



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 129 OF 2012

BETWEEN

F.S.W APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kakamega

(Lenaola, J.) dated 4th November, 2006

in

H.C.CR. NO. 52 OF 2006)

JUDGMENT OF THE COURT

The appellant, *F.S.W*, together with another person namely *A. W*, were, in an Information dated 20th February, 2008, and presented to Court on the same date, charged with the offence of murder, the particulars of which were that:-

“On the night of 18th/19th day of August 2006 at [particulars withheld] in Kakamega District within Western Province, jointly murdered R.N.”

They each denied the charge but after full hearing first before Ochieng J. who heard five witnesses and went on transfer and thereafter before Chitembwe J. who heard the remaining three witnesses and found both accused then before him had prima facie case established and put them on their defence then also ceased to exercise jurisdiction and lastly before Lenaola J. who heard the unsworn statements of the then two accused and submissions by their counsel, the appellant, who was the second accused in the High court was found guilty, convicted as charged and thereafter sentenced to death. The other accused person was acquitted and released.

The appellant felt dissatisfied with that conviction and sentence. He moved to this Court on an

appeal citing in total ten grounds of appeal the summary of which is that the learned judge erred in law and fact in convicting him notwithstanding that the evidence in respect of his identification as the perpetrator of the offence was unreliable and inadequate; that the learned judge erred in convicting him of the offence of murder whereas there was no malice aforethought established as against him; that the learned judge erred in convicting him despite the contradictory evidence on material aspects of the case one of which was that the evidence of postmortem report contradicted that of the first three witnesses as to the possible cause of death of the deceased and that the learned judge of the High court erred in rejecting alibi defence advanced by the appellant.

Mrs. Onyango, the learned counsel for the appellant, adopted the same grounds and urged us to accept that the evidence that was on record was not reliable and thus the trial court erred in entering a conviction based on the same. She referred to the evidence of the main prosecution witnesses namely: **E N (Pw1), F.M (PW2), F.S.T (PW3) and Dr. Jason Amukonyi (PW7)** and contended that their evidence contradicted each other and in some cases each witness's evidence was so full of discrepancies and inconsistencies that no conviction could safely be entered on the basis of such evidence. In her view, the Doctor's evidence that the deceased had bruises on both knees showed that he did not die mainly because of the force of a stone thrown at him from far. She urged us to allow the appeal.

Mr. Mongare, learned Senior Prosecuting counsel, conceded the appeal stating that the evidence on record demonstrated that the light obtaining at the time of the incident was not such as would enable proper identification of the perpetrators of the crime and secondly, the evidence of F was contradicted by that of F to such an extent that no conviction could be safe. He felt the benefit of doubt should have been given to the appellant.

On the fateful day, the late evening of 18th August, 2006, some members of the public from [particulars withheld] location, were celebrating the circumcision of one P who was circumcised at the advanced age of 46 years. They were singing as they were dancing along [particulars withheld] to Shinyalu road. The deceased, E, F and E who were aged between 17 and 12 years respectively joined them. To be precise, E was 17 years, F was 15 years, the deceased was 14 years and E was 12 years. It is not clear as to what happened as the singers were going along the road for there are different versions given in evidence by the three main witnesses E, F and Fidelis C.T (Pw3) but all the three of them stated that stones were thrown at the dancers and in the course of the apparent fracas, the deceased was hit and died instantly. As the versions were different, we shall endeavour to set out what each of the three main witnesses said in their evidence in chief and in cross examination.

E was 17 years when he gave evidence and was in standard 8 at [particulars withheld] Primary School. On 18th August, 2006, at 9.00 pm., he was at home when he heard people singing along the road. He left home together with the deceased, F and E. They joined those who were singing. There was moonlight. The appellant, whom he referred to as F. S, chased people from the road. He had known the appellant and his co-accused before that date as they were boda boda operators along the same road. At that time he saw the co-accused holding two bicycles one in each hand while the appellant had stones in both hands, and was using the stones to hit people who were on the road, throwing stones at them. He (witness) and E ran off and went home but the deceased and F remained on the road. Once home, they heard someone crying and someone came home and called them. His brother was killed. They rushed to the scene and found many people. His father and some other young men went to report the incident to the police station.

In cross examination, E was shown his statement he had made at the police station immediately after the incident and he confirmed that what he had told the police was the whole truth and that was that he had not named the accused person to the police neither by their real names nor by their local names; that he did not tell the police about the appellant and his co-accused; that he did not tell the police that he saw the appellant with stones nor that the second person was holding two bicycles; that he did not tell the police that the two accused were at the scene, though he knew who killed his brother, he did not put it down in his statement to the police. He ended his cross examination by saying he did not see who hit his brother with a stone. In re-examination he said inter alia:-

“It is the statement which contains the truth. Yes, the statement contains the truth as I told Mr. Kerich. I repeat that I did not see the two accused.”

Then comes F.M. He said in his evidence in chief that he was 15 years old and was in standard five at [particulars withheld] Primary School. He was together with his brothers when they joined a group of dancers that were singing along Khayega – Shinyalu road at about 9.00 pm. There was light from above, so it was not dark, but they were not seeing very clearly. Whilst singing, they met two people who had boda boda. Those two people started chasing him and his brothers. He had known the two people before that day. The two people had a torch and he saw them very clearly. He then identified the appellant and his co-accused in the dock. The co-accused was holding a torch which he used to *“shine light on the people while the appellant was throwing stones at the people.”* He ran towards home but did not reach home. He went back to the scene and found his deceased brother lying down and was alone. He saw him bleeding from the head and he started crying. E then went to call their mother, and later to call their father. The other relatives reported to the scene and then went to Khayega Police Station leaving him still at the scene.

In cross examination, he said that when he saw people who started to throw stones at them, he went off to a distance of 10 metres and when he was there, he did not see what was happening behind him. Then he said:

“I knew who hit my brother. It was S (2nd Accused). I saw him hit my brother with a stone. I saw that very well. The first accused only shone torch.

When shown the statement he made to the police, this witness said:-

“In my statement I did not mention either a torch or stones which the accused had. I mentioned a panga when I made my statement. I was sleepy. I did not tell the police that those who killed my brother were our neighbours. In the statement I said I heard my brother screaming from far. But 10 metres is not far. My statement reads that I heard some children saying that Richard had fallen down.”

In his re-examination he said he saw the persons who hit his brother with a stone, though not very clearly and he went on:-

“It was S, the 2nd accused. I did not see what he used to hit the deceased.”

The third important witness is F.C.T. He was a relative of P the person whose circumcision was the genesis of the entire saga. He was among the more than 20 people who were singing along the road. He also confirmed that there was moonlight. As they were singing, the young children were placed on the side of the road. At that time, two boda boda people appeared. He identified the appellant and his co-accused. According to this witness, the appellant and his colleague were on their bicycles and they rode into the crowd from the opposite direction. A young boy Edwin Sore was knocked down by the two boda boda persons. F picked that young boy and then asked the appellant why they knocked down that boy. The appellant jumped off his bicycle, held F. Other people intervened and the appellant got back to his bicycle and rode off to a distance of about 20 metres and then turned back towards the crowd and said in Luhya, words to the effect **“I will kill somebody today.”** The crowd continued dancing and singing but after a distance of 50 metres stones started being thrown to them from behind. F and two young men then stood on a raised ground on the side of the road. The deceased was seated close to F. Suddenly the deceased fell forward, as he screamed once *“Aaah.”* F saw blood oozing from one side of the deceased’s head. He turned the deceased and then he (F) started screaming as he followed the appellant and the other who were on their way to Khayega market. He ran after them screaming that they had killed the deceased. He then called the deceased’s mother and told her that the appellant and the other had killed her son. In cross examination this witness stated inter alia:-

“I do not know what exactly hit the deceased.”

and after describing what the appellant and his co-accused were wearing that night he concluded his evidence in cross examination by saying:-

“I do not know what exactly hit the deceased.”

The above three were the main witnesses in this case as far as identification of the perpetrators of the offence was concerned. Dr. Jason Amukonyi (PW7) examined the body of the deceased and stated that the cause of death, was head injury due to fracture of the skull. He also saw bruises on both knees. **Julius Bulenda Shikoli** (PW4) was present when the postmortem examination was done on the body of the deceased. He was together with **Dismas Shikanga Shihachi** (PW5) who identified the body to the doctor for postmortem examination. **B.K** (PW6) was the mother of the deceased and she reported to the scene after the incident had taken place and found her son already dead and lastly was **PC Hillary Kepich** (PW8), who was the investigation officer in the case together with Inspector **Patrick Ngeiywa**. The appellant denied the charges and in his unsworn statement said he was at his place of work on the material date in Nairobi and was not at the scene. Thus he raised alibi defence.

We have given detailed aspects of the evidence of the three witnesses above because in law, this being the first appeal, the appellant is entitled to fresh analysis of the evidence that was adduced before the trial court, and to fresh and detailed evaluation of the same before we reach our own independent conclusion in the matter – see the well known case of **Okeno vs R. (1972) EA 32**.

The appellant’s defence was that he was not at the scene on the material date. He was at his place of work in Nairobi. He thus as we have stated raised what is commonly known in legal jargon as alibi defence. That enjoined the Court to consider with great care the evidence of identification that placed the appellant at the scene on the material date and at the material time and to ensure that it left no doubt in the mind of the Court that the appellant was indeed at the scene and was the perpetrator of the offence he was charged with before a conviction could be entered against him on reliance on such evidence. The learned Judge of the High Court agreed that the entire case turned on the issue of identification of the appellant. He considered the evidence of E, F and found the two witnesses unreliable as their evidence was inconsistent and contradictory. We agree with him in that respect. He however found the evidence of F cogent, clear and completely unshaken during cross examination. He had the following to say on the evidence of Fidelis upon which he relied to convict the appellant:-

“21. The evidence of PW3 however was cogent, clear and was completely unshaken during cross examination. He was at the scene, had an altercation with the 2nd accused who then grabbed him before releasing him and he saw him using moonlight at close range. The witness heard the 2nd accused declaring that he was going to kill someone that day. PW3 was next to the deceased when he was hit and his first action was to run after the accused persons who were cycling away and shouting that they had indeed killed someone..... I am convinced beyond reasonable doubt that the witness was present at the scene and his proximity and prior knowledge of the accused persons made his recognition using moonlight at 9.00 pm., beyond doubt.”

The learned Judge of the High Court having made that finding also found supporting evidence in support of his finding in the witness giving the names of the appellant and his co-accused and that the appellant was arrested much later after several months in Nairobi and thus his conduct in running away supported the evidence of F.

As we have stated, being a first appeal, we have on our own considered the evidence of Fidelis as well. We have spelt out above the same evidence in chief and in cross examination. We have agreed with the learned Judge of the High Court in rejecting the evidence of E and F as indeed those two did not meet the standards set out by this Court for a witness whose evidence the Court can rely to convict an accused person. That standard was set out in the case of **Ndungu Kimanyi vs R. (1979) KLR 1442** where this Court stated:-

“In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

Those two witnesses were clearly unreliable. However, in our view, the learned Judge of the High Court in relying on the evidence of F, a single witness evidence on identification, was right in warning himself that he needed to consider such evidence with greatest care before basing a conviction on it. He was right in his citation of the case of **Samuel Kanyi vs R. (2001) KLR 70** in support of that principle. But did the learned judge exercise greatest care as is also required in such cases particularly when the conditions for proper identification were difficult as was, in our view, the case on the night the incident took place? Did he consider that there were over 20 people dancing and singing along a road at night with only moonlight to aid them in seeing other people – what is called multitude of by passers? Did he consider that F had had altercations – indeed a fight with the appellant and had reason to implicate the appellant even if the appellant was not at the scene when the alleged stone was thrown? On our perusal of the judgment, there is nothing to show that he considered the strength of the alleged moonlight. And to cap it all, the learned Judge, with respect, failed to appreciate and to consider that F said that as the deceased was sitting close to him, suddenly, he fell forward and screamed **“Aaah,”** but he did not see what hit the deceased or who hit the deceased. In fact, the learned Judge did not consider the part of the evidence of F in cross examination, we have reproduced herein above namely:-

*“I do not know what exactly hit the deceased. **“After the deceased fell, I saw the bicycles of the two accused riding away. I do not know what exactly hit the deceased.”***

In our view, it is clear that even Fidelis did not know who killed the deceased and could as well have ran after the appellant and co-accused as the ones who had caused trouble to the dancing and singing members of the public celebrating circumcison of P and not that he saw them hit the deceased even if we were to accept that the appellants were the people who were interfering with the celebrations.

We have also considered whether, in the circumstances prevailing at the relevant time, it could be said that only the appellant and none other could be responsible for the death of the deceased. We are unable to come to that conclusion because as stone throwing had started, any other person including those seeking to expel the alleged attackers could have thrown the stone. Again the Doctor recorded in the postmortem report and said in evidence that the deceased was also bruised on both knee joints. The evidence of Fidelis is that the deceased was sitting next to him and suddenly fell forward and in doing so screamed once **“Aaah,”** and then died there. In such a scenario, it becomes difficult to appreciate how the alleged hitting with a stone which was not witnessed by F could have caused injury on the head – a deep penetrating wound on the occipital region of the head and bruises on both knee joints. One wonders in these circumstances whether any other source of attack existed.

In our view, had the learned Judge considered those other aspects and particularly that F did not see what happened to the deceased that caused his sudden fall forward and did not see who hit him as F clearly said in his cross examination, he would have certainly entertained reasonable doubt as to whether the appellant was indeed positively identified as the perpetrator of the offence. The appellant’s conduct, we agree, would have been an added evidence against him, but only if it were positively proved that he was at the scene and that he was the one who hit the deceased. In the existence of doubt as to proof of those aspects, his being away from the area after the death of the deceased would be neither here nor there.

The above is enough to show that in our view, Mrs. Onyango’s submissions on the issue of identification are based on good grounds and cannot be wished away and Mr. Mongare did well to concede the appeal. We are of the view that this is a suitable case for our intervention as the evidence

availed at the trial left lingering reasonable doubts the benefit of which must be given to the appellant. Conviction in such circumstances would be unsafe.

The appeal is allowed, conviction quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 26th day of September, 2013

J.W. ONYANGO OTIENO

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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

I certify that this is the
true copy of the original

DEPUTY REGISTRAR