



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 128 of 2008

JACOB MUCHOMBA BAIMUNYA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lenaola, J.) dated 28th January, 2008

in

H.C.CR.C. NO. 56 of 2003)

JUDGMENT OF THE COURT

1. **Jacob Muchomba Baimuya**, the appellant herein was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, Chapter 63, Laws of Kenya in the High Court of Kenya at Meru (Lenaola, J.). The particulars of the offence were that on 6th September, 2002 at Kiguru Location in Meru North District within the then Eastern Province, the appellant murdered Jeremiah Kirema (deceased).
2. The prosecution called a total of six witnesses. It was the prosecution's case that on 16th August, 2002 PW1 (David Kimathi) (David) and the deceased underwent the rite of passage to manhood through circumcision. As per the Meru Custom freshly circumcised men were required to stay in seclusion for a certain period of time. Therefore, PW4 (Juanina Kangai) (Juanina) hired the appellant to nurse both David and the deceased in her home from the 16th August, 2002 to the end of September, 2002 for an agreed fee of Kshs. 1,000/= . The appellant occupied a hut in which he shared with the two boys. The appellant took care of the boys until 2nd September, 2002 when he demanded money from Juanina for his services. Juanina offered to pay him Kshs. 300/= . This angered the appellant and he threatened to burn down the hut in which the boys were staying. The threat was made in the presence of both David and PW3 (Simba M'amuru) (Simba). At around 11.00p.m the appellant took his personal belongings from the hut.
3. At around 2:00 a.m, the same night, Simba heard screams coming from the hut where the boys were sleeping. The hut was on fire. Simba managed to pull out the boys from the said hut. The boys were burnt. They were taken to hospital. David was admitted for 13 days while the deceased died on 6th September, 2002, four days after his admission. Meanwhile, the appellant, who hailed from the same village as Juanina, disappeared and was only arrested on 8th April, 2003, seven months after the incident.
4. In his sworn statement, the appellant testified that the deceased was his employee, helping him to

cut miraa in his shamba. He stated that Juanina requested him to take care of only David and not the deceased. He maintained that he was not being paid and that his services were voluntary; that the only thing he was to be given as per their custom was beer. He testified that at around 8:00 p.m. on 2nd September, 2002 he received information from his brother that his son was seriously ill. He immediately informed both Simba and Juanina to take care of David as he left to attend to his sick son. According to the appellant, he found out about the fire at the hut the following morning when one M'nana M'antike went to his house the following day, accusing him of burning the hut. He denied burning the hut and also denied that he disappeared to avoid arrest. He said he had gone to Kisimani to prepare his land for the planting season.

5. Based on the foregoing evidence, the learned judge, in his judgment dated 28th January, 2008, convicted and sentenced the appellant to death. Being aggrieved with the said judgment the appellant filed this current appeal based on the following grounds of appeal:

- ***The appellant was not afforded a satisfactory trial as envisaged by the then prevailing law with regard to presence of assessors in a trial.***
- ***The learned judge of the superior court erred in law and in fact in relying on evidence that was mere hearsay which was not supported by any credible, and/or supporting evidence.***
- ***The learned judge of the superior court erred in law and in fact in sustaining a conviction on circumstantial evidence which was riddled with inconsistencies and contradictions thereby failing to meet the threshold required for circumstantial evidence to support a conviction.***
- ***The learned judge of the superior court erred in law and in fact in convicting the appellant despite glaring inconsistencies and discrepancies in the evidence.***
- ***The learned judge of the superior court erred in law and in fact in failing to consider the appellant's defence as adduced.***

6. At the hearing of this appeal, Mr. Muhoho Gichimu, learned counsel for the appellant submitted that the evidence that was tendered at the trial court was purely circumstantial and that the same did not meet the threshold required to render the conviction therein safe. He maintained that the threats alleged to have been made by the appellant were hearsay and did not carry any weight. Mr. Gichimu stated that the trial court did not take into account the appellant's defence. He argued that the three assessors were not present throughout the trial rendering the same a nullity. He further submitted that the appellant was not given an opportunity to mitigate before sentence and therefore the same amounted to a mistrial. He urged us to allow the appeal.

7. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal maintained that the evidence against the appellant was overwhelming. He pointed out that the appellant took his belongings from the hut immediately after he threatened to burn the hut. He stated that the appellant's actions were a clear indication of his preparation to commit a felony. He submitted that the appellant's actions were consistent with that of a guilty person because he went underground for almost seven months after the incident. He further submitted that during the appellant's trial there were two assessors throughout, as required by law.

8. This being a 1st appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In **Okeno V. Republic [1972] E.A. 32** it was held:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see

Peters v. Sunday Post, [1958] E.A. 424.”

9. The evidence in this case was purely circumstantial. In ***Sawe -vs- R (2003) KLR 364*** this Court at page 372 held ,

'In order to justify, 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 other reasonable hypothesis than that of his guilt . There must be no other co-existing circumstances weakening the chain of circumstances relied on. '

10. The prosecution in this case proved beyond reasonable doubt that the appellant was hired by Juanina to nurse both David and the deceased who had been circumcised and were in seclusion as per the Meru custom; that on 2nd September, 2002 ,the appellant demanded payment for his services from Juanina ; that he was angered by Juanina's refusal to pay him his full dues and that he left with his belongings after threatening to burn down the hut in which the deceased slept. The said hut burnt down later that night at around 1:00 a.m and thereafter the appellant went missing from his home for close to seven months until he was arrested at Kisimani. Before the appellant disappeared he knew he was a suspect in the said incident. We are convinced that based on the series of events which took place prior to and after the hut was burnt down, that the evidence irresistibly pointed to the guilt of the appellant. Therefore, we agree with the following finding by the learned judge,

'I have elsewhere above set out the circumstances said to point to the culpability of the accused person and my view, as that of the assessors is that where an accused person makes a threat to burn the hut where the deceased was being nursed and later that night after the accused has moved out with all his belongings, the hut burns as threatened, and the deceased dies, no other reasonable hypothesis can be deduced save that the accused person carried out his threat as specifically made. Further, where the accused soon after the arson and death disappears from his homethen that conduct is truly inconsistent with the conduct of an innocent man and I agree with the submission that both circumstances as enumerated and if read together would lead to only one conclusion; the accused with prior malice set the hut in which the deceased was sleeping in on fire and the consequent death can only be placed in his hands.'

11. On the issue of assessors, we have perused the record of the trial court and have noted that when the trial commenced on 20th September, 2006 there were three assessors and that on subsequent hearings there were only two assessors. From the record it is clear that the learned judge discharged one of the assessors namely Fredrick Mburugu on 6th March, 2007 for being absent without lawful cause and proceeded with trial with the two remaining assessors pursuant to **section 298(1)** of the Criminal Procedure Code, Chapter 75 , laws of Kenya which states:

“ 298.(1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is for any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors.”

In ***Cherere Gikuli vs. Republic (1954) 21 EACA 304*** it was held,

'1. A trial which has began with the prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 (in this case section 298) of the Criminal Procedure Code.

2. To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either that the absent assessor is for any sufficient reason prevented from attending througout the trial or that he absents himself and it is not practicable immediately to enforce his attendance.'

Therefore, the appellant's trial was properly conducted with the two remaining assessors.

12. From the record of the trial court it is clear that the appellant's defence was considered and rejected by the trial court in view of all the surrounding circumstances and the prosecution's evidence. On our own evaluation of the defence we find nothing in it that would dislodge or cast reasonable doubt on the prosecution's evidence.
13. Lastly, it emerged during the hearing of this appeal that the appellant was not given an opportunity to mitigate before the learned judge pronounced the sentence. According to Mr. Gichimu the failure to do so amounted to a mistrial. The sentence herein was made as part of the main judgment that was delivered on 28th January, 2008. In **John Muoki Mbatha vs. Republic – Criminal Appeal 291 of 2008 (unreported)** this Court held,

' As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because in mitigation, matters such as age, and pregnancy in cases of women convicts may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the Court receives mitigating circumstances if any are offered.'

Therefore, the learned judge erred in sentencing the appellant in the main judgment without giving him an opportunity to mitigate. However, the said error does not in our view render the conviction and sentence issued by the trial court a nullity. In **William Chemase Sitienei vs. Republic -Criminal Appeal No. 291 of 2008** this Court held,

' Though the learned judge erred in sentencing the appellant in the main judgment without giving him or his advocate an opportunity to state mitigating factors, we find no fault in the manner the learned judge reached his decision in convicting the appellant.'

14. We find no reason to interfere with the conviction and sentence issued by the trial court in its judgment dated 28th January, 2008. Accordingly, the appeal herein is dismissed.

Dated and delivered at Nyeri this 23th day of May, 2013

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

MARTHA KOOME

.....
JUDGE OF APPEAL

J. OTIENO-ODEK

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR