



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 252 OF 2012

BETWEEN

EZEKIEL JUMA BARASA APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe, J) dated 15th March, 2012

in

HCCRC NO. 17 OF 2009)

JUDGEMENT OF THE COURT

The appellant, **Ezekiel Juma Barasa**, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code particulars of the Information being that on the 27th day of February, 2009 at Butali market in the former Western Province he murdered Simon Mungai Chikamai. The case was heard partly by Lenaola, J and then by Kimaru, J but was concluded by Chitembwe, J who in a judgement delivered on 15th March, 2012 convicted the appellant and sentenced him to twenty five years imprisonment the learned judge making the further order that the appellant to only qualify for parole after serving a minimum of twenty years imprisonment.

Those findings provoked this appeal premised on the three grounds of appeal set out in the Memorandum of Appeal drawn by the appellant's counsel, M/s Odhiambo Owiti & Company Advocates. In the first ground the trial court is faulted for giving undue regard and emphasis on the evidence against the appellant and disregarding evidence in the appellant's favour. In the second ground it is claimed that the trial court erred in failing to consider all the factors and evidence on record and in particular the evidence of the appellant while in the last ground it is alleged that the trial court erred in failing to find that the prosecution had not proved its case beyond reasonable doubt.

Being a first appeal we are to reconsider the evidence, re-evaluate and analyse the same and reach our own conclusions always remembering that we did not hear the witnesses or observe their

demeanour and we must give allowance for that See - **Okeno v Republic [1972] EA 32** and Also **Raphael Isolo Echakara & Anor v Republic (Kisumu) Criminal Appeal No. 44 of 2013 (ur)** amongst the many decisions that have come forth from this court and its predecessor on that duty of a first appellate court.

The case put forth by the prosecution was this: On 27th February, 2009 **Andrew Shimanyi (PW2) (Andrew)** was at his brother **Simon Shikamayi (deceased's)** hotel at Butali when the appellant arrived and ordered for food worth Kshs. 40/= which was served and he proceeded to consume it. A bill was presented but he refused to pay. He instead walked out and entered the nearby Highway bar where he proceeded to indulge in drinks with friends until 5:00 p.m. when the deceased in the company of Andrew confronted him and asked him to pay for the food he had earlier consumed. The appellant produced a knife which he used to stab the deceased in the chest inflicting injuries that killed the deceased.

Jebui Kongoi Mulupi (PW1) (Jebui), a local administrator, was attracted by a crowd at the said Highway bar. On walking there he found the deceased lying on the ground in a pool of blood writhing in pain. The appellant was at the scene standing over the deceased and was holding a knife which he used to threaten those around him. Jebui summoned administration police from the nearby Butali Administration Police Camp as he and members of the public followed the appellant who walked away from the scene. The appellant threw the knife into a sugar plantation but the same was retrieved and **No. 88658 PC Joshua Kiptilon (PW4) (the Police Officer)** of Kabras Police Station who later produced it in court as evidence. The police officer upon taking possession of the knife found that it was blood stained and was attached to three keys. He went to the appellants home on the night of the incident but did not find the appellant. On trying the keys he found that one key could open one of the padlocks in a house in the compound. The appellant was arrested the next day at a bus stage as he planned to travel to Mombasa.

Shikamai Shitanda (PW5), the father of the deceased, attended post-mortem on 4th March, 2009 and identified the deceased's body to **Dr. Benard Oburu Oreke (PW6) (the Doctor)** who examined the body and found that the deceased died of cardio-pulmonary arrest due to accumulation of blood in the cavity due to stab wounds to the chest.

Upon the trial court finding that the appellant had a case to answer the appellant in a sworn statement stated that on the material day he was at Highway bar where he drank alcohol in the course of which some people started a fight. He later went home. The next day he was arrested and told that the deceased had been killed in the fracas that had occurred at the bar. He admitted having fought with the deceased but denied killing him.

At the hearing of the appeal before us Mr. Kouko, learned counsel for the appellant, submitted that Andrew could not have had opportunity to see the appellant stab the deceased because he walked out of the bar after pointing him out to the deceased. Counsel wondered why the appellant would commit such a crime but remain at the scene enabling witnesses to gather and identify him. He also attacked evidence on the keys because the actual padlock was not produced in evidence and finally submitted that the appellant was prejudiced by shoddy investigations.

Mr. Sirtuy, learned Principal Prosecuting counsel, in opposing the appeal urged that the facts of the case were clear because it had been shown that the appellant unlawfully and fatally injured the deceased. Counsel submitted that it was not necessary to call many witnesses to prove the case.

Chitembwe, J, who convicted the appellant found as fact that the appellant entered the deceased's hotel and ate food which he did not pay for; that the appellant entered Highway bar where he remained until about 5:00 p.m. when the deceased in the company of Andrew asked him to pay for the food he had consumed earlier that day; that Andrew while walking out of the bar heard a scream and upon looking back he saw the appellant stabbing the deceased; that Jebui upon observing a group of people gathered at the said bar went there and found the deceased lying in a pool of blood with the appellant standing over him holding a bloodied knife; that the appellant left the scene but was followed by amongst others Jebui who retrieved the knife from the plantation where he saw the appellant throw it and that attached to the knife were keys one of which the police officer found could open a padlock in the appellants compound.

We have reviewed and re-evaluated the record and considered the submissions made before us.

The facts of the case show an unfortunate situation where the appellant's unprovoked act led to unnecessary loss of life. The appellant was served food which he happily consumed but refused to pay for. Such refusal to pay was not because of inability to do so – witness the fact that upon leaving the hotel the appellant entered a bar next door and proceeded to engage in a drinking binge which could very well suggest that he paid for drinks after refusal to pay for food whose bill was a mere Kshs. 40/=. Upon being asked by the deceased to pay for the food the appellant proceeded to produce a sharp knife which he used to inflict fatal injuries upon the deceased. This was witnessed by Andrew and there is the circumstantial evidence of Jebui and the police officer. Jebui went to the scene when it was still fresh and found the deceased was lying in a pool of blood while the appellant stood over him holding a bloody knife which he used to threaten those at the scene including Andrew and Jebui. Jebui followed the appellant who threw the knife into a sugar plantation before making his escape. This knife was retrieved and was produced in court as part of the evidence. Attached to the knife were keys one of which the police officer used to unlock a padlock in a house in the appellants compound. So there was the direct evidence of Andrew which was supported by the circumstantial evidence of Jebui and the police officer. As was held by the predecessor of this Court in **Kipkering Arap Koske & Anor v R [1949] EA 135**, in order to justify, a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. In this case the direct evidence of Andrew coupled with the circumstantial evidence proved as required that the appellant attacked and stabbed the deceased leading to death from the fatal injuries inflicted by the appellant.

The appellants defence that he engaged in a bar brawl was not true at all. The learned judge was right to dismiss that defence in the light of the evidence put forth by the prosecution against the appellant.

Upon our own reanalysis of the evidence we find that the appellant was properly convicted. There is no merit in this appeal which we accordingly dismiss.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF NOVEMBER ,2014

D. K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL