



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 439 OF 2010

BETWEEN

1. KAHINDI NGUMBAO BAYA

2. KAZUNGU MAE MARINGA

3. ALI NGUMBAO *alias* FRANCIS.....APPELLANTS

AND

REPUBLICRESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Omondi, J.)
dated 29th October, 2010*

in

H.C.Cr.C. No. 6 of 2008)

JUDGMENT OF THE COURT

The three appellants, *Kahindi Ngumbao Baya*, *Kazungu Mae Maringa* and *Ali Ngumbao alias Francis* were charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the information were that:

“On the 16th and 17th day of December 2004 at Kakoneni Village, Jilore Location in Malindi District within Coast Province, jointly with others not before court murdered Kahindi Kombe Yeri.”

The trial proceeded before *Omondi, J.* who on 29th October, 2010 found the trio guilty and sentenced them to death as by law prescribed. The appellants were dissatisfied with the conviction and sentence and they filed respective appeals to this Court being *Criminal Appeal Nos. 55 of 2012, 56 of 2012* and *57 of 2012* which were subsequently “consolidated” and became *Criminal Appeal No. 439 of 2010*. On the onset, we wish to point out that this was an irregular procedure as it is the court that consolidates appeals

and not the registry. We also could not understand why although the appeals were filed in year 2012, they were subsequently given the number 439 of 2010.

Be that as it may, when the appeals came before us for hearing on 2nd July, 2014, **Mr. Kimani** learned counsel for the appellants pointed out that the appellants' grounds of appeal were similar in all material aspects. Each one of them had four (4) grounds of appeal and they raised similar issues. In fact, the grounds were the same word by word. Mr. Kimani abandoned ground 1 and urged grounds 2, 3 and 4. These were:

“2. That the learned trial Judge erred in law and fact in failing to note that there was no proper and positive identification of me the appellant as a member of the group that attacked and killed the deceased when given other facts that;-

I) The witness did not immediately after the attack upon the deceased give my names or descriptions to the assistant chief PW6, the village elder PW5 or the police PW7. The lapse in time waters down the value and impact of that identification and it is tempting to call it an afterthought.

II) The alleged incident took place in the year 2004 while me the appellant was in the same village with my accusers from that day until the year 2008 yet no one reported me to the authorities as a prime suspect who killed the deceased.

3. That the learned trial Judge erred in law and fact in failing to note that the prosecution case was not proved to the required standard leading to a miscarriage of justice when given that:-

i) The trial court acted on a theory which was not conversed in doctor's speeches for the cause of deceased death was unknown.

ii) No sketch plan or map was drawn and produced in court to ascertain the position where the deceased body was found lying thus contrary to section 89(1) and (2) of the Evidence Act.

iii) KAREMBO NGUMBAO BAYA who was the key witness whom PW1 alleged to be one who was bewitched by the deceased was unreasonably left out of prosecution case contrary to what the law provides under provision of section 150 of the C.P.C.

iv) There was no corroboration that the deceased was burnt to death which evidence was never supported by the doctor PW8 evidence.

4. That the learned trial Judge erred in law and fact in rejecting my defence without seeing that the burden of proof is throughout on the prosecution to prove its case and never shift to the accused.

In urging the appeal, the learned counsel for the appellants urged us to find that the evidence against the appellants was contradictory and that there was no evidence that singled out the three appellants as having committed the murder.

Mr. Oyiembo, the Assistant Director Public Prosecutions supported the conviction and sentence. He submitted that the three appellants admitted to have been part of the crowd that fished out the deceased from his abode; that the deceased met his death in the hands of the crowd; that there was common intention and that the group's intention was to kill the deceased whom they alleged was a witch.

We have taken due consideration to the rival submissions, the evidence on record, the judgment appealed against as well as the law. This being a first appeal, our primary role is to re-evaluate and re-analyse the

evidence tendered before the trial Judge and arrive at our own conclusion although in so doing we should not lose sight that we did not have the benefit of seeing the witnesses (see *Okeno v R* [1972] EA 32). This position was further reiterated in the case of *James Otengo Nyarombe & 2 Others v R Criminal Appeal No. 84 of 2002 (UR)* where it was held as follows:

“It is trite that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and to draw conclusions only based on the evidence before it. In the same way a court hearing a first appeal (that is a first appellate court) also had a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so, the first appellate court would give allowance for the same.”

The trial court analyzed and re-examined the evidence and came to the finding that the three murdered ***Kahindi Kombe Yeri***. The evidence analyzed and re-examined by the court was that of PW1 ***Fatuma Saidi Kombe*** who on the night of 16th December, 2004 was at her home together with her deceased husband. At about mid-night the 1st appellant (*who is her nephew*) together with his sibling Karemba Baya called on them and the 1st appellant asked the deceased to come out of the house as he was a witch. She heard her husband being told ***“come out because if you do not, we will burn you.”*** According to her Katana Wa Mae (2nd appellant) then cut the deceased’s hand using a panga. Thereafter, the appellants who were with others frog-marched the deceased from his home having doused their house with paraffin and setting it on fire. She decided to follow the group and when she was noticed, she was threatened that she may also suffer the same fate as her husband. She knew the three appellants as:

“1st accused is Kazungu Wamae’s son, the 2nd is the son of Furaha Noti and 3rd accused is known to me by physical appearance.”

Having been warned to keep off, she hid behind a cactus tree and saw her husband’s private parts being set on fire, before eventually being killed.

PW2 ***Joseph Henry Kahindi***, a son of the deceased did not witness the killing. He learnt of the death of his father and proceeded to the scene and accompanied the body to the mortuary.

PW3 ***Arnold Harold Nyanza*** was woken up by his mother as there was a house on fire. He went towards the large group whom he found were armed with pangas and rungu. On seeing him, the group wanted to get hold of him thinking he was Samini, a son of the deceased. He was able to get away after he explained and it was confirmed that he was not Samini.

PW4 ***Karisa Yaa Baya*** is the husband of Karemba Ngumbao Baya who had been ailing and had been taken by her mother Jumwa Nyange for treatment at their village in Kakoneni. He was at his house on the night of 16th December, 2004 when he was woken by a group hurling abuses at him and asking him why he was sleeping yet his wife was dying. He came out of his house and saw a large group. He recognized his mother-in-law, his brother-in-law ***Kahindi Ngumbao***, the 1st appellant, his ***“wife’s uncle who is 2nd accused and 3rd accused is the younger brother to my wife.”*** Because the group was charged, he decided to keep mum for his own safety.

PW5 ***James Charo Kadzeya***, a village elder of Kakoneni Sub-Location was woken up on the fateful night. He found a large group of people and he heard chants to the effect that the deceased was a witch.

PW6 ***Robert Safari Charo***, the Assistant Chief of Kakoneni too was woken up by noise. He followed the group only to find the deceased dead.

PW7 ***Pc. William Metto*** received the report of the deceased’s death on 18th December, 2004 whilst at Malindi Police Station. He proceeded to the scene and collected the deceased’s decomposed body.

PW8 **Dr. Chepsiron Daniel Kipkoech** produced the deceased's post-mortem report carried out on 22nd December, 2004. As the body had decomposed, it was difficult to ascertain the cause of death.

In their defences, all the three appellants chose to make unsworn statements of defence.

The 1st appellant, **Kahindi Ngumbao Baya** denied having murdered the deceased. He told the trial court that in the morning of 16th December, 2004 he went to tap wine and upon his return at about 5 p.m. he found his mother, children, wife and sister not at home. He decided to go to his brother in-law's home where he found his sister (*Karemba*) and his brother in-law (PW4) and the deceased exorcising evil spirits from his sister. The deceased was led away, purportedly to the area Chief. On 15th May, 2008 he received summons requiring him to attend the police station on 7th March, 2008. He appeared as demanded and it was not until 29th March, 2004 when he was arrested and locked up. He denied having committed the heinous act.

In his defence the 2nd appellant, **Kazungu Mae Maringa** told the trial court that he was discharged from hospital on 16th February, 2004. He too went to where the large crowd had gathered and found the deceased exorcising evil spirits from his aunt *Karemba*. As he was not well himself, he did not stay at the place where evil spirits were being exorcised from his aunt (*Karemba*).

The 3rd appellant, **Francis Ali Ngumbao Baya** too went to the scene. He found his sister, *Karemba* and an old man (the deceased) pouring water on her from a can. He was ordered to go back home to look after his younger siblings and he complied. On 29th December, 2008 he was arrested on allegations that he had murdered the deceased. He denied having murdered the deceased.

The three grounds of appeal urged before us were substantially that the appellants were not positively identified; that the charge was not proved beyond any reasonable doubt and finally that the trial court failed to take into consideration the appellants' defences.

On the issue of identification, we have the evidence of PW1 **Fatuma Saidi Kombe** who on the night of 16th December, 2004 was at her home together with her deceased husband. At about mid-night the 1st appellant (*who is her nephew*) together with his sibling *Karemba Baya* called on them on the pretext that they had come to greet the deceased and accused the deceased of being a witch and asked him to **"come out because if you do not, we will burn you."** According to PW1, **Katana Wa Mae** (2nd appellant) then cut the deceased's hand using a panga. PW1 narrated to the trial court how the three appellants in company of others fished out her deceased husband from their home on allegations of bewitching *Karemba* a sister to the 1st and 3rd appellants and PW4's wife. The 2nd appellant was related to *Karemba* as she was his aunt. *Karemba* had been ailing and she had been taken from PW4's home for treatment.

Thereafter, the group frog-marched the deceased from his home having doused their house with paraffin and setting it on fire. She decided to follow the group and when she was noticed, she was threatened that she may also suffer the same fate as her husband. According to her she saw the appellants as **"there was moon shining"** She knew the three accused as:

"1st accused is Kazungu Wamae's son, the 2nd is the son of Furaha Noti and 3rd accused is known to me by physical appearance."

Having been warned to keep off, she hid behind a cactus tree and saw her husband's private parts being set on fire, before eventually being killed.

The evidence of PW1 was corroborated by the evidence of PW4 **Karisa Yaa Baya** the husband of *Karemba* who had allegedly been bewitched by the deceased. He was at home on the material night when he was woken up by the appellants who were hurling insults at him. He was accused of 'sleeping' whilst his wife was dying. He came out of his house and saw a large group of people. He recognized his mother in-law; his brother in-law *Kahindi Ngumbao*, the 1st appellant; his **"wife's uncle who is 2nd accused and**

3rd accused is the younger brother to my wife.” He was related to the three appellants by virtue of marriage. Sensing danger from the enraged crowd, he chose to keep mum for his own safety. It would appear that the crowd which included the three appellants was so enraged that it would have set against any relation of the deceased. Indeed the crowd wanted to pounce on PW3 **Arnold Harold Nyanza** who was initially thought to be Samini, the deceased’s son. Fortunately for him, his life was spared when he explained and it was confirmed that he was not Samini. This was therefore a case of identification by recognition as PW1 as well as PW4 knew the appellants very well.

In **Anjononi & Others v Republic [1976-80] IKLR 1566**, the Court of Appeal observed that identification by recognition is:

“More satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other.”

Yet caution must also be exercised in accepting the evidence of identification for as was stated in **Abdala Bin Wendo v R 20 EACA 166**,

“On an identification issue, a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true must be true.”

On our part we rule out the possibility of mistaken identity as PW1, PW4 and the appellants were closely related to each other and the deceased was killed as it was alleged that he had bewitched Karembu. According to PW1, the deceased was told as much when he was forced out of his house in the dead of the night. The allegation of a witch is supported by the evidence of PW5 **James Charo Kadzeya**, the village elder of Kakoneni Sub-Location who when he got to the scene of the murder, he heard chants that the deceased who was witch had been killed. We find that the three appellants being relations of Karembu killed the deceased on the allegation that he had bewitched Karembu. Given the above, we reject the invitation by the appellants that the charge against them was not proved to the required standard. We find that the evidence against the appellants was sacrosanct and was carefully evaluated and examined by the trial court before returning a verdict of guilt against the three appellants. All the three appellants denied having killed the deceased. They however admitted that they were at the scene of the crime. Each of the appellants told the trial court that at the scene they found an old man (*the deceased*) exorcising evil spirits from Karembu. The 1st and 2nd appellants were Karembu’s brothers whilst the 3rd appellant as Karembu’s nephew.

The trial court considered the appellants defences and rejected them. It is our view that it is not difficult to fathom the trial court’s rejection of the appellants’ defences. Firstly all the three appellants admitted having been at the scene, although they denied any role in the commission of the offence. Secondly, it is important to bear in mind that Karembu whom as we have earlier explained was a close relation of the three appellants, had been ailing. Thirdly, the deceased was accused of having bewitched Karembu. This explains the infuriation by the appellants who when they went to the home of PW4, they accused him of “*sleeping*” whilst his wife was dying. Fourthly, the deceased was also fished out of his home by the three appellants on allegations of being a witch. It cannot therefore be true that the appellants were passive observers when the deceased was being tortured to death on allegations of having bewitched Karembu. We have therefore come to the inevitable conclusion that the appellants were part and parcel of the large crowd and the trio took an active role in killing the deceased, whom they accused of bewitching Karembu. It mattered not that the deceased was frog-matched and subsequently died in the hands of a large crowd as there was common intention to kill. **Section 21** of the Penal Code provides thus:

“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.”

The appellants together with others who were part of the crowd were joint offenders in prosecution of a common purpose, which in this case was to kill the deceased. We have no doubt whatsoever that the three appellants murdered the deceased and their appeals are devoid of merit as the convictions and sentences were properly founded.

For the foregoing reasons, we dismiss the appellants' appeals and confirm the convictions and sentences of death.

Dated and delivered at Malindi this 10th day of October 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL