



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, 'M'INOTI & SICHALE, JJ.A.

CRIMINAL APPEAL NO. 172 OF 2012

BETWEEN

MANGALA SOMBO MARICHENI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Mombasa (Odero, J.)  
dated 17<sup>th</sup> November, 2011

in

H.C.CR. C. NO. 49 OF 2009.

\*\*\*\*\*

JUDGMENT OF THE COURT

This first appeal arises from the conviction of the appellant, **Mangale Sombo Mricheni**, of the offence of murder contrary to **section 204 of the Penal Code** by the High Court in Mombasa (**Odero, J**) on 17<sup>th</sup> November, 2011. Upon conviction the appellant was sentenced to death. The particulars of the charge as laid out in the information were that on 7<sup>th</sup> March, 2007, at Mtumwa Village, Mwereni Location, Msambweni District within Coast Province, the appellant murdered **Chibuta Mwachilungo (deceased)**.

The rather tragic background to the commission of the offence was an allegation by two fellow villagers of the deceased, **Chaka Nyondo** and **Mwatsuma Nyonda** that he was a witch. That accusation was made about three days prior to the death of the deceased. To prove otherwise and absolve him from the charge that he was a witch, the deceased submitted himself to a **Duruma** traditional oath conducted by a witchdoctor at a place called Msamani. As it turned out, the oath allegedly confirmed that the deceased was indeed a witch, for which he was ordered to pay a fine, the exact nature being unclear. Friends and relatives assisted him to raise part of the fine which was paid over to one of his accusers, Chaka Nyondo. Thereafter the deceased went back to his home.

On 7<sup>th</sup> March, 2007, at about 6.00 pm, the appellant and one **Mwatsuma Mwero**, who subsequently fled and has never been apprehended, allegedly set upon the deceased outside his house and viciously slashed him with pangas. So serious were the cuts and injuries inflicted upon the deceased

that he died on the spot. According to the evidence of **Samba Mricheni (PW4)** who is also the father of the appellant, the appellant and his accomplice had been paid some money by Chaka Nyondo and Mwatsuma Nyonda, the accusers of the deceased, to kill him because he was a witch.

After the murder of the deceased on 7<sup>th</sup> March, 2007 both his assailants fled. The appellant was not apprehended until 19<sup>th</sup> November, 2009, more than two years later, when he resurfaced in Mtunwa village. On 1<sup>st</sup> December 2009 he was charged with the murder of the deceased and after hearing evidence from 12 prosecution witnesses and the unsworn defence of the appellant, the trial judge convicted and sentenced him as earlier stated,

Aggrieved by the judgment of the High Court, the appellant lodged the present appeal. His Supplementary Memorandum of Appeal dated 31<sup>st</sup> March, 2014 and which formed the basis of the appeal before us, raised six grounds of appeal which, for the avoidance of prolixity, grammatical errors and repetitions, may be recast thus:

***That the learned trial judge erred in law and fact by convicting the appellant:***

***i) while there was no psychiatric report to confirm his mental status before the trial;***

***ii) when no mens rea was proved on his part;***

***iii) on the basis of prosecution evidence that was inconsistent in material particulars; and***

***iv) on the basis of evidence that required corroboration, but was not otherwise corroborated.***

**Mr Njenga**, learned counsel for the appellant argued all the grounds of appeal globally. Counsel started by criticizing the quality and consistency of the evidence relied upon by the trial judge to convict the appellant. He submitted that of the 12 prosecution witnesses who testified, only three, namely **Julius Masudi Ndegwa (PW6)**, **Nadzua Ndegwa (PW7)** and **Munga Ndegwa (PW 9)** purported to have witnessed the appellant committing the offence. Of the three, counsel contended, the trial judge had concluded that PW6 had not witnessed the actual commission of the offence and that his evidence was embellished. Having discounted the evidence of PW6, counsel submitted, the trial judge had erred by holding that the evidence of PW9 could corroborate that of PW6.

Regarding the evidence of PW7, learned counsel submitted that it did not support the finding by the trial court that PW7 had seen the appellant commit the offence. In counsel's view, the evidence of PW7 was that she knew only one of the two people she had seen slashing the deceased, and that assailant whom she named as "Bunge" was in fact the assailant who was never apprehended.

Next, learned counsel latched onto what he perceived as material contradictions in the prosecution case. Mr Njenga submitted that according to the evidence of PW9, the offence was committed at 4.20 pm while the other prosecution witnesses testified that it was at about 6.00 pm. Counsel argued that because of the above inconsistencies, there was reasonable doubt whether any of the witnesses had witnessed the commission of the offence.

It was Mr Njenga's further submission that the prosecution evidence was riddled with contradictions that it could not sustain a conviction without proper corroboration. The judgement of this Court in **CHOGE VS REPUBUC (1985) 1 KLR 1**, was cited to support the view that in the circumstances of this case, corroboration of the prosecution evidence was required.

Learned counsel concluded his submissions by contending that no psychiatric report was presented before the trial court to confirm the mental status of the appellant. In counsel's view, it was desirable to subject the appellant to mental evaluation before he could be tried for the offence that he faced.

**Mr Kiprop**, the Senior Prosecution Counsel, opposed the appeal, contending that the appellant was properly convicted of the offence of murder. Learned counsel submitted that even if the evidence of PW6, which the trial court found to have been exaggerated, was discounted, there was other credible and consistent evidence upon which the appellant was properly convicted. Such evidence, counsel argued, was tendered by PW9 who the court believed as a credible eye Witness.

**Mr Kiprop** further submitted that under the Law of Evidence Act, the prosecution case may be proved even by one Witness; that the evidence of the eye Witnesses was sufficiently corroborated by the postmortem report that was produced in evidence by **Dr Anderson Kalundi, PW12** that discrepancies in the prosecution evidence regarding time was not material; and that the complaint of lack of a psychiatric report was ill-founded because under section 11 of the Penal Code, every person is presumed to be sane and that in any event, the appellant had not suggested that he was at any time, prior or during the trial, mentally unfit. Neither did he advance the defence of insanity.

We have perused the record of appeal, the grounds of appeal and also considered the submissions by learned counsel. This being a first appeal, issues of fact as well as issues of law falls for consideration. In addition, we are in law enjoined to subject the evidence adduced before the trial court to a fresh and exhaustive examination. (See **OKENO VS REPUBUC (1972) EA 32**). In **NJOROGE VS REPUBUC (1982-88) 1 KAR 134** this Court rendered itself as follows regarding the duty of a first appellate court:

***"It is the duty of the first appellate court to remember that 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 inference and conclusions, bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this."***

(See also Rule 29(1)(a) of the Court of Appeal Rules)

We agree with the appellant that from the prosecution evidence, only PW6, PW7 and PW9 testified as direct eye witnesses to the commission of the offence. Clearly, the trial judge, who had the advantage of seeing the witnesses testify, was not impressed by PW6 as a witness. She noted on the record that he had a dishonest demeanor and was evasive in answering questions. Moreover, PW6 readily admitted under cross-examination that he had not recorded in his statement to the police, when presumably the matter was fresh in his mind, that he had seen accused and his accomplice slashing the deceased. What he had told the police was that he had seen the appellant and his accomplice leaving the scene of the crime, carrying bloodied pangas. The learned trial judge concluded as follows regarding this witness:

***"It is my view that PW6 did not actually witness the attack. He probably only saw accused and Mwero as they left the scene brandishing the blood stained pangas. No doubt PW6 was trying to embellish his testimony in order to ensure a conviction against the accused."***

Accordingly the learned judge was cautious in the manner in which she treated the evidence of PW6, and rightly so in our view.

The evidence of PW7, who described herself as the wife of the deceased, was also largely self contradictory. In her evidence in chief, she testified as follows:

***"I know one of those slashing the deceased. His name is 'Bunge". I knew him before as he is my relative. He is my uncle. I only know him as "Bunge". Bunge escaped. I could not identify the other man, who was cutting the deceased. Bunge has not been traced to date." (Emphasis added).***

From this evidence, PW7 was saying that the deceased's assailant whom she knew ("Bunge") is the

one who is still at large and that she did not know the second assailant, who is presumably the appellant.

A few lines later in her evidence-in-chief, with regard to the identity of the assailants of the deceased, PW7 took a radical turn, when she testified:

***"I saw Bunge. He escaped and has not been found to date. I can identify the second man I saw slashing the deceased. It was accused (identified). He is my nephew. He is my sister's child." (Emphasis added).***

Cross-examination further compounded the inconsistencies in PW7's evidence regarding the murder of the deceased. The witness stated that she saw the appellant and Bunge cutting the deceased from about 70 yards. A short while later, she told the Court:

***"It is true I was in a state of shock. It is true that due to shock I could not see who was cutting my husband."***

If the identification of the appellant as one of the murderers of the deceased was hinged on the evidence of PW6 and PW7 alone, we would agree with the appellant that his conviction would be ill founded. There was however other evidence which the trial court took into account in convicting the appellant, which in our view was sound evidence.

The evidence of PW9, which was largely unchallenged, was such other evidence that was considered by the trial court. The evidence of that witness was that after hearing PW7 screaming, he ran back home and found the appellant and Mwatsuma Mwero, who were well known to him as neighbours, slashing the deceased with pangas. As he approached, the appellant warned him to keep off; otherwise he would also be killed. It was his evidence that he witnessed the appellant cut the deceased on the neck. On its own, the evidence of PW9, which the trial court believed after finding that the witness had no reason to lie against the appellant, would have sufficed to sustain the conviction because, as rightly submitted by the respondent, under **section 143** of the **Evidence Act**, in the absence of any legal requirement to the contrary, no particular number of witnesses are required to prove a fact in issue.

The postmortem report which was prepared by Dr Onzere and produced in court by PW12 indicated that the cause of death of the deceased was severe hemorrhage secondary to cut wounds. The report tabulated the injuries inflicted upon the deceased as a deep cut wound 12 cm long on the right side of the neck; a 6 cm cut wound on the back of the head; near total amputation of the right forearm due to cut, leaving only a 3 cm skin hold; a 6 cm cut wound on the right wrist; severed right great vessels (carotid and jugular systems) at the neck; severed spinal cord due to cut wounds on the neck; and prolapsed spinal cord.

In our view, these injuries were consistent with the evidence of PW9 regarding the slashing of the deceased. PW9 was known to both the appellant and his accomplice, who were his neighbours. The offence was committed at about 6.00 pm when it was not yet dark and visibility was good. In the circumstances of this appeal, the question of the identification of the appellant could not possibly arise.

It is important to also point out that the learned trial judge did not discount the evidence of PW6 in its entirety. She disbelieved only the part of the evidence that stated that PW6 witnessed the actual slashing of the deceased. The court was prepared to believe, and indeed believed, that PW6 had only seen the appellant and his accomplice as they left the scene of the offence, brandishing bloodstained pangas. That evidence was strengthened by that of PW9, who the court believed to have witnessed the commission of the offence, when PW9 told the court that he got to the scene of the crime before PW6, thus strongly suggesting, as the learned judge held, that PW6 only came to the scene as the appellant and his accomplice were leaving, having accomplished their murderous enterprise.

Another piece of evidence which corroborates the evidence adduced to prove that the appellant was one of the murders of the deceased, is the conduct of the appellant immediately after the deceased was murdered. The appellant fled from Mtunwa Village for more than two years, and was only arrested on 19<sup>th</sup> November, 2009 when he resurfaced in the village. This piece of evidence is significant when considered against the evidence of Sombo Mricheni, PW4, which appears to have been largely ignored. PW4's evidence was that his son, the appellant, had on the date the offence was committed, informed him that he, the appellant, had killed the deceased at the request of Chaka Nyondo and Mwatsuma Nyondo, because the deceased was a witch. The appellant further informed PW4 that he was about to flee. Although PW4 tried to dissuade him and advised him to report to the chief instead, the appellant nevertheless fled the village.

The conduct of the appellant of fleeing the village immediately after the murder of the deceased is not consistent with the conduct of an innocent person. In similar circumstances, this Court found such evidence to amount to corroboration in *ALEX WAFUIA VS REPUBUC Crim. Appeal No 7 of 2008 (Eldoret)*. In that case the Court stated as follows:

***"Some corroboration for that finding, if any was necessary, was found in the conduct of the appellant who had been escaping from the police for about one week and also ran away and had to be chased and arrested by the vigilante group led by Patrick Wepukulu (PW 4). It was not the conduct of an innocent person."***

Regarding the alleged contradiction on the time when the offence was committed, we do not think much turns on that ground of appeal. Having heard the evidence, the learned trial judge found that the offence was committed at about 6.00 pm. We do not see any basis for holding otherwise. In any event, the contradiction alleged by the appellant is not a material contradiction as it did not go to the root of the prosecution case. The Uganda Court of Appeal aptly noted in *TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA 6*, that it is not every contradiction warrants rejection of evidence. The court stated:

***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.,"***

The last issue in this appeal regards lack of a psychiatric report. The general rule, as stated in section 11 of the Penal Code is that every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved. During his trial, the appellant, who was represented by counsel, never indicated that he was of unsound mind and never raised any issue regarding his mental status. Neither did the trial court observe anything that could have suggested mental challenge on the part of the appellant. Indeed, before us, counsel for the appellant maintained that the appellant was not suggesting that he was of unsound mind or that he had wished to raise the defence of insanity. Nevertheless, he still faults the trial court for essentially failing to confirm his soundness of mind, even though there is no such legal requirement. In this case the appellant himself maintains that he is and has all along been of sound mind.

We do not think, in view of the provisions of section 11 of the Penal Code that there is any merit in this ground of appeal. To hold that the appellant has, as of law, a right to be mentally evaluated before he is tried would be to negate section 11 of the Penal Code and create a contrary presumption to the effect that an accused person is presumed to be mentally unsound, unless after due mental evaluation he is proved to be of sound mind, in which case he may be tried. That is clearly not the law.

The appellant did not canvass or press the ground of appeal relating to whether mens rea on his part was proved, which we deem to have been abandoned. Whatever it is worth, it is our view too that that ground had no merit because malice aforethought can readily be inferred from the circumstances of this

appeal.

We have ultimately come to the conclusion that this appeal has no merit and the same is accordingly dismissed.

**Dated at and delivered at Mombasa this 21<sup>st</sup> day of July, 2014**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**K.M'INOTI**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**