



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WARSAME, KIAGE & M'INOTI, J.J.A.

CRIMINAL APPEAL NO. 586 OF 2010

BETWEEN

KYALO KALANI.....APPELLANT AND

REPUBLIC RESPONDENT

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

Nairobi (Lesiit, J) dated 17th December, 2010

in

HCCC NO. 76 OF 2009)

JUDGMENT OF THE COURT

This is an appeal from the High Court's original criminal jurisdiction. The appellant, Kyalo Kalani was on 28th August, 2009, charged with murder contrary to *section 203 as read with section 204 of the Penal Code, cap 63, Laws of Kenya*. The particulars of the offence were that on 4th August, 2009 at Isinet Masai Reserve in Loitoktok District in the then Rift Valley Province, he murdered Stephen Kisyula Kyenze.

The prosecution called 10 witnesses while the appellant gave sworn evidence and called no witness. On 17th December, 2010, Lesiit J found the appellant guilty as charged, convicted him and sentenced him to death as provided by law. Aggrieved by the decision of the High Court, the appellant appealed to this Court. His petition of Appeal (sic) filed on 30th December, 2010 and the Supplementary Memorandum of Appeal filed on 22nd July, 2013 raise a total of 18 grounds of appeal. At the hearing of the appeal, however, Mr Evans Ondieki, learned counsel for the appellant compressed the grounds of appeal into the following five grounds which he urged before us:

1. *That the learned trial judge erred in law by failing to record the proceedings as required by section 197 and 198 of the Criminal Procedure Code, cap 75 Laws of Kenya;*
2. *That the learned trial judge erred in law by convicting the appellant on the basis of circumstantial evidence that did not meet the required legal standard;*
3. *That the learned trial judge erred in law and in fact by failing to evaluate the entire evidence*

and draw proper conclusions;

4. That the learned trial judge erred in law by terming the appellant's defence as a lie when the same was plausible; and

5. That the learned trial judge erred in law by convicting the appellant without proof of *mens rea*.

Before we consider the grounds of appeal, it is apt to highlight the main evidence adduced at the trial. The main prosecution evidence was tendered by PW1 and PW9. PW1, Kone Dima, was a neighbour of the appellant and the deceased. His *shamba* is about 150 „steps“ from that of the appellant. On the material day, at 8.30 pm, PW1 was guarding his *shamba* from wild animals. He heard noises that he likened to maize being pounded. He immediately went out to check the cause of the noise and met the appellant crying. He talked to the appellant, but he did not respond, disappearing instead into a maize plantation. A short distance further, PW1 found the deceased lying down and a torch next to him. The deceased was bleeding from the ears and had injuries on the head and face.

PW1 called the police on a cellphone and was advised to look for a motorcycle to take the deceased to the clinic at Isinet. With Alex Rukwaro (PW2) and one Kimani, they got Martin Mbae (PW6) to take the deceased to the clinic. Kimani went on the motorcycle while holding the deceased who could not stand or support himself. The deceased died before reaching the clinic and was laid down by the roadside at Isinet Centre. His body was subsequently taken to Loitoktok District Hospital where a post mortem was conducted by Dr John Motaku Waiharo (PW4) on 10th August, 2009. The Doctor noted multiple lacerations on the skull, a deep 8 cm long cut above the right eye, 8cm long laceration of the left cheek and a 6 cm long cut on the left leg. He formed the opinion that the cause of death was head injury with massive intracranial hemorrhage and brain trauma secondary to blunt trauma.

The evidence of PW9 Musyoka Mutenyi Joseph was that he too is a neighbour of the deceased and the appellant. He had known the appellant for about 9 months. On the material night, as he entered “kwa Wangombe” hotel in the neighbourhood, he encountered the appellant leaving the hotel. The appellant, who was drunk, informed PW9 that he was going to the deceased to ask him why he had abused him. PW9 tried to dissuade the appellant, in vain. The appellant then walked away towards the house of the deceased. As PW 9 was later leaving the hotel, he heard the sound of something being hit four times. The sound came from the direction of the appellant's house. He proceeded to his own house and got a three battery torch. In the torch light, he saw the appellant running into a maize plantation. He then met PW1 who told him that the deceased had been injured by the appellant. He went and saw the deceased lying down bleeding from the head and ears. After the deceased was taken to the clinic on a motorcycle, PW9 joined other neighbours in the search for the appellant.

PW3, APC Solomon Lengiteng, testified that upon learning of the incident on 4th August, 2009, and in the company of APC Mugo, they went looking for the appellant the same night. They did not find him and resumed the search next morning at 6am. At 9am PW3 was informed that the appellant had been arrested by members of the public at Manira. He proceeded to Manira and re- arrested the appellant.

In his sworn defence the appellant testified that on the material day he had been working in his *shamba*. Between 12.30 pm and 1.30 pm he went to a local brew den and took some *chang'aa*. He also carried away some more *chang'aa* in a 5 litre jerry can. He went back to his *shamba* and worked from 3 pm till 5.30 pm. Between 5.30 pm and 8pm he was just resting at “kwa Wangombe” Hotel, from where he went to his *shamba* and lit a fire. While standing by the door of his house, the deceased shone a torch in his face and hit him on the leg with a stick. The deceased asked the appellant to leave the locality, or else he would kill him. The deceased threw a stick at the appellant which he successfully dodged and ran to seek refuge at Mulwa's home. Later the appellant went back to his house and started taking his *chang'aa*. Once again the deceased shone his torch in the appellant's face, and hit him on the left eye. The appellant then „pushed“ the deceased away and escaped to hide from him.

The next morning, as he went to report to the police that he had been assaulted by the deceased, the

appellant continued, he was arrested and tied with a rope by one ole Mambo. Ole Mambo called the police on his cellphone and shortly the police arrived in a motorcycle and took the appellant to Seneti Police Station. In essence, the appellant's position was that he had nothing to do with the murder of the deceased.

As we consider the grounds of appeal presented by the appellant, we remind ourselves of our role as a first appellate court. That role was succinctly articulated as follows in OKENO V REPUBLIC, (1972) EA 32:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v Republic (1957) EA

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 conclusion [Shantilla M. Ruwala v Republic (1957) EA 570]. It is not the function of the 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) EA

424]”.

In the first ground of appeal Mr Ondieki assailed the trial court for failure to record the proceedings as required by *section 197 and 198 of the Criminal Procedure Code*. Although those two provisions relate to proceedings before the subordinate courts, the Criminal Procedure (Record of Evidence in the High Court) Rules (L.N. 344 of 1958) made under *section 200* of the *Code* provides that evidence before the High Court shall be recorded in the manner prescribed by *sections 197, 198 and 199 of the Criminal Procedure Code* in respect of trials before a magistrate. At the hearing, Mr Ondieki did not demonstrate how *section 197 of the Code* was violated in the proceedings before the High Court, seeking to focus instead on *section 198 of the Code* which requires that whenever any evidence is given in a language not understood by the accused person, it shall be interpreted to him in open court in a language he understands.

According to Mr Ondieki, the appellant understood only the *Kikamba* language, but the record of the Court did not indicate the presence of a *Kikamba* interpreter throughout the proceedings. He relied on the record of the court on

28th August, 2009, when Margaret Mutuku, a higher clerical officer from the Criminal Division was present in court during the taking of the plea. The record indicates that the charge and ingredients thereof were read out and explained to the appellant in *Kikamba* after which a plea of not guilty was entered. Mr Ondieki argued that thereafter, there was no record of a *Kikamba* interpreter in the proceedings and that the appellant did not understand what was going in court.

