



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, KARANJA & MARAGA, JJ.A.)

CRIMINAL APPEAL NO. 498 OF 2010

BETWEEN

ANDREW NJERU MAKUNYI.....1ST APPELLANT

JOSEPHAT MUTEGI VIRINGO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence of the High Court of Kenya at Mombasa (Sergon, J.) dated 29th October 2010

in

HCCR CASE NO. 31 OF 2007

JUDGMENT OF THE COURT

The first appellant, Andrew Njeru Makunyi and the second appellant, Josphat Mutegi Viringo alias Majera were the first and second accused at the trial respectively.

They were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The charge stated that on 18th October 2002 at 10.00 p.m. with another not before court, they murdered Cyprian Kaburu. The appellants were convicted after trial and each sentenced to death. This appeal is against that conviction and sentence.

The prosecution called six witnesses at the trial, namely, Paustal Gitonga Julius alias Makucha (Makucha) (PW.1); John Gitonga (PW.2)(Gitonga), Dr. K.N. Mandalya (PW.3); Edward Njagi Makabu (PW.4) (Njagi); P.C. Joseph Kamau (PW.5) and CPL Masina Situma (PW.6). The key witnesses were Makucha; Gitonga and Njagi.

The prosecution case was briefly that on 18th October 2002 at about 9.30 p.m. the deceased was stabbed with a knife in the abdomen outside a palm wine bar by Oscar who was in the company of the two appellants after which the three fled. The deceased reported to P.C. Joseph Kamau who was manning a police road block nearby that he was stabbed with a knife by Njeru (1st appellant), Oscar and Mutegi (2nd

appellant). The deceased also later reported his assault to CPL Masina Situma at Inuka Police Post, Likoni. Thereafter the deceased was taken to hospital where he died on 20th October 2002. Dr. K.N. Mandalya who performed the postmortem on the body of the deceased on 1st November 2002 formed the opinion that the cause of death was hemorrhage shock due to stab wound on the abdomen.

P.C. Kamau started looking for the appellants and Oscar on the day following the report but he could not trace them as they had fled. The first appellant was ultimately arrested at his mother's house at Lunga Lunga on or about 20th October 2002. Oscar had not been arrested at the time of the trial. It is not clear when and where the second appellant was arrested. However he stated in his evidence that he was arrested sometime in 2007.

The first appellant testified at the trial that on the material day he left his place of work at 7.00 p.m.; that he passed by a nearby pub to take local brew; that he was served by the deceased and that he left the pub after a commotion broke out.

The second appellant on his part testified that on the material day he went to the house of Mama Betty which is next to a popular pub at 8.00 p.m. and left for his home at 11.30 p.m. after finishing his drink. He called Elizabeth Mwikali Wambua alias Betty as a witness who testified that the 2nd appellant visited her home to take palm wine on 18th October 2002 at 8.00 p.m. and that he left at 11.30 p.m. after the palm wine was finished.

The trial judge evaluated the evidence of two main witnesses Gitonga and Njagi at length and also the evidence of appellants and concluded thus:

“I am unable to believe the defence of alibi raised by D.W. 1 and D.W. 3. I find the evidence of P.W. 2 and P.W. 4 to be consistent. I find that the evidence of P.W. 2 and P.W. 4 places the two accused persons at the scene of crime. There was sufficient sort (sic) of light to enable the two witnesses identify the accused persons as the people who jointly assaulted the deceased. I am satisfied that the accused persons jointly with one Oscar who has not been apprehended so far to have had a common intention to commit the offence of murder.”

The main ground of appeal raised by both appellants is the credibility of the evidence of identification by Gitonga and Njagi.

It was submitted that the evidence of the two witnesses was inconsistent; that the witnesses did not describe the intensity of light and that an identification parade should have been held.

We have reconsidered the evidence of Gitonga and Njagi. Their evidence was consistent in material respects. They both testified that they were seated with the deceased before deceased left to buy cigarettes; that, with the help of light from a pressure lamp at the scene, they saw the deceased being assaulted; that they knew the attackers before as they lived in the same estate; that the first appellant held the deceased before Oscar stabbed him and that they were close to the scene of assault.

There was also the evidence of Makucha that both Gitonga and Njagi reported the assault of the deceased who was his nephew immediately and gave the name of the assailants, and, that the deceased was lying outside his house with a knife stuck in his abdomen. In addition there was also the evidence of P.C. Joseph Kamau that the deceased gave the names of the assailants. Indeed, the Police recorded in the postmortem form that the deceased was stabbed with a knife by known people. The trial judge also relied on the evidence of the first appellant who admitted that he was served by the deceased at the pub that there was sufficient light from the pressure lamp.

On our own evaluation of the evidence we are satisfied that the first appellant was in the company of Oscar and that he held the deceased as Oscar stabbed him. The first appellant was therefore properly convicted and his appeal is hereby dismissed.

However, the evidence of Gitonga does not connect the second appellant with the stabbing of the deceased. He testified thus:

“I saw Oscar remove a knife and gave a chase. Njeru also gave a chase. Njeru managed to catch up with the deceased. He held him and Oscar stabbed him with a knife.”

Njagi on his part testified:

“Shortly a young man known as Oscar came, slapped Kaburu on the face. Njeru came and whipped Kaburu on the back. Another one called Majera tried to separate. Njeru held Kaburu and Oscar stabbed Kaburu.”

Thus the evidence of Gitonga and Njagi exonerates Majera the 2nd appellant. The evidence of Njagi in particular shows that the 2nd appellant dissociated himself from the actions of Oscar and the 1st appellant.

In the result the appeal of the 2nd appellant is hereby allowed. His conviction quashed and sentence set aside. The 2nd appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED at Mombasa this 24th day of January 2013.

E.M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR