 2nd appellant sat down and informed the deceased that they should step outside the house to complete a discussion that had apparently taken place between them earlier. Before this could happen the 1st appellant who resided in the same neighbourhood entered the house, asked for water to drink which was served to her by the deceased but she did not drink it. The 2nd appellant and the deceased then left the house and were closely followed by the 1st appellant. Suddenly the stillness of the night was broken by screams outside the house and the deceased was heard shouting:

“Yusuf I have been stabbed with a knife”

On hearing this Yusuf rushed outside the house and because there was moonlight he observed the 1st and 2nd appellants and a third person who was acquitted at the trial running away as the deceased was running towards the house screaming that he had been stabbed by three people - Alice, Lotikei and Paulo. It emerged in the evidence that “Alice” was a nickname given to the 1st appellant in the neighbourhood. On reaching where Yusuf was the deceased fell down and Yusuf noticed that the deceaseds' clothes were soaked in blood. Yusuf and others ran to Makutano Police Post where they made a report and a police motor vehicle was availed to offer assistance but upon arrival at the deceaseds' house they found that the deceased had succumbed to the injuries he had suffered that night. A formal report was thereafter made at Makutano Police Station that same night where Yusuf gave names of suspects to the police. Yusuf later identified the deceaseds' body for purposes of post-mortem examination.

On cross – examination on the issue of identification Yusuf stated:

“...It was 9:00 p.m. It was not dark. There was a full moon. You could even see coins on the ground. It was the full moon of January. I saw them very clearly...”

On the events that took place that night Grace added that:

“...When the deceased left with accused 2, Chebet Accused 3 also left – leaving the water. I then followed them. I stood at my doorstep. They went with him. I called Yusuf . He told me may be they were going to give him work. Accused 2 and 3 are the ones who went with the deceased. After a short while, he came back screaming saying that Alice had stabbed him with a knife. He said that twice.....”

Alice was carrying a knife. I saw it when she asked me for water. I saw her stab him before they ran away. Alice ran away with the knife.....”

Dr. Omunyiny Festus (PW4), a General Practitioner who was at the material time the Medical Officer of Health at Kapenguria District Hospital testified that on 21st January, 2003 he performed a post-mortem on the body of the deceased and observed that there was a multiple area of bleeding on the left side of the forehead and a stab wound on the left side of the chest. Internally the deceased had a collapsed left lung with superior perforation on the same. The cause of death was cardiopulmonary failure due to massive intrathoracic bleeding and lung collapse. The Doctor found that the injury on the left side of the head was due to blunt trauma while the stab wound was a 3cm linear stab caused by a long sharp object including a long knife.

No. 54413 P. C. Kasundi Towett (PW5) who was at the material time attached to Kapenguria Police Station was on patrol on the night of the incident when he and colleagues received a report on a murder in Makutano. They proceeded to the scene and found the body of the deceased lying where it had fallen. The witness interviewed witnesses who gave him names of suspects. The witness also drew a sketch plan of the scene which he produced in court as part of the evidence. On the same night this witness proceeded to houses of suspects named by witnesses but did not find any of the suspects.

That was the case made out by the prosecution which the trial court reviewed and found that the appellants had a case to answer. Upon being put on their defence the appellants chose to give unsworn statements which were essentially this: The 1st appellant stated that on 23rd July, 2003 she was in her house undertaking cleaning duties when she was confronted by 2 police officers who asked her to accompany them to the police station where upon arrival she was locked up, tortured, and later charged in court alongside strangers.

The 2nd appellant testified that on the date in question he went to the deceaseds' house like he always did and found the deceased and 3 others eating food. While he engaged the deceased in a conversation a woman entered the house and said that she was following her husband. This woman started quarreling with the wife of the deceased and at this point the 2nd appellant decided to leave. Upon doing so he was followed by the deceased and they continued chatting outside the house and then the 2nd appellant left for his house. Thereafter he left for Uganda for an undisclosed period but upon return he was confronted by members of the public who told him that he was wanted by the police. He reported to police, was arrested and charged with the offence of murder which he denied.

The trial court found that the prosecution had proved the charge against the appellants as required by law and convicted them accordingly. This therefore provoked this appeal.

