



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CRIMINAL APPEAL NO. 53 OF 2012

BETWEEN

BRIAN KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Khaminwa, J.)

dated 19th February, 2008

in

H.C.C.CR NO. 3 OF 2006)

JUDGMENT OF THE COURT

1. **Brian Kariuki**, the appellant, 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 at Embu. The particulars of the offence were that on 14th and 15th February, 2006 at Gichiche Sub-location in Embu District within the then Eastern Province, the appellant murdered Lydia Igandu (deceased).
2. The appellant pleaded not guilty to the charge and the trial commenced with the aid of three assessors. The prosecution called a total of 12 witnesses in support of its case. It was the prosecution's case that on 12th February, 2006 the deceased sent PW5, Linus Nyaga Njeru (Linus), to deliver a valentine's card to the appellant in his rented room. However, Linus did not find the appellant in his room and left the card in a nearby kiosk to be delivered to the appellant once he got home. On 14th February, 2006 at around 2:00 p.m while PW2, Peter Gitonga (Peter), was in his restaurant which was next to the appellant's room, he saw a girl enter the appellant's room. He testified that the girl was dressed in a red top and a pair of trousers. Thereafter, at around 8:00p.m the appellant went to the restaurant and inquired from Peter when he would close the restaurant. Peter informed him that he would close up at 9:00p.m. Peter stated that he did not see the appellant or the girl again on that day.
3. PW6, Andrew Nyaga Kavoli (Andrew), testified that on 14th February, 2006 his daughter, the deceased, left home for Gichiche market but never returned. On 16th February, 2006 at around

- 10:00 p.m while PW4, Margaret Wanjiru (Margaret), was heading to her house she met a man carrying a body on his shoulders. Margaret testified that the body was of a lady who had a red t-shirt and pair of trousers. She noticed that the man had put on gloves on his hands. At that time Margaret was not sure if the lady was dead or alive. She maintained that she was able to observe the foregoing as well as the physical attributes of the man with the aid of the moonlight which was bright on that day.
4. On 17th February, 2006 at around 9:00 a.m, PW3, Nyaga Munyi (Nyaga), the area assistant Chief was informed by members of public that a body had been dumped at the market. Nyaga went to the market and saw the body of a lady. He testified that he noticed that the lady's left arm had been cut off and was missing. He thereafter, reported the matter at the Runyenjes Police Station. PW10, PC Saidi and his colleague proceeded to the scene in the company of Nyaga and collected the body and took it to the mortuary. Thereafter, Andrew went to the mortuary and identified the lady as his daughter.
 5. Since the appellant was the last person to have been seen with the deceased he was arrested as a suspect on 20th February, 2006, at the Embu Provincial Hospital. PC Saidi testified that upon searching the appellant's room he recovered a blood stained knife under the mattress. He further testified that the appellant insisted that the blood on the kitchen knife was his because he had cut himself. Thereafter, an identification parade was conducted on 7th March, 2006 wherein Margaret identified the appellant as the man she saw carrying a lady's body.
 6. PW1, Steven Matunde (Steven), a government analyst based at the Government chemist in Nairobi testified that he received a blood stained knife, the two blood samples belonging to the appellant and the deceased from Runyenjes Police Station. He was requested to compare the blood samples with the blood on the knife to determine whose blood was on the knife. He testified that upon analysing the samples he found that the blood on the knife matched the deceased's blood group and not the appellant's. According to PW7, Dr. Njue Mungai (Dr. Njue), the cause of the deceased's death was as a result of physical assault. He testified that there were marks around the deceased's neck suggesting that she was strangled. Dr. Njue confirmed that the deceased's left arm was missing. PW12, Dr. Stephen Maina (Dr. Stephen), testified that after carrying out a mental examination on the appellant he found that he was medically fit to stand trial.
 7. The appellant in his defence gave an unsworn statement. It was the appellant's evidence that he knew the deceased and that she was his friend. He stated that upon receiving the valentine's card which the deceased had sent to him he went and purchased one for her; he waited for the deceased to come to his mother's house at Blue Valley but she did not turn up. He maintained that on 14th February, 2006 he was at his home in Gichine Village in Runyenjes and on 17th February, 2006 he attended a funeral in Nyeri. He testified that he returned to Embu late in the evening on Saturday and spent the night at his aunty's house. The following morning he went to Embu town to visit his friends and spent the night at one of his friend's house which was near Embu General Hospital. He stated that on Monday morning while walking near the Izaak Walton hotel a police vehicle from Runyenjes stopped in front him; James came out of the vehicle and told the appellant to enter into the vehicle. The appellant entered the vehicle and they drove to his room at Gichine and the policemen searched his room. According to the appellant the policemen took the flower and valentine's card which he had been given by the deceased. The appellant was then taken to the police station and he was arrested in connection with the deceased's death. The appellant denied killing the deceased.
 8. The High Court (Khaminwa, J.) in a judgment dated 19th February, 2008 convicted and sentenced the appellant to death. Aggrieved by the said decision the appellant has filed this current appeal based on 11 grounds which can be summarised as follows:-
 - ***The learned trial Judge erred in law and in fact by failing to sum up the evidence for the assessors.***
 - ***The learned trial Judge erred in law and in fact by failing to take cognizance of the fact that the assessors never attended the hearing of the defence case.***
 - ***The learned trial Judge erred in law and in fact by conducting the proceedings partially in***

English language which the appellant did not understand.

- **The learned Judge erred in law and in fact by failing to take cognizance of the contradictions in the prosecution's case.**
 - **The learned Judge erred in law and in fact by shifting the burden of proof from the prosecution to the appellant.**
 - **The learned Judge erred in law and in fact by failing to properly analyse the evidence on record.**
9. Mr. Maragia Ogaro, learned counsel for the appellant, submitted that the assessors did not attend the defence hearing and no reason was given for the non-attendance. He stated that the trial Judge did not sum up the evidence to the assessors and neither did the assessors give their verdict on the case. In relying on the case of ***John Ndiragu Wahome -vs- Republic- Criminal Appeal No. 371 of 2008***, Mr. Maragia urged us to quash the proceedings of the trial court on account of the foregoing.
 10. Mr. Maragia argued that despite the appellant indicating to the court that he did understand English, the learned Judge conducted part of the proceedings in English; there was no evidence that the proceedings conducted in English were translated to the appellant. He submitted that there were inconsistencies in PW 3's testimony in that in his evidence in chief he testified that the deceased's body was found in the market and in the same breath during cross examination he testified that the deceased's body was found in the appellant's room. Mr. Maragia argued that the doctor's evidence showed that the deceased died of a blunt object and not from cuts by a knife.
 11. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal argued that the prosecution's case was proved to the required standard. He stated that the description given by Peter concerning the clothes the deceased had when he saw her entering the appellant's room matched those on the lady's body that Margaret had seen the appellant carrying on his shoulder. He also stated that the blood stained knife found under the appellant's mattress matched the deceased's blood group.
 12. Mr. Kaigai submitted that the assessors were not asked by the learned Judge to give their opinion due to Legal Notice No. 7 of 2007 which repealed the use of assessors in a trial. He argued that the inconsistencies in regard to where the deceased's body was found are curable under **Section 382** of the **Criminal Procedure Code, Chapter 75, Laws of Kenya**. Mr. Kaigai argued that even though the proceedings were partly conducted in English, the appellant was not prejudiced in any way because he was represented by an advocate. He finally urged us to dismiss the appeal.
 13. This being a first 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 -vs- 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.”

14. We have considered the grounds of appeal, submissions by able counsel and the law. It is not in dispute that the appellant's trial commenced on 30th January, 2007 with the aid of three assessors. We cannot help but note that the assessors were only present during the prosecution's case. The learned Judge did not indicate on the record the reasons for the assessors absence. The trial proceeded to its conclusion without the assessors. Mr. Kaigai submitted that the absence of the

assessors after the prosecution's case was due to the fact that at the material time **Legal Notice No. 7 of 2007** had come into effect and that the said Notice had repealed the provision of a murder trial being conducted with the aid of assessors. In **Peter Ngatia Ruga -vs- Republic- Criminal Appeal No. 42 of 2008**, this Court expressed itself on the above issue as follows:-

“We are aware that pursuant to Act No. 7 of 2007, trial with aid of assessors was repealed and removed from our statutes, but the trial in respect of this appeal began as we have stated on 10th August, 2006 long before the provisions for trial with aid of assessors were repealed and that being the case, by virtue of the provisions of Section 23(3)(e) of the Interpretation and General Purposes Act, Chapter 2, Laws of Kenya, which was applicable the trial should have continued with the aid of assessors to the end.”

15. Further, in the case of **Cherere Gikuli -vs- Republic (1954) 21 EACA 304**, it was held,

“ A trial which has begun 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 of the Criminal Procedure Code. To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either that the absent assessor is for any sufficient cause prevented from attending throughout the trial or that he absents himself and is not practicable immediately to enforce his attendance.”

16. In this instant the trial commenced before the **Legal Notice No. 7 of 2007**, came into force on 15th October, 2007, and therefore the trial court ought to have continued with the said assessors. We therefore, find that by virtue of the foregoing the trial at the High Court was a nullity.

17. Having expressed ourselves as above what then should be the next cause of action? Mr. Kaigai submitted that if found that the trial at the High Court was a nullity we should order a retrial. We have considered many decided cases on principles that would guide the court when considering whether or not to order retrial. Some of these are cases such as **Ahmed Sumar -vs- Republic, (1964) EA 481, Pascal Ouma Ogola -vs- Republic, Criminal Appeal No. 114 of 2006,** and **Muiruri -vs- Republic (2003) KLR 552**. The principles in all those cases are as spelt out in the decision of the case of Bernard **Lolimo Ekimat -vs- Republic- Criminal Appeal No. 151 of 2004** where this Court stated:-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

In the instant case life was lost; the appellant has been in custody since 2006 and Mr. Kaigai informed us that witnesses in this case were available. We are of the considered view that in these circumstances it is appropriate to order a retrial.

18. The upshot of the foregoing is that the appeal herein is allowed. The appellant's conviction for the offence of murder is quashed and the sentence which was imposed on him is hereby set aside. We direct that the appellant be presented to the High Court at Embu before a Judge other than Khaminwa, J., for retrial of the same offence but without assessors.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA 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