The importance of the right to an interpreter in a criminal trial cannot be gainsaid. It is an integral part a fair trial and is intended to ensure that an accused person, who risks life and liberty, fully understands the case against him and is able to defend himself adequately. It was a right guaranteed under *Section 77(2) (f)* of the former *Constitution* and is currently guaranteed under *Article 50 (2) (m) of the Constitution of Kenya, 2010*. So important is the right to fair trial that it is one of the few rights and fundamental freedoms that

cannot be limited under *Article 25*. In DIBA WAKO KIYATO V REPUBLIC(1982-88) 1 KAR 1974, this Court emphasized the importance of the right to an interpreter as follows:

It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused

person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”

On the law and the facts of this appeal however, we are unable to hold that the appellant's right to have the trial conducted in a language that he understood was violated. The record of the trial court for 28th August, 2009, also discloses that the appellant had informed the court that he was proficient in both Kikamba and Kiswahili. Throughout the proceedings, the language of the court is indicated as English/Kiswahili. The appellant was represented by counsel throughout the proceedings and the issue of his not understanding the proceedings was never raised before the trial court. PW 1, PW2, PW3, PW5, PW6 and PW9 gave their evidence in Kiswahili. The record shows that the evidence of the four witnesses who testified in English was interpreted in Kiswahili. For his part, the appellant offered a very robust sworn defence in Kiswahili. We do not find any merit in the contention that the trial was conducted in a language that the appellant could not understand, or that the appellant did not understand what was going on. As correctly observed, in our view, by the High Court in SOLOMON V REPUBLIC, (2010) 1 KLR 423:

“The law on the use of language is very clear. The language used need not be the accused person's mother tongue; it need not be the language of his choice either. All it needs to be is a language clearly understood by the accused.”

The second ground of appeal is that the appellant was convicted on circumstantial evidence that did not exclude other reasonable explanation of the cause of the injuries from which the deceased died. Mr Ondieki argued that since it was in the evidence of several of the prosecution witnesses that the area where the deceased died was frequented by wild animals such as zebras and elephants, it was a plausible explanation that the injuries from which the deceased died were inflicted by wild animals. Mr Kioko Kamula, the Assistant Senior Director of Public Prosecutions submitted that the trial court properly addressed itself on the circumstantial evidence adduced and there was no evidence on which the involvement of wild animals in the death of the deceased could be deduced.

There was no direct eye witness of how the deceased sustained his injuries. The circumstantial evidence came from the neighbours, PW1 and PW9. PW1, upon hearing pounding noises from the direction of the appellant's home, went to find out what was happening and met the appellant crying before he disappeared into a maize plantation. A short distance away he found the deceased lying down injured and bleeding. PW9 met the appellant as he was leaving “kwa Wangombe” hotel and the appellant informed him that he was going to find out from the deceased why he had insulted him. This witness also testified to hearing the sound of something being hit four times coming from the direction of the appellant's home. When he shone his torch, he saw the appellant running away. He met with PW1 and he also saw the deceased lying down injured and bleeding.

The learned trial judge reminded herself that the evidence of PW1 and PW9 was circumstantial evidence. She cited the three tests in ABANGA ALIAS ONYANGO V REPUBLIC, CR. A. NO. 32 OF 1990 which circumstantial evidence must satisfy, namely, that it must be cogent and firm, it must be definite and unerringly pointing to the guilt of the accused and that it must cumulatively form a complete chain towards the irresistible conclusion that the crime was committed only by the accused. The learned judge then concluded as follows:

“I have considered the proximity of the time between the time the accused was seen leaving the scene, to the time the deceased was found with the fatal injuries and find that there was no lapse of time. I consider the evidence of PW1 and PW9 that they had just heard heavy blows before seeing the accused leaving the deceased lying on the ground with severe injuries. The circumstantial evidence points irresistibly to the accused as the person who inflicted the injuries found on the deceased. There is no doubt in my mind that it was the accused who inflicted the injuries on the deceased”.

In addition the learned judge also found that the cause of death as detailed by Dr John Motaku Waiharo (PW4) was consistent with the deceased being hit with a blunt object and also with the

pounding noise heard by PW1 and PW9.

There is no dispute that the area in which the death of the deceased took place is frequented by wild animals. Several of the prosecution witnesses testified that they have to guard their shambas from wild animals such as elephants, buffaloes and zebras that destroy their crops. The real issue is not whether the area has wild animals; the issue is whether there was any reasonable evidence from which it could be inferred that the injuries to which the deceased succumbed were inflicted by wild animals. The evidence of PW9 was that there had been a zebra at PW1's farm earlier on the material night, which he (PW9) had chased away. Both PW1 and PW9 were however categorical that when they heard the pounding noise immediately before seeing the appellant disappearing in a maize plantation and the deceased lying down injured, they had neither heard the sound of any animal nor seen one in the vicinity. The assertion that the deceased could have been injured by an animal was refuted by PW4 who testified that the blunt injury on the head of the deceased could have been caused by a stone or a heavy *rungu*. In our view, the assertion that wild animals may have caused the death of the deceased is refuted by the evidence on record.

We are satisfied that the learned trial judge did not misdirect herself on circumstantial evidence. On the contrary, she was very alive to the duty upon her to satisfy herself that the evidence adduced was incompatible with the innocence of the appellant and incapable of any other reasonable explanation, save that of the guilt of the appellant.

The third ground of appeal was that the learned trial judge had erred by failing to evaluate the entire evidence and draw proper conclusions. Under this ground, Mr Ondieki argued that since no murder weapon was found and produced as an exhibit, the offence was not proved beyond reasonable doubt. He criticized the learned judge for the following statement in the judgement:

“The weapon used was not found. However, I do not think that significant because the accused had the opportunity to hide it the time he left the scene after this attack”.

In the opinion of learned counsel, that statement amounted to putting forward by the judge, of a theory not supported by evidence, a practice

deprecated by the predecessor of this Court in OKETHI OKALE & OTHERS V REPUBLIC, (1965) EA 555. While we fully endorse the position consistently

taken by the Court that a conviction can only be based on the weight of the actual evidence adduced and that it is dangerous and inadvisable for a trial judge to put forward theories not supported by evidence, we do not think the above statement warrants the label of “*fanciful theories or attractive reasoning*” decried in OKETHI & OTHERS V REPUBLIC. Be that as it may, in our view the real issue raised here is the effect on the conviction of the appellant of the failure by the prosecution to produce the murder weapon.

In EKAI V REPUBLIC, (1981) KLR 569 this Court rejected the argument that failure to produce the murder weapon, of itself, is fatal to a conviction. In that case the Court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed weapon.

The Court took a similar approach in RAMADHAN KOMBE V REPUBLIC, CR.A NO. 168 OF 2002 - MSA when it stated:

“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this

submission” (emphasis added).

The same issue was considered by this Court in KARANI V REPUBLIC, (2010) 1KLR 73. At page 79, the Court delivered itself as follows:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.

We respectfully agree, and find no merit in the appellant’s argument pertaining to the non-production of the murder weapon.

For convenience, we shall take together the appellant’s next two submissions, namely that the appellant was intoxicated at the time of commission of the offence and that he was convicted without proof of *mens rea*. Mr Ondieki argued that there was evidence on record to suggest that the accused was so intoxicated as to be unable to form the necessary *mens rea* for the offence he was charged with. Mr Ondieki contended further that had the learned judge considered *Section 13 (4) of the Penal Code*, she could not have found that the necessary guilty intention on the part of the appellant had been established.

Section 13 of the Penal Code provides as follows:

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

The import of the above provision is that where an accused person relies on the defence of intoxication, the Court must satisfy itself from the evidence adduced that the accused person was so drunk as to be incapable of forming guilty intent. See NJOROGE V REPUBLIC, (2002) 2 KLR 200. In MICHAEL SHEEHAN AND GEORGE ALAN MOORE, (1974) 60 CR APP R 308, Geoffrey Lane LJ delivered himself at page 312 as follows regarding intoxication and *mens rea*:

“In a case where drunkenness and its possible effect on the mens rea is in issue, ...the mere fact that the defendant’s mind was affected by drink so that he acted

in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intent was there. For a drunken intent is nevertheless an intent...the jury should be instructed to have regard to all the evidence, including the evidence relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent”.

From the evidence of the appellant himself, he had been drinking chang?aa on the material day for about one hour between 12.30 and 1.30 pm. Thereafter he was sober enough to go back to his *shamba* at 3pm and work until 5.30 pm. From 5.30 pm to 8 pm he was just resting at “kwa Wangombe” hotel. His next reference to his intoxication was when he had come back from Mulwa?s house and was taking his *chang?aa* before the deceased shone a torch in his face, and hit him on the left eye.

From the totality of the evidence, including the time the appellant said he had taken chang?aa, his ability to work on his *shamba* for several hours thereafter, his almost three hours rest at “kwa Wangombe” hotel, his telling PW9 that he was going in search of the deceased, his evidence of the words exchanged between him and the deceased, his ability to dodge an attack by the deceased, his presence of mind to go to Mulwa?s house to avoid confrontation, it is difficult to conclude that the appellant was so drunk as to be incapable of forming the guilty intent. The learned trial judge addressed her mind to the appellant?s defence of intoxication and, properly in our view, concluded that the appellant?s judgment and mental faculties were not impaired and therefore, the defence of intoxication was not available to him.

On *mens rea* the learned judge considered *section 206 of the Penal Code* on malice aforethought and cited the decision of this Court in *MORRIS ALUOCH V REPUBLIC, C.R.A NO 47 OF 1996* to the effect that malice aforethought could, in a proper case, be inferred for example, from repeated blows. The learned judge concluded that from the repeated blows that the deceased was subjected to and the nature of the injuries sustained, the force visited upon the deceased by the appellant was so excessive as to lead to an inference that it was intended to cause grievous harm or even death and therefore malice aforethought on the part of the appellant could be properly inferred in this case.

In *DANIEL MUTHEE V REPUBLIC, C.R.A NO. 218 OF 2005*, this Court, while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section

206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very

sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

In *OMAR V REPUBLIC, (2010) 2 KLR, 19* at page 29, this Court expressed the same principle as follows:

“So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought”.

We are satisfied that on the evidence, the learned judge did not misdirect herself on intoxication and *mens rea*. We accordingly find no merit in these grounds.

In the last ground of appeal, Mr Ondieki criticized the learned judge for failure to consider the appellant's defence. There is no substance in this ground of appeal too. In her judgment the learned judge considered very carefully the appellant's defence including the issues we have already referred to above relating to intoxication, lack of malice aforethought, and self defence. After considering the evidence adduced by the prosecution and the appellant's defence (*including the appellant's evidence that all he had done was to „push? the deceased*), the learned judge disbelieved the defence, as she was entitled to do in this case.

The only ground upon which we fault the learned judge is some two gaps on pages 14 and 15 of the judgment. On Page 14, the learned judge intended to

cite a passage from the judgment of the High Court in *REPUBLIC V KIMAIYO, ELDORET HCCRC NO. 40 OF 2005* while on page 15 she intended to cite *PALMER VS R, (1971) 1 ALL ER 1077*, at page 1088. The relevant passages were however not reproduced, leaving two ugly gaping holes in the judgment.

The two passages that were missing had in fact been cited by the appellant in his submissions and the judgment addressed the issues raised therein. In our view, these two lapses did not occasion the appellant any prejudice, because the reasoning and conclusion in the judgment is quite clear. That notwithstanding, we think it is important to always ensure that the judgement is complete in all respects so as to be readily understood by the parties. It is our hope that this kind of lapse will not occur again.

Ultimately, we have come to the conclusion that the appellant was properly convicted of the offence of murder with which he was charged. We, accordingly, dismiss the appeal and uphold the conviction and sentence.

Dated and delivered at Nairobi this 18th day of October, 2013.

M. A. WARSAME

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M?INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

