



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 50 OF 2013

BETWEEN

STANLEY KAMAIRO ETHANGATHA 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. 121 OF 2003)

JUDGMENT OF THE COURT

1. **Stanley Kamairo Ethangatha**, the appellant, was charged with two counts 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 Meru. On the first count, the particulars were that on 8th October, 1991 at Akirang'ondu Location in Meru North District within the then Eastern Province, the appellant murdered Edward Koome; while the particulars of the second count were that on the above mentioned date and place the appellant killed Isaiah Ethangatha.
2. The appellant pleaded not guilty to the charge. The prosecution called a total of seven witnesses in support of its case against the appellant. It was the prosecution's case that on 8th October, 1991 PW4, James Mutia N'Ethangatha (James) sent PW2, Moses Ntogai M'Miriti (Moses), to take *miraa* to his father, Isaiah Ethangatha (Ethangatha). James is the appellant's step brother while Ethangatha was their father. Moses arrived at Isaiah's compound at around 4:30 p.m where he found Edward Koome (Koome), the appellant's nephew; Koome directed Moses to where Ethangatha was grazing his cattle. Moses met Ethangatha and stayed with him up to around 5:00 p.m; the deceased requested Moses to collect firewood for him; Moses agreed to collect firewood as the deceased returned his cattle to his compound. Meanwhile, the appellant went to Kaberia's land where he found PW1, Joel Kainga (Joel), ploughing the land and requested him to also

- plough his land; Joel agreed that after he had finished ploughing Kaberia's land he would go to the appellant's land and view the same in order to determine how much he was going to charge for his services. At around 5:30 p.m on the same day, Joel went to the appellant's land and viewed the same; it was agreed that Joel would charge the appellant Kshs. 300/=. It was Joel's evidence that the appellant's compound was close to Isaiah's compound; as he was leaving the appellant's compound he saw and heard the appellant argue with his nephew, Koome, about a cow that the appellant had taken to his in laws; suddenly, he saw the appellant cut Koome severally on the head with the panga he had; fearing for his life, Joel ran away.
3. After Moses had collected firewood and began heading to Ethangatha's home, he heard the deceased screaming; he ran a distance of about 150 metres, towards the direction of the screams; he saw the appellant cutting Ethangatha on his head and legs with a panga. Moses ran away to tell James what had happened. PW3, Johana Mitu (Johana), who had at the material time gone to see the deceased also saw the appellant cut the deceased; he also went to inform James what had happened. James testified that after he was informed what had occurred he went to his father's home and on the way he found the appellant holding a panga in his left hand. After James inquired from the appellant what had happened, the appellant ran away and disappeared for about 11 years. James testified that when he arrived at his father's compound he found both his father and nephew dead. James reported the incident at Maua Police Station.
 4. On 23rd December, 2002 James received information that the appellant had been seen in Timau. James and PW5, Jeremiah Ntoiti (Jeremiah), went to Timau; with the assistance of members of public they managed to arrest the appellant and took him to Timau Police Station. PW6, CPL Florian Wamalwa (CPL Florian), testified that on 29th December, 2002 he was directed by the OCS of Maua to go and pick up the appellant who had been arrested at Timau and subsequently the appellant was charged and arraigned in court. PW6, Dr. John Awala (Dr. John), produced the post-mortem reports in respect of Ethangatha and Koome; he testified that according to the said reports both deceased persons died as a result of severe loss of blood caused by the severe and deep cuts inflicted on their bodies.
 5. In his defence, the appellant gave a sworn statement. He testified that on 8th October, 1991 he was at Kianjai doing casual work; that he lived in Kianjai which was quite a distance from Isaiah's house. He stated that he worked in Kianjai between the years of 1989 to 1990 and then moved to Timau where he continued working as a casual labourer. He maintained that he had a good relationship with his father, Isaiah and his nephew, Koome; the only person who had a grudge against him was his step brother, James, because he blamed him for the death of his chicken. He denied killing his father and nephew. He also denied that he had been hiding for 11 years following his father's death. He maintained that he did not know his father had died and only learnt about his death when he was arrested.
 6. Being convinced that the prosecution had proved its case, the trial court convicted the appellant on both counts of murder; sentenced him to death in respect of the first count and directed the sentence in respect of the second count to be held at abeyance. Aggrieved with the decision of the trial court, the appellant has filed this appeal based on the following grounds:-
 - ***The learned Judge erred in law and in fact by convicting the appellant based on evidence that was contradictory in nature.***
 - ***The learned Judge erred in law and in fact in convicting the appellant based on circumstantial evidence that was weak in nature.***
 - ***The the whole trial was a nullity for failure to comply with the provisions of Section 322 of the Criminal Procedure Code.***
 - ***Thee trial was a nullity for failure to comply with the provisions of Section 200(1), (2) & (3) of the Criminal Procedure Code.***
 - ***The evidence of PW1 was at variance with the post-mortem report and the learned judge erred in convicting the appellant based on the evidence of PW1.***

7. M/s J. Nelima, learned counsel for the appellant, submitted that the appellant's trial was a nullity because it did not continue with the aid of the requisite number of assessors; no reasons were given or an inquiry made about the absence of one of the assessors. Citing the case of **Charles Mwangi Muraya -vs- Republic- Criminal Appeal No. 97 of 2000** M/s Nelima argued that before a court could discharge an assessor it must give reasons for doing so. She submitted that the prosecution's evidence was full of contradictions; the evidence of PW1, 2 & 3 were full of inconsistencies because there was no possibility of the appellant killing both his father and nephew at the same time and place; the contradictions cast doubt on the prosecution's case. She urged us to allow the appeal.
8. Mr. N. Ongige, learned counsel for the respondent, argued that the issue of assessors was never raised by the appellant in his memorandum of appeal. He maintained that the proper procedure was followed during the appellant's trial. Mr. Ongige argued that the prosecution's case was not contradictory; PW1 testified that while in the company of the appellant he met Koome at around 5:30 and he saw the appellant attack Koome and he ran away; PW1 was not present when the appellant attacked Isaiah but PW3 witnessed the said attack at around 6:30 p.m. He urged us to dismiss the appeal herein. In response to the aforementioned submissions, M/s Nelima argued that despite the fact that the issue of assessors was not indicated in the memorandum of appeal, the appellant was not barred from raising an issue of law.
9. We have considered the record of appeal, submissions by counsel, the judgment by the learned Judge (Lenaola, J) and the law. This is a first appeal and it is our duty to re-evaluate the entire evidence on record and arrive at our own independent conclusion. As was stated in **Okeno-vs-Republic, (1972) EA 32**, an appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination and to the appellate court's own decision on the evidence.
10. Our evaluation of the record reveals that the prosecution's case was based on direct evidence as opposed to circumstantial evidence as alleged by the appellant in his supplementary memorandum of appeal. It was M/s Nelima's submissions that the prosecution's case was full of contradictions. PW1, Joel, testified that he arrived at the appellant's land at around 5:30 p.m and viewed it for a short period; as he was leaving in the company of the appellant they met Koome and the appellant and Koome began quarrelling; suddenly, the appellant viciously cut Koome with the panga. Joel, fearing for his life, ran away. PW2, Moses, testified that the appellant viciously attacked Isaiah at around 5:30 p.m. On the other hand, PW3, Johanna, who had gone to see Isaiah in his house testified that he arrived at around 6:00 p.m and saw the appellant viciously attack Isaiah. Therefore, did the discrepancy in the evidence of Moses and Johanna as to when the appellant attacked Isaiah cause prejudice to the appellant? We are of the considered view that the discrepancy as to the exact time of the attack did not prejudice the appellant in any way. This is because from the evidence it was clear that the deceased persons were killed by the appellant on the same day albeit at different times but at close intervals and in the same compound. We further find that the said discrepancy is curable under **Section 382** of the **Criminal Procedure Code** because it was inconsequential to the appellant's conviction and sentence. In **Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993**, this Court held:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

11. On the issue of whether the proceedings at the trial court were a nullity we agree with the M/s Nelima that the same is a point of law and therefore, we cannot overlook it even if it was not raised in the appellant's memorandum of appeal. See this Court's decision in **Elirema & Another -vs- Republic (2003) 1 EA 50**. It was the appellant's contention that the trial in the High Court was a nullity because despite the fact the trial commencing with three assessors only two of the assessors were present until the conclusion of the trial; the trial court did not give any reason for discharging the said assessor. 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 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 cause prevented from attending throughout the trial or that he absents himself and it is not practicable immediately to enforce his attendance.”

See Peter Ngatia Ruga -vs- Republic- Criminal Appeal No. 42 of 2008.

From the record the trial begun on 16th May, 2006 with the aid of three assessors; on 11th December, the learned Judge (Lenaola, J.) discharged one of the assessors for being absent. We find that the trial court correctly discharged the assessor because he failed to turn up for the trial midstream and there was no evidence that the court could enforce his attendance. Therefore, the proceedings in the trial court were not a nullity.

12. Having expressed ourselves as above we find that there was overwhelming evidence pointing to the guilt of the appellant. We concur with the following findings of the trial court:-

“ On my part, the evidence is consistent because PW1, PW2 and PW3 were all eye witnesses who saw the accused person viciously cutting his nephew, Koome and his father, Ethangatha with a panga on the material day. They died from their injuries and the evidence of all those witnesses was not shaken nor was it challenged in any way. PW4, the accused's own brother later found the accused holding the murder weapon and when he tried to speak to the accused, the accused ran away and was apprehended only 11 years after the incident. The act of disappearing for all these years was itself conduct wholly inconsistent with innocence more so where the deceased persons were close relatives of the accused person.”

13. The upshot of the foregoing is that we see no reason to interfere with the conviction and sentence meted against the appellant. Accordingly, the appeal herein is dismissed.

Dated and delivered at Meru this 5th day of December, 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