Both appellants filed home-made Memoranda of Appeal which were adopted by counsel when the appeals came for hearing before us.

The 1st appellant took various grounds of appeal which are not numbered and we discern them to be that the learned trial judge erred in relying on insufficient evidence by the prosecution; that the learned judge erred in finding that there was identification of the 1st appellant by PW1; that there was no eye-witness to the assault; that the learned judge erred in finding that the charge was proved beyond reasonable doubt and that the sentence of death was uncalled for and excessive.

The 2nd appellant took 5 grounds of appeal –these can be summarized as follows: that the learned judge erred in finding that this appellant was involved in the commission of the offence; that the learned judge erred in finding that there was evidence against this appellant and that the learned judge erred in failing to evaluate the defence case against that of the prosecution.

Mr. J. K. Korir, the learned counsel for the 1st appellant submitted before us that the trial court was wrong in finding that there was identification when according to counsel there was no light. Counsel submitted further that the deceaseds' dying declaration was not tested and the assailant repeatedly called “Alice” by prosecution witnesses was not properly identified. According to counsel the prosecution did not establish a common intention by 3 accused persons to murder the deceased.

On his part Mr. A. Kitigin, the learned counsel for the 2nd appellant, submitted that the 2nd appellant did not participate in the commission of the offence as there were inconsistencies in the prosecution evidence. Counsel thought that because a co-accused was acquitted on grounds of reasonable doubt the same doubt should have been found in favour of the appellants. Counsel cited **Dracaku s/o Afia & Anor v R [1963] EA 363** for the proposition that there was no common intention to kill because the 2nd appellant did not encourage “Alice” to kill the deceased. He also cited the case of **Solomon Mungai & others v R [1965] EA 782** in support of the submission that common intention may develop in the course of the event.

Mr. Z. G. Omwega, the learned Assistant Director of Public Prosecutions in opposing the appeal submitted that circumstances existed for identification of the assailants because there was a full moon where it was said that one could see a coin on the ground. Counsel submitted that there was no doubt on identity of "Alice" because the prosecution witnesses had testified that "Alice" was also called "Chebet".

We have considered the Memoranda of Appeal, the submissions by counsel and the law. On the issue of identification we have already noted in this judgement that this unfortunate incident took place within a close neighbourhood where all parties to the case were known to each other. Indeed the deceased was related to prosecution witnesses who were in turn related to some of the accused before the trial court. According to Yusuf on the fateful night:

"... There was a full moon. You could even see coins on the ground. It was the full moon of January. I saw them clearly...."

This witness testified how he saw the incident happen, heard the deceased cry out that he had been stabbed and witnessed the 2 appellants' fleeing from the scene of murder. Grace testified that there was moonlight and she saw the appellants running away from the scene where her husband the deceased had been left injured. Penina similarly testified that there was a full moon.

We agree with the finding of the trial judge that the 1st and 2nd appellants were properly identified as the assailants who caused injury to the deceased.

Was it necessary to find a common intention on the part of the appellants to lead to a conviction?

In criminal jurisprudence the motive with which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility - See Section 9 of the Penal Code.

In **Solomon Mungai & others (supra)** it was held that if the evidence supports the inference that violence of any degree has been used in prosecuting a certain design incidentally resulting in death, and if the offence charged was a probable consequence of the use of that violence, then all sharing in the design are murderers.

It was observed by this court in **Libambula v Republic [2003] KLR 683** that since it had been proved that the appellant had issued actual threats to harm the complainant before another matter between them in another court was heard was motive relevant? Motive was that which made a man to do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. That is the essence of Section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive may be drawn from the facts although proof of it is not essential to prove a crime.

In **Mwangi Mungai v Republic [2006] e KLR** it was held that in criminal cases motive for committing a criminal offence is normally irrelevant. See also **Wilson Wanjala Mkendeshwo v Republic [2002] e KLR**.

It was proved by the prosecution to the required standard that the deceased died from the stab wounds inflicted by the weapon the 1st appellant had and the 1st appellant was accompanied by the 2nd appellant when the deceased was killed.

The appeal by the appellants has no merit and we dismiss it accordingly.

Dated and Delivered at Kisumu this 23rd day of May, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR