



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 47 OF 2012**

**BETWEEN**

**ZAKAYO RUKARIA KAMAKIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction of the High Court of Kenya at Meru (Lesiit, J.), dated 10th November, 2011)*

in

H.C. CR. C. No. 23 of 2006)

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**JUDGMENT OF THE COURT**

On 28th March, 2006, at around 7.30 pm or 8.00 pm depending on the evidence of those who last saw **Gideon Mwenda (deceased)**, that was the last time he was seen alive at Rubiru Market. Samuel Mwethia M'Rimberia (PW 2), also a brother of the deceased, he told the court that on the material day, at about 7.30 p. m. he left the deceased at the shop of Francis Guantai (PW 1). The deceased was also seen at about 8 p.m. by Cyrus Muriungi (PW 6) a local civil leader at the time, who told the court that, he saw the deceased bending over a counter of the shop of (PW 1), while Zakayo Rukaria Kamakia (the appellant) was standing along the road across the shop. Apparently, PW 1 testified that at about 7.00 p.m., it is only the appellant who came to his shop in the company of other people. They bought items from his shop but the deceased was not among those people.

PW2 testified that at about 8 p.m., he heard the wife of the deceased being called and the caller was saying the deceased had been attacked. PW 2 with the deceased's wife and children went to PW 1's shop and found the body of deceased lying outside the shop. On checking, they found the deceased had died. PW 2 said he proceeded to make a report to the chief and also to the local police station. The chief of the area then was Abraham Gatobu Magambo (PW 4). He received the report from PW 2 at about 10 p.m. and the report was to the effect that the appellant killed the deceased. The chief and PW2 proceeded to Kariene Police Station to make a report.

At the police station, they found Chief Inspector Mohamed Mahmoud, (PW8) who was then the officer in charge. He recorded a murder report, he said the deceased was last seen with the appellant who was a

suspect. They went to the scene at Rubiri Market and found the body of the deceased lying on the ground with an injury on the head. They also mounted a search for the appellant beginning with his home as he was the one who was suspected of the murder. The appellant was not at his home, he was found sleeping under the bed in his brother's house. He was arrested and taken to Kariene Police Station. The appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence stated that on 28th March, 2006, at Uruku Location in Meru Central District, within Eastern Province, he murdered Gedion Mwenda.

The appellant could not plead to the charge immediately he was arraigned in court. When he was taken for mental examination, he was found to have abnormal mental status and was certified by Dr. A.K.S. Njuguna unfit to plead. This was followed by prolonged treatment at Mathare Mental Hospital which took slightly over one year. After treatment, the appellant was certified fit to plead and on 14th June, 2007 he pleaded not guilty to the charge. The appellant was tried with the aid of assessors.

The prosecution's case as presented against the appellant was that on the material day between 7 pm and 8 pm, Florence Kathuure Jacob (PW 5), was at her compound tying a cow. Her home was about 20 Metres from the shop where the deceased was last seen by PW 4 and near the scene of murder. She heard two people on the road talking and answering each other. She said she knew the voices of the two people who were quarreling for about 15 years and she recognized their voices. The two people were quarreling loudly. She heard the deceased tell the accused person that if it was money he wanted, he should say so, he gives him rather than engaging in a quarrel.

The appellant said he had no need for money, all he wanted was to kill the deceased. According to PW 5, the two people quarreled for about 20 minutes, she later heard blows as the two engaged in a fight, then there was silence which made her think the duo had stopped fighting. She went inside the house but after about 20 minutes later she heard the deceased's wife screaming. PW 5 went to answer the screams, she met the deceased wife at the gate and they went up to where the deceased was lying dead. The body was near PW 1's shop at the middle of the road, by then the shop was closed. PW 5 said she recognized the voices of the appellant as they were talking loudly. During cross-examination, she confirmed that there were many people speaking at the same time but she only recognized the voices of the appellant and the deceased. The other people were just passing on the road.

An autopsy on the deceased's body was carried out by Dr. Isaac Macharia (PW3) at the Meru General Hospital on 3rd April, 2006. The body of the deceased had a bruise on the forehead measuring 1 cm by 10 cm and internally, there was bleeding in the brain. The doctor formed the opinion that the cause of death was severe head injury.

The appellant was found to have a case to answer, he was put on his defence and he gave sworn evidence. He gave a chronology of events that happened on 28th March, 2006. He was drinking an illicit brew called "*kathoroko*" with his nephew from about 7 p.m. to 8 p.m. While in a drunken stupor he heard a knock on the door and they were all ordered by the police to go outside. They were arrested and taken to Kariene Police Station where he was held in custody. He claimed he was not told why he was arrested and all along he thought it was because of drunkenness, he was later told that the deceased died while they were together. He claimed the deceased was his friend but he denied that he had seen the deceased on the material day. He admitted that earlier in the day at about 6.30 p.m. he had passed by Rubiri Market while driving a cow he had bought. He passed by the shop of PW 1 greeted him but he proceeded to his home, took a bath and went on to drink. He denied having murdered the deceased.

The evidence as well as the law were summarized to the two assessors who remained in the trial, both returned a verdict of not guilty. The learned Judge, however, after analyzing the evidence was satisfied that there was circumstantial evidence that showed the appellant was seen with the deceased, and they were heard by PW 5 quarreling over money. Immediately, thereafter, the deceased was found dead. Moreover, when the police went to arrest the appellant, they found him hiding under the bed in his brother's house. The Judge found the prosecution proved its case beyond reasonable doubt, that it was the appellant who caused the death of the deceased. This is what the Judge had to say in her own words:

***“I find that the circumstances taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. I am convinced that the prosecution evidence points directly and irresistibly to accused person as the person who inflicted the head injury on the deceased, and that it is the head injury that caused the death of the deceased.***

***I have also considered the entire evidence and find that there was no co-existing circumstances that would weaken the ingredient of the accused person’s guilt.”***

Having made that conclusion, the Judge went ahead to consider the defence by the appellant and dwelt on two aspects *alibi* and *insanity*. The defence of *alibi*, was found lacking in credibility while the defence of mental insanity that was also supported by medical evidence was found credible. After taking into account the ratio in the authority of the case of ***Marii v R, 1985 KLR 710***, the Judge reduced the charge of murder to manslaughter and found the appellant guilty of the offence of manslaughter contrary to **Section 202** of the **Penal Code**.

Interestingly, no terms for holding the appellant in custody or sentence was pronounced. This is what the Judge ordered:

***“I enter a special finding that the accused is guilty of the substituted charge of manslaughter contrary to Section 202 of the Penal Code, but insane.”***

This is the judgment that has provoked this appeal that was argued based on the homegrown grounds of appeal and the supplementary grounds filed by Mrs. Ntarangwi, learned counsel for the appellant. These grounds can be condensed to the following:

- v. ***That the Judge was faulted for failure to follow the laid down procedure under Section 265 of the Criminal Procedure Code by failing to indicate the age of the assessors and to record the reasons for the absence of one assessor during the trial. (See the case of *Njagi v R, Nyeri Criminal Appeal Number 120 of 2006.****
- v. ***The main witness that is PW 5 did not record her statement, whereas the offence was committed on 28th March, 2006, PW 5 recorded her statement in 2007 after attending court. According to counsel for the appellant this was evidence collected to fill the gaps along the way.***

The last two grounds of appeal urged were regarding the quality of evidence by PW 5 on the voice identification. Counsel submitted that PW 5 referred to the appellant as “*Mutuma*” which name does not appear anywhere. The identification of voice also fell short of the threshold provided for in the case of ***Choge v R, 1985 KLR 1***. Counsel urged us to allow the appeal for reasons that there was no evidence to support the findings of manslaughter and the sentencing was wrong as no sentence was pronounced.

Mr. Kaigai, learned Assistant Director for Public Prosecutions, opposed this appeal by supporting the findings of the learned trial Judge. However, on sentencing he conceded that since the appellant was found guilty of manslaughter, a sentence ought to have been pronounced so that the appellant, although to be held at the pleasure of the President **under Section 166(1), (2)** of the **Criminal Procedure Code**. It was subject to a defined period. Mr. Kaigai urged us to order a retrial

This is a first appeal, that being so we are duty-bound to subject the evidence on record to a thorough evaluation and to make our own conclusions in the matter always allowing for the fact that the trial court saw and heard the witnesses appearing before it. This Court stated in ***Pandya v R, [1957] EA 338*** at page 337:

***“On first appeal from a conviction by a Judge or Magistrate sitting without a jury, the appellant is entitled to have the appellant court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and***

***reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellant court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellant court must be guided by the impression made on the Judge or Magistrate who saw the witnesses but there may be other circumstance, quite apart from manner and demeanor which show whether a statement is credible or not which may warrant a court in differing from the Judge or Magistrate been on a question of fact turning on the credibility of witnesses whom the appellant court has not seen. On second appeal it becomes a question of law as to whether the first appellant court on approaching its task, applied or failed to apply such principles.”***

See also *Okeno v R*, [1972] E.A. 32.

It is also evident that there was no eye-witness to the offence and we must therefore consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. That was the standard set out in *Rex v Kipkering arap Koske*, 16 EACA 135. But in *Musoke v R*, [1958] EA 715, citing with approval *Teper v R*, [1952] A.C. 480, the predecessor of this Court added a further principle that:

***“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”***

It is a sad fact that the deceased was seen alive on 28th May, 2006, at about 7.30 Or 8.00 p.m. at a shopping centre where there were many people, and soon thereafter, his wife, brother and others were called to witness the lifeless body of her husband and brother respectively and yet nobody from the people who were said to have been at the shopping centre witnessed the murder. The only circumstantial evidence that placed the appellant on the scene of murder was by PW 6 who said he saw the appellant standing at the shop of PW 1 while the deceased was on the opposite side of the shop. Incidentally, PW 1 said he saw the appellant at about 7.00 p.m. while he was busy selling in his shop but he did not see the deceased.

It is apparent this evidence of PW 1 was not evaluated by the trial court, particularly the fact that the appellant admitted in his defence that he passed by PW 1’s shop while driving a cow he had purchased on the same day. Another aspect, which we find disturbing is the evidence of PW 5, who was essentially the main witness. PW 5 was tying a cow in her compound which was about 20 metres away from the scene of murder. She said she recognized the voices of two people who were quarrelling. This is what she said in her own words:

***“The two people were quarrelling loudly. I heard Mwenda tell Mutumu that if it was money he wanted he should declare so he gives him as he did not want quarrels. Mwenda is deceased Mutuma is the one in the dock..... (identifies accused).”***

This court as was also appreciated by the trial Judge, accept the principles set out in the case of *Choge v Republic* (*supra*) as the legal basis for acceptance of the evidence of voice identification:

***“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. In the instant case, it was safe to say that Okumu’s identification of the 1st appellant’s voice was free from all possibility of error.”***

Unfortunately, this evidence of voice identification was not analyzed by the trial Judge. We say so because the discrepancy on whether the appellant was “Mutuma” was not resolved. If PW 5 knew the appellant that well, then she should have known his name. Another aspect the Judge did not consider was that PW5 admitted that she heard other voices of other people who were passing at the same place. This is compounded by the fact that this witness did not record a statement until when the trial was in progress. It was common ground and brought to the attention of the Judge that her statement was not among the committal bundles. The Judge was persuaded by the fact that the appellant was arrested while hiding under the bed in his brother’s house, a fact that pointed to his guilty mind. The appellant gave evidence that he was drunk of illicit brew which tended to affect his mental capacity. In our view, there was a possibility that his state of drunkenness could also have led him to sleep under the bed in his brother’s house. In other words, the circumstances of this case did not lead to only one conclusion that it was the appellant who had the opportunity to kill and indeed killed the deceased.

Before we pen off this judgment, we also point out that after the Judge made a special finding of guilty of manslaughter, there was no order made regarding the custody of the appellant as provided for under **Section 166(1), (2) of the Criminal Procedure Code:**

***“(2) Where a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused person to be kept in custody in such place and in such manner as the court shall direct.”***

There was no order regarding the holding of the appellant for a particular period or place, and the question that was never answered was on what basis was the appellant held. If this was the only problem of this appeal we would agree with the submissions of Mr. Kaigai the conviction be upheld and the matter of sentencing be remitted to the High Court. Alternatively this being a first appeal, we could have sentenced the appellant appropriately. However, as pointed out, the evidence of identification of the appellant, coupled with the circumstances of this case, are not safe to sustain a

conviction of the offence of manslaughter.

The upshot of the foregoing is that this appeal is meritorious, and we allow the same. We set aside the conviction of the offence of manslaughter and order the appellant be set at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of July, 2013.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO – ODEK***

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***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**