IN THE COURT OF APPEAL
AT NAKURU

CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A.

CRIMINAL APPEAL NO. 366 OF 2008

BETWEEN

GEOFFREY KIPNGENO …….……...…….. APPELLANT

AND

REPUBLIC ……..…….…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kericho (Ang'awa, J) dated 21st November, 2008

in

H.C.CR.C. NO. 25 OF 2008)
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JUDGMENT OF THE COURT

The learned state counsel, Mr V. O. Nyakundi, was unable to support the conviction of the appellant in this matter and thus conceded the appeal. That concession, however, does not lessen the need for us to analyse and re-evaluate the evidence on record to reach our own conclusions on the matter, which is a duty cast on this court on first appeal. What are the facts:

The appellant was convicted by the High Court (Ang'awa, J) for the offence of murder contrary to ***Section 203 as read with Section 204 of the Penal Code***. Amazingly, after conviction, he was *"sentenced to death and will be detained at the pleasure of the President"*. It was alleged in the information filed by the Attorney General that on the 8th day of June, 2008, at Emitiot Village in Bomet District, the appellant murdered ***LEONARD KIPKURUI LAGAT*** (the deceased). The prosecution evidence came from ten prosecution witnesses one of whom retracted his statement to the police and was declared hostile.

It is certainly the case, as observed by both learned counsel that the record of the trial does not make easy reading, but we are in no doubt that the entire record of evidence taken in totality establishes that there was a quarrel between the appellant and the deceased which led to a fist fight between the two and the death of the deceased from ensuing injury. On the material date at the about 6 pm, the appellant was in the company of his friend Wesley Kiplagat (PW 2) who turned out to be a hostile prosecution witness and, therefore, his evidence lost probative value in favour of the prosecution case. The fact that they were together was confirmed by Geoffrey Kipngeno Chirchir (PW 3) [Chirchir] who was with two of his friends; Benard Kipkoech (PW 4) [Kipkoech] and the deceased. The two groups were either moving

towards each other or walking in the same direction, but at some point near a river, some words were exchanged between the deceased and the appellant whereupon the two started fighting. Both Chirchir and Kipkoech said they were struggling but Chirchir stated that they *"pulled each other"*, *"they were pulling each other and slapping each other"*, *"they were fighting"*, and within a short time, the deceased was down and the appellant ran away. That is when a watchman from Longisa High School nearby, Joseph Mutai (PW 1), Ludia Kosgey (PW 6) whose house was nearby, and Gladys Koech (PW 5) who was going to the river to fetch water, arrived at the scene. They found the deceased injured and bleeding from his mouth and nose. He was lying down and managed to answer when asked by Mutai what happened; he said the appellant had beaten him. Chirchir was also at the scene and they sent him to call the deceased's parents whose home was about 5 kms away, although Chirchir says he told them he was going after the appellant. It then started raining and the three decided to take the deceased to the house of Ludia (PW 6). Chirchir did not return to the scene. The deceased was collected early the following morning but by then he had died.

The incident was investigated by PC Albert Juma of Bomet Police Station. He was instructed by the OCS to go to Ludia's house where the deceased had died. He collected the body and arranged for a post mortem examination, which was carried out by Dr Cheruiyot but produced in evidence by Dr Isaac Birech Koros (PW 8) of Longisa District Hospital. Dr Cheruiyot found no fractured limbs. There were also no cut wounds externally but swelling and bruising of the left temporal region, forehead and lips. In his opinion, the cause of death was severe head injury resulting from blunt head trauma. He associated the blunt trauma with blows and not falling down. The history of the postmortem was that the deceased had traditional brew with friends and was found dead the following morning. Dr Koros (PW 8) examined the appellant and found him normal physically and mentally. He was told by the appellant that he had been provoked by the deceased.

The nature of the provocation was expounded on by the appellant himself in evidence when he stated that the deceased told him he used to make love to the appellant's wife. They held each other and struggled but the appellant managed to free himself and ran away, only to be arrested by police on allegation of killing the deceased.

In its evaluation of the evidence, the trial court found as a fact that it was the appellant who inflicted the blows which resulted in the death of the deceased. The court also found that the blows were inflicted of malice aforethought and therefore, the offence of murder had been committed. It dismissed the issue of provocation because, in its view, the appellant had an opportunity to stop the fight but instead continued it despite pleas from the witnesses nearby. At all events, the court held, the intention of the appellant was malicious and he used excessive force long after he was dissuaded from the fighting. For those reasons, he was convicted for murder as stated earlier, and sentenced, not only to death, but also to detention at the pleasure of the President which sentence he has been serving until his appeal was heard.

The first challenge in the appeal is, of course, the sentence which is said to be illegal, and we have no hesitation in upholding that challenge. The other frontal challenge was on the findings of fact which according to learned counsel for the appellant, Mr Maragia Ogaro, had no basis. In his submissions, the evidence on record was so contradicting, especially between the evidence of key eye witnesses, PW 3 and PW 4, that no single proper finding could be made. Mr Maragia picked out several inconsistent statements from those witnesses to illustrate his point. The only other evidence, he observed, was from PW 1 and PW 6 who did not witness any fight, and the rest of the evidence is all hearsay. Mr Maragia further submitted that the evidence of a witness declared as hostile was used to support the findings of fact when such evidence was of no probative value. He called for the acquittal of the appellant.

The appeal as stated earlier was conceded by the Attorney General, mainly, on the basis that there were serious contradictions in the evidence of key witnesses called by the prosecution. He also agreed with the appellant's counsel that it was erroneous to make findings of fact on the basis of the evidence of a hostile witness.

We agree with both counsel that the evidence of a witness who is declared hostile carries little, if any, probative value. The reasoning is that a witness who materially deviates from a statement made to the

police would not pass the minimum standard of a reliable witness as laid down by this Court in ***NDUNGU KIMANYI VS REPUBLIC [1979] KLR 282 AT PAGE 284***, thus:

"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."

That is why the ***Evidence Act, in Section 161 and 163 (1***) gives the court the discretion to allow cross examination of own witness and impeachment of credit of witnesses. The procedure laid out in those sections ought to be followed in order to ensure that apparent inconsistencies are not explicable by the witness before he is declared hostile. In ***SHIGUYE VS REPUBLIC (1975) EA 191***, the predecessor of this Court reiterated that the effect of declaring a witness hostile was to render his entire evidence untrustworthy. The court stated at page 192, thus:

"After having declared Shizya a hostile witness; the effect would be that Shizya was an unreliable witness, whose evidence would not be accepted by a court. All parts of the evidence of a witness declared hostile would be rejected as untrustworthy not only some parts. The purpose of having a witness declared hostile by the party who calls him is to discredit him completely. ……."

And so it was with the witness Wesley Kiplagat (PW 3) herein who was declared hostile by the prosecution. His evidence was for exclusion and we do not intend to rely on it in this judgment.

There was nevertheless, the evidence of eye witnesses, Chirchir and Kipkoech, which the appellant himself did nothing to destroy, and which confirmed that he was at the scene of the incident and that he fought with the deceased. Indeed, the evidence of the appellant reinforced that evidence. The medical evidence confirmed the injuries inflicted on the deceased and it did not matter that the deceased succumbed to a mere blow on is mouth and face. It does not matter either, that the deceased was not taken for medical treatment immediately which would have probably saved his life. The definition of ***"causing death"*** under ***Section 213 of the Penal Code*** covers those eventualities.

On our own evaluation of the evidence, we find that the appellant caused the death of the deceased. It is our view, nevertheless, that the aggressor was the deceased and that there was a fight between the two where no weapons were used. It was also in evidence that the fight was brief and in all the circumstances, there was no intention to cause death or grievous harm. It was unlawful, however, and for that matter the appellant should have been convicted for the offence of manslaughter.

Accordingly, we allow the appeal, quash the conviction for the offence of murder, and set aside the sentence imposed by the High Court. We substitute therefor a conviction for the offence of manslaughter contrary to ***Section 202*** as read with ***Section 205 of the Penal Code***. The appellant has been in prison detention since his arrest in June 2008. We sentence him to serve the period he has served in prison custody with the result that he shall be released forthwith unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered at Nakuru this 23rd day of February, 2012.

S. E. O. BOSIRE

